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Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright Amendment (Digital Agenda) Bill 1999

TUESDAY, 5 OCTOBER 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 5 October 1999

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

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

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

WITNESSES

Committee met at 2.05 p.m.

Participants

BLACK, Mr Graham, Deputy University Librarian, Central Queensland University

EMERY, Mr David, Policy Officer, Copyright Agency Ltd

FRASER, Mr Michael, Chief Executive, Copyright Agency Ltd

GAMERTSFELDER, Mr Leif Olaf (Private capacity)

LEAN, Mr Michael MacLeod, Copyright Officer, Queensland University of Technology

MORGAN, Ms Caroline, Senior Corporate Counsel, Copyright Agency Ltd

SCHMIDT, Mrs Janine Betty, University Librarian, University of Queensland

WOODBERRY, Mrs Evelyn, Director, Information Resources, Council of Australian University Librarians

Roundtable forum—session 1

CHAIR—We are looking specifically this afternoon at the Copyright Amendment (Digital Agenda) Bill 1999. I welcome the witnesses to the inquiry. We have chosen a roundtable format for this afternoon so there is an ability for some interaction between witnesses. That may or may not occur, or there may be furious agreement or some disagreement or different nuances to the various things that you put to us. It gives us some opportunity to hear from more than one person at once.

To ensure that parliamentary privilege continues to apply to these proceedings and we meet the requirements of the privileges legislation, I ask you that if you have a question for the other participants you direct it through me. I am advised that in that way parliamentary privilege continues to apply—not that I expect that there is going to be the basis of defamatory actions here today but, nonetheless, it is probably better that we do it that way. Secondly, I advise you that although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament.

As we have heard from CAL before, I thought we might start with Mr Gamertsfelder first. It is great to have this musical overture we can hear at the moment. Verdi once described an overture as a piece of music which had no relationship to the rest of the opera, the only purpose of which was to quell the audience. We have your submission, Mr Gamertsfelder. Would you like to make some opening comments?

Mr GAMERTSFELDER—Succinctly, I think the aim of the bill is to provide greater protection for copyright owners in the digital context. However, there needs to be a balance

struck between the greater protection provided under this bill and the rights of society in general. My specific comments today will be directed to the balance struck in relation to the recent amendments to the Copyright Act as far as error correction, interoperability and security testing under sections 47E, D and F.

The first comment I would like to make is in relation to a couple of words in the act that are not defined. Firstly, 'device' is not a word defined in the bill. I am of the opinion that a court could take an overly broad approach to the definition of that term and capture things such as writings or schemes or illustrations of points for academic or educational purposes—for example, a course in security testing in a university or something of that ilk. I think the word 'device' should be narrowed down so as to make sure it could not capture things such as plans or schemes for effecting a purpose, and I direct you to item 1 of my submissions on that point.

Similarly, in the term 'circumvention device' the word 'device' is not defined. I believe a court could also take an overly broad interpretation to that word and it would catch things such as articles, commodities or activities in an educational forum—such as security testing courses or similar. So I would like the drafters to turn their attention to that issue and whether or not they can narrow the scope of that term, 'circumvention device'.

The next item I would like to address is the bill's effect on security testing in the Internet. The scheme basically provides a reactive regime in relation to the exceptions in items 116A(3) and 132(5). Basically, you can supply a circumvention device if a declaration is provided to the person making the supply. In many ways that is contrary to what actually happens in practice, which is that you will have security testing organisations that monitor viruses—such as the Melissa virus earlier this year—and proactively send out material to either subscribers or parties that may be affected by that virus, and show them how to get around an effective technological protection measure or some other type of protective mechanism on a computer program, and then show them how to remedy the problem with the virus or whatever else is ailing the system.

That cannot occur under the bill as presently drafted. The person who is to be supplied with that material must send a request—called a 'declaration' under the bill as currently drafted—before the supplier can make the supply. In many cases that is way too late. Even if it does occur, what you will have is a lot of traffic going to the one site—for instance, in the Melissa virus case. The security testing organisations may receive one million hits within a 24-hour period. That sort of traffic will cripple any site. If you force people to go down that path, basically you are not giving them any remedy whatsoever under this bill. You need to be able to supply for bona fide security purposes any circumvention device and not trigger the prohibitions, either civil or criminal, in the act.

I direct your attention back to the Copyright Act as it stands now in relation to the exception for security testing. You are allowed to do bona fide testing. There should not be a super-added requirement. If you are doing bona fide testing on behalf of the owner or the licensee of the program, why do you need them to give you a declaration under the bill?

Ms ROXON—Can I just interrupt to ask a technologically ignorant question. Is the device you use when you are testing for a virus or giving people advice about how to get rid

of it the same as the circumvention device to get around other encryption codes? Is it actually the same bit of technology, or can it be described in a different way, so you can prohibit one and not prohibit the other?

Mr GAMERTSFELDER—No. It is result driven, so whatever gets around the protection device is going to basically be caught by the bill as currently drafted.

CHAIR—Just on that, Mr Gamertsfelder, clause 116A states:

(4) This section does not apply in relation to the making or importing of a circumvention device: (a) for use only for a permitted purpose . . . Wouldn't the bona fide use which you are a describing fall within the definition of a 'permitted purpose'?

