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Official Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS
(Subcommittee)

Reference: Copyright Amendment (Digital Agenda) Bill 1999

FRIDAY, 22 OCTOBER 1999

SYDNEY

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Friday, 22 October 1999

Members: Mr 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 and Mr Murphy

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

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Subcommittee commenced at 8.29 a.m.

ACTING CHAIR (Ms Julie Bishop)—Regrettably, the chair is not yet here, and we are not quite sure where he is, so I propose to open this public meeting of the committee. It is the final day of hearings on the inquiry into the Copyright Amendment (Digital Agenda) Bill 1999. At the outset I advise participants that, because we do not have a quorum at this point—a quorum for the purposes of today will be two members—any evidence you give until the chair arrives will not be covered by parliamentary privilege. However, at the end of proceedings, we will authorise the transcript so that it will attract parliamentary privilege. Appreciating that the proceedings until that time will not attract parliamentary privilege, I would ask that you all bear that in mind in terms of the statements that you give.

You will be aware that the committee does not require you to give evidence under oath, but the hearings today will be legal proceedings of the parliament and will warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I remind you again that, until the chair arrives, the proceedings, which are being recorded by Hansard, will not attract parliamentary privilege but they will be authorised later.

For the meeting today, I propose that we again use a roundtable format, and I believe that most of you here will be familiar with that format. Today we hope to take evidence on the remaining important issues in relation to the bill, and there will be a second session. We would appreciate it if you could focus on the proposed amendments to the bill that we are identifying today.

In the interests of having orderly proceedings, could you observe some procedural rules. First, only members of the committee can put questions to participants, if the hearing is to constitute formal proceedings of the parliament and attract parliamentary privilege in due course. If other participants wish to raise issues for discussion, they should be directed through the chair and the committee will decide if it wishes to pursue the matter. It is not possible for participants to respond directly to each other.

I announce that, having just constituted a quorum with the arrival of the chair, the committee will attract parliamentary privilege from now on.

[8.32 a.m.]

Participants

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Session 1—Remaining issues

CHAIR—Welcome. We have six issues to deal with in this first session and then some remaining issues subsequent to that. The first issue is the liability of Internet service providers. Would someone like to lead the discussion on this.

Mr METALITZ—I would like to speak to three of the provisions that have been printed on page 16 of the paper, all of which are extremely relevant to the ISP liability issue. I also note that the temporary copying questions that we will be talking about a little later are also extremely relevant to that. First, I would like to address proposed subsection 22(6), which deals with who is responsible for communication or who can be held to have made a communication under the new public communication right.

This provision strikes us in the copyright industries as profoundly ambiguous, perhaps dangerously so. Let me give you an example that may help to illustrate my concern. On behalf of the IIPA, I prepared a submission on this legislation and I emailed it to the committee. The committee then placed my submission on the web site—in other words, performed an act of making available a communication to the public. Let us leave aside any issues of parliamentary privilege and so forth, let us just assume that the bill were enacted and the act of communication to the public had been exercised. The question then arises: who is responsible for determining the content of this communication? In this case, it is the

content of the material that is made available on the web site. I would assume that I am the person responsible for determining the content of the communication. In other words, since I have determined what words would be used in making this submission, therefore the person responsible for determining the content is really another way of saying the author.

If the author is the only person who can make a communication under the new law, it becomes almost impossible for anyone to make an infringing communication under the law. Anyone can take my words, my literary work or my other copyrighted material, place it on a web site without my permission, without my authorisation, and then seek to avoid liability by claiming that I am the person responsible for determining the content of the communication and the person who placed it on the web site is not that person.

I think that reading of 22(6) is perhaps the most logical reading. If so, it is an extremely troubling reading because it means that no-one could ever be held liable for violating my exclusive right of communication to the public of my material. So IIPA would urge that this provision be stricken from the legislation or, at the very minimum, that there be greater clarity provided for this ambiguous provision.

I would be glad to move on to the other two provisions that are of concern. The second one is the one immediately following subsection 36(1), which is the codification of the authorisation liability provision. I know some of my colleagues will have some comments on this as well. IIPA has taken the position that it may be appropriate to codify the common law doctrine of authorisation liability, to codify what the courts have said about it, but what concerns us here is the absence of an element of knowledge in this list of the factors that are to be considered.

It strikes us from reading the Moorehouse decision that either actual knowledge or constructive knowledge is an important element in the determination of whether someone should be liable under the authorisation liability provisions of the copyright law. We are quite concerned about the situation—to go back to my scenario—in which someone puts copyrighted material on a web site without permission. They may be able to evade direct liability for that because they did not determine the content of the communication, yet they may actually know that this is infringing material. They may either know that at the time that they first make it available or it may be brought to their attention in some way that it is infringing material.

As it is currently drafted, subsection 36(1A) does not take into account whether or not the person knew the infringing character of the material or the infringing character of the act of, let us say, communication to the public, but it could also be a reproduction or any other exclusive right.

We would propose—and we will have a paper that has this language in it, which we will distribute shortly—that an element D be added to subsection 36(1A) to read as follows: Whether the person knew the infringing character of the act or was aware of facts or circumstances from which the infringing character of the act was apparent.

The reason that we have proposed this particular language—obviously there could be other formulations of this—

Ms JULIE BISHOP—Such as ‘knew or ought to have known’.

Mr METALITZ—Yes, that certainly would be a reasonable way of expressing it. We have suggested this language simply because it is the language that has been arrived at in the United States under the Digital Millennium Copyright Act and also the language that is now under consideration in the European Parliament and the European Commission in their e-commerce directive. It has a certain degree of international momentum, if you like, but I would agree with Ms Bishop that it would be perfectly reasonable as well to say whether the person knew or ought reasonably to have known of the infringing character of the act.

CHAIR—The definition here is one which uses the word ‘include’. As a matter of statutory interpretation, that means that there are other things which may well fall within that definition but are not spelt out by the legislature. Wouldn’t it be arguable that the matters which you wished to include by way of an additional subsection would, as a matter of commonsense and interpretation, be taken into account by the courts?

Mr METALITZ—It certainly would be arguable but we think it would be very valuable to explicitly spell this out. One reason is that we think that ISPs and others who might be affected by this should be given some incentives to acquaint themselves with what is happening on their systems. They should also be given some guidance in the statute as to their responsibilities once they become aware of infringing material on their systems or of the infringing act. We think it would be of value to spell it out but I do not disagree with you that a court could still take this into account. We just think it is sufficiently important that this should be explicitly noted. As I mentioned, my colleagues may have some further comments on 36(1).

My last suggestion on this relates to the next section, 39B, and the parallel provision, 112E, for copyright in subject matter other than works. This provision on provision of facilities appears to be derived from the agreed statement that was adopted by the diplomatic conference that approved the WIPO treaties. However, it goes well beyond that agreed statement and we would suggest that it be restricted to the issues that were addressed in the agreed statement that represents the international consensus. In short, that would mean cutting it back so that it does not apply to all infringements of copyright but only to an infringement of the right to communicate a work or other subject matter to the public.

That is the thrust of the agreed statement to article 8 of the WIPO copyright treaty. We think if the law goes beyond that, it certainly risks stepping over the boundaries of the permissible exceptions and limitations to exclusive rights which remain unchanged and, in fact, were reaffirmed when the diplomatic conference adopted the two new treaties.

So our suggestion on 39B, and it would be parallel in 112E, is that, in the second line of the printed text, the word ‘copyright’ be stricken and replaced with ‘the public communication right’ and that, in the third line, which begins ‘facilities used by a person to’, the rest of that sentence be stricken and instead the words ‘make or authorise a communication to the public’ be inserted so that the provision as a whole would read:

A carrier or carriage service provider is not taken to have authorised any infringement of the public communication right in a work merely because the carrier or carriage service provider provides facilities used by a person to make or authorise a communication to the public.

We think that would restrict this provision. It really would put it on all fours with the agreed statement adopted by the diplomatic conference. Therefore, we suggest that it be amended in that fashion.

Ms JULIE BISHOP—Is ‘public communication right’ defined somewhere?

Mr METALITZ—The right is the right to communicate a work to the public and it could be cross-referenced.

Ms JULIE BISHOP—I am being pedantic but ‘public communication right’ gives rise to a concept that perhaps should be reworded ‘the right to communicate to the public’.

Mr METALITZ—I would agree with that. I think that is a better way to differentiate.

CHAIR—Any other comments on these provisions? Mr Gonsalves?

Mr GONSALVES—We agree with the comments made by Mr Metalitz and have an additional point of concern which relates to subparagraph (c)—the insertion in this new draft of the bill which was not in the exposure draft of a factor of compliance with relevant industry codes of practice. That is item 39. The concern that we have with that is that copyright owners may not have had any input into that code of practice. Probably the most obvious code of practice that will be used here is the Internet Industry Association code of practice which, as the name suggests, is an organisation of ISPs and others involved in the Internet industry.

If they have a draft code of practice, as I understand it at the moment it does not particularly address these issues in detail. But if it did and it had certain provisions in it relating to the steps which an ISP should take in these circumstances, those measures may not be considered by copyright owners to be adequate. It seems to be giving one group the ability to significantly influence the result as to whether or not they would be deemed to have authorised an infringement. I am not quite sure how these words came into the new draft of the bill.

CHAIR—Presumably if you were going back to common law principles and trying to in some way codify them, then at common law being able to refer to some relevant codes of practice would be open. Perhaps it is based on that notion.

Mr CANDI—By taking the words out, that does not mean that the defendant cannot put it into evidence. What we are saying is that if they are going to put it into evidence, it can then be tested, whether it is a legitimate code of practice or a fulsome code of practice. Industry code of practice should have the participants on either side of the transactions fully involved.

That is a question that goes into evidence. If they want to put it into evidence, they would be the first to put it into evidence and then the other party to the case can deal with it with their evidence as to whether it is legitimate or what the court could consider a code of practice that had some merit. By taking the words out, it does not mean it is lost. It just takes you back to the normal principles of common law as you were alluding to it, Mr Chairman. Just for the record, the changes that Steve Metalitz took you through have our agreement. We worked on these during the week, so we add our weight.

Ms JULIE BISHOP—Just on that (c), again we have got the use of the words ‘including whether the person complied with any relevant industry codes’, so if they were not legitimate industry codes, I suggest they would not be relevant.

Mr GONSALVES—It would be hard to say that the Internet industry code of practice was not legitimate. I am not suggesting it is not a legitimate code of practice but it is a code of practice arrived at by the Internet industry for their benefit largely. It could be a relevant code of practice but not one which we believe necessarily should be taken into account. If the code of practice had been developed in consultation with copyright owners and reflected a balanced approach then clearly it would be a code of practice which would very properly be taken into account by the courts but, as Mr Candi says, that could be taken into account by the courts in any event. It just seems that putting it into the legislation gives it a status which it may not deserve depending on how the code of practice was arrived at.

CHAIR—We understand the point you are making, Mr Gonsalves.

Mr CANDI—There is one other change. In paragraph (c) as well, it would appear that the word, ‘any’, which comes after the word ‘took’ and before the word ‘reasonable’, is probably an error as ‘any reasonable step’ is taking us a long way down the road of what is reasonable.

Ms JULIE BISHOP—Took reasonable steps?

Mr CANDI—Yes. In the document we will hand up on redrafting, we have struck that word out as well for those reasons.

Mr ROTHNIE—On behalf of Telstra, first let me say that Telstra supports the communication right; it believes it is necessary for modernising the Copyright Act. It is concerned about the operation of some of these exceptions as they are presently drafted, and it does not believe that they are going to provide adequate protection. I think it is also concerned about some of the proposals which are being put forward this morning. Telstra agrees with the general principle acknowledged in the discussion paper provided by the committee that the responsibility for the communication should not lie with the person who has no responsibility for determining the content. Provisions in the bill at this stage do not adequately reflect that principle.

To take Mr Metalitz’s concerns about subsection 22(6) first, regarding the person who is the maker of the communication as the person responsible for determining the content, Telstra believes that that provision is absolutely vital, given the decision in the music on hold case, which is a ruling of the High Court under two separate copyright rights—the

broadcasting right and the diffusion right, although, to some extent, part of the ruling on the diffusion right is not relevant here. Telstra was found liable for broadcasting music on hold to mobile phone users because it provided the mobile telephone service—not because it was the person who played the music on hold but because it provided the mobile telephone service that carried the communication. Telstra's position is that the person who actually introduced the music on hold into the telecommunication service should be the person who is responsible for the copyright infringement, not the carrier, because the carrier has no control over what happens.

Ms JULIE BISHOP—In that case, was the party who introduced the music on hold to the carrier also held liable?

Mr ROTHNIE—No.

Ms JULIE BISHOP—Were they defendants?

Mr ROTHNIE—No, they were not. The carrier was held to be the person who exercised the right to broadcast the music to the public because it provided the broadcasting service.

Mr Metalitz raises the ambiguity that the person who determines the content of the communication could be the author of the material rather than the person who makes the communication. Telstra would suggest that the proper interpretation is that the person who determines the content of the communication is the person who does the communicating act. That is consistent with a High Court authority in relation to defamation, as seen in the case of Thompson and Australian Capital Television, where Channel 7 in Canberra, I think, picked up and relayed a broadcast by the Sydney network. Although it did not change much of the communication, it was held liable because it made the decision to pick up the material included in the broadcast to the public. That is what Telstra says should be the approach here.

Given all that, Telstra is quite concerned about subsection 22(5), which defines who makes the broadcast. The problem with this definition is that the person who makes the broadcast is defined as the person who provides the broadcasting service. That repeats exactly the same problem as in the music on hold case, where Telstra was liable for exercising the broadcasting right because it provided the mobile telephone service which was considered to provide the broadcast. Telstra is fundamentally opposed to that. We note that the discussion paper provided for the roundtable says on page 15 that the definition was altered from the exposure draft 'to avoid the potential for conferring copyright on channel providers'. Telstra submits that this definition, rather than avoiding that potential, actually institutionalises it. The channel provider is the person providing the broadcasting service.

Part of the problem with the change of definition is that it seems to be concerned with identifying who owns the copyright in the broadcast, whereas it totally overlooks the issue of who is liable for exercising—for want of a better word—the broadcasting right or the communication of the broadcast. That brings us back to the point arising from the music on hold case. Telstra would be liable for any transmission made by anybody else where it is providing a broadcasting service, as in the music on hold case.

Item 39 introduces a new 36(1A). I do not think Telstra has any concerns about the expressed recognition of the extent of knowledge. We would be extremely concerned about the inclusion of wording along the lines of the US model—which Mr Metalitz referred to—which refers to ‘knowledge of facts or circumstances’, and ‘probably even ought reasonably to have known’. The reason for the concern about the ‘knowledge of facts or circumstances’ wording is that we already have wording of that sort in section 115 and 116 which relates to remedies, and it is virtually impossible to rely on. It is virtually impossible for anybody to rely on those defences to escape liability for damages. I think it is section 115(3).

The point was also made about the reference to industry codes of practice in that provision. I think it would be accepted that there needs to be a balanced industry code of practice—one which is worked out by all the interest groups. I cannot say that I am personally familiar with how the Internet industry code was developed. I know there is quite a process for codes of conduct to be developed under the Telecommunications Act. It involves representation by all sorts of stakeholders and, ultimately, hearings before the Australian Communications Authority.

Telstra would submit that it is important to keep that reference in the bill for very much the same sorts of reasons the copyright owners say that knowledge should be referred to: to make it clear that it is a factor which should be taken into account. We would probably say that it should go further and that there should be some mechanism put in place to actually force the parties to sit down and come to some sort of an agreement about these sorts of issues. The way the bill is drafted at the moment, as a copyright owner I do not have any incentive to actually sit down and come up with a code of conduct. So the copyright owners hold the whip hand.

Moving on to the last item, section 39B and the corresponding 112E, Telstra would be very concerned about limiting this provision to replace the words ‘by infringement of copyright’ to ‘infringement of the public communication right’ as Mr Metalitz proposed, because providing an immunity just for the communication right does not address what the exercise is of the copyright involved. The exercise of the copyright here is a potential exercise of the reproduction right. At this stage, I am not in a position to comment on the second amendment that Mr Metalitz proposed to 39B. I would have to look at the wording that he has foreshadowed, which is likely to be available later this morning.

Telstra believes that these provisions are important. It is very concerned that the inclusion of the words ‘merely because’ will render the protection that they purport to provide as minimal. That is particularly reinforced by the references to ‘knew’ or ‘reasonably to have known’ that we had in relation to 36(1A). The concern here arises because 39B is modelled on section 39A, which is a provision that allows libraries to put up a notice over a photocopying machine. It follows closely the wording in that provision.

We believe that the effect of section 39A is greatly overstated. It provides a sort of prima facie rule or a presumption rather than an exemption. We believe that if the provision were tested and a library, in the case of section 39A, or, in this case, a carrier or carriage service provider, were shown to have constructive knowledge—in other words, that they ought reasonably to have known that infringing communications were taking place—then the provision would have no impact at all. It would be disregarded. Their liability would attach

not because their facilities were being used but because they had constructive knowledge that their facilities were being used. In other words, it would be the knowledge element and their inability to do anything about it which would impose liability on them.

That brings me to the final point about that. The whole regime needs to be consistent with the regulatory regime imposed on carriers and carriage service providers under the telecommunications legislation, in particular. That legislation is designed to ensure that carriers and carriage service providers do not interfere with communications. They are not empowered to intercept them, analyse them and examine them—for very good reasons. This legislation would require, if it were possible, carriers and carriage service providers to intercept and examine everything and make a judgment. I am not saying that that is possible—I think that is totally impossible. It is totally impracticable. It would either bring the networks to a standstill or it would impose statutory liability on the carriers and carriage service providers, and that is exactly what the government's policy is designed not to achieve.

Mr COTTLE—Could I address the issue of liability for communications to the public and broadcasts under subsections 22(5) and 22(6) and the concerns of Telstra expressed by Mr Rothnie. My understanding of the working of those sections is that there is no longer a problem for Telstra. It is true that the High Court found that, where music on hold was transmitted through the ether to a mobile phone, Telstra had broadcast the material and was liable for that broadcast. But the definition of broadcast has now changed. A broadcast under the new 10(1) definition refers to a broadcasting service within the meaning of the Broadcasting Services Act 1992. I would not have thought that music on hold or Telstra's role in it constituted a broadcasting service within the meaning of that legislation. Warwick will correct me if I am wrong, but I am sure it does not.

That being the case, the transmission to mobile phones of music on hold is no longer a broadcast. It is a communication to the public, as it rightly should be under the act. Under 22(6), the liability falls clearly on the person who determines content. So I cannot see that Telstra has any remaining problem with that particular scenario. It was really just that point that I wanted to address.