Mr GAMERTSFELDER—It would. I would prefer that approach to apply in 116A(3) in relation to supply. The trouble is that you will have to either develop your own circumvention device or import it—whatever 'import' will mean in this context, which is another issue. You will have to do it yourself. Basically, you cannot get someone else to supply it, because as soon as supply is involved you trigger the declaration statements. That means perhaps an individual company or group of companies cannot say, 'We have a problem,' remedy the problem by creating a circumvention device and then supply all of the other companies in that group of companies without first getting a declaration.

Declarations will take time. They will not be automatic. It will not be a matter of just ringing someone up; someone will have to get authority from someone else. Seconds matter when a virus is released on the Net. Another major virus was released this morning and there has been remediation in the last few hours in Australia. If you have a declaration requirement, a lot of these people will not get to the finish line in time and you will also create unnecessary traffic, I believe.

CHAIR—Is there some place for some general declaration to suppliers of antivirus software?

Mr GAMERTSFELDER—I think there is scope. I have concerns whether a standing declaration would work in the current drafting of the act because, if you look at item 116A(3)(a), it says 'the device'—pointing towards the actual device being used currently, the device you want to use immediately for current purposes. If it were 'a device' or 'any device', it might be wider.

CHAIR—Or the device or devices?

Mr GAMERTSFELDER—Exactly; that needs to be attended to if you are going to have standing requests or standing declarations, as they are under the bill.

CHAIR—Mr Fraser, are any of these matters issues which your agency has any comment about?

Mr FRASER—We have no comment on these issues.

CHAIR—If something arises that you would like to comment on, would you indicate that?

Mr FRASER—Yes.

Mr CADMAN—Mr Gamertsfelder, you have used the example of a virus, which implies an emergency circumstance and, building on that emergency circumstance, you seek to get rid of the need to generate a demand notice.

Mr GAMERTSFELDER—That is correct.

Mr CADMAN—For licensed sites, where there is a record of a person's past track record, I can understand that would be quite easily managed. I do not know that there is a record of all sites or of all licence holders or how up to date those records are—I am not privy to that. But it seems to me that there are two areas where your proposal creates difficulties. One is that dispensing with the need for a declaration opens up opportunities for people to gain access to things other than viruses. That is where there is no urgency—where you do not have to respond within minutes, where it is a matter of days—but the material they gain is material that they would not normally have if they had to make a declaration.

Mr GAMERTSFELDER—That is correct. My main concern is with viruses and with what might be termed attack tools created by hackers or, more correctly, crackers, as they are called in industry. In all those cases there is a very grave urgency regarding access to computer programs.

Mr CADMAN—How do we determine urgency, because that seems to be critical?

Mr GAMERTSFELDER—That is critical but you still have to point back to section 47F of the act, as it is currently drafted, in relation to security testing exemptions. That has to be done on behalf of the owner or the licensee of the computer program, and there are other elements that must be satisfied. The most important one is bona fide security testing of a network, a computer program or any Internet related software program or application.

Mr CADMAN—Who is the guru of viruses in Australia at the moment?

Mr GAMERTSFELDER—There are a few gurus, as you put it. There is Professor Bill Caelli from the Queensland University of Technology.

Mr CADMAN—He gives it the tick for the way it goes without declarations—is that right?

Mr GAMERTSFELDER—No, I think it is more that it cannot be so technical; it has to be a more commonsense approach. If you are in business and you are moving toward e-commerce, the gravest concern you have is for the integrity of your network and of your system. Many people will join up with virus security testing entities to get forewarned of developments in that area. They will also get consultants in from different groups to tell them how their system may be breached or how the integrity of that system may be breached.

In all cases it is a matter of grave urgency when there is an introduction or a possible introduction of a virus. If that virus checking were not done for a bona fide reason—or any of the other exceptions under sections 47D, E or F of the act as it is currently drafted—there is going to be no protection, so any fears about whether or not the supply was made for a bona fide reason should disappear. If it is not made for a bona fide reason, you do not have protection under the act and therefore you can be prosecuted because item 116A ties back in to sections 47D, E and F, and sections 49 and 50 et cetera, which are not relevant for the purposes of this comment.

CHAIR—So your proposition is that subsection (3) should be deleted and section 47F should be amended so as to ensure that the provision of a security protection device to a licensee is a legitimate action under the legislation. Is that correct?

Mr GAMERTSFELDER—The current point I making is that subsections (3) and (4) could be merged. If you look at subsection (4) as it is currently drafted, (a) and (b) were the elements that you had to satisfy, rather than the declaration requirement contained in subsection (3). So you would remove that and merge it so that it is 'supply-making' or 'the importation', so the same elements as in the current subsection (4) are satisfied.

CHAIR—Yes, I understand that.

Mr GAMERTSFELDER—However, if the word 'declaration' were to remain, I am not sure whether the courts might take a narrow or a broad approach to that—depending on your perspective—and define that to mean a statutory declaration or something more formal than a mere notice. I do not think that is what was intended by the drafters, but if it were to stay in—which I do not wish—I think that word should be deleted wherever it appears and the words 'written notice' substituted. That will make sure that it will certainly satisfy the written and signature requirements under the electronic transactions bill.

A further problem with the declaration requirement is that you have a statute of limitation period of six years under the act. If you were to receive a declaration, your protection under the bill revolves around having that declaration under subsection (3) as it is currently drafted. If you dispose of that before the limitation period in a civil action expires, you have no evidence. So you might be getting millions and millions of declarations and it behoves you to hold on to them for at least the civil statute of limitation period of six years. Obviously, in criminal proceedings there are no limitation periods so you might have to hold on to them forever. It is moving toward absurdity when you consider that item.

Another difficulty in practice with security testing is that you do not have protection under section 47F, subsection 2 if you reverse engineered or copied or adapted an infringing copy of a program. In a security testing context, it is impossible most of the time to know whether it is an infringing copy before you test it. You might get to someone's site and know that there is a virus in there. There might be 10 or so different programs that you may need to reverse engineer, copy or adapt. Then you find out that one was a pirated copy used by a hacker to gain entrance or a trojan horse or something like that.

If that is the case, the person conducting the test did not have authority or exception under 47F, subsection 2. But it is after the event. You have caught the wrong person, so to

speak. Instead of assisting e-commerce and security on the Internet, you are catching bona fide testing organisations that cannot comply with the act until after the event. It is a little too late in that context. Perhaps an amendment to the Copyright Act or section 47F along the lines of the American experience is what is required, or merely saying that section 47(2) does not apply if it is bona fide testing. Otherwise, you are chasing your tail.

Mr CADMAN—Can you repeat what you said about the American example?

Mr GAMERTSFELDER—Under the Digital Millennium Copyright Act, they take a different approach on this point. I refer you to the submissions made by Anne Fitzgerald on this issue. I believe she submitted written submissions on Friday afternoon. They take a non-exhaustive approach. They look at the global situation of facts as they occurred and say, 'Was this warranted in this case, even if it is a pirated copy?'

If it is bona fide testing, why should it matter if a hacker has intruded by using an unauthorised copy of a computer program, and then a third party has come along and remediated a virus, but in doing so has adapted or reproduced a pirated copy used by another third party who had broken the law? Why should they be tainted with the same illegality in those circumstances when they were merely reverse engineering or adapting or reproducing for the purposes of security testing? That is an issue we have to get straight if we are going to ensure we have secure systems in Australia.

A level of absurdity that places a veneer over this situation relates to copyright in hackers' programs or log files. A log file is basically an information file that can tell you what occurred at a particular time on a network, or it can contain pure information. That information can tell you how to access another site. So it can tell other hackers what to do, how to create attack tools or whatever. There is a suggestion that, if you reverse engineered those, you may in some circumstances breach a copyright owned by the hacker. Many people are of the belief that that could not be so.

In Australia, we would have a public interest or a public policy defence to make sure that a hacker or a cracker never had copyright in an attack tool or a log file. However, Justice Gummow stated in Collier Constructions v Foskett in 1990, volume 19, intellectual property reports, page 44, that:

> . . . there is no legislative or other warrant for the introduction of such a concept [ie, the public interest test] into the law of this country . . . I would hold that in this country there is no such defence known at law.

Therefore, if you do not fit within the Copyright Act, there is nothing else to be implied. If you have satisfied the tests in the Copyright Act, perhaps you do have copyright in a hack program or an attack tool. Perhaps that issue also needs to be addressed in the bill. If someone wrote something which would normally be an offence under state, territory or federal law for which they never had copyright in the actual program or log file or data but they created it as a literary work, it would be an absurdity. But it is waiting to happen, if Justice Gummow's views are taken to the extreme.

The penultimate point is in relation to the exclusionary provisions of the bill. Section 47H of the Copyright Act provides that those rights which I spoke of earlier in relation to error correction, interoperability and security testing cannot be excluded by contract. There are no counterpart or mirror provisions in the bill. Even though we might have error correction, security testing, interoperability and reverse engineering rights under the act, if you put a circumvention device on it and then in a contract say, 'You may not circumvent this device in any instance,' you cannot get to your underlying rights in the Copyright Act as it stands. There has to be parity there.

There has to be an exclusionary provision to make sure that software vendors, such as the big houses in the States, cannot make a contract under the uniform computer information transaction act, as it has been discussed in the States now. It will have global effect and will basically cover the field in relation to contracts for the supply of software. They basically state that the law of America will be the law that prevails. Under that act, you might be able to get around the bill as it is currently drafted, but if you have mandatory provisions in there saying, 'The rights under sections 116A, subsections 3 and 4, 132, subsection 5G and subsection 5H have effect no matter what a contract says,' then that would be a much better situation. Otherwise, you will be rendering 47H of the Copyright Act devoid of any content.