CHAIR—Do you want to respond to that, Mr Rothnie?

Mr ROTHNIE—Yes. I accept, as Mr Cottle says, that the definition will change under this legislation. What was previously a definition of a right to broadcast will change to a subject matter. Telstra would say that that is not relevant to the reasons for its concerns.

The first concern is that the approach taken by the High Court in the music on hold case on who exercised the broadcasting right provides an excellent guide to who will be taken to have communicated or exercised the communicating right. In particular on the proposals put forward by, I think, Mr Metalitz and seconded by some of the other copyright owners, the removal of section 22 subsection (6) would basically reinstate the situation and the approach taken in the music on hold case for the communication right. That is why Telstra is fundamentally opposed to removing 22(6) and thoroughly supports it.

CHAIR—I hear what you are saying about that, but your proposition does not seem to address the concern that Mr Metalitz had about it. I think you are slightly at cross-purposes. You are saying you have a problem that this addresses. Mr Metalitz is saying there is another problem because of lack of clarity in this that it fails to address. If my understanding of what you are both saying is correct and you are not talking precisely about the same mischief, then there is possibly some way at defeating both mischiefs.

Mr ROTHNIE—That may be possible. We have not been able to achieve that with particular formulations in the approach taken in the bill so far. I would say, however, that we do not see the same problem that Mr Metalitz sees. We think the concerns he raises are probably not correct in that the definition focuses on who is responsible for determining the content of the communication. That is the person who decides whether or not the thing is communicated, rather than the person who goes away and writes the paper and somebody then picks it up and communicates it. It is focusing on who is the person who decides to include the material in the communication. The communication there refers to the act of communicating. If there is a concern there, Telstra would certainly support clarifying that to make it clear that that is what the intention is.

CHAIR—Mr Metalitz says that the words ‘person responsible with determining the content of the communication’ suggest, in ordinary commonsense language, the author. That strikes me as being a fairly forceful argument.

Mr COTTLE—Certainly, taking the music on hold example, it will not be the author who determines the content of the communication; it will be the business who decides to play music on hold. The point is that in that context it is the business who is deciding proactively to play the music, rather than Telstra. It directly solves Telstra’s liability problem, in terms of the High Court decision, I would have thought.

CHAIR—I will let Mr Rothnie respond and then Mr Metalitz.

Mr ROTHNIE—Telstra agrees entirely with what Mr Cottle says, which is why we support 22(6). That is why Telstra thinks that 22(6) is absolutely fundamental to ensure that the outcome that Mr Cottle says is the outcome will be the outcome. That is consistent with the principle. What Mr Metalitz is proposing is going to shift us away from that and reintroduce the problems that arose from the music on hold case.

Mr Cottle also raised the question of whether or not Telstra would be liable for making broadcasts or as the maker of a broadcast under 22(5). Telstra is not so sure that the definition proposed in 22(5) does relieve it of any liability for broadcasting. It is not entirely clear what a broadcasting service would be in the case of a situation where somebody takes an off-air recording of a television program and makes it available over the Internet to 10 or 20 or 30 friends or members of a club or whatever. Our problem with 22(5) is that it is perpetuating the same sort of approach which was taken in the context of the diffusion right in the music on hold case. It says that the person who makes the broadcast is the person who provides the channel. That is the opposite of what the discussion paper says the intention of changing the definition of 22(5) from the definition in the exposure draft set out to achieve.

Ms JULIE BISHOP—But you are opposed to section 22(5) on the basis that Telstra will still be caught by the definition of broadcast and broadcasting service?

Mr ROTHNIE—Yes.

Ms JULIE BISHOP—That is what Mr Cottle says does not occur, that Telstra is not caught by the definition.

Mr ROTHNIE—Telstra is not as confident as Mr Cottle that it is not going to be caught and it is the one that Mr Cottle is going to try and impose the liability on.

CHAIR—I think we understand the arguments anyway. Whether we resolve them is another matter.

Ms MEREDITH—Let me make the point that both FARB and FACTS agree with the analysis of Mr Cottle in relation to section 22(5). We cannot see how Telstra could be providing a broadcasting service under the Broadcasting Services Act with this amended definition.

Mr CANDI—One of the examples that Warwick did give was that if something were taken and then put on the Internet by another person, that would not be a broadcast anyway. That would be a communication under the way this bill is constructed. That problem is not there and I agree with Brett and Tracey's analysis about the work that the section does. That is all I have got to say there.

Mr METALITZ—On 22(6), I appreciate Mr Rothnie's analysis of the case that gave rise to this formulation but I think it is interesting that he came up with three or four other formulations rather than this in explaining what that case meant. He mentioned the person who introduced the music on hold, the person who does the communicating act, the person who made the decision to include the material. All of these things are different from the person responsible for determining the content of the communication. So I think the chair's observation that this plain language here seems to be at odds with the interpretation that Mr Rothnie attributes to it remains a problem.

Certainly the person who does the communicating act, who does what is necessary for the communication to take place, ought to be the person considered to have performed the communication. I think that is commonsense and you do not need a special provision to say that. If that were acceptable to Mr Rothnie and consistent with the interpretation of the High Court's case, then we would certainly be content with that in lieu of the language that we now have in 22(6).

Also, on one other point, I believe we now have circulated our draft language. I want to point out that besides the amendment to 36(1A)(d), there is a parallel provision, subsection 101(1A)(d), which deals with subject matter other than works.

Finally, on one of the points that Mr Rothnie raised, there is concern about whether Telstra or other carriers would be liable for intercepting communications that contained infringing material. I think the answer there is in (1A)(a) which already directs the court to

take into account the extent, if any, of the person's power to prevent the doing of the act concerned. If Telstra cannot intercept these messages and determine whether they are infringing, then it cannot be liable. That factor certainly argues against any authorisation liability. So I suggest that is really a non-issue in this case.

Ms BAULCH—Section 22(5) is relevant to two issues. Firstly, it determines who is the owner of copyright in a broadcast as a subject matter which is protected by copyright. Secondly, it determines who is liable for material which is broadcast. I would say that it is correct policy that the person who gets the benefit of owning copyright in the broadcast as a subject matter which is protected by copyright should be the one who is responsible for getting the copyright clearances for any material which is contained in that broadcast.

CHAIR—As there are no further comments on these provisions, we will move to the next set of provisions: the exception for temporary reproductions.

Mr METALITZ—On this question of temporary reproduction, which is very closely bound up with what we were just talking about on ISP liability, let me start by observing that I think it is not contested that there is nothing in the WIPO treaties that requires Australia or any other country to recognise and create an exception to the reproduction right for temporary reproductions. In fact, there are very definite limitations on Australia's ability to do so and still remain in compliance with its obligations under international copyright agreements. In our submission we have gone through the three-part test that any exception to exclusive right must meet in order to satisfy these international standards. That is particularly true of the right that really is the cornerstone and foundation of the copyright owner's bundle of rights, and that is the right of reproduction.

Secondly, I would like to offer the observation that this issue was extensively debated in the United States during a period of several years leading up to the enactment of the Digital Millennium Copyright Act which implemented the treaties under US law. The decision was ultimately made not only not to include an exception for temporary reproductions but also to reaffirm decisions by the United States courts that made it clear that a reproduction is a reproduction even if it is a transient reproduction and occurs as part of technological process and lasts for only a short period of time. It is, nonetheless, a reproduction and one that is subject to the copyright owner's exclusive right.

In the year since that legislation was enacted—and that provision was effective immediately—I do not think we have seen cataclysmic changes that have wreaked havoc on the ISP industry in the United States. In fact, it is thriving. It seems to do quite well without any exception for temporary reproductions made in the course of communication. We urge the committee to reconsider the issue of whether there should be a statutory exception for temporary reproductions made in the course of communication.

I believe it raises a lot of very difficult questions that it is probably not necessary to address in the statute and we would encourage the committee to consider the alternative of leaving the reproduction right alone, leaving it in place, not cutting back on it, and, instead, fashioning remedies in a way so as to avoid any difficulties that might arise through the application of the reproduction right in the digital network environment.

If the committee is reluctant to undertake that re-examination or if it concludes after taking it that it still believes a temporary copying exception is needed, we do have some suggestions on how the provisions of 43A and 111A could be modified to lessen the detrimental impact on copyright owners and to restrict any such exception to what is absolutely necessary to avoid any interference with the operations of the Internet or digital networks. I direct the committee's attention to the submission from a number of industry groups—pages 13 and 14, I believe—that address these issues.

There really are three main changes that we suggest. First, in subparagraph (1), the problem that we see with the temporary reproduction exception, as it stands right now, is that there is no definition and no limit provided on what is a temporary reproduction. Indeed, the discussion in the explanatory memorandum suggests that virtually any reproduction that is made in the course of online communication would be considered a temporary reproduction.

Temporary reproduction is not a defined term. It is not one that has a standard or accepted meaning in the industry, as far as I understand it. Therefore, I would suggest that we should focus this exception on those types of reproductions that are unavoidable, indispensable, inevitable, that you cannot get away from and still operate a digital network, and yet have no independent life of their own.

If the concern is that copyright owners might somehow seize upon those reproductions and demand an additional toll on the information highway, I think that concern can be set at rest if the exception is limited to the transient reproductions that are made as an indispensable step in the technological process of making a communication. It is not necessary to have such an exception for copies made in the course of receiving a communication.

The second area of concern has to do with subparagraph (2). I would like to say, first of all, that this provision does reflect a big improvement over the exposure draft. It does limit the scope of this temporary reproduction exception and tries to minimise the possibility that the exception will be abused. I am not sure it is entirely successful in doing that. The reason is that it turns on the question of whether the making of the communication is an infringement of copyright. This is a problem, I think, of the collision between a global communications system like the Internet and the fact that copyright law is, essentially, territorial. It does not have any impact outside of the jurisdiction.

When we have a global network in which people may, without authorisation, put material up on web sites outside of Australia and people in Australia have ready access to them, we run up against the problem that an act of communication that takes place outside Australia is not an infringement, it is simply not a violation of Australian law. It may be a violation of the law in the country in which the act of communication takes place, but it may not be a violation in that country and it may not be practical to pursue the violator in that country.

Having the applicability of the subsection turn solely on whether or not the making of the communication is an infringement of copyright is, we feel, too narrow and would allow many unauthorised communications to take place. It would shield the temporary reproductions that take place in the course of those unauthorised communications from any

liability. So we have proposed in the second dot point, point 2, that the exception not be available when the communication is not authorised by the right holder or permitted by law, or when the act of communication would be an infringement if it were to take place within Australia.

The first part of that phrasing, again, is similar to language that is under consideration in Europe. The second part, about acts that take place outside Australia, is really intended to address this problem of the territorial scope of Australian copyright law. Under this analysis, if someone put material up on a web site in Fiji, to which Australians have ready access, and did so under circumstances where it would have been an infringement if the server were located in Australia, then this temporary reproduction exception would not apply.

The third point, and I believe I will defer to Mr Gonsalves for more detail on this, is to make the temporary reproduction exception unavailable with regard to reproductions made in the course of using or running a computer program.

CHAIR—Thank you.

Mr GONSALVES—I would like to speak to that. This point simply illustrates, in the view of the Business Software Association, the potential breadth of the exception in subsection (1). When a computer program is used, temporary reproduction occurs in the random access memory of the computer. When a computer program is used across a network, a similar reproduction takes place from the server where the computer program is stored to the terminals that are running the computer program.

The concern which the software industry has over this exception and the breadth of it is that it could potentially allow a network of 100 users to use 100 copies of a program, effectively, across a network, and for that use to be caught by the exception. The reason is that if you look at the wording in subsection (1) where the right of reproduction is not infringed, where the temporary reproduction is made as part of the process of making a communication, the definition of ‘communication’ is very broad and includes to electronically transmit any information. And the way the computer program is used, the program itself is communicated or transmitted from a server to the terminals that are using the computer program. Therefore, 100 infringing copies effectively could be made and legitimised by this exception. That is the reason for subsection (3), which we have added.

I would probably go on to say that subsection (3) would not strictly be necessary if the changes which we have proposed to subsection (2) are made. So, the exception does not apply if the communication is not authorised by the right holder, but we have put in subsection (3) because obviously we are not sure how this wording will end up at the end of the day.

CHAIR—Thank you. Ms Meredith.

Ms MEREDITH—Mr Chairman, FACTS and FARB feel that the provisions as they are currently drafted are actually fairly balanced. Really, they are not merely provisions that are relevant to ISPs or to television and radio broadcasters, they are provisions that will be of general concern to many industries that use integrated systems, as we will all do in the

future. And there is no element of choice because the equipment dictates the procedures. You will end up having incidental reproductions as a result of our commercial undertakings on a day-to-day basis.

The point has been made that reproduction has been the essential feature of copyright law and very much the genesis of the protection. But it needs to be acknowledged that the evolution of the way in which we communicate and utilise material might require some adjustment to the way in which we approach the traditional concepts of copyright because it would simply not be possible to identify and remunerate every reproduction in a modern communications environment. There is an old copyright tenet which says that you do not introduce a right that you cannot enforce. Really, the enforcement of incidental reproductions in the course of making communications would be almost impossible to administer.

CHAIR—Before you go to the next point, on that, if you take a purist view of copyright, surely this is a reproduction, and a reproduction is the basis of copyright. Therefore, there is a logical argument for saying that there should not be an exception to it. The proposal from Mr Metalitz is to say, ‘Let’s not play around with what fundamentally is copyright but to reflect the reality in terms of what might flow so far as penalty is concerned.’ My question is really to put Mr Metalitz’s proposition to you and ask, ‘Why not adopt that approach?’

Ms MEREDITH—You certainly could adopt that approach. I have some difficulty with the wording proposed because I think once you start introducing concepts like an indispensable step in a technological process you are inviting uncertainty. It seems to me that the provisions as they are currently drafted are quite simple but quite comprehensible on their face. The temporary reproduction as part of a technical process of making or receiving a communication is fairly clear on its face and does not invite ambiguity, which I suspect some of the proposed provisions may do. Incidentally, we think it is essential to have the receiving component of the communication for incidental reproductions because, of course, in the course of receiving communications there are just as many incidental reproductions as in making a communication. It probably needs to be clear that that should cover those positions. Certainly, the proposal does not remove the benefit of the section but it seems to us that the sections as they are presently drafted are preferable because they are simpler and not open to litigation to work out what they mean over a period of time.

CHAIR—Mr Candi.

Mr CANDI—Not surprisingly, I disagree with Tracey. She is talking about subsection 43A and 111A. The word ‘temporary’ is the problem. It is vague. It is something that could be debated in many court cases. But the job of what these temporary copies reproduction sections are about is that there are—and Tracey used the word—‘incidental’ or automatic reproductions in the process of choofing an authorised communication through down to your end user in their home. It is only those automatic reproductions or unavoidable reproductions that the work of this type of section, if it is to survive, is to do. The word ‘temporary’ could mean longer than the authorised communication. ‘Temporary’ is a word that could import any time frame. It could even import a time frame slightly less than the life of copyright if you wanted to really put the argument up. We do not think that the section is really needed. If it is, certainly ‘temporary’ needs tightening up. The subsection (2), which was added in the last draft, must survive. These things and remedies can be fixed up.

Just coming back to a point that Warwick made earlier, section 115 of the act, which is a section that has been there for an awfully long time, does say where the defendant did not know then the court will not order damages. I do not agree with Warwick Rothnie's view on behalf of Telstra that it would be impossible for the court to arrive at that conclusion in this new environment—with this act, the development of the ISP and the global Internet trade. If they have got the solid argument there is no reason why under 115 the court could not arrive at that conclusion. The wording of that section is very plain. We are not trying to do away with, by striking out 'temporary', the work of what this subsection (1) is there to do. We are just trying to make it more precise and attach to the work or the unavoidable circumstances that happen with a communication.

CHAIR—Before Ms Meredith raised it, I had circled the word 'indispensable' because it seemed to me that that has a certain vagueness associated with it. You have been using the word 'unavoidable' which seems to me to be more precise. I am not saying it is necessarily the best word but it seems more precise than 'indispensable'.

Ms JULIE BISHOP—We have also had 'incidental' and 'automatic'.

Mr CANDI—I would not argue against you, Mr Chairman. From a phone call I had with some European counterparts last night, 'indispensable' looks as if it will probably end up being 'essential' or 'unavoidable'. 'Essential' is a good one too.

CHAIR—Would words like 'essential' and 'unavoidable' or something like that be more precise?

Mr CANDI—Yes.

Ms JULIE BISHOP—Or 'incidental' and 'automatic'.

Mr CANDI—Yes, we would be fine with those.

Ms WARD—Not 'incidental'.

Ms JULIE BISHOP—It is the word that was used. I wrote it down.

Mr CANDI—'Unavoidable' or 'essential' instead of 'indispensable' is okay by us.

CHAIR—Any further comments on this? You have had a go Mr Metalitz. Mr Wodetzki?

Mr WODETZKI—Apologies for my lateness, I have been circling Sydney airport. This issue is one on which we have certain views, including that we do not think it should be drafted as an exception. We do not accept that temporary 'copies' are always reproductions for copyright purposes. This is an open issue. There was an attempt to address this at the WIPO Copyright Treaty negotiations. In fact there was a provision in the WIPO Copyright Treaty in its basic proposal form that went into the negotiations that purported to specifically include temporary copies to confirm, in the words of the draft treaty, that temporary copies were reproductions for copyright purposes and that almost caused the entire conference to melt down at one point because no-one could agree upon it. In fact there was no

international consensus that temporary copies are even copies. Against that backdrop we are now having a discussion about whether this exception is acceptable. The exception starts from a false premise and that is that these temporary, incidental, ephemeral—or other words that we might like to use—types of copies are actually the types of copies that copyright has ever protected.

It is a requirement of our act that we have a reproduction in a material form and some of the electronic blips that we are talking about in this context are a long way from any natural reading of what constitutes a reproduction in a material form. In fact, taken to its most logical conclusion, I can give you an illustration of how preposterous some of these expansive definitions of temporary copies in fact turn out to be. If you were able to memorise a poem—I assume there are people around the table who have memorised a poem in their time—that will be stored in your brain as a series of electrical impulses. Are they, for the purposes of the Copyright Act, reproductions? In my view they are not but if you cast this type of definition in such expansive language, you will end up catching them. Again it just reinforces the point that we may be obsessing about trying to pull everything under the copyright veil where it does not necessarily fit.