My last point is in relation to the reasonable portion test. There are great difficulties with that in relation to the Internet and literary works presented on the Internet. There is a grave difficulty in knowing where a work starts and where it finishes, considering the relational and dynamic nature of web pages. It is quite easy to apply a quantitative test walking into a library and picking out a book, but on the Internet you can structure a site where a file is downloaded from a URL which definitely looks like and smells like a literary work. But, in other cases, you may use extensive hypertext linking or deep hypertext linking and you have no idea where the files are being drawn from or sent from or whether or not it is the same work or different works. You might be having bits of literary works coming from all over the world but compiled on one web page. How do you know what 10 is in that case? In that situation, there are difficulties even starting to think about the quantitative test.

Ms ROXON—What do you propose? Your submission says that we should not use a percentage rule, but you do not propose—

Mr GAMERTSFELDER—It is not a very sensible submission just to attack it and not supply any alternative. The only alternative is—

Ms ROXON—It might be sensible; it just does not help us a great deal, that is all.

Mr FRASER—May I say that I concur with the view, and we will be making some suggestions for alternative tests.

Mr GAMERTSFELDER—I have not given this a lot of thought, but all you can really do is map it to a URL. For example, you might download the High Court's recent case on data access and power flex, and that is quite patently a literary work in toto. But then you may go to the Copyright Act, and it will use hypertext linking and you will only get bits of it. You can go to the sections one at a time, so you do not know where it starts or finishes. If it is a URL or a related URL, you may be able to define it in the bill. But I would steer

clear of that. I would wind back all the quantitative tests. I would prefer an approach which left it to the courts, if you want to preserve technological neutrality. Because technology today—hypertext linking and deep hypertext linking—might mean nothing in five years time. I think it is pointless putting too much in the bill of a technological nature.

Mr CADMAN—Parliament could pass an act saying, 'We do not know the answer here. Let's allow the courts to find out.'

Mr GAMERTSFELDER—I do not think there is anything wrong with that. I think you can pronounce the tests or the elements to be satisfied. Whether the words 'reasonable portion' or any other words are used, I do not think parliament will do itself much justice by putting into the bill words of a technological nature. It will not mean anything in five years time. The half-life of a computer program is six months. So any technology that you describe in an act today will be redundant in a few years time. I am looking forward to what my colleagues have to say on the point.

CHAIR—Thank you, Mr Gamertsfelder. Mr Fraser, would you like to make some comments?

Mr FRASER—First of all, I would like to thank the committee for the opportunity of addressing you today on behalf of the Copyright Agency Ltd. We have a summary submission which we have circulated. We have a more detailed submission which we would like to circulate today. To begin with, to take a step back from the legislative and technical detail, the context of our discussion is an attempt to address a profound social revolution driven by changes in communications and reproduction technology, which will have an enormous effect on the way that we communicate, on the way that we trade and in the way that society is shaped.

Some might say that the challenge for us as a society today is whether the technology will control us or whether we will control the technology to the benefit of society. It has been said that this revolution is greater and more rapid in its impact than the industrial revolution was. I would agree with that view. In some ways we are trying to gaze into the future and to shape a future which is not yet clear. One way to predict the future is to shape it, and I believe that is the task which confronts this committee and the parliament. When we get into technical issues, I try not to lose sight of the great social issues at stake, as we enter into the information age.

Having said that, copyright itself is the economic infrastructure. It is the only market infrastructure for works of the mind. It is not only an ideological question; it is also an economic question. We have all this marvellous infrastructure—the Internet and computers—but they are only tubes or pipelines. The question is: what will be the content that travels through those marvellous pipelines, those marvellous technologies? Will it be of quality? Will it be of benefit to us as a nation? Will it be of benefit to readers and the community as a whole?

As you may know, CAL is a not-for-profit company, limited by guarantee. Our members are authors and publishers, practically all authors and publishers in Australia. Through bilateral agreement with sister collecting societies around the world, we represent most

authors and publishers around the world. That is an ongoing process to increase our repertoire. We are also the declared collecting society—declared by the Attorney-General and by the Copyright Tribunal—for statutory licence photocopying in educational institutions and in government departments. We submit our report to parliament annually.

The copyright agency was established by authors and publishers themselves in response to the threat to the viability of publishing in this country that was posed by photocopying initially. It was incorporated in 1974 but began operations in 1986. The problem, simply put, was that institutional users of books, journals and newspapers stopped buying the books, journals and newspapers as photocopiers became available and convenient and more and more inexpensive and reliable. In relative terms, sales went down as the photocopying went up. Publishers and authors needed to establish a system of equitable remuneration for that copying.

Centralised copyright management by a copyright collecting society such as CAL is called into being in these kinds of circumstances where individual authors and publishers cannot individually administer their rights. There are hundreds of thousands of photocopiers and computers in corridors and offices of educational institutions, departments, corporations and so on, copying individual works. Hundreds of millions of copy pages are being copied in libraries and institutions across the country, and authors and publishers depend on CAL to protect, enforce and administer their rights. So we provide a service and, where there was previously infringing, we create a legitimate market. We allow that copying to be lawful when users take a licence and pay equitable remuneration, and we do so in an efficient way, returning the fees to the authors and publishers less our running costs. We facilitate exchanges of intellectual property in a reasonable, efficient and equitable way. The reason for our existence, then, is to protect copyright, and we see our task as twofold: to support an environment for creativity and investment of regional works of the mind, and to give users lawful access to quality materials.

We commend most of the developments in this new bill in coming to grips with and dealing with a new digital environment. In particular, the new right of communication to the public which allows authors and publishers to enter into the field of e-commerce, gives them a new right for protecting their work online. As I said, copyright is the economic right. Whatever the artistic or cultural value of the work, it is only the right to control the making of copies and access to copies of those works which gives a commercial value, an economic value, to those works—that is, the ability to control the copyright. Copyright law, then, exists to encourage that quality production, which ultimately sends the works into the public domain. After 50 years after the death of the author, the work enters the public domain.

So in general we support the bill. However, the bill contains certain exceptions that do not achieve the stated policy aims of the bill, to encourage creativity and to encourage access. In that way they do not achieve their policy. To come to the legal questions themselves—

Ms ROXON—Before you go to those questions, I know that at least Mr Emery was in one of the previous hearings in Canberra where I was asking for some information about the industry, which I would be grateful if you could give me before we go on. When you say that you represent both authors and publishers, I was interested to know whether there was

really a significant interest in the copyright matters that rested with authors. My understanding of the general practice is that an author would be paid a certain amount by a publisher for producing the work and would have a very small amount of money, if any, which they might receive in terms of royalties. The publishers would usually own the copyright and then continue to have the interest in what happens with the work after that.

Is it possible to generalise whether that is the standard procedure? I should, to be fair, give you the context. We were talking about whether the way of getting round this to some extent is that any copyright owner allowing their work to be put on the Internet to start with may well at that point negotiate a higher price, depending on what sort of access was going to be available, particularly if they were selling to people who are going to pass that information on and be able to do so under the exceptions. Would you be able to give me a little bit of information about that before we go on to the other part so that I can be clear what your position is on that?

Mr FRASER—I see in that question two questions, really. One is who owns the rights, and then how they can control them in the online environment. As far as the ownership of rights is concerned in the industry, one cannot generalise. There are different categories of contracts that do apply. As you know, the author owns the right. Copyright is the exclusive right of the author. When he goes to the publisher, he enters into a contract and typically they will share that right under the contract, including rights for payment for reproduction by photocopying or digital copying. It is not possible to say what the standard split is. For example, in educational textbook publishing it is commonly 50-50 between the authors and publishers, but we have seen examples, though we do not take any role in this negotiation, of 100 per cent one way for photocopying fees to 100 cent the other way.

It is common in scientific, technical and medical journal publishing for the publishers to buy out all the rights from the author, but that is a question between the authors and publishers. It is very much the case now in this new digital environment that new model agreements are being proposed by the Australian Society of Authors and other authors' associations as to how those digital rights should be dealt with in the split between authors and publishers. That is very much in a state of flux at the moment as this new market develops.

The second part of your question I take to be a crucial question. Copyright is essential for a balanced development of an online market, because there are three possibilities, as I see it, in the economic paradigm of an online market. One is that an author or an e-publisher will put their work up on the Internet for free because they do not want to be paid. Of course, nothing that is said here will prevent any author or publisher who wishes to do that from sharing their information online. The other possibility will be for large publishing corporations to basically employ authors, buy out all their rights, own all the rights, put their work onto large multimedia web sites and sell those works without any return to the author. They will rely on contract enforcement litigation in order to protect their interests, and as very large corporations they will be able very well to protect their interests, even in a dispersed network such as the World Wide Web—this is the big conglomerate organisations.

Ms ROXON—Is that any different from what is happening now, other than that it is exacerbated by the speed with which the information can be moved around? Presumably the

largest publishers still have that sort of advantage in enforcing any copyright breaches currently against any small producers or publishers.

Mr FRASER—That would be so, but I just think it would be exacerbated with large multimedia conglomerates controlling large chunks of content and marketing them on their own terms.

I would like to see a third possibility exist for the medium and small players: the self-publishing authors, the small and medium sized publishing houses, the publishing houses working out of educational institutions and trying to maintain themselves on a cost recovery basis. The whole range in between those two extremes must depend on copyright law. It is the only way that they will be able to administer and enforce their rights and get a payment for use of their works in an online environment. Unless they have that right, they have nothing to transact.

So, for a healthy, pluralistic communications environment and society, it is essential that they should be able to enter the market with confidence, that their work can be treated as intellectual property and that they can deal with their work and can make their living in that way even if they are not the largest corporations. To make their living from intellectual property online, they depend on strong copyright law.

Mr CADMAN—Can I put another proposition to you. It is not the well-intentioned author that wants the world to read their genius so such as the author that says, 'I have made a conscious decision that my work should not be in the electronic media and I want people to read it in book or article form. Therefore standard copyright will apply to my work.' But a library then puts it—or sections of it—on the Internet and suddenly that bar applied by an author has been overturned by our commitment to public information. Have you got views on those circumstances?

Mr FRASER—Yes. In a sense, that is the crucial issue: to what extent does the author's exclusive right apply and to what extent does a social interest override his intellectual property right to control the use of what is, after all, his work?

Ms ROXON—Isn't it a crucial issue both ways?

Mr FRASER—It is.