From that starting point we think that this can be quite easily fixed by redrafting it to confirm that temporary copies made as part of the technical process of making a transmission are not reproductions in material form for copyright purposes. If you do that, you still leave open this unresolved debate about what really is a copy. By adopting the approach currently in the bill, you set in place the premise that temporary copies must be copies, otherwise you would not need to create an exception. I do not think that premise is something that should be accepted or that is necessarily true. An example of a problem that arises addressing this issue by way of exception is that you effectively set up the premise that temporary copies are copies and therefore any temporary electronic copy, no matter how ephemeral or short lived it might be, is an infringement of copyright unless it is authorised.

As you may be aware from our submissions, if you press ‘play’ in most portable CD players, a section of the music will be buffered into an anti-jog memory inside the device. Those copies are not occurring in the course of any transmission, but they would now be considered to be copies that presumably are not authorised. You could come up with any number of other situations down the track in terms of devices that we use in our daily lives that, simply by switching them on, probably generate inside their internal workings a number of different temporary electronic copies just as part of the way they operate. If this is done as an exception, you are only solving one of the problems of setting in place an unnecessarily broad definition of what constitutes a reproduction.

Ms SYMONS—CAL has not actually made a written submission in relation to the temporary reproduction provisions. However, having had the benefit of seeing the industry proposal put forward by Mr Candi and others, CAL would generally support the drafting that has been proposed, subject to the discussions we have just had about the use of the word ‘indispensable’.

I note Mr Wodetzki’s comments just now. CAL may take those on notice and provide some further comment on those as an alternative. But the major point that CAL would seek to make is an ambiguity that has been created by the wording in the explanatory

memorandum so that, since the exposure draft, the draft of the bill itself has been changed to remove the exception in relation to viewing on screen, but the explanatory memorandum itself has not been changed accordingly. There seems to be a conflict which remains. CAL's submission to the committee is that the explanatory memorandum itself needs to be amended. I do not think I will open up any further debate on the browsing and viewing position. I might leave that until later in the day. That is all we need to say at this point, thank you.

CHAIR—Do you have any other comments, Mr Wodetzki, Mr Rothnie and then Ms Ward.

Mr WODETZKI—Thank you, Mr Chairman, I just wanted to add one response in particular to the words 'indispensable' and 'unavoidable'. In our view, that would have the effect of unreasonably frustrating the purpose of the provision. In almost any situation that one could think of in the context of a transmission—particularly in a transmission over the Internet—you could probably not argue that each and every copy was unavoidable. The copies made in the course of a transmission across the Internet are made for efficiency reasons. The path it takes and the number of stops that a transmission has along the way across a packet switch network are done for efficiency reasons. None of them is unavoidable. They are done according to what will work best. If you say that you can only make unavoidable temporary copies, then it would force the computer to route things through the shortest physical number of hops route, which is not going to be the route that necessarily works appropriately according to network traffic.

Ms JULIE BISHOP—Can I just ask Mr Wodetzki to comment on the proposed section 3 that Mr Metalitz put up—43A(3)—in relation to using or running a computer program: do you have that?

Mr WODETZKI—Thank you. I have only just laid eyes on that. Having done so, we would strongly reject that and oppose it, turn it around on its head and put it the other way around.

Mr ROTHNIE—Telstra endorses the remarks that Mr Wodetzki made on the international position about whether or not a temporary copy is an exercise of the reproduction. I do not think it is as clear as has been presented that the international community has reached unanimous agreement.

Telstra's main concern about these provisions comes back to the government policy, stated in the discussion paper, that the amendment is intended to reflect the government's aim of ensuring that the technical processes which form the basis of the operation of new technology such as the Internet are not jeopardised. Telstra submits in the strongest terms possible that the inclusion of subsection (2) in proposed section 43A in the counterpart very much jeopardises the technical processes of the Internet or, alternatively, imposes strict liability on carriers in Internet service providers.

Subsection (2) has been introduced since the exposure draft and it says that you cannot rely on the exception for anything which is an infringement or an unauthorised communication. It would seem most likely that 99.999 per cent of the times that anybody is

trying to impose liability on anybody will be where there is an unauthorised communication or some sort of infringing activity. The point of section 43A(1) is to say that liability does not fall on the carrier or the ISP: it falls on the person who is introducing the material into the communication. Subsection (2) totally negates that. Therefore, Telstra is fundamentally opposed to it.

Ms JULIE BISHOP—Your position would be just to delete it?

Mr ROTHNIE—Yes. Turning to subsection (1) in the draft that has been circulated this morning—I think we are attributing it to Mr Metalitz—once again Telstra would say that it cannot be limited to the right of reproduction. It should be as drafted—it is the copyright—subject, of course, to consideration of Mr Wodetzki's points. Telstra thinks that the word 'transient' has as many, if not more, problems as 'temporary'. We believe 'temporary' is probably the preferable expression and with the temporary reproduction that is made in the course of the making of the communication, we do not see why we need to get into the indispensable, unavoidable and incidental type of language, for the sorts of reasons that Mr Wodetzki outlined.

The final point we would make, given the number of references to what goes on in the US and Europe—and I should have also made this point in relation to proposed section 39B—is that Telstra does not believe these provisions go far enough, even amended as we have foreshadowed, in that the US, in its Digital Millennium Copyright Act, includes express exceptions to allow the acts of caching and hosting. The European Union process is well advanced to adopting very similar sorts of exceptions, defences or whatever. Telstra believes that those protections should also be introduced into this bill.

Caching is the practice very commonly used by ISPs to store something on a web site where it is in high demand, so that it does not need to be retrieved from typically a US site. It is basically an efficiency measure designed to save bandwidth and time. The US and the European proposals include mechanisms to make sure that copyright owners' legitimate interests are adequately protected, refreshing obligations, requirements to pass on hit information, requirements to remove material when the copyright owner takes them down or changes them, and things of that sort of nature. I will not go into all the detail of those proposals. They are set out in Telstra's submission. Thank you.

Ms WARD—Viscopy supports the amendments as proposed by ARIA and the Australian Publishers Association group. In essence, we support the argument that the provisions of sections 43A(1) and 111A(1), as presently drafted, are too wide. The favoured position is that only transient reproductions which are technologically indispensable—or however that is redefined—for the internal workings of equipment should gain the protection of these provisions.

Mr METALITZ—Let me respond briefly to a few of the points that have been raised in the last few interventions. Firstly, with respect to the international consensus on temporary copying, I do not think it is very good use of the committee's time to go into the details of who said what in Geneva in December 1996. The important thing is what came out of that process, as embodied in the treaties and in the agreed statements that reflect a consensus of

the international community. The agreed statement to article 1(4) of the WIPO Copyright Treaty states:

It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

That means that the current consensus about international standards, even without regard to these new treaties, is that copies in electronic form in a digital medium—and I will exclude for the moment copies that may exist in Mr Wodetzki's brain of the poem that he has memorised—are copies within the meaning of current international standards, and certainly nothing in the treaty has weakened that. To the contrary, it reaffirmed that international consensus. If Australia were to adopt the premise in the amendments proposed by Mr Wodetzki that somehow these copies are not really copies, it would place itself outside that international consensus and in violation of its current obligations as a member of the Berne Convention and of the World Trade Organisation.

Secondly, we have heard a couple of times that these temporary copies need to be made not because they are indispensable or unavoidable but because they are more efficient. I would simply say that if efficiency is a defence to copyright infringement then we do not have very much of copyright left. It is sometimes the case from the point of view of someone using copyrighted material that it is more efficient to simply copy it and not seek permission, but that does not mean that the copyright owner's exclusive rights can be set at naught by that type of conduct.

CHAIR—Can I stop you there, Mr Metalitz. I understand your point that if you allowed efficiency to be a defence then you would have broadened the scope. But, by the same token, if we are trying to find a practical, commonsense outcome to this which reflects the preservation of copyright in its various formulations but at the same time says that the way in which this technological process works in industry is going to be best all round, I would have thought, particularly for copyright owners, we should look for an efficient system that does not mean we have to go routing around in all sorts of ways to overcome the problems.

Again, I suppose I am pleading for some meeting of the minds on this. If, in reality, efficiency is a part of what you are trying to achieve but you do not want to put the word 'efficiency' into any provisions, if 'unavoidable' or 'indispensable' do not meet that real objective, surely there is some formulation of language which can preserve copyright but at the same time not be overly burdensome, if I can put it a that way, in the terms that Mr Wodetzki is suggesting?

Ms JULIE BISHOP—Essential to whom?

CHAIR—I cannot speak for the committee, because the committee has not discussed this yet—and I am not acting as a devil's advocate—but I would urge that it would be helpful to us if there was some way in which you could have a meeting of your minds to meet the various objections or the concerns you have on this, given that you are the experts and we are just coming to grips with it. I just throw that out as a proposition generally.

Mr METALITZ—Your point is very well taken. This very similar impasse was demonstrated time and again in the United States over an extended period of time. The solution was to try to deal with these problems as matters of remedy in a way that would encourage and give incentives for cooperation among the parties. Certainly, it is in the interests of the copyright owners, the carriers and others that they cooperate to make this medium achieve its full potential for everybody.

The way to do that under the US legislation was, again, not to degrade or weaken the exclusive rights of copyright owners but to try to fashion remedial limitations. That is why I was quite surprised to hear Mr Rothnie refer to exceptions to protection to allow caching. There is no such exception under US law. I am sure that if he were to review the provisions, he would find that it is not an exception, it is not a limitation on liability; it is simply a limitation on remedies.

It says that if certain steps are taken and certain criteria are met, then the carrier cannot be liable for monetary damages and there are some restrictions on what injunctive relief can be entered in a case in which it is proven, under existing standards unchanged by the new law, that an infringement has taken place.

The concerns that Telstra has expressed have to be viewed in light of the fact that carriers are accepting and living with, in the United States, no temporary reproduction exception and, in Europe, as their process has not been completed, a temporary reproduction exception that looks much more like what we have put forward than what Telstra asks for with the deletion of subsection (2) of 43A. Somehow the ability of these carriers to thrive in the digital network environment has not been fatally compromised.

The last point I would like to make is a much smaller one. It was raised in Ms Meredith's response to the chairman's question, although I am not sure she responded to the chairman's question about why any temporary reproduction exception was needed at all. She raised the point about the temporary reproductions in the course of receiving a communication.

In the provision, as it stands now, there is a lack of symmetry. Section 43A(1) provides an exception for certain temporary reproductions made in the course of receiving a communication, but section 43A(2) does not cut back on that exception or impose conditions on that exception for receiving a communication. It applies only to making a communication. I would suggest that if there is to be a temporary reproduction exception set out in paragraph 1 and some limitations on that exception set up in paragraph 2, there should be symmetry; it should apply to copies in both the course of making and receiving the communication.

Ms JULIE BISHOP—So would the second part of 43A(2) read ‘. . . as part of the technical process of making or receiving a communication if the making or receiving of the communication is an infringement of copyright’?

Mr METALITZ—That is correct. That is one point we did not pick up in the printed amendment that has been given to you, and I apologise for that. The way we have done it in our draft is to take out ‘receiving’ in our 43A(1). However it ends up, it must be symmetrical: if there is an exception for copies made in the course of receiving—which we

would oppose—that should also be reflected in 43A(2) as far as the limitations on that exception go.

Ms JULIE BISHOP—So if you left in receiving in 43A(1), even in your version, you would insert it in your (2) as well?

Mr METALITZ—Yes, that is correct.

CHAIR—If there is an exception for communicating, should there not equally, because of technological events, if I can put it that way, or technological occurrences, be one for receiving? Don't you have similar occurrences in receiving communication, where temporary copies can be made as—to use your language—an indispensable part of the process technically of receiving?

Mr METALITZ—The reason we do not think the making and receiving are really the same thing is that making a communication also involves making available—it includes both the making available right and the electronic transmission right. The concept of receiving a communication, although as a commonsense matter we understand what that is, is not defined in the legislation. Therefore, it is not clear to us why it is necessary to create an exception for reproductions that may take place in the course of an activity that may not implicate exclusive rights at all. I do think there should be a symmetry between the two provisions, and we would prefer to see neither of them cover receiving the communication.

Ms MEREDITH—I think the relevant point about that is that the key activity under 43A(1) is the reproduction. The point is that in the course of both making and receiving a communication there may be a relevant reproduction. So it is not so much that receiving a communication does not carry with it any copyright implications because you are not engaging in an act in which copyright subsists. The point is that in receiving the communication you may well be nonetheless incurring a reproduction.

Mr WODETZKI—I would just like to put to bed this business about international consensus. In response to my suggestions, Mr Metalitz suggested that the agreed statements on the treaty confirm an international consensus on temporary reproductions. There are two points on that. The first is that the language of the agreed statement asks about storage, which in itself was a deliberately ambiguous word chosen to get around the problem with temporary copies. The second point is that the only thing in the entire WIPO treaty negotiations that resulted in a vote was that provision. So the so-called agreed statement is not a consensus position at all, and it requires a great deal of diplomatic disagreement for this to happen: it was the subject of a vote at the conference. I just want to reiterate that there is no international consensus on this issue—that is a non-argument. The argument should be on the merits. And, on the merits, we see no problem with the proposal.

CHAIR—Saying it required a vote, Mr Wodetzki, does not advance your argument much, does it? That is like saying a piece of legislation in parliament required a vote.

Mr WODETZKI—It does because it is a vote of member countries putting their view on what they see the treaty addressing. Everything else happens by consensus. If things happen by consensus they can be said to represent a consensus. When they happen by vote

they can be said to represent a majority view, as reflected in a document, but they do not represent a consensus.

Ms JULIE BISHOP—How close was the vote?

Mr WODETZKI—I do not have the numbers. It was passed, but it was passed in ambiguous wording by use of the word ‘storage’.

Ms JULIE BISHOP—I guess they were confronted with what we are confronted with: the ADA temporary reproduction amendments and the IIPA temporary reproduction amendments could not be further apart.

Mr ROTHNIE—I do not want to enter the Geneva debates at any great length, although I think the first vote they were called on to make, which a senior official at WIPO believed was going to get unanimous exception, was a vote that reproduction did include temporary reproduction. It was as a result of that vote not getting passed that there was a vote on the agreed statement—although that is only my recollection. I am sure officers of DFAT or Attorney-General’s would be able to give you a better blow-by-blow description of what went on.

Ms JULIE BISHOP—An eyewitness account.

CHAIR—I do not think the committee is going to be finally swayed one way or another by the vote in Geneva.

Mr ROTHNIE—Sure.

Ms JULIE BISHOP—But if we went there, Kevin, that is it.

Mr ROTHNIE—I did wish to respond though on a couple of things, since it would appear it was me who inadvertently introduced the word ‘efficiency’ and that has now justified piracy forever and a day. I think the reference to efficiency was made in relation to—I am not now allowed to call them exceptions even—the provisions relating to caching and hosting, and that was all I was talking about with the reference to efficiency.

The only reason I can advance, despite Mr Metalitz’s assurances that the carriers in the US and Europe are happy with the situation, is that unfortunately the carriers—or fortunately for them—in Europe and the US are not labouring under a High Court decision in the music on hold case which, with whatever rationality might think, imposed liability on the conduit rather than the people responsible for the infringing acts.

Ms JULIE BISHOP—It is a little bit like the defamation analogy then, isn’t it, when the publisher is held liable? Even though the publisher did not put the newspaper together and had nothing to do with the editorial and nothing to do with content—

Mr ROTHNIE—Probably the analogy we prefer is that we are going to impose liability on Australia Post for carrying infringing copies as well.

Mr GONSALVES—I just wanted to respond briefly to Mr Wodetzki's comments on temporary copying and the philosophy behind it. He seems to be suggesting that temporary copying should not fall within the ambit of the reproduction right at all. The software industry would be fundamentally opposed to that position for the simple reason that the whole basis of marketing and licensing of mass produced software depends on temporary copying being made.

Software is generally supplied by reference to the number of users or number of computers on which you can install that software. If a position were taken that temporary copying were permitted under the Copyright Act and a person could buy a single-user version—which obviously is the cheapest you could buy of a particular program—load that onto a server and have that used by 100 users instead of paying for the 100 user version, the whole basis of the software industry will be seriously jeopardised. If those proposals by Mr Wodetzki were adopted, the industry would be jeopardised.

CHAIR—I think we have probably canvassed the arguments sufficiently. At least, we are clear what the arguments are.

Ms JULIE BISHOP—We have reached the impasse anyway.

CHAIR—Perhaps we will move on then to subscription broadcasting of sound recordings.

Mr CANDI—That is an issue I raised when I was last in front of the committee on 30 September, so with your permission I will kick off on that. This is probably not an issue relevant to everyone around the table. I spoke in quite some detail and at some length on 30 September—that is there on the transcript. Section 136(1)(b) in this bill had amended or added to it the very last part of that sentence which reads 'or to broadcast the recording in a broadcast transmitted for a fee payable to the person who made the broadcast'.

You will recall that when I was last in front of you I explained that, for a whole lot of reasons, we were opposed to this and we wanted the words deleted. We have given it more thought since then and the proposed words that I have put up should be taken to address the concerns. My main concern, and the reason why I wanted the words deleted, was that it should not provide a way into the Copyright Tribunal in respect of audio only subscription broadcasting, multichannel broadcasting. But thinking about it, sound recordings are used in television programs and broadcast or transmitted by subscription broadcasters. Of course, the sound recordings are embodied in various parts of current affairs shows, movies or whatever.

To distinguish that, no doubt the licence scheme that we would put up for the broadcast of sound recordings included in television programs broadcast by subscription broadcasters would be a licence scheme. That is what the work of section 136 is there to do in respect of the tribunal.

Looking at that piece of paper that I have handed out, I have specified that purpose. Picking up from the words that I have underlined, it says:

... to broadcast the recording in a broadcast of a television program transmitted by a subscription broadcast service

or to retransmit the recording in the process of retransmitting a free-to-air broadcast of a television program by a subscription television broadcasting service.

That last part is what we were talking about yesterday in regard to part 5(c) and the flow-on point that we made in respect of section 135ZZZC. We covered all that yesterday and I do not want to do that again today, obviously. This narrows it down to include the access to section 136 licence schemes in respect of television programs and leaves out the issue of audio only subscription broadcasts.

As the record shows, we discussed this a lot. Audio only subscription broadcasts should go on to the marketplace, as they do in respect of getting licences and putting together packages of movies and compete amongst themselves to put together their programming and go direct to the copyright holders. In this case it would be the record companies.

That is what we have tried to do here. In the interests of time, I do not think it would be of any benefit if I went over the half an hour of discussion I gave you the last time.

Ms JULIE BISHOP—It is not necessary.

Mr CANDI—I have tried to narrow it down and do the work that we are after.

CHAIR—Does ASTRA have a view about this?

Mr MEAGHER—I am afraid that we have not formed a view on this particular issue at the moment. If it were possible to consider it for a while and come back to you either today or in writing, that would be appreciated.