Ms ROXON—This is a question I was asking at the last hearing as well: if that author has previously allowed her text to be in the library and anyone can borrow it and do anything they want with it for that time, what is the electronic equivalent of that? It is not satisfactory to say, 'Someone can come and read it for the 30 hours that it takes to read on the terminal in the library but cannot do what would be the equivalent of borrowing a book for two weeks.' I think it actually goes both ways, Alan. The first question is: how do you make sure that an author's right not to have it put on to start with is protected? The second is: if it is put on with an author's or publisher's consent, how do you make sure the libraries can still provide the same services that they used to but just in a different medium, so that the medium is neutral?

Mr FRASER—Yes, that is the crux of the question. I will go on to say that making the work available on the Internet without payment to the author or publisher is to subvert the entire online market and cannot in any way be equated with going to the library and reading a book or borrowing a book, because one obtains the primary product which the author is marketing, a digital copy of the work, through that library service.

Ms ROXON—For the assistance of both of us: is there any provision which allows or prevents that sort of example? I thought all of the situations we have been talking about before have been situations where there is no dispute about it being put onto the Internet to start with. There is dispute about whether you should copy it or how you should use it. But presumably it would still not be permissible for a library of their own accord to say, 'We are going to put this printed work into digital form and then copy it for people.'

Mr FRASER—Well, this is what the bill would propose to do, and without payment to the author.

Ms ROXON—Is it proposed to allow it being put on by the library, not just passed on once it has been purchased in some format?

Mr FRASER—It would permit the library to do that without the permission of the owner of the work and without—

Ms ROXON—Which provisions change that and allow that?

Mr FRASER—The provision that would allow that is section 49 of the act and also the fair dealing—

Mr CADMAN—Of the act or of the bill?

Mr FRASER—Section 49 of the act. I do not have the section of the bill off the cuff.

Ms ROXON—It is section 48.

CHAIR—Obviously you have a number of specific proposals to take us through. I am conscious of time.

Mr CADMAN—I am sorry, chairman. I have just been carried away.

CHAIR—That is all right. I have allowed you to be carried away a little. If you could just take us through the provisions or the proposals you have in relation to the bill—which will include what we are now discussing—that would be helpful.

Mr FRASER—I will try to be brief, and I will address those particular concerns in the course of my remarks now. The first point, before getting to the very nitty-gritty, is that Australia is a signatory to the Berne convention and the WIPO copyright treaty which extends it into the digital environment. Therefore, there is a simple test, a famous test in the Berne convention that applies to any national legislation by signatory countries. For there to be a copyright exception from the exclusive right of the author, a three-step test applies. We

say that this bill does not meet our obligations under the Berne convention three-step test. Under the Berne convention, an exception to copyright must be a special case, the use must not conflict with a normal exploitation of the work and it must not unreasonably prejudice the legitimate interests of the author. If those three conditions are met, one can have an exception to the author's exclusive right in his work.

It is also very important to note that an exception can be of two sorts. One is an exception of the right of the author to control the use of his work; that is, one can copy without the author's permission under a statutory licence but pay the author. That is an exception to the author's exclusive right in his copyright. The other kind of exception is an extreme exception of the kind proposed in this bill where not only does the author lose control of his work with its copying but, by law, there is no payment under any circumstances within that exception for those uses. What is proposed here in sections 49 and 40(3) is that extreme kind of exception where the author loses control and does not get paid not only for photocopying but also for digital and Internet uses of his work. So that is the international context in which the discussion is taking place.

I believe that the exceptions do not meet our Berne obligations and, consequently, would not meet our TRIPS/GATT agreement obligations. This would open Australia to the possibility of cross-sectoral trade sanctions under the juridical process of the World Trade Organisation. The reason for our having taken a mistaken approach in this bill is that, very simply, it equates digital technology with photocopying. It has simply transferred the exceptions that applied in the analog print environment precisely to the digital environment on the false premise that those two environments are the same and the effect will be the same. That is a mistaken approach.

The new technology is infinitely more powerful than photocopying technology for reproducing and transmitting works. Because users can now use that more powerful technology to gain access to works by copying and transmission, so commensurately the legal exception to the author's right must be narrowed so as not to allow the whole world of books and journals to go through that same exception that applied in the print environment.

The area of main concern is what was in the act as section 49—in the bill I believe it is section 48—'library copying for users'. It would allow a library to copy an article or a chapter from a work and transmit it to any user online, provided that the user logged on to the library, made a request and with a keystroke said, 'Yes, I need this work for research and study,' a broad and undefined term. The library can then scan it onto a database or, if it is an electronic work, transmit it to the user who makes the request. The library can charge a cost recovery fee, which can include a fee for its general overheads, and transmit the work to the user, without payment to the author or publisher. In my view, this is a wrong exception: it is an unethical and unfair exploitation of the work and investment of the author and publisher in requiring them to subsidise this wonderful service that the library would provide.

Ms ROXON—On that point, would your objections be dealt with if there were a requirement that the library pay for the initial transfer into electronic form?