CHAIR—Thank you.

Mr COTTLE—We at APRA have an issue concerning the drafting of 136(1)(a). That is the provision which gives the tribunal jurisdiction over works and certain acts relating to works. We have drawn this problem to the attention of the department. The problem is that in framing the jurisdiction, there is now an omission of a part of what was the diffusion right and is now part of the communication to the public right.

Unfortunately, an example of it relates again to the music on hold situation. It used to be that the definition of ‘licence,’ in so far as works are concerned, related to the acts of public performance, broadcasting, diffusion, and some other acts as well. Diffusion has now disappeared, so there is only public performance in broadcasting. It omits any reference to communication to the public. There are some acts which we say ought to be before the tribunal’s jurisdiction which are part of the communication right, not part of the broadcasting right, the example being music on hold.

In practice, what that means is that when tens of thousands of businesses are asked to pay royalties for music on hold now that Telstra no longer has that liability, the Copyright Tribunal will not have jurisdiction to arbitrate on any disputes as to fees. We think the tribunal ought logically to be given jurisdiction in that kind of area. It is not an issue which

affects the rights of copyright owners or duties of copyright users, it is merely a means of settling disputes as to fees.

CHAIR—Any further views on these provisions?

Ms MEREDITH—I am not certain why Mr Candi suggests that it should be confined to television subscription broadcasting services because there are, of course, radio subscription broadcasting services under the Broadcasting Services Act as well. I just do not know the answer to that.

Mr CANDI—With radio subscription broadcasting, which is what I am calling audio only subscription broadcasting, where there is going to be the fee charged, it is an audio only station. And particularly where it is going to be multichannel audio only subscription services, this is a particular and very specialised form of dealing with the recordings and getting them to the public. In this case, the public pays to get the access.

The reason why they should not be subject to statutory licences, or quasi statutory licences once section 136 sets up, is because that interferes with the central right of the treatise which this bill is dealing with, which is the making available right. That is because it easily ends up being a substitute for retail sale, or the communication sale, that the copyright owner will be making. That is not to say that the copyright holders, the rep companies and the artists, will not be licensing audio only subscription broadcasters—they will in certain circumstances, I am sure—but they will licence them according to the marketing decisions relating to the recordings they are releasing and the life cycle of the recordings.

It is very different. Of course, there is a statutory licence, and this is where Tracey's question would be coming from. There is a statutory licence, a longstanding one, for free-to-air, or general radio broadcasters, to use sound recorders. That is an entirely different situation, hit and miss broadcasting, where people are not specifically subscribing to it and cannot get messages about what is going to be recorded and it cannot be tailored or made multichannel. That is a very different situation to subscription broadcasting. That is why I have written this the way it is, to distinguish between those two types of things.

Mr MEAHGER—That probably misstates a lot of the way that, at least in the early days, subscription broadcasting or music broadcasting services are going to operate. Certainly the services that Austar is proposing for its regional interests are not unlike those of a commercial free-to-air broadcaster in the sense that they will be a package of channels, probably divided into genres, and subscribers will simply acquire a package of channels, or maybe a subset of the channels available. It will not be nearly as precise and as targeted as Mr Candi is suggesting. So, why you would distinguish between that and say that you had to have a more onerous scheme of obtaining rights than a commercial free-to-air broadcaster I do not really understand.

It is also the case that it is not yet clear how a lot of other services along the multichannel, multiservice models will develop. But if we do not have a reasonably transparent and easily manageable licensing scheme for some of these services—and I am thinking about some of the enhanced television services and other sorts of things like that—

we are going to unnecessarily limit or restrict the development of those services to the detriment of consumers and, ultimately, rights holders as well.

Mr CANDI—On this package of channels, already, here at this table, they have said, ‘Right, we are going to put together a package of channels.’ This is the precise point. They are genre specific. They will not yet have a Beatles channel, and the last time we spoke one of the members of the committee proffered the view about an Abba channel, which we will not go into today.

Ms JULIE BISHOP—I am sure that person is not here.

Mr CANDI—I am not looking at any of the present members. The subscription television broadcasters have 20, 40, 50 television channels. They have gone into the marketplace and they have got licences to put those programs together. I am not saying by what we have done here that they cannot go and get those licences, but they cannot go and get those licences by right of fudging their way through into the tribunal and saying to the copyright holder of the sound recording, ‘We will see you in there, mate. We will just do what we want to in the meantime.’ They can go into the marketplace as they do for video clips, direct to the copyright holders, as they do for movies, direct to the copyright holders. The sound recordings of the movies are the end commercial product. The people who make them exploit them in various ways, including licensing them for this type of activity.

If they want to package together genre bundles of audio only broadcasting to run off the side of their television stations, fine, but they should go into the marketplace and compete for that. Between Foxtel, Optus, Austar and whoever else comes along, just as one has competed to get MGM movies and the other one has competed to get other people’s movies or different programs, let them go to the copyright owners and ask for that permission. It will make sure we do not end up with two genre specific stations that will substitute for the work of the communication right.

I was just in Japan. It is completely out of control there. There is one service that has 100 channels in their bundle of genre specific, and it has a Beatles channel and an Elvis channel. It has British rock of the seventies, British rock of the eighties, British rock of the nineties, US rock of the nineties. It has every possible configuration of classical genres you could think of—light classic, classics to listen to while you are having brandy, all this type of stuff. It is a real problem. This is the specific issue that I am seeking to address here. They are large businesses. They have fought with the movie houses about getting rights for movies and TV shows, and they compete to get those licences. They have got valuable businesses going. They can come and do the same direct with the copyright holders about the subscription radio situation.

CHAIR—Any further comments on these provisions? No. We will move on to transitional provisions.

Mr COTTLE—I know this is an issue which affects a number of copyright interests sitting around the table. There are certainly some problems in the drafting of the transitional provisions which give rise to a few nightmarish possible scenarios of interpretation. Leaving those issues aside and looking at the policy, as we understand it, of the transitional

provisions, they do give rise in our view to significant practical problems for copyright owners and therefore for users.

The policy appears to be that in summary no licence or assignment pre-dating the legislation covers the new portion of the communication to the public right unless, in the case of licences only, there is an express contrary intention. We say two things in essence. Firstly, putting the presumption where it lies is going to give rise to a lot of uncertainty and therefore a lot of litigation. Treating old assignments and licences of those rights which are the precursors to the communication to the public right, as not including the whole of the communication to the public right, will give rise for many copyright owners to a lacuna in the documents that they have and make it difficult for them to exploit the material that they have assignments or licences for.

Secondly, we say that treating that portion of the communication right which relates to making works available online as a new right really overstates the position. Just coming to that second issue first, if you take my work and put it up on a web site and make it available through the World Wide Web, in our view we can prevent that from occurring as the law currently stands. If you are charging for access to my work then I can get an injunction against you for breach of the diffusion right. If you are not charging then I can probably get the ISP, which is hosting your web site, to disconnect you on the basis that the ISP is probably breaching my diffusion right. If neither of those works I can almost certainly get an injunction or get some relief in connection with any reproduction of my work which has been necessary in order to put the work up on the web site.

While the landscape may be a little bit confusing we say that that ability to stop that kind of usage currently exists within copyright and there is good authority, we would have said, on the basis of the High Court decision in the Telstra case for taking that view. But to give you an idea of what the practical problems are, at least in the musical area and in particular for APRA, APRA currently has 27,000 assignments of broadcasting and diffusion rights in musical works. We have always regarded the communication to the public right as the natural successor in simplified language of the combination of broadcast and diffusion rights. Both we and our members had always assumed that we would continue to license on their behalf the communication to the public right, including any communication occurring through a web based application.

All of a sudden when this legislation comes into force the licensing of web based applications, assumed to be part of the diffusion right up until now, probably will not fall within APRA's mandate and we will have to go back and get 27,000 new assignments from our members of that so-called new portion of the communication to the public right. What that will mean in practice is that anyone who wants to make a web based application using music will not be able to rely on an APRA licence. I dare say it will be the same for the record industry in that they will not be able to rely on a PPCA licence.

We think the problem does not just extend to music and to APRA, it probably affects a whole range of other copyright owners as well—in particular, the film industry. Where a film producer might have obtained a licence or an assignment from those who have provided inputs to the film, for example a scriptwriter, which covered either the whole of the copyright as it is currently known, understood to be, or in particular for broadcast and cable

diffusion rights. After this legislation comes into force it may well be that film producers cannot exploit video-on-demand rights or cannot licence their films for video-on-demand because it is not a non-broadcast communication to the public application. We understand this is a difficult issue. It is a difficult issue primarily because of the intermingling of the broadcast and diffusion rights and taking a part of what has hitherto been treated as a broadcast and treating it now as a communication to the public. It is difficult to look at single rights and successors to those single rights.

We think the appropriate and just solution is to reverse the burden. That is to say that, where there is an assignment or licence of the whole of the copyright or of the broadcast and diffusion rights, such licences or assignments ought to be treated as assignments or licences of the whole of the communication to the public right, unless there is an express contrary intention. We think that that will give rise to a more practical system of workability.

Mr CANDI—I would like to echo and emphasise those words that Mr Cottle has put forward. I think what has happened in this schedule 2—Transitional Provisions, which were originally raised by RMPPCA in response to the first draft of the bill not having them in there, is that the communication right replaces and bundles together the broadcast right and the cable diffusion right. The transitional provisions, as drafted, head the right way until you get to subsection 3 of it which completely reverses what the work of the transitional provision is. The work is that, for pre-existing copyright items, works and subject matter, other than works that are in existence and still in copyright before the date of these amendments, the communication right has to vest into them and the Acts Interpretation Act, and there are cases to that effect. What is really going to happen in these transitional provisions, if they are drafted right, is just to confirm that.

Then, because we are dealing with commercial products and there are a lot of licences, assignments and arrangements to do with them, those contracts, licences and assignments in regard to pre-existing works that had assigned or licensed the broadcasting cable diffusion right need to also incorporate the communication right to the extent that each contract might provide otherwise. I have handed up a draft here that was drafted by some barristers for us. I think Mr Cottle might have a model, but I am not too sure. What the one that we have handed up says is that the new item 2 that we have suggested will simply say, ‘Communication right exists and all the work and subject matter that is protected by copyright that pre-existed the amendments, the communication right invests in that.’ That is the first important point.

Item 3 simply says that, in the contract, licence or arrangement including assignment that included the broadcasting cable right, it takes with it now the communication right, except where that contract provides to the contrary. I think it is just a drafting error. I happen to know it was done as the last thing on the bill in a very great rush and these things happen. I do not think it is any real policy issue. I don’t think many people around the table would have a much different view, but that is up to them to say. We have suggested that drafting. Maybe it can be improved on but that is what we have put.

Ms MEREDITH—We endorse the comments of both APRA and PPCA, which we don’t often do, but we do on this occasion. There are significant problems with the present technical aspects of the drafting of the transitional provisions and also significant problems

from a substantial point of view. Mr Candi's proposed amendment seems to address those problems from that perspective.

Ms BAULCH—We agree that there are significant problems with the current drafting in the bill. We confirm the view put by other speakers that where there is a clear arrangement between the parties that contemplated being able to use the material online then those arrangements should be able to continue under the new regime. The concern is where that was not understood or contemplated under the old regime and how we deal with that. There are different ways of approaching this in the legislation and I confirm that it is not easy to draft it to achieve the desired result.

CHAIR—No more comments? Let us move on then to (e) Educational statutory licences—insubstantial portions.

Ms SYMONS—I think initially what I might do for the committee's benefit is simply put forward a summary of what CAL's position would be in relation to the insubstantial portion provisions which exist in the educational statutory licence in part VB and in its extension under division 2A. Our position is that we are opposed to section 135ZG of the act as it currently exists. We want to see this repealed. In addition to that, we are completely opposed to the extension of the provision into the electronic environment which is contained in the proposed section 135ZMB.

The proposal that was placed before the committee last Thursday by MCEETYA also made some changes to the proposed 135ZMB in relation to the use of the words 'solely for educational purposes'. They changed the current wording that is in the draft bill which refers to 'on the premises' and they proposed to delete that and include the words 'solely for educational purposes'. In relation to that, CAL is also opposed to MCEETYA's proposal.

That is a summary of our bottom line, if you like, our ideal position. Our written submission to the committee dealt with the issue of insubstantial copying. I understand also that when representatives of CAL appeared before the committee in Brisbane, we also handed up some additional material which included examples of books and a summary of how the insubstantial copying provisions work and how they are applied by schools, in particular, in providing education to students. I guess the nub of our concerns is that this is a free exception which is contained within the statutory licence, so there is no remuneration to copyright owners for the use of their works. It allows one per cent of work, in the digital proposal 'words', to be copied and that may be done over a period of time, separated by 14-day intervals. What it leads to is that educational institutions and teachers can select the most important parts of works and they can continually present those to their students.

The effect is that you can have copying which is way beyond what would be regarded as either reasonable or a small amount. In the materials that we provided to the committee, we tried to quantify how a particular work which was called *Science Australia* might be used. Given that there are 38 school weeks in a year, it would mean that a teacher technically could copy two pages every two weeks from this book over a period of time and provide that to their class, so they could provide 38 pages free of remuneration and, when you look at that as a percentage, it equates to 18.9 per cent of the work, so it is much more than the

10 per cent which is allowed under the statutory licence. I just reiterate it so that there is no doubt about it: it is able to be done for free.

In our written submission to the committee we emphasised the history of the provision and looked at why the Franki committee, in their report in 1976, had recommended the inclusion of such a provision. We quoted from them. It was basically so that a small amount of copying would be permitted, and they emphasised that it would be very small. Also, it would have been uneconomic at that time for copyright owners to collect remuneration for that copying.

Importantly, as we stressed in our written submission, times have changed. With the establishment of collecting societies such as CAL, copyright owners are now in a position where they are able to administer statutory licenses. They are able to collect payment for these kinds of copying. As we are trying to illustrate by the evidence we have presented, the kinds of copying that can be made in reliance on this provision have been extended beyond the insubstantial. It is no longer just insubstantial copying, it is far greater than that.

That is as much as we need to say. We have given you clear examples, and you have our written submission to which you can refer. Unless there are other particular questions that you might have, I will conclude there.

CHAIR—Thank you. Any other views?

Ms WARD—I would like to respond to this in two parts. First of all, in relation to 135ZMB, insubstantial portions, this section is not expressed to extend to artistic works. But in so far as works of Viscopy members may be characterised as tables or compilations, Viscopy comments that the quantitative test again is entirely inappropriate in relation to the reproduction of tables or compilations in digital format. Electronic rights management schemes are likely to be technologically capable of capturing information regarding usage. In the meantime, the matter should be a matter for negotiation. The statutory licence scheme may be extended once technological measures are commercially available.

In relation to the second part, and that was the proposal by MCEETYA at the last meeting to extend this to make works available for educational purposes, we very strongly resist that proposal because if such a reproduction was made off the premises for broad educational purposes, it could be done for somebody else. We believe that the work can escape far too easily. Once it is out in that technology you can never sheet home the responsibility.

I can only give an example, off the top of my head, of an artistic work. We have experience of the fact that artistic works are being downloaded in educational institutions for educational purposes. Students are putting together a portfolio, and at the same time with the next step they are taking those very portfolios out into their next commercial business operation. So, we see that those boundaries are not there between the strict educational purposes and the outside commercial environment as far as our works and that technology are concerned.

CHAIR—Any other views?

Mr ALEXANDER—The MCEETYA Copyright Task Force has a somewhat contrary view to this. We have always started with this inquiry on the basis that the Copyright Amendment (Digital Agenda) Bill was to reflect the current provisions of the act, bearing in mind the new technology which was available.

What is being proposed here is a move away from that. It is a proposal to take away certain rights which educational institutions presently have and certainly not to reflect them in the new environment. What CAL is arguing, from putting up what could be called a ship lot, just does not happen like they are saying. They have drawn an example of what might happen with *Science Australia*. We would say there is absolutely no evidence to say it does happen.

What happens nowadays with modern teaching is that students in schools are encouraged to go out and look at various sources. Textbooks are not used nearly so much as they were in previous years. Teachers will also go out and draw on materials from various sources. Sometimes the amounts taken will be infinitesimal. It might be a paragraph, it might be two paragraphs, it might be a page, it might be two pages, but that will be all that is taken from a particular work. It might be a work of many pages which are absolutely irrelevant to any other purpose. We say that the schools have always had this right, as have universities.

We say that argument is really trying to say that we are going to be depriving an author of some income that they would otherwise get. Well, firstly, they would not get that income because no-one would buy the book for that purpose. Secondly, we say that we should not be paying for something which has always been regarded as insubstantial and if done by a single person would be regarded, almost invariably, as a fair dealing.

We do not accept that teachers go out and try to make use of the provisions of the act so that they can copy more than they do under it. I do not think anything has ever been put forward to say that. So, we would be extremely concerned if it was changed in this way. Indeed, it has the potential to cause institutions to pay very considerably more than they are paying at the moment. We suggest it could cost up to 20 per cent or 30 per cent more in fees.

CHAIR—Doesn't that later point undermine your argument, Mr Alexander? If it is going to cost 20 per cent more, doesn't that suggest that it is something other than insubstantial?

Mr ALEXANDER—No, because it is not 20 per cent for one author. One author might only get 20 pages of their book taken. What we are saying is that nowadays, with modern teaching, sources from all over the place are being used. Single authors are hardly going to achieve anything from it. But CAL will achieve a great deal from it.

CHAIR—I must say I am not attracted to that argument because what you are saying is that if you can take a small portion from enough people then you do not have to pay any of them. Isn't that the effect of your proposition?

Mr ALEXANDER—The way you are putting it makes it as though it is a deliberate thing. That is not how it happens. For example, Mr Chairman, suppose you wrote a book

and someone took one page from it. Suppose it was a book on the history of the Liberal Party. There are numerous other books dealing with the history of the Liberal Party.

CHAIR—It would be a best seller, Mr Alexander!

Mr ALEXANDER—It is a bad example because most people would want to buy the whole book! But let us just pretend they are silly enough to only want one page. There are a lot of other books on the history of the Liberal Party. So a teacher might say, ‘It’s a pretty hopeless book, but there is one page here which is interesting and I’m going to copy it for my students.’ In fact, they might only want one paragraph, but it is easier to copy a page than it is to copy a paragraph, so they copy the whole page. Do you really feel that for your book of 300 pages that you should be recompensed for that one page? Isn’t it really a windfall?

CHAIR—If that happens over and over again, and the cumulative effective of this is that you take a paragraph from my book and a paragraph from Ms Bishop’s book and a paragraph from—

Ms JULIE BISHOP—Several from mine.

CHAIR—several from Ms Bishop’s book, and a paragraph from X, Y and Z’s books, it seems to me that that is starting to undermine the concept of copyright and the property which the copyright owners have in their creation.

Mr ALEXANDER—No, Mr Chairman, for this reason: there has always been a concept that small amounts can be copied; copyright law has always accepted that.

CHAIR—I accept that. But now we are in a digital environment, where the means of obtaining that copy is so much more readily available, so much more accessible; the way it can be reproduced is not simply hand writing it out or photocopying—it can be reproduced and assembled into some new document by taking a bit of my work and a bit of Ms Bishop’s work, et cetera. It seems to me you are saying, ‘Let us maintain the current situation,’ when in fact the ground has moved in terms of the environment we live in.

Mr ALEXANDER—There are two issues perhaps. The first issue is that CAL is saying that the present exception should be removed in the non-digital environment. Our starting point is that it should not be. That it is not part of this inquiry, it has got nothing to do with it; it is something which is opportunistic. The next issue then is: should it be brought into the digital agenda bill to say the same exception should not be given under the new provisions? In one sense it is easy to copy—we cannot deny that. But it is a very different thing to say that because it is so easy it is going to be used or abused, which is what is being suggested. Students have limited capacity, we all have limited capacity, to read; we can only absorb so much. Teachers are not going to take great slabs out of things or even small slabs out of a large number of things to feed to students because it just will not be read. We just do not see this happening. It is an absolute furphy, quite frankly.

Ms JULIE BISHOP—Is the test whether or not it is likely to be read?

Mr ALEXANDER—It is from an educational point of view because it is bad educational practice to give massive amounts of material to people and say, ‘I have done a good job here.’ Proper educational practice is to draw out only the material which is relevant.

CHAIR—I know you say that the point made by Ms Symons is not going to occur in reality—the taking of 19 per cent or whatever it was of *Science Australia*. If you are correct about that, shouldn’t the act reflect that no more than a certain amount be taken cumulatively from any one work? Without going into whether it will or will not happen—you say it will not happen, Ms Symons says it can happen—couldn’t there be some in-between position to say, ‘You can take your one per cent every 14 days, but if you take more than X per cent you are nonetheless in breach of the provisions and you should pay for it’?

Mr ALEXANDER—I am not sure that I disagree. I am thinking it through in a practical sense. If you have got a teacher teaching one maths class and another teacher teaching another maths class, it is quite hard to do that, but within practicality in how you draft it and do it I do not think we would have a problem with that.

Ms SYMONS—I would like to respond to some of things Mr Alexander said. But firstly, just on the last point that you raised, Mr Chairman, I did not mention initially that the provisions do not actually talk about the length of the work. You can have very long works and short works from which you can take one per cent or this ‘insubstantial’ part. So, quite obviously, the shorter the work the greater the impact if you apply this provision.

There are a couple of things I want to say. Firstly, it is quite clearly called ‘insubstantial copying’. I stress the point that that is the emphasis of the provision. Copyright law has a principle which is that if you take a substantial portion of the work then it can amount to a copyright infringement. This is clearly trying to say that where it does not amount to a substantial amount it is okay.

But, as I think you are acknowledging, times have changed, especially in the digital environment, and if this is a provision that has been around, or was being contemplated over 20 years ago, I think it is ripe for a re-examination, particularly when you are wanting to reflect an existing exception—not a right but an exception—and transferring it over to the digital. I think that necessarily raises the question about how the current provisions operate.

Just finally, I suppose CAL’s compromise proposal would be that this matter simply becomes one more matter that the copyright tribunal takes into account in assessing the level of remuneration that educational institutions pay. So if the parties cannot agree, they take it into account in calculating whether or not insubstantial copying is occurring and what impact it is having on our members.

CHAIR—I take it without you saying so, Mr Alexander, you oppose that.

Mr ALEXANDER—We would indeed.

Ms WARD—I just want to talk briefly about how we read and study, following up the points that Charles made. I say this from the perspective of somebody who has taught for

over 10 years in the state education system in a number of states. Also, I am currently studying at a tertiary institution.

If you were going to be an astute student within the new technology, you actually try to get something in electronic form, particularly a 1,000-page law textbook. You select according to indexes and search facilities. You may select only one paragraph, and the fact that the technology is allowing all of us to study in this way is very easily confirmed by the fact that, for example, law reports and decisions are now coming out not in page format but in paragraph format—paragraphs are now numbered. We are no longer stuck in a text-based page format. In fact, the technology allows us to move much more fluidly and to be much more highly selective in what we choose to read, study and reproduce.

Mr McLEAN—We support the proposals put by Charles. I would just add two brief points. In the current hard copy environment, it would be possible to make copies of an insubstantial portion every single day. We are not aware of any instance of CAL or copyright owners coming to us alleging that that is what is happening in universities. So the suggestion that in the future with this 14-day thing we would take advantage of it—instead of copying under the statutory licence and paying for it, to do things for free—I just do not think has substance.

The other point is that the extreme result of what is put is that you would go from a balance where there are some small things that are not paid for in a public interest or educational context to a situation where everything was paid for. What is proposed is that you would take this away and everything would be paid for. It would be far from saying that because it is insubstantial it might not amount to a reproduction. You would wind up paying for it under a statutory licence. So it would be a very radical shift in the balance. You have gone from a position where the state gives copyright owners copyright in return for the public interest getting various exceptions. The exception would be taken away. Everything would be remunerable. We would say that that is a very radical shift in the balance between users and owners.

Mr ALEXANDER—I will just add one little thing to that, and it is something Anna Ward made me think of as well. We would have to be very careful that it did not start moving towards a protection of ideas rather than the way they are expressed because very often things are just taken out, not because of the way they are expressed, but because of the concept they are putting forward. Copyright is not about protecting ideas.

Mr WODETZKI—Firstly, the ADA supports the views put by MCEETYA and the AVCC. Just to reiterate two points and one of them was the one that Charles made first. This bill is not intended to be revisiting the merits of an insubstantial portion exception. It is intended to be carrying it forward to digital, and that is exactly what it does.

There are two policy grounds for having the test: firstly, on the merits that copyright is allowed as part of the bargain that it strikes between the public and private interests, some things are to be copied for free. This is beneficial to educational purposes. So there is that policy argument that still stands. CAL argues that the only other policy basis for it is a transaction costs argument, that the only reason it came in in the past was because it was not practical to charge for it. They are saying that now it is practical to charge for it.

I question whether that assumption is true. When a university picks and chooses lots of little bits and pieces to put into their reading bricks, as they are called, at some point in time they often have to go through sampling processes and fill out lots of tedious forms and report to CAL. All of sudden, you pull within that tedious report keeping process, a whole bunch of little bits and pieces which give rise to substantial extra costs in administrative terms to the universities in a situation where previously they had not had to incur those costs and where the benefit to users is, as Charles said, probably minimal.

CHAIR—Any other views on this issue?

Mr EMERY- It is incorrect to portray that as the Copyright Agency's position. We are not against exceptions; we are interested in altering the way exceptions are judged. That point has to be made clear. We are not against exceptions.

Another comment that Ross made with respect to a radical change being suggested by what we are saying: we agree that it is a substantial change, but it is required by the change brought about by the advent of a digital environment.

Mr McLEAN—Perhaps just a brief response: I have not heard when an insubstantial portion would remain an exception and when it would be free. So I think it does effectively remove the exception as I hear it. That is the first point. The premise that because copyright owners could be paid for something they should always be paid for it is not the starting point for the discussion. There is a balance, and the bill attempts to maintain that balance. Some things should be free.

CHAIR—I think we appreciate the arguments that have been put. The next section is educational statutory licences, illustrative artistic works. I believe Ms Gilchrist from the Arts Law Centre wants to contribute to this debate.

Ms GILCHRIST—We give legal advice to artists including visual artists and we are concerned that obviously this section 135ZME replicates the print section in so far as it relates to illustrative artworks. We are just concerned that this section in the digital environment somehow gives the connotation that artistic works are somehow less valuable than the text. Therefore, while we agree that this section is important to be crossed over into the digital environment, we would prefer that artistic works are recognised in their own right.

CHAIR—How would you amend or modify the bill to do that?

Ms GILCHRIST—I do not have any proposed drafting amendments. I just wanted to make the comment that the current drafting is appropriate but not preferable.

CHAIR—I am trying to understand exactly what you mean. To take 135ZME(1), which is at the bottom of page 23 of the discussion paper, are you suggesting that the inclusion of the words 'accompanied by an artistic work or artistic works in electronic form' be delineated from the article or other literary, dramatic or musical work? Is that the nub of your point?

Ms GILCHRIST—Yes, it is.

CHAIR—You would be suggesting, therefore, that 135ZME be replicated for artistic works. Is that correct?

Ms GILCHRIST—Preferably the removal of 135ZME and inclusion of artistic works in the main 135ZML.

CHAIR—You want an extension of 135ZM for artistic works in electronic form. Is that right?

Ms WARD—In terms of the provision for 135ZME, we are actually recommending, on behalf of the copyright owners and artistic works, the repeal of that section. I could be corrected by others here, but I think once that section is repealed that section 135ZL would then cover all types of works in an equitable way. In a few moments I will explain why we want the repeal in the digital environment of 135ZME.

CHAIR—Rather than waiting a few moments, why don't you do it now?

Ms WARD—Those of you who do actually have the description here of provisions of the bill on page 24 and the arguments against the retention of this provision in the electronic environment will see that there is a summary that refers to the fact that accompanying illustrations are no longer worthless accompaniments to the text but, in fact, we always have believed these works to have their own integrity as original works. That is the essence of the problem of retaining 135ZME in the digital environment. Our position is that the value of the illustration in digital form is much greater in the digital environment because it can be readily divorced from the text. In fact, what I would like to do, and what is not possible today, is actually do a demonstration with some of you, in Canberra perhaps, to show how the technologies can secure the stand-alone works.

What we are saying is that, if you take the example of the way the technology works to produce something in digital form, for example, there might be an original work which is digitised or there might be a publication which is digitised. A lot of publishing now takes place in that digital technology.

So, even if something is in print format, or it might be actually digital to digital, it is very easy then for anybody to actually reverse engineer it—to go in with technologies like Photoshop, to just put your frame around whatever it is you want, to pull out that picture embodied in a text or in somebody's Internet site, and then reuse it in any way conceivable as a stand alone work.

So what we are saying is that the work is neither less than any other work, nor is it to be regarded as accompanying any other work. It has always been and always will be a stand alone work. That is why we favour repeal.

CHAIR—I understand that and I understand what you are saying. What I am not clear on is, if you repeal the proposed 135ZME, what is the effect?

Ms WARD—I would assume that 135ZL would govern the use of all works relevant under this part. But, if I could, I would refer to Libby Baulch for confirmation of that.

Ms BAULCH—Perhaps I can assist. If 135ZME is omitted from the bill, then an educational institution could copy artistic works under 135ZMD. The effect of 135ZME is in relation to the distribution of moneys collected for copying artistic works when they are copied together with text. So omitting 135ZME does not take away allowing education institutions to copy artistic works. They would still be able to do that, to copy and communicate under 135ZMD. But what it does is allow the distribution of the money collected to be decided according to the distribution policies of the collecting society. We would say that that is the appropriate position, that the attempt by the legislation to govern distribution in 135ZME and in the hard copy equivalent in 135ZM is inappropriate and can lead to inequitable results.

CHAIR—Thank you; I now understand that. Mr McLean, you have a contrary view?

Mr McLEAN—We do. Just three quick points. The universities and educational users have never said that artistic works are a worthless accompaniment to text. It is just that, in a hard copy world, if you have a page of text with very little text and an illustration, obviously you are getting less words and more illustration. We pay for both, and it is a question of how that payment is distributed.

The second point in terms of higher value uses under a statutory licence, which is what 135ZL is, is that there is the potential to pay more in the examples that Anna Ward gave. Equitable remuneration for that sort of activity would probably be higher. That is readily dealt with under the existing system.

So it is really about whether you have to—as somebody photocopying or making a copy of a piece of work that has illustrations embedded in text—make two separate recordings to assist with distribution. Does a teacher have to photocopy a page with artwork and with text and then record once for one purpose and once for another purpose just to assist distribution? We would submit that the existing balance is perfectly appropriate and there is no need to change that.

Ms SYMONS—For CAL, I would just simply say that we would support the position of VISCOPY and what Libby said in relation to not necessarily retaining a distribution mechanism in the act. Just in response to Ross's point with the difficulty that he is alluding to in the sense of recording two kinds of copying for two kinds of owners, we would hope that collecting societies would be able to offer some kind of scheme which avoided that necessity of duplication.

Ms WARD—My final comment on that is that, should it be repealed, certainly we would see, if the copyright owners cannot agree between themselves about the distribution mechanism between the respective rights owners, that there would be recourse to the Copyright Tribunal on an application made by any of them.

Ms GILCHRIST—I confirm the view that Libby Baulch from the Australian Copyright Council has put. It was the view I was trying to make before.

CHAIR—No more views? If not, can I thank all of you for having participated in this first session this morning. I will not repeat—at length, that is—what I have said on other

occasions, that is, that we have found it most valuable and useful in terms of addressing the issues and seeing where the differences are and, now and again, seeing that some commonality exists over this. It will certainly help us. I propose to break for about 10 minutes and then we will reconvene with our next session. We need to finish by 3.30 to be elsewhere for other appointments this evening, so we will just have to push it through.

Proceedings suspended from 11.16 a.m. to 11.35 a.m.

Session 2—Wrap up session

CHAIR—This session has been designed as a wrap-up of all of the issues in a sense, or at least those which have been indicated as being in contention. It arises specifically from the discussions, both last week and yesterday, in which there were some further thoughts being entertained by various people as to specific proposals which could be made. We do not want to rehearse all the arguments again; that would drive us to an earlier plane than the ones we are taking. Can we take it that the general positions that you represent and have put, with all the rhetorical eloquence with which you have done so during these hearings, is well understood and accepted by the committee.

The committee would really like to look at any aspects of detail which remain unresolved and in relation to which you have further points to elaborate or further propositions or submissions to make to us. If there are none, we will take on board what has already been said and move on rather than simply hearing it again. So perhaps we could start off with ‘Fair dealing, the reasonable portion test and exceptions for libraries and archives’, which starts on page 26 of the paper that has been distributed. On the reasonable portion test, is there any further view that anybody would like to advance at this stage?

Ms BRIDGE—For this purpose, the Australian Publishers Association is going to make a joint submission with the Australian Copyright Council, the Australian Society of Authors, Copyright Agency Ltd and Screenrights. We have some papers to hand out. These organisations have come together to address matters that were discussed at the roundtable last week, on 14 October, that related to education on the libraries, exceptions and fair dealing.

In relation to fair dealing, the groups have come together under the banner of the Copyright Council’s suggestion that the reasonable portion test for fair dealing would not, under the current council’s proposal, be a deeming provision, instead it would be a presumption. We think it is particularly important, when you are looking at what is a reasonable portion for the purposes of determining what is fair, that the circumstances of the case can be taken into account. The problem with the deeming provision is that we are precluded from arguing about the fairness of what is reasonable in the electronic environment. We think that there are sufficient safeguards for individuals who would seek to rely on the fair dealing provision by the presumption that we put forward and also by guidelines that could be negotiated and published by the relevant industries—that would make it clear that individuals copying for their own research and study would be squarely within the fair dealing provisions.

I would like to respond to a question put by the chairman last week which was: wouldn’t there be an increase in litigation? I think there would not be an increase in litigation in relation to fair dealing uses by individuals, but I think we ought to respond openly and honestly in saying that the publishers do foresee that there would be at least one, and possibly a number, of test cases to test the boundaries of fairness in the digital world.

What we are putting forward is that we would like our day in court. We would like the opportunity to rebut the presumption that an article delivered online was reasonable in all circumstances by evidence that looked to the Berne convention factors and the factors in

section 40 itself, to determine particular uses—and I am thinking, for example, of commercial uses by corporations—and to test in the new environment whether that test of fairness stands. For that reason, we would like the presumption to be removed to give us that opportunity. While I do not think there would be a rash of litigation, we would like the opportunity to look at whether, in all cases, the supply of articles or reasonable portions, in all circumstances, meets the fairness test.

CHAIR—Have you circulated a proposed model?

Ms BRIDGE—Yes, it is being circulated. Briefly, that submission also looks at the library copying provisions and education. I imagine we will come back to that.

Mr EMERY—From the point of view of the Copyright Agency, we would like to support those comments in the strongest possible way on behalf of our members. I would also like to table the latest version of the harmonisation of certain aspects of copyright entitled *EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on the harmonisation of certain aspects of copyright and related rights in the Information Society*.

CHAIR—On the bottom of page 3 you say that you would be happy to put forward a proposed draft and you give effect to this position. You haven't done that yet, I take it?

Ms BRIDGE—No. In relation to fair dealing, it is a simple amendment that would remove the words 'shall be taken' and insert the presumption 'subject to evidence to the contrary'. That would be a simple drafting amendment which we can present to the committee. The drafting in relation to our proposals for library copying is more complex, but we will be happy to undertake that task as well.

CHAIR—I will make this point generally to any others who have any further material that they wish to put to the committee after today. Again, because of the time constraints we are trying to meet, we would appreciate any further material by the end of next week, if that is possible. Are there any comments on the proposal from Ms Bridge?

Ms GLEESON—Yes. On behalf of the Australian Society of Authors, I would like to say that we, of course, support this proposal in the strongest possible terms. I would like to make a further comment which is relevant to this part, but it is probably relevant to all of our discussion today.

I was unable to attend the roundtable last week because I was attending a public lending right international conference in Canada, which was a gathering of writers and people who dealt with public lending right in the public service departments of all sorts of nations across the world. I have to say that in lots of the discussions I had—informal discussions about circumstances of writers—people were absolutely outraged at some of the notions that are coming forward in our proposed bill. They could not believe, given the conditions they say are coming through in the millennium bill in the USA and in the European directives, that we would not be of a like mind and we would not be seeking to fairly recompense the creators of content. I am anticipating further connections with people all around the world as the bill continues to be debated.

Mr McLEAN—We oppose the proposal. We considered the idea of a presumption following on from the hearings last week. As it stands now, it is largely illusory. A presumption that 10 per cent is okay assumes that there is a very wide degree of consensus as to a wide range of things where 10 per cent will be okay. I guess without seeing the drafting and exactly what is meant by the private research and study section, which would be conceded as always being okay, it is a little difficult to know how often it would apply. For an individual teacher or academic trying to operate the statutory licence—and bear in mind the educational statutory licence is all in terms of reasonable portion; you can copy a reasonable portion under that statutory licence—if they cannot know what that is with a fair degree of certainty, things become very difficult.