Mr FRASER—I believe that the library should pay for this kind of systematic use of the original works when it copies them and also when it transmits them to the individual user. It is, after all, charging the individual user for its costs in doing so, and I believe it only fair that the author of the object of this exercise, the content, should share in the value of this transaction. After all, the library is getting paid, Mr Photocopier is getting paid, Ms Database is getting paid, the electricity is getting paid, the toner is getting paid, the computer people are getting paid. But what is the object of the exercise? It is to obtain the intellectual property, the content, and the person who has invested their time, their talent and their money into creating that product is the only person not to be rewarded for this marvellous new use of their work. That is inequitable and it is self-defeating because it will discourage talented and innovative people from investing in the creation of new product for our information, education and culture.

If I could give an example to highlight that—and we have some examples which are in our packet—if you are an author or a publisher and entering into this new digital environment, you are creating a web site for electronic publishing of your works, and you will market them online to the community and charge a fee. You will have a visa card transaction and you will download articles or chapters as well as entire works. If you are a consumer, will you go to that author or publisher's e-publishing web site and enter into that transaction where the author is trying to make their livelihood, or will you go to the library service which provides precisely the same product, indistinguishable from the legitimate marketed commodity being provided by the author or publisher who owns it, and pay a lesser fee which does not include a payment to the author or publisher?

Ms ROXON—Isn't that exactly what people do now? I guess my question really is: are you using this as an opportunity to say, 'We're not really happy with the copyright system as it applies now to non-electronic medium, and this is an opportunity for us to change what we think has been patently unfair to authors in the past'—if that is your view—or do you really want to say to us, 'What's being proposed in the bill doesn't deal neutrally with all different forms of communication, and we therefore think it is inadequate because we're not even going to have the same protection we currently have'?

Mr FRASER—I want to achieve the possible. I believe that there is a quantum leap, a fundamental shift in the paradigm when we enter in the digital technology. It is simply facile to equate online transmission of perfect digital copies of works with their photocopying. To allow what was copyright free in the photocopying environment to become copyright free in the digital environment would be to destroy the market because the market is now for articles, for chapters provided online. So it is a mistake to apply exactly the same exception from the photocopying environment into the digital environment and think that you are maintaining a balance. You are radically altering the balance if you are to do that.

To be frank, I also believe that the photocopying exceptions that were in place for 20 years when photocopiers were slow and unreliable are now being unfairly exploited by libraries that have invested in tremendous new paper based systems. One can buy these so-called Docutec machines which very rapidly produce beautiful copies. These libraries are systematically embarking on these document delivery systems and, for their cost recovery purposes, charging $12 and up—we have an example of an express service by a library of

$65 for an article—to corporations and every other user but without payment to copyright owners.

I think it has become unfair now in the analog environment to systematically use these exceptions which were designed for people who were copying by hand or for articles which were borrowed and then returned. To now use these technologies even in this high-tech systematic document delivery paper environment has also become unfair. If we could have that changed, I think it would be right and proper. They say that politics is the art of the possible, and I am learning that. But the problem in the digital environment is infinitely greater, and I have put my focus on that for that reason.

CHAIR—So what are you proposing?

Mr FRASER—Perhaps I could just touch quickly on the other exception that troubles us because the solution would be comprehensive.

CHAIR—Right.

Mr FRASER—The other area of concern is part of the fair dealing provisions. We have no problem with fair dealing where the dealing is indeed fair. We agree with the factors in section 40(2)—this is of the act itself—which allow a dealing to be fair. They are longstanding and are: the purpose and character of the dealing, and so on; the possibility of obtaining the work or adaption within a reasonable time at an ordinary commercial price; crucially, the effect of the dealing upon the potential market for, or value of, the work or adaptation, and so on. These have been tried and tested in the juris prudence and have been found to be good and reasonable factors for fair dealing. We have no problem in principle either with the concept. It is a social good, I think.

We have a problem with section 40(3), which deems certain copying to be fair by a quantitative test. Again, that quantitative test would allow an article or a chapter to be copied for research and study by anyone—by a corporation, by an individual. It is deemed to be fair without reference to the fair dealing factors. We think that deeming provision should not apply certainly in the digital environment. By the way, I would say that it has become outmoded in the high speed, high-tech, paper based document delivery environment as well.

I merely mention that we disagree with the exception in substantial portions and for accompanying illustrations, 135ZM. I will return to those should we have time, otherwise I would refer you to our documents. The answer, in our view, is to allow fair dealing which does not replace the commercial market for online delivery of works by electronic publishers, electronic authors. That means that authors and publishers should be allowed to license libraries and license users for copying of their works. Fair dealing outside of those licences should be fair if it falls within the fair dealing factors. That is our primary submission. I think it is fair and equitable and a reasonable proposition.

I know that our critics among the libraries object to such a solution, if I may speak for them for a moment rhetorically, on the basis that that does not give certainty to the user about what particular instances of copying and what kinds of practices would indeed be fair.

A lot is uncertain in the digital environment, and we think that industry codes of practice can be developed that everyone can adhere to.

If the committee does not accept our primary submission and there is a fear that there would be uncertainty or a fear about pricing or social justice issues, CAL would be content for a statutory licence to apply and the copying to come under the jurisdiction of the Copyright Tribunal. This solution is tried and tested after all for 10,000 educational institutions and many thousands of government departments and agencies which are all copying satisfactorily under statutory licences administered by CAL and where the rates and the terms of the licence are subject to the jurisdiction of the Copyright Tribunal to ensure that the rates are equitable.