As it stands, we think the presumption creates an illusion of a core of certainty which really does not exist. Really it is not clear to me from this whether it applies to digital only or whether we are talking about digital and hard copy. It does risk quite a degree of difference, dispute and litigation as to how large that core of certainty that is caught by the presumption is. So without having that detail, it is difficult to accept it as an alternative.

CHAIR—May I ask you, Ms Bridge, when you do have a draft, can you also provide it to Mr McLean in case he has some further comment he would like to make on the specifics of it.

Ms BRIDGE—Yes, I would be happy to, but may I make just a quick point of clarification. We accept in relation to the educational copying provisions, where there is a statutory licence for remuneration, that the deeming provision could stand. I think that makes sense. Our proposal is in relation to fair dealing.

Mr ALEXANDER—Could I make an observation—a little prophecy; I may prove to be incorrect, but let me try. If this presumption comes in but the absolute provision is taken out, what will happen is that the relevant copyright collecting agencies will go around to people who are regularly copying, or have people who regular copy, and say, ‘You can’t be sure now what’s going to be fair dealing. To make it safe for you, we suggest you get a licence from us. Once you get a licence, there’ll be no more arguments.’ That will be the practical effect of what is going to happen.

It is all very well to say, ‘We’d like to have our day in court.’ but there is going to be someone else at the other end of that day in court and it is going to cost them money. They might say, ‘I’m not prepared to spend \$10, \$15, \$20, \$50,000 working out if this was a fair deal. It might be interesting from the copyright owner’s point of view, but I’m not going to spend that sort of money. I would rather pay a licence fee.’ That will be the practical result. Put it whatever way you like.

Mr BRITTON—I would just like to endorse the need for certainty, particularly at the level of consumers. There is already a degree of confusion about copyright. Adding more judgmentalism to people’s understanding of it is not helpful.

Mr WODETZKI—I would just like to add the ADA’s position on this. The practice seems to be—in the strongest possible terms—to oppose it—

CHAIR—Why am I surprised, Mr Wodetzki?

Mr WODETZKI—on the basis that it completely defeats the purpose that it is indeed to be there for, and that is certainty. The whole point of this provision is certainty, and a presumption is not certain. So it is just not a compromise position at all.

Ms SYMONS—Could I just refer to an undertaking that CAL gave last Thursday which arose in the context of trying to find some certainty. It was that we would provide a copy of some guidelines which have been developed to deal with fair dealing in the UK. Unfortunately, I am not going to hand that up today, but we will do it early next week. Those guidelines have been developed, and they deal with the electronic environment. There are nine scenarios which are documented in some detail, and they have been developed through a consultation process. The committee will have those early next week. There is another part of them that I need to obtain. We might also provide them to our colleagues so that they have an opportunity to comment on those in the context of the certainty argument.

CHAIR—Can you remind me who developed those guidelines?

Ms SYMONS—They have been developed by what is referred to as the Joint Information Systems Committee and the Publishers Association of the UK. I understand the guidelines have been applied in relation to print copying for some years and they have now been developed to the stage that they apply in the electronic environment. We are actually waiting for some other advice in relation to how they are working.

Mr METALITZ—From the international perspective and in strong support of the proposal that is made by the Publishers Association and the other groups, could I add that there may be nothing quite as illusory as a false sense of certainty. The international standards that are applicable here ask what is the impact of an exception to protection on the normal exploitation of the work. The fact is that, in the electronic environment, we do not really know what is a reasonable level, what is the level of copying that can take place without permission and without compensation, that would fall short of having an unfair impact on the normal exploitation of the work. It is going to take some time to determine what that is.

There is no reason to assume that the number of 10 per cent that has been in the law in the analogue environment in Australia should necessarily be the right level in the digital environment. I think it is quite sensible to allow this to proceed on the basis of a presumption of what is an acceptable level but without locking that in. From the international perspective, Australia would be well-served by avoiding a false sense of certainty about what is and what is not an excessive level of unpermitted, uncompensated copying.

CHAIR—I take it that we have finished with that matter. Ms Bridge, I think you have some proposals in relation to the definition of library.

Ms BRIDGE—Yes, thank you. We have a proposed model to put jointly in relation to library copying. One aspect of that we think deals with the issue of the definition of library. We put forward that the definition of library be retained in the bill, but we are responding to

concerns that have been expressed, particularly by the libraries community, that a consequence of the change of definition would be that corporate libraries and certain specialist libraries conducted for profit would be taken out of the inter-library network and, therefore, those collections would not be accessible by public libraries.

Our model proposes that a public library, a library within the definition in the bill, would be permitted to acquire, from a profit making library, material to supply to researchers and students under section 49. In this way the public library system would have access to these collections that are held by businesses and other profit making organisations, but, because the library definition would be retained, those corporations and businesses would be required to take licences if they themselves wanted to undertake document supply.

CHAIR—Is there any comment from libraries or universities or anyone else on that proposition?

Mr WODETZKI—I should just point out that the ADA includes as one of its constituent bodies the Australian Libraries Copyright Committee and, although there is no-one from there here today, they have authorised me to speak on their behalf. I do not want to walk over the territory that we went down last time but, as you know, we strongly think that this issue has nothing to do with the digital agenda and, again, this is not really a compromise. We do not see this as compromise territory; we see this as something that has not even been properly considered and that has been very thoroughly dealt with in another context, namely, in a complete review by the Copyright Law Review Committee of exceptions and limitations as part of a review to simplify the act. That expert committee has made recommendations which we think should be considered before this, which we regard as a pre-emptive strike on the library sector, goes anywhere.

It seems to us far more appropriate that a proper debate in light of all the facts about how this will affect the library sector is carried out in response to the CLRC's report, which, I might repeat, specifically recommended the inclusion of libraries within private sector organisations and in fact went further than that. So the experts have considered this and made a recommendation starkly in contrast with what is set out in this bill, and it is not a digital issue, so we strongly reject the change in definition. We suggest that the issue be deferred for more proper consideration in another context. We suggest that the definition reverts to the way it was which, I should point out, excludes libraries where the library conducts itself for profit. The current position under the act says that if the library itself conducts itself for profit it cannot rely on these exceptions. The act already protects, if you like, non-profit libraries. We do not see that as an unreasonable holding pattern until proper consideration and proper debate has occurred in relation to the wider issue of library copying and, if you like, exceptions for fair dealing as they apply in the commercial sector.

CHAIR—Are there any further views?

Mr BRITTON—There is a superficial attraction in trying to exempt users in public libraries, et cetera, but I agree entirely that the systemic implications of striking corporate libraries out have not been fully contemplated. I agree entirely that it should be thought through and talked about completely, and unintended consequences and making adjustments on the fly, as it were, is not the way to go at all.

Mr EMERY—We have had this issue on our agenda for a long time and so have our sister interests. It has been in every one of our submissions for the last couple of years. It has been discussed very broadly. We do not agree with the ADA's position on this. We would just like to note that it has been on all of our submissions for discussion for a long time.

Mr BORGHINO—I would just like to say that, on behalf of the copyright creators, we find it quite interesting that we have been asked to, in some sense, subsidise the public library system. That has been going on for a while now and we see this definition of libraries as at least not asking us to further subsidise the corporate world as well as the public system.

CHAIR—Let us move on to (c) 'Extension of section 49 to electronic reproduction and communication'. Are there any comments or proposals that we have not already heard?

Mr WODETZKI—Mr Chairman, I tabled this morning on behalf of the ADA some small amendments to section 49(5)(a). It was part of a bundle. The front page was talking about temporary copies. This submission is made by us in the interests of what we see as ensuring the technology neutrality of the new provision that permits libraries to make material available on the premises of the library.

At the moment the provision appears to allow a library to make an electronic work available on the premises, but only allows a student to make a hard copy within their fair dealing rights, not a soft copy. In our view, there is no reason why a student ought not be able to make a soft copy if that falls within the reasonable portion test and the fair dealing test for that soft copy. It is a little difficult to understand why we have a debate about what constitutes a fair dealing and what constitutes a reasonable portion in relation to copying of electronic materials if a student or a researcher cannot copy that 10 per cent amount onto a disc and take it away to put into their report or into their notes at home on their computer.

The proposal that we have put forward simply confirms that the library would be able to make it available at a terminal on the premises provided that it cannot communicate the article or work to someone else. We accept that you should block communication facilities on that terminal, but we do not accept that you should block electronic copying rights because we think students can do that legitimately under fair dealing in some circumstances. But we have added a proposal that there must be a warning against that to replicate the situation that currently exists for photocopying.

I might point out that, if a library was flagrantly disregarding this, they would still be at risk of liability for authorisation of infringement if they allowed such premises and such equipment to be used for infringement. We see this as a reasonable amendment intended to make meaningful the exercise of fair dealing rights electronically.

CHAIR—Are there any comments?

Ms BRIDGE—Normally, when an electronic version, a CD-ROM or an online delivery to a library, occurs, my understanding is that there would be some licence terms. I guess we

would be nervous about the ability of library users to take soft copies because they would not then be subject to the terms of the contract that the library had entered into.

Mr METALITZ—Copyright interest generally would be concerned about the proposal to substitute for a technological protection against infringement simply a warning not to infringe. Technological protections are not perfect but they can help to manage and attempt to minimise infringements that might otherwise occur. So I think the approach in 49(5A) as it stands in the bill now is preferable to what the Digital Alliance is proposing because it encourages libraries to employ the technology that is available to try to minimise infringements.

CHAIR—If there are no further comments, we will move on.

Ms BRIDGE—I would like to speak on the library copying provisions generally.

CHAIR—What did you want to raise?

Ms BRIDGE—Perhaps I could speak briefly to the joint submission proposals and model in relation to sections 49 and 50 on page 2 of the joint submission. The organisations got together initially to discuss the suggestion by the committee member Duncan Kerr. I would not say that we have taken that model as Mr Kerr put it but we have added some detail to it in our own proposed model.

I will draw your attention to the most important points in relation to this. Under our model, a library would not be able to make the first digital copy of any work. We propose a model where works are available in electronic form and we propose that the library has certain rights in relation to using those electronic copies, but it would not be able to make the first digital copy.

The model suggests, at Mr Kerr's suggestion, that the library not be permitted to make a charge, including a cost recovery charge, and that there be a statutory licence. To that we have added certain provisions in relation to unpublished works and some mechanics of how a statutory licence would operate and that the statutory licence would be effective in relation to cases where the work was not commercially available. As I mentioned before, it also permits this copying electronic to electronic where the work is held by the library making the copy for supply under section 49, and also permits it to acquire the portion or work from another library, including a library maintained for business purposes.

There are two issues that we have with the library provisions as they are currently proposed. One is the ability of the libraries to network—that is, to build their collections by copying under section 50, the interlibrary provision. The other problem we have with the current bill is that it allows a work that is published only in a paper format to be digitised by the library. We point out that electronic publishing is an expensive business, that digitisation of commercial quality and e-commerce software, watermarking and the application of rights management information, and so forth, is not only a costly business but also, at the moment, a fairly uncertain business because the international standards for digital object identification, watermarking and the whole infrastructure of digital rights management are not certain.

In that environment and in an environment where a work in electronic form is so vulnerable to copying and, as we have talked about before, instantaneous communication around the world, we think the copyright owner is entitled at least to be able to authorise the first digitisation of their work so that they can make the decision whether or not they will allow it out to the world in this vulnerable way and, if they do, that they can then attach technological protection measures if they choose to or do whatever else is available to them to protect their work against unauthorised copying. We do not think it is an acceptable situation that that first digitisation should be able to be made without the copyright owner's authority and without any of the protections that the copyright owner may seek to place around the subsequent use of the work.

Ms GLEESON—Could I add to that, Mr Chairman?

CHAIR—Yes, Ms Gleeson.

Ms GLEESON—I think it is possible that I have a unique voice at this table, being someone who earns her entire income from the creation of content. I cannot speak too strongly to say that it is not just the publisher who voices this view, but I think we speak for all members of the community who are themselves content creators in that, if we do not have the power to control what is going to happen to our work, we are probably going to have to stop making that work. The whole of this discussion is based upon the assumption that people are going to continue to create content and the whole economy is going to be based upon that. There has to be some way in which we are able to control our intellectual property and the first digitisation must be in the control of the person who creates the work in the first place.

Mr WODETZKI—The ADA does not support a substitution of a free copying regime with a statutory licence. In our view that is, again, not a compromise. It is a fundamental change that really is completely inconsistent with what the objectives of this bill have been stated to be.

Just to respond to that last comment, I also think this is not just about authors who derive their income solely from writing works. A lot of the authors whose interests are apparently being protected here are the authors in the context of what is called STM publishing—scientific, technical and medical publishing—and journals, and those sorts of things. I suspect the lion's share of the copying that we are talking about in the library context is about journal copying. I do not know the exact statistics, but I understand that probably most of the lion's share, a vast majority—some other vague term like that—of those authors do not get paid. They are academics who write and then assign their copyright to a publisher. I just wanted to repeat the point that, although this is not to suggest that publishers do not have a right to earn money, it is just to bear in mind that the real interests at stake here are often those of the publishers, not authors, particularly not in the STM context.

Mr BORGHINO—I think that situation is changing. I know the ASA would like it to change much more quickly than it is at the moment. Again, it is a presumption that, because that is the situation, it should always remain the situation.

To support what my chair has said, we have the opportunity to look at the e-commerce system of the future in a way that will actually help Australian copyright creators create more work for more consumption. The ASA is here not to stop the free circulation of information but to increase the circulation of information when that means that copyright creators are recompensed to remunerate it and can create more. We are the ones that have been talking about zero rating licences for access and equity reasons. I represent people who earn at a median \$2,000 a year from their creative work. We do not represent people who are making millions out of publishing, whether in the print format or the e-format of the future. So I reject the proposition that, because it is happening at the moment, that is the way it has to be and that is equitable. We are saying that it is not equitable, that we should be looking at a system that allows people to create more work for more consumption.

CHAIR—We will move on to educational statutory licences.

Ms WARD—Was there a section (e) there to do with preserving copying of artistic works?

CHAIR—I am sorry, I missed that page.

Ms WARD—I am actually continuing this on the theme of the creator and their rewards from intellectual property and from licensing. In fact, yesterday I went to the Australia Council's launch of their 'Valuing the arts' campaign. I thought it was highly relevant to mention very briefly the type of discussion that surrounded the preservation copying of artistic works last week in Canberra because in terms of valuing the arts, the focus was very clearly on making a distinction between the originality, the expressive quality, and the work put into creating the work, and the general public's valuing of that.

I am very pleased that Libby Gleeson is with us today because I felt that in the discussion of the licence to do with artistic works that the creator was being somewhat undervalued. In fact, Mr Chairman, you brought your daughter into that room quite briefly last week and you said, 'If I bring my daughter into a gallery and we want to look at a terminal which shows the works in the collection, surely we should be able to do that?' I want to ask whether, in a few years time when your daughter is a creator, how she is going to earn her living?

CHAIR—My response to that might be that if more people see her magnificent works, some of them might go out and buy them!

Ms WARD—Yes, but one of the points I wanted to make was quite clearly the distinction, which I know we are all very mindful of, that when somebody buys a book, they do not buy the IP; when somebody buys a CD, they do not expect to buy the copyright; and when somebody buys a work of art—whether it is an individual or a public institution—they do not buy the copyright.

Moving from that point to readdress the preservation copying of artistic works, you heard most of our arguments last week. As I said, it is a matter of emphasis and it is a matter of balancing.

In relation to section 51A, the intended amendments to sections 51A(2) and (3) do not sufficiently define the many purposes which might or might not be administrative. Viscopy submits that any electronic copies made under the proposed clause 51A should be under a statutory licence and the library or archive must continue to restrict its use to the purposes set out in section 51A.

Following on from that, the development in section 51A(3A)—which was a new proposal to us from the draft—we maintain is an unwarranted use of the reproduction and transmission right where a preservation copy of the work is displayed online. Whilst the conservation reasons for the creation of a preservation copy are understood, the artist is still entitled to remuneration and it is submitted, as we discussed last week, that the artist is still entitled to remuneration where an image is transmitted online to the public. Unless we can secure the rights of our creators and producers creating this IP, we are not going to be able to reward them through the creation of the work so that they can make a living and live in rural Tasmania.

CHAIR—You are appealing to the wrong members of the committee today.

Ms WARD—I know. I will actually write a letter.

CHAIR—We will tell Mr Kerr. Are there any other comments?

Mr WODETZKI—I think we skipped section 50 as well.

CHAIR—Yes, I have just been reminded of that. If there is nothing else on subsection (e), ‘Preservation copying of artistic works,’ we will go back to (d), ‘Inter-library supply of copyright material.’

Mr WODETZKI—May I make a comment on (e), or shall I make a comment on (d) and then on (e)?

CHAIR—I would like to finish (e) first.

Mr WODETZKI—In our submission we have also included some suggested amendments in relation to the preservation copying and administrative purposes copying provisions, which I assume everyone now has a copy of.

We made some minor changes. The main one in relation to subsection 51A(3) was to ensure that when preservation replacement or administrative purposes copies are made, that they can be made available at terminals within the library not just to library officers but to people who come into the library, which is the purpose of making the preservation copy in the first place—so someone can look at it. If it was only available to library officers then it might just as well not have been done.

Our amendment is intended to extend it so that users can access those terminals and have a look at the copy that was made for preservation purposes. But to address some of the fears that that might give rise to a wave of piracy we added some subsections along similar lines

to those discussed earlier whereby a user would be warned against making an infringing copy and the communication facilities of that terminal would be disabled.

We also suggested some small changes to subsection 51A(3A). Again, these are relatively minor. One of the changes is intended to address the temporary copies issue. Currently, the terminal at which one is permitted to view an artistic work cannot be a terminal from which an electronic copy can be made. If it is possible that an electronic copy is necessary to browse the work, then obviously no terminal would pass that test and the section would become ineffective. So, we have put the words 'other than a temporary copy' in brackets into subparagraph (b) of subsection 51A(3A).

We have also deleted the words 'or a hardcopy' from that same subsection to leave open the possibility that in some cases a library, museum or gallery user might have a right to make a copy for fair dealing purposes. The scope of that is ambiguous, I must say, but it is not to say that they do not have that right in any circumstances.

CHAIR—Are there any further comments?

Ms WARD—Just reading these briefly as they have been tabled, Viscopy certainly opposes the suggestions that have just been made to the legislation.

CHAIR—On the grounds that the creators should receive payment?

Ms WARD—Yes, they should receive payment for this type of reproduction. It is a new kind of right. In fact, we recommend that that section be repealed entirely.

CHAIR—Even if it is for the purposes of preserving a work which is otherwise deteriorating?

Ms WARD—No. We agreed to preservation in a very narrow context. As I said, we still do not have sufficient clarity and definition of preservation or administrative purposes. I was referring then specifically to section 51A(3), and it is that in particular that should either be repealed or subject to remuneration, and that could possibly be achieved via a statutory licence which Viscopy would be prepared to administer.

CHAIR—Right. Can we come back then to—

Mr BRITTON—Can I just—

CHAIR—Yes, Mr Britton.

Mr BRITTON—I want to endorse the ADA proposal. I am concerned about the notion of paying to view, as it were. I think the pay to view paradigm that creeps in throughout the bill is exemplified there. You do not have to pay necessarily to look at an image on a wall, and this being a way of giving somebody a similar view, I think the protections against it being reproduced out into the world are quite valid, but charging people to look at things is a dangerous way to go.

Ms WARD—In terms of hard copy, it is standard practice that catalogues are produced. That is a reproduction. People pay for catalogues. All sorts of licensing takes place within the museum-gallery context which enables the public to look at it and also to take something away. It is not that different.

CHAIR—I think these arguments have been well put. We will turn now to section (d), which is the provisions in relation to section 57A. Do you want to lead off, Mr Wodetzki?

Mr WODETZKI—We have tabled some small changes to this provision that seek to address some of the issues we have raised previously. In item 59, in relation to subsection (1), we are proposing a very small change. Where that provision would refer to ‘the library’, we want to change it to ‘another library’. The purpose of that is it is a peculiar situation but it is one that the National Library raised with us, that sometimes the library to library provisions work two hops instead of one. In this situation, this change facilitates the double hopping of a request. For example, the situation might be that a very small library needs to request something from a very large library.

Some very large libraries do not deal with very small libraries that fall outside the interlibrary system, which is administered through a particular club. The National Library facilitates some small libraries making requests of it which it then on-requests from one of the other members of the interlibrary network. It is a purely technical change. It is set out there in relation to the change to subsection 50(1).

In relation to item 64 of the bill, we have made some very small changes to subsection (7B) that are intended to address the concerns we expressed previously in relation to the commercial availability test. We do not consider that a library should be required to make an inquiry as to the commercial availability where they are copying only a reasonable portion or less than a reasonable portion of the work in electronic form. The purpose of that change is to give effect to our position.

Ms SYMONS—On behalf of CAL in relation to that final point that Mr Wodetzki has raised, we would oppose that. We could probably provide further comments in a supplementary written submission, but I will just put it on the record that we oppose it. As I am speaking, I might just make another comment which may be of interest to the committee. CAL has actually recently concluded a series of negotiations and entered into an agreement with a company that will be providing a document delivery service that will operate between libraries and users, in effect, as if it was a section 50 arrangement. Under that licence with CAL in providing the service, the company is incorporating a copyright fee as part of the total cost to the users. So it is a voluntary licence. Obviously, it indicates the preparedness of users to recognise copyright as a component of a service and to pay for it. It also indicates the ability of CAL to license in the area already.

Mr WODETZKI—It also illustrates that these provisions do not undermine the commercial market for document delivery services—that they can subsist side by side.

CHAIR—Any further comments?

Ms BRIDGE—To make a very small point, the model that the copyright interest together put forward would not permit the first digitisation of the work without the copyright owner's authority. But if we lose that debate and the provisions as they stand are being considered afresh, I would like to make a small point about subsection 50(7A) that is quoted in the issues paper.

This provision seems to proceed on the assumption that a work will be available either in an electronic format or in a print format. As a matter of practice, many works are published in both electronic and print form. The provisions as they stand would lead to an anomaly whereby, if a library happened to have a printed version, it would be entitled to digitise from that printed version even in circumstances where an electronic copy was legitimately available. That may have been a drafting error or an incorrect assumption about the electronic publishing marketplace, but I thought I would draw it to your attention.

Ms BAULCH—I should confirm that our joint proposal is that there be no reproduction or communication of material between libraries. We propose that a library could acquire material from another library to supply to its clients but it could not include that in its collection.

CHAIR—Let us move on to 'Educational statutory licences—parts VA and VB'. We will discuss replacing the word 'transmission' with 'broadcast'.

Mr LAKE—I would like to comment not specifically on that issue but on the issue of the extension to part VA to the right to communicate. Last time we met on this issue, we said that there was furious agreement between Screenrights, MCEETYA and the AVCC about the need to extend the right of communication to part VA. We said to the committee that we would endeavour to come back to it with an agreed set of words. We have attempted to do that but, unfortunately, have not been entirely able to.

I will be tabling to the committee the version which Screenrights and the copyright interests prefer. Our colleagues from the universities will be tabling a version which they prefer. We would have liked to help the committee a little more in coming closer on this issue, but it will be one of the many jobs of the committee to try to get some sort of compromise in terms of what they think is the most appropriate way to go. The strong intention is to extend the right to communication to part VA, and we have both tried to achieve that in our own ways. So I would like to table our version.

Mr McLEAN—To respond briefly, we concur with Screenrights: it is very important to extend the licence. We did make some progress on some areas. At (1) it says there is a need for flexibility in the style of a statutory licence that is provided and that it makes sense to have reference to a range of factors when assessing what value to give to different types of copying and communications of copies of broadcast. It is really a matter of which model you choose. Do you have a model which involves two statutory licences because there are two rights, or do you have a model, such as we suggest, that says that there is one use being made—an educational use—which will involve copying and communication? How much is that worth in each case? For the reasons we have put in the material that has been put in front of you today, we would prefer the second model. We say it is simpler and it retains

flexibility, and that is all to the good. We are happy to let it lie. As Simon suggested, there are two models—each with the reasons why they are to be preferred.

Mr ALEXANDER—I will just add to that. I am not certain that this is not much ado about nothing. The schools were very anxious to have this provision included to allow the communication right to go into part 5A because numbers of schools have systems whereby you have a central area where a videotape is put in and it is relayed through wires to classrooms. This has been going on for very many years under the current licence.

The only right that the licence gives is the right to copy a transmission. There is no right given under part 5A to make a copy of that copy or something else; it is a right to copy the transmission, full stop. All we are going to be doing, at least in the school sector, is transferring that via wires to classrooms. I cannot see why that is going to attract any greater remuneration. Mr Lake might think so, but it is just like carrying the actual thing down the road and putting it into a video recorder in the classroom. There might be something I am missing. That is why we would say that the two rights are subsumed with each other. They should be the subject of just one remuneration notice. There is absolutely no need to put them in two.

Mr LAKE—I will just respond briefly to that. The issues which Mr Alexander has rightly raised go to valuation. The fact of it is that there is a right to copy and the parliament is creating a new right and that is the right to communicate. No matter how much we do not want to call that right whatever that beast is, it is still a new right. So what we want to do is create a statutory environment which facilitates the many uses under which that right may be used.

The sort of example which Mr Alexander has used there might lead to a low valuation—or nil valuation as they have suggested—for that type of use. But we also get many requests from various educational institutions that want to use material in different ways. It might be they want to incorporate it into different sorts of learning environments. We have had requests about providing information on CD-ROMs and so forth. None of us know the extent of this right to communicate. That will grow with the technology. What we want to do is set up an environment which facilitates the use of this work within the four walls of the statutory licence. The issues of whether or not they are low value, high value or nil value will be matters of evidence which we will look forward to discussing in a practical and productive manner with our colleagues.

Mr ALEXANDER—Perhaps it might be helpful if Mr Lake could come clean. Is he going to be saying at some point in time that what we are doing now—that is, transmitting a video through a wire to a classroom—is now entitled to attract remuneration? The other points are just irrelevant. He makes comments about people seeking permission. They will still have to seek permission. This right does not give anyone the right to recopy something or to include something in some different sort of work. All this is a right to communicate. If he comes clean and tells us that this is a little goldmine that he is going to work on in the future, then it might be helpful to us all because we then know what it is all about.

Mr BRENNAN—It might be of some assistance to the committee to understand that the effect of the AVCC's understanding of the communication right in the 5A context was one

where placing a VHS video cassette into a video recorder connected to a television in the classroom or a lecture theatre gave rise to the exercise of the communication right. Our submission is that that is a misconception of the nature of the communication right. What occurs in that setting is an exercise of the public performance right. That is already accounted for in the Copyright Act. The introduction of the communication right will not affect any educational institution's ability to put a VHS video cassette into a video recorder and play it in a classroom.

What it does affect is the ability of an educational institution to disseminate through wire or whatever other means of communication to many different end users a single copy of an audiovisual work which has been copied off air. That would be an exercise of the communication right and that is something which should be looked at and assessed separately outside the exercise of the reproduction right.

Mr ALEXANDER—I take it that they really are saying, 'Here is a goldmine,' because we are doing exactly now what we are saying we should be allowed to do under the act. But a new right is going to be introduced and by dint of this, they are saying they are going to get a quid of it. I am not sure that that is what it is all about.

CHAIR—I was not sure. Mr Brennan, seeing the matter has been raised, you were saying that if you put a video in a player connected to a monitor in a classroom that is already contemplated by the public performance right and it is not a communication right. Are you saying though that if you put a video in a machine which is not connected by a wire to a television set in that classroom, but is connected by a wire to a television set in another classroom, that that is a communication right?

Mr BRENNAN—Yes. Without wanting to prejudge anything, we would say that that would be a very low value exercise of the communication right. Where it is virtually analogous to having the video recorder in the classroom, that is something quite analogous to existing public performance right and would not attract a significant additional remuneration, if any. However, what if that single copy is made available to many different locations at the same time? More likely, however, is the situation that small segments of audiovisual works are digitally copied and incorporated within some sort of an interactive multimedia educational product, such as course materials, that is then made available to students at their own choosing, at home, wherever, and it is communicated to the students in that format.

The Screenright submission is that that sort of use is more looking to the future as technology and bandwidth increases. The licence should have maximum flexibility to take account of those new and more sophisticated uses of audiovisual material, the incorporation of that sort of material into educational course packs, and that it should be able to be assessed as an additional and valuable use of that material.

Mr ALEXANDER—What they are saying then is, with respect, that the present provisions of part 5A are not wide enough and they should be widened to allow different sorts of copying, that is, copies of transmissions. What he is talking about is not allowed under either the amendments or the present provisions.

Mr BRENNAN—The proposition is that a copy of a copy is not permitted under part 5A. That has never been Screenright's understanding of the part 5A licence.

Mr LAKE—In fact, to that end there is licensing of resource centres that actually do copy transmissions and then educational institutions may request copies of those copies and they become remunerable copies. So we do not accept Mr Alexander's proposition. That has actually been a feature and part of the very flexible 5A environment.

Mr ALEXANDER—I think that that has been done by agreement by the institutions and Screenright and it is a very sensible, but not under the statutory licence. I think if Mr Lake looks at the history, he will know that that is what happened, as someone here can tell us.

Ms BRIDGE—Yes, perhaps I can talk about the history briefly. I think it is perfectly clear that under part 5A multiple copies can be made. There are provisions in there that, for example, talk about how a copy should be marked. One of those says that the date of the transmission should be marked and if a copy is made on a different date then that different date should also appear. So I do not think there is any doubt legally that multiple copies can be made and, certainly in practice, multiple copies are made and records of that copying are generated under Screenright's sampling system.

Mr LAKE—This is a matter of practicality and flexibility.

CHAIR—I understand the point that you are putting that, if there are further copies made, you ought to be able to be remunerated for that. But it does strike me—and perhaps your answer is that this is a question of a value—as a little absurd that you can put a cassette in a video player which is connected by wires to a television set two feet above it, and that is a public performance right and not a communication right but, if you happen to connect it by a wire to a television set in another room, it is something different. That defies commonsense. I keep using this word 'commonsense' but it is something which I find very valuable: it defies, in my view, commonsense. I think sometimes we get too bound up in—

Mr LAKE—We would agree with you that it does, at the end of the day, go to value and, basically, that would be our approach. The universities have said that should have a nil value. The only area in the Copyright Act that goes about prescribing a value is in the sound recording area with statutory caps for commercial radio and the national broadcaster. I think the act says that should be worth one per cent of the gross revenue of the commercial radio station. The CLRC have looked at that recently and said that it is an inappropriate thing for the Copyright Act to say what something should be worth now. Really this is the start of a new dawn in some ways. We do not know whether the right to communicate is going to be worth nothing—as our colleague suggests—whether it will be worth something, or whatever. It is something that is not really appropriate in terms of ascribing nil value towards a particular thing. All we can say is that, in that example that you use, we would agree with your approach that it would not appear to us to be an additional high value use.

Mr McLEAN—I have two quick points. If it is not made clear, we can be fairly sure that, at some stage, there will be time spent in a copyright tribunal trying to figure out how much it is worth. So unless it is said to be free, there will at least be a claim for money. Getting back to the example that you raised, Mr Chairman, it is a perfect example to

illustrate our point that the best way of dealing with something like that is to look at the use that is being made, not to differentiate things in terms of 'you have copied this' or 'you have communicated that'. At the end of the day, you are not going to make a copy unless you are going to communicate it. There is no point in making a copy unless somebody can watch it.

The focus ought to be on what use is being made. We agree with Screenrights that different uses will have different values. Let us have the flexibility to deal with that in the act but let us look at it as one single question—here is the use: what is it worth? Let us not have two separate questions: how much was the copy worth; how much was the communication worth? Where you get to then is that you have paid for the copy and you are going to have to pay more to show it in the classroom next door than you will if you show it in the classroom you are in. Why not look at the use? We want to copy it and show it in classrooms: what is that worth? There is only a need for one licence focusing on the use that is being made.

Mr LAKE—In terms of what Mr McLean has said, we have been having these conversations with the AVCC, and we see some of their points. That was one of the reasons why we wanted to prescribe some of the issues which go to value. The key to the suggested prescription is the purpose and character of the communications. We have put that squarely in our suggestions as to the issues which go to value. Certainly, as they have raised it, that would be something which would bring the value down.

CHAIR—Let us move on to (b) 'Operation of electronic use system'. Are there any comments?

Mr McLEAN—In some ways it is a rehash of the same issues. We are in furious agreement with the copyright owners that the statutory licence ought to be flexible and that it ought to provide a basis for remunerating different value forms of copying and communicating at different rates. But there are two key areas where we disagree. First, as with part VA, we say the focus should be on the educational use that is being made. If a university was to approach copyright owners for a one-off voluntary licence on something like this, you would not do two separate deals, one on the copying thing and one on the communication thing. You would get one licence to cover the use that you want to make. Copyright licensing is like that. It might be a licence of many different rights, but you ought to have one agreement.

The scheme that is proposed in the act would see us having multiple remuneration notices, multiple agreements we have to reach and multiple potential for dispute and tribunal hearings. That is not a path we think the act should go down. It is perfectly possible to have a flexible system, which, as Screenrights has just described, looks at a range of factors for deciding value for different uses, but to do that within the context of a single statutory licence.

The second point where we disagree is that it is fundamental for universities to have a choice between paying on some rough and ready sampling type of system, remuneration electronic use type of system or paying on the basis of what they actually do. There is a very wide range of universities that will make different uses of material, that will have different levels of use and they will communicate in different ways. Right now they have a

choice between being assessed as part of a sector and paying on the way the sector uses, or being assessed on what they actually do.

The materials here sort of suggest why it is that the copyright owners suggest the current proposal which gets rid of that choice. There is a reference to the choice being:

. . . a powerful bargaining tool for educational institutions and the negotiating position between owners and users has been skewed in favour of the users.

In the context of educational institutions dealing with monopoly copyright collecting societies, it is very important to have that choice to be able to be assessed on what you actually do. So it is a fundamental importance to universities that the thing is as simple as it can be and that they have, at the last resort, recourse to paying for what they do.

Ms SYMONS—I think I should respond first in relation to part VB. The joint submission that has been put forward by us, the Publishers Association, and others, addresses the part VA and part VB schemes. In addition, you have received today from Screenrights their final submission. CAL's will come to you in a week but I can speak to it generally this afternoon.

We have had the opportunity to consider MCEETYA's proposal, which is supported by the AVCC. Having considered their proposal in its entirety, we do not feel able to support it in its entirety and, for that reason, we support the government's present model. However, in agreement with MCEETYA's proposal, we also favour flexibility and the possibility that there simply be one remuneration notice issued that would cover the variety of uses that are being made of works. What we could not or would not want to agree to is a system that seems to be proposed under their present proposal that would allow you to have flexibility in determining how to measure the volume of copying and identifying copyright owners in the electronic environment—or for electronic copying and communication—which is completely flexible but, at the same time, for the print exercise of those rights, retain sampling and record keeping.

CAL's proposal would be that you remove sampling and record keeping from the matters to be negotiated between parties. You cannot say, 'We want complete flexibility and one notice' and 'Let's just focus on the use' and, at the same time, retain a system which has proved to be contentious between the parties and, in CAL's view, certainly does give users quite a powerful negotiating tool. I could go into that further but I will not. We all know, sitting around this table, exactly how it has been used. It is the ability of users to elect between whether they want to participate in a sampling system or whether they want to go to a full record keeping system. Of course, that imposes additional administrative burdens on non-monopoly collecting societies.

In essence, our proposal would be to take the flexibility of the government, which is contained in 135ZWA, and delete the sampling and record keeping provisions. That is a sort of combined MCEETYA and government proposal, which we will give you a written brief on. That would be our second position: we either adopt the government's position in its entirety or we go for complete simplicity. I believe that is all I have to say. I might stop now and consult my notes.

Mr McLEAN—Could I make one quick point while you are consulting. The MCEETYA-AVCC system would indeed propose a single notice for the lot—digital and hard copy. We are not trying to have one system for digital and one for hard copy. That would go completely against what we suggest, which is that we have a single notice which covers copying and communication of works for educational purposes and that you pay depending on what the value of those purposes is. We do say that in both situations, digital and hard copy, you ought to have a choice between being assessed on some kind of sector wide or sampling type basis and being assessed on what you actually do. That is the difference.

Mr LAKE—I would like to clarify where we are coming from, which is, obviously, the electronic world with television and radio. There has been, as has been alluded to, a fair bit of baggage associated with the term ‘record keeping and sampling’. One of the things which we tried to achieve in the way in which we went about this task was to use the term ‘assessment system’, to get away from those terms in order to open up for a maximum amount of flexibility the way in which use would be measured. I think we are all in agreement that, whatever happens, there has to be some sort of payment-for-use system. What that system is should be determined by the parties. Also, technology will have a big influence on all of this because different systems, as they develop, will help us track use more accurately. We want to be as open as possible to avail ourselves of those technologies. So we thought that in this new world, this new right-to-communicate world, that the term ‘assessment system’ would hopefully bring a new approach from all the parties. That is why we have used that term.

Ms WARD—In relation to the extension of part VB as a statutory licence for electronic copying, our fundamental position is, of course, that it should remain a voluntary licence. Bearing that in mind, it is crucially important for the copyright owners in artistic works that the government’s proposed two separate schemes approach is retained, especially for the three-year period that is proposed for this bill prior to its review.

The other element that I would like to comment on—possibly following Simon’s suggestion—is that, under the licensed schemes and due to the nature of the survey, we have found it very difficult to track the use of the work of our copyright owners under either system. In the future, with the prospect of two separate schemes, we are very interested to see what volume and type of use there is under the electronic scheme. We really welcome that technology to be able to determine the extent and use of the artistic works. So two schemes is a possibility, probably moving towards the suggestion that Simon made at the end. We certainly would not be opposed to something that was broadly described as an assessment system, but we want as much information about use as possible.

Mr McLEAN—I have one last comment. I find it difficult to see, when there is talk about wanting as much information as possible and technology allowing any amount of specific information on copying that is done, why one would want to move away from the option of recording what is done. What could be more accurate and more fair in a remuneration system than the option to do that, which, we are told, will increasingly be technologically possible. We have no problem with names—a rose by any other name—whether it is called sampling assessment or whatever. We would hope that it is possible to agree to sectorwide systems, which, for those who want to use them, save administrative costs, are more convenient and achieve the ends of both sides. But, if a university or school

wants to copy and use works in a very different way—perhaps doing less or more or just doing differently—then they ought to have that option of paying for what they actually do.

Ms SYMONS—In adopting a flexible approach to assessment of copying, there is obviously the possibility that the parties would agree that some kind of full record keeping that is technologically possible continue. But what CAL would not be pleased to see is the maintenance of a pre-determined position in the act so that there can only be record keeping as set out in the act, or sampling as set out in the act, and that the parties are in some way limited in how they approach determining copying and remuneration. That is why we continue to refer to the flexibility option as contained in the government's proposal.

Mr ALEXANDER—The record keeping right is a fundamental right. If a person says, 'I want to make use of it, but I don't believe the sampling scheme suits me and I want to make sure that I pay for what I do,' what is being proposed will effectively take that away. The people who wish to use record keeping systems are not suggesting that they would not pay. They are just saying, 'I want to pay for what I do.' It is a pretty significant thing to take that out of the act. It has been in the act since the time these provisions were first introduced.

Mr METALITZ—I hesitate to insert myself in this discussion among the experts, people who know much more about this than I do, but I did note that one of the provisions that would be deleted by the AVCC proposal is one that had attracted our attention on behalf of the copyright industry. That is section 135ZXA(b), which imposes an obligation on the educational institution to take all reasonable steps to ensure that communications that are subject to this licence can only be received or accessed by persons entitled to receive or access them. In other words, under the proposal the material that is made available online, for example, can only be accessed by students and teachers for educational purposes and not by the world at large.

This is an extremely important provision when you take into account the fact that, at least in the United States, networks run by educational institutions are probably the leading source of digital copyright piracy in our country. It is extremely important that the security be maintained and if there are communications that are allowed under a statutory licence that they be restricted to the purposes for which that licence is granted. It may be that this is picked up somewhere else in the proposal. If so, I apologise for raising it here but I just wanted to flag the importance of this provision, 135ZXA(b), and urge that it in some form be included in whatever the committee reports.

CHAIR—Any further comments?

Mr LAKE—I was not going to make this comment but I think I have been somewhat forced to just in regards to the record keeping system. There was a case concluded in May brought down by Justice Burchett which said that universities had been incapable, in his view, of maintaining true and complete records. That was actually a finding within that case, hence the nervousness about the record keeping system and hence the need for us to take a deep collective breath between the parties and have a look at a new way of going about this very hard task.

CHAIR—But, Mr Lake, surely technology is going to increasingly be able to accurately keep records on a case-by-case, if I can put it that way, or item-by-item basis. Why would you want to exclude it?

Mr LAKE—No, we would not want to exclude anything. We just do not want to have this box which is called record keeping or this box which is called sampling. We would like the flexibility to come up with the best system. We think that there has been so much argy-bargy between the parties as to what is the best sampling system. There has been a finding from the judge about record keeping. Certainly, that particular judge looking at the universities has said that at that particular period of time he did not think that universities were capable of maintaining true and complete records. What we are trying to do is just say, ‘Let us put that baggage behind.’ Maybe a record keeping system in the future, as you have suggested, will be the best way to go. That is terrific. Maybe some sort of sampling system will be the best way to go. Again, that is good. But let us not use that baggage and those terms for this brand new right. That is what we are suggesting.

Ms BRIDGE—I was going say what Mr Lake has since said. Just to echo, there is nothing in the provisions in part VB or what is proposed in part VA which would preclude a record keeping or sampling system being arrived at by agreement or by determination by the copyright tribunal. But I think some of the heat in this debate springs from the ability under the current provisions for a unilateral decision to be taken by the educational institution as to whether it will be one system or the other which allows the educational institutions at the negotiating table to pick the system on the day the other party does not like and threaten to move from one system to the other in order to achieve a better negotiated position on price.

The particular context in which that arises, as Mr Lake has pointed out, has been that in relation to full record keeping it is always a threat from an educational institution to say, ‘I will go to full record keeping,’ because the history of that is that there is a level of under-reporting and that not all records are kept. So the proposal in the government’s bill to say let us have an electronic use notice and flexibility about how the valuation takes place allows the parties to discuss this but it does not allow one party to have the say. If there is not agreement between the parties, then in the usual way with the compulsory provisions there is a determination by an arbitrator. That seems to me a sensible legislative approach. Let the negotiating happen in a different place but at this table let us just have a legislative framework for the debate to continue.

CHAIR—I think I understand the arguments and I am sure Ms Bishop understands them even better than I do.

Mr McLEAN—Just two quick points in response and I will try not to be drawn into the heat of the under-reporting debate. Those comments are taken somewhat out of context in a different period. One of the things with record keeping is it does enable one to manage one’s copying. A sampling type of system or any other system may see a university or a school assessed on what a sector does if it is the person doing the copying at the coalface.

There is no record of what you do. It is very difficult for management at that university to manage what you do. If you want your people to copy less and make less use of copyright works, there is nothing like the discipline of a record keeping system to enable that to

happen. The idea that we could agree a record keeping system under the option that is proposed is illusory. To truly have an option to pay for what you do, the option has to be there. To be in a situation where you must agree it with, with respect, a monopoly collecting society, and you don't have the advantage of going to talk to another collecting society—there is one. That is not a record keeping option.

CHAIR—I propose to move on unless someone has a point that is entirely novel. Lunch is now available and what I propose to do is, rather than have a lunch break, to adjourn for five minutes to allow people to get a sandwich and a drink and then to continue. I think we will need all the time we have.

Proceedings suspended from 1.11 p.m. to 1.28 p.m.

CHAIR—In resuming, can I say that we should not continue by rehashing arguments and positions that have been put before. If there are some new proposals that have come forward as a result of the previous discussions, if there is something concrete which has been agreed upon, or if there is some specific drafting provision that people can bring forward, that would be useful. But for us to simply sit here as if we were watching a tennis match, just going backwards and forwards when we have already seen the match played to deuce on a previous occasion, is not particularly useful.

You may feel good in putting your arguments again but when I was at the bar—and I said this to Mr Wodetzki the other day—I was once told by a judge in the Federal Court, whose name I cannot recall, that an argument did not gain anything by its repetition. I remember that comment on occasions when I am on the other side of the fence, so to speak.

Ms JULIE BISHOP—I am never prepared to take the risk, just in case.

CHAIR—We will deal with it on that basis. I suspect that some of you would actually appreciate the time to do other things, or even talk together about some of these issues that you may be able to take a step further, rather than just sitting around this table for the sake of doing that. That is the way in which I propose to move forward. If there is something specific, let us hear it.

I think we have heard all the arguments. We have the transcripts and we will be busily reading them and your submissions again about these things. Remember, if there are any further submissions that you would like to put in, we will certainly take those further submissions. The only thing I ask is that it would assist us if they are in by next Friday. I am not ruling out something beyond that, but if they were in by next Friday it would help us in terms of the management of the time that we have available.

Have we dealt with part VB? I think we have done that. Part VC on page 54 is headed, 'Retransmission of free-to-air broadcasts.' Are there any new proposals there? No, okay. On page 62 there is 'Definition of "electronic rights management information"' and 'Manufacture and dealing in circumvention devices.'

Mr WODETZKI—I am sorry to spoil the party. I thought I should say a few quick words about the document that the ADA tabled this morning in relation to circumvention

devices. I do not really need to say a lot because we discussed these issues yesterday. This is simply a form of words which we would like to put forward which, as I said yesterday, creates the link to infringement. You will see that we have amended section 116A and section 132(5B) and 132(5C), and certain consequential provisions, to change the knowledge test back to the way it was in the exposure draft and to make it a knowledge test that relates to not only the fact that the device is a circumvention device and will be used to circumvent, but also that it will be used to infringe.

I do not need to make a lot of comments about that—this is getting into repetition territory—except to say that in relation to permitted purposes, we think a permitted purpose should be a non-infringing purpose. If that is not accepted then, as we said yesterday, we would like the opportunity to present a list of must have exceptions, if you like. We will be interested to hear arguments in favour of excluding certain exceptions from permitted purposes. Why is it that some exceptions can be overridden by tech measures?

CHAIR—I presume that those who expressed a different view yesterday have not changed their views overnight?

Mr METALITZ—We have not, but we will not tax your patience with our explanation of why the proposals that Mr Wodetzki has just put forward are untenable. We have given you a preliminary proposal which we will be refining and submitting to the committee in accordance with your deadline to address both this issue and the next issue, which is the permitted purposes question. We do not really need to add anything to what we said yesterday.

CHAIR—I take it that everybody is maintaining the position they had yesterday. Have we covered the breadth of permitted purposes? Mr Wodetzki, Mr Metalitz and Mr Candi have all made reference to that.

Mr EMERY—I would like to bring to the committee's attention article 6 in the European directive obligations as to technical measures, which has already been tabled.

CHAIR—Thank you. We will move on to retransmission and broadcast issues—extension of copyright protection to non-broadcast communication.

Mr McCULLOCH—As we indicated yesterday, that is not an issue that we are pursuing in the context of this bill. What is important to us is that we get some indication from the government as to how and when it intends to implement its commitment to provide remedies with respect to the unauthorised interception of encrypted signals. That will provide remedies both for the interception of broadcasts and other program signals. It is something that we think is appropriate for consideration in the context of this bill to the extent that the next issue—broadcast decoding devices—provides a first remedy.

CHAIR—I understand that. As there are no other proposals, we will go to manufacture and dealing in devices for the unauthorised reception of encoded subscription broadcast signals.

Ms RICHARDS—I do not think that we have anything further to say to what we said yesterday, and our submission makes the case clear.

Mr McCULLOCH—We have indicated that the broadcasting decoding device provisions of the bill need to be amended to include a prohibition on use or possession of a satellite decoder to receive a free-to-air signal outside its intended licence area. Early next week, we will be providing suggested drafting to implement that. We note that no other party at the table appeared to object to that proposition.

CHAIR—Does anybody object to that proposition?

Mr BRITTON—If the proposition is for free-to-air television decoders to be licensed by area effectively, then I think we would have a problem with that.

Mr McCULLOCH—The proposition is that the current provisions of the bill that deal with the dealing and manufacture of circumvention devices, as they apply in a subscription context, would also apply to a situation where a broadcast decoding device leaves a licence area, arrives in another licence area and is used to intercept an encrypted satellite signal. As I explained to the committee yesterday, that mainly occurs in the context of pubs broadcasting blacked out sporting events. The ill that we are attempting to redress is the one where the interception is for a commercial purpose.

CHAIR—The next issue is conversion of films from analog to digital format.

Ms MEREDITH—The first point we would like to make, which is an additional point, is that yesterday we omitted to advise the committee that the ABC and SBS also endorse our position on this issue. They have the same concerns and, in fact, support the draft amendment that we handed up to the committee yesterday. The second issue is that the main opponents, or at least the parties that held widely differing views on this yesterday, were probably PPCA, FACTS and FARB. It may well be that we can get together during the course of this coming week and, to the extent that there is any ability to compromise, we will let the committee know by the end of next week.

CHAIR—We would encourage you to do that. Thank you. The next issue is retransmission of free-to-air broadcasting, number of collecting societies. I cannot imagine there has been great movement overnight on this issue.

Mr LAKE—We have nothing further to add.

Ms WARD—I certainly would like it noted in relation to this issue—the new part VC—that Viscopy submits that the range of copyright interests represented in broadcasts require that there be provision in the bill for the declaration of multiple collecting societies. In other words, we support the government and the provision for multiple collecting societies.

CHAIR—The next matter is retransmission of free-to-air broadcast, payment to film directors. I think the film directors are here today, so we will take it that Mr Colley has not changed his mind since yesterday. Does anybody have any outstanding matters that they would like to put to us?

Ms MEREDITH—One issue on which FACTS made a submission originally is that it is proposed under the draft not to extend the communication right to the statutory licences—and I am referring to this off the top of my head so I might be slightly wrong—that apply in sections 65, 66 and 67. They relate to certain artistic works that are incidentally included in the filming of a television program. FACTS made the submission that—and it was a point that we thought had some general application—when you go out and make a television program or film something, obviously you are going to incidentally include things such as the Opera House, for example. Presently, you have statutory protection from infringing the artistic works that are filmed incidentally under those sections when that film or program is transmitted. If we do not extend the right to the communication right we could see circumstances—given that there will be quite a distinction between broadcast and communication rights in the future—where, for argument’s sake, you were filming, say, the Grand Prix or some sailing event on Sydney Harbour for a television program that was later or simultaneously transmitted in a form that was a communication and would not, therefore, get that protection.

We just raise that issue for the committee to think about. It might have some unintended consequences, given that broadcast has a very specific meaning now. It means something that is authorised under the Broadcasting Services Act and it has certain limitations. There may be circumstances in the future where films and programs are transmitted under the communication right but do not amount, strictly speaking, to a broadcast. It appears quite reasonable to extend the statutory licence in that sense because it has never been a protected right. Incidental filming of buildings and artistic works in the course of making a program has never attracted a particular remunerative right for the copyright owner. We commend that to the committee’s attention for consideration.

CHAIR—Does anybody else have any other comments to make on that?

Ms WARD—Yes. I have to respond to that. In the first place, under the current act, we believe the provision which allows incidental use of the work is far too broad and overexploited anyway by a range of copyright users. In relation to this particular bill, we support the repeal of section 69 as appropriate. And, going beyond that, to make things entirely consistent in this bill, we are proposing that all sections 65, 66 and 67 to do with copying works in public places also be repealed as recommended by the Copyright Law Review Committee.

CHAIR—Are there any further comments?

Ms GILCHRIST—I endorse Anna Ward’s view on that particular issue.

CHAIR—What happens if you incidentally film the Opera House?

Ms GILCHRIST—I think there has to be further consideration about particular exceptions but, for a broad sweeping exception to allow artistic works to be used in television programs where music and other copyright work owners are compensated for their inclusion in those programs, to omit artistic works is an anomaly.

CHAIR—Does that mean every time somebody takes a news television view of Sydney, Mr Seidler will be entitled to some remuneration?

Ms GILCHRIST—I think the fair dealing exceptions for reporting the news should allow that to occur, but for programs generally there should be compensation for artistic works.

CHAIR—I do not know whether it was filmed on Sydney Harbour but it purports to be, I think. Does that mean that the makers of *Water Rats* should have to pay royalties for having certain buildings that have been designed by certain architects in the background of their film?

Ms GILCHRIST—Possibly so. They pay for the music in the same way so why not for the artistic work?

CHAIR—You will have to do a lot more to convince me of this one.

Ms WARD—I think I can convince you of that immediately. We have recently licensed the use of an artistic work by Peter Day, which is a mural on the King George V recreation centre in the Rocks for production by the producer of *Water Rats*.

CHAIR—That is a mural. That would be the same as if you filmed some piece of public art in Sydney. What I am asking is: how far does this extend? If Mr Seidler or whoever else is the architect in vogue in Sydney these days and if there is any incidental footage of Sydney which includes two or three or even one of his buildings, is he entitled to have some licence in place for the use of that?

Ms WARD—I will put my answer together with the one that the Arts Law Centre put just prior to that. He could well be the copyright owner. We represent the interests of a number of architects. The example I gave from *Water Rats* was a case which has often been pushed into incidental use under the current act. That is now being regulated. As I said, that licence was done just in the last couple of months and paid for. To complement that, as Kate said, you have the operation of fair dealing provisions in certain specific circumstances. That is the best answer we could give at the moment.

Ms GLEESON—I would like to let the committee take away very strongly in its mind the significance of the content creator in this whole discussion. Too often I find that our discussions become involved in the legal minutiae of the bill, forgetting that unless we focus very firmly on the material that is being created, there will be no information economy. The publishers, printers, libraries, booksellers and educational sector—the whole community—depend on the continued creation of Australian material at every possible level.

We at the ASA have urged fairness, equity, access. Nothing we have ever said has in any way attempted to limit the availability or spread of information, of material. We are most keen to see more Australian information, more Australian material, going out to more readers and users. We look forward to being able to negotiate a whole range of new partnerships and relationships across the library and the education sector. We certainly do not want any of that possibility to be taken away.

CHAIR—I understand that. I am not proposing to allow closing addresses from all of you.

Ms GLEESON—I was not here last week.

CHAIR—That is the only basis on which I accepted it. Mr Wodetzki, did you have some specific matter? It is not a closing address?

Mr WODETZKI—There was a suggestion earlier about our doing away with a few exceptions, which struck me as a completely non-digital agenda again. I thought let us keep to the issues at hand.

CHAIR—I thank you all once again on behalf of the committee members for your participation today and on previous occasions. This has been very useful for us as a committee. I reiterate: if there are further submissions we would appreciate them by the end of next week. We will then start to deliberate on all the material that has been put before us.

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

That submissions from the following organisations be authorised for publication: Viscopy; the Attorney-General's Department; the Australian Copyright Council, the Australian Publishers Association, the Australian Society of Authors, Copyright Agency Ltd and Screenrights; the MCEETYA Copyright Task Force and the Australian Vice-Chancellors Committee; and Screenrights.

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

That this subcommittee authorises publication of the evidence given before it at this public hearing today.

Subcommittee adjourned at 1.50 p.m.