In certain instances, CAL itself administers statutory licences in what we consider to be a socially equitable way. For example, with our statutory licence to the disabled—I am sorry, I forgot to mention them—the rate set by CAL itself is zero. We charge zero for those rates out of considerations of social justice and also because it is not replacing a primary market or a market for our members—the authors and publishers—but is providing a service to the users to lawfully copy. But the charge is set at zero and has been for many, many years. So either apply the fair dealing exceptions and allow the market to do the licensing or, if one does not trust the market for some reason, put it under the jurisdiction of a statutory licence and the Copyright Tribunal.

Mr KERR—Are those two things intellectually inconsistent, or is it possible to do both? Is it possible to have a fair dealing provision, as you suggest, with not the quantum in terms of the 10 per cent and the like, and then to have a statutory licence with respect to those components which are beyond that? Is that intellectually inconsistent?

Mr FRASER—Not at all. One could have a fair dealing provision which applied in general but absent the deeming provision. Then, with what is now the library exception, make it a less extreme exception, allow the libraries to provide this service, but make it subject to a statutory licence and subject to the jurisdiction of the Copyright Tribunal as to equitable remuneration. That would take into account the concerns of different kinds of users, such as disadvantaged users as opposed to, say, corporate or other users, and it could set the rates that applied if it were felt that the market could not achieve that.

Mr KERR—One matter I think we addressed in discussion at one stage was the possibility of a regime that discriminated on the basis of whether the institution charged for its services; in other words, if it were a commercial supply for fee, that would exclude it from the free access provision. I think there was some willingness to entertain that as at least a possibility of a way of addressing this particular matter. I am not certain whether you have taken that further, examined it and dismissed it or—

Mr FRASER—What we have done is examine it and include it. It appears in the fair dealing factors, the effect on the market. The purpose and character of the dealing comes within the fair dealing factors, but it is not subject to manipulation so easily when you look at all the factors. If you look at just the commercial charge alone, one can have a general student fee or some such other thing and then it makes it very convoluted to find whether

there is not a charge for each transaction. So we rely on those fair dealing factors as a better way of achieving that.

Ms MORGAN—At the same time we refer to it in paragraph 60 of our submission. We talk about it, rather than as a charge, as a commercial advantage for that very reason.

Mr KERR—Please excuse me, it is not indifference to your submission.

Mr FRASER—Thank you. We appreciate that there has been some tentativeness in the government about this and that the bill is to be reviewed in three years. But in three years, if these exceptions were to go through, it would be too late. The market in Australia would have been effectively hamstrung and overseas competitors would have taken the first mover advantage. If one is to take an interim approach, it is to take a copyright protection approach. If for some reason that results in an inequity in practice—because there has not been shown to be any—it then would be to regulate the market. But at the moment we would say the position is reversed.

I see that I am close to the end of the allotted time. I would like to say though that we see our approach as definitely being consistent with the approach taken in the United States and Europe. I understand that there is some controversy about that. The United States millennium act and the Copyright Act: section 108G(1) and (2) of the US Copyright Act only allows copying in libraries for users for isolated and unrelated copying which is not related, not systematic and would not allow charges for such systematic copying. The European draft directive, which is still in draft stage in its penultimate stage back with the council, was passed by a two-thirds majority of the European Parliament. That only allows library copying for archiving and preservation, and for no other purpose, copyright free. It does not allow individual use—what it calls 'private use'—unless it is with compensation to the copyright owner. So our suggestions are fully within the mainstream of practice in the United States and in Europe, and the bill stands starkly outside the developments in our trading partners and competitors.

Finally, I hope that the result of this interesting debate will be to engender respect for copyright in Australia which will support creators and producers who invest time and money in original works. That is investing in the community. It is investing in library services, invention, innovation and production of original works. It is investing in trade and in our culture. Thank you, Mr Chairman.

CHAIR—I suppose it could be argued that what you are proposing is similar to the statutory licensing system that operates in relation to, say, the production of course notes for students where they are produced by universities and similar institutions.

Mr FRASER—Yes, that is the case. Many authors and publishers have now come to rely as a significant part of their revenue, a substantial part of their revenue, on CAL collections and payments for those substantial new uses of their works in universities.

CHAIR—Can you remind me of the history of that provision in the Copyright Act? Presumably that was subsequent to the advent of photocopying.

Mr FRASER—That provision in section 53B of the Copyright Act came into effect in 1981, when photocopying had already begun in the seventies. In effect, it did not actually come into operation until the end of 1988. The new statutory licence, the amended statutory licence was enacted in 1989 and, I think, declared in 1990. CAL has been operating as the declared collecting society under that since that time; it has been collecting and distributing to authors based on that and, in the same way, in government as well. Those rates are set in the Copyright Tribunal.

Ms MORGAN—I would also make an additional comment in relation to the concern expressed earlier about the parallel systems that might be forced upon libraries if there were to be a statutory licence and also fair dealing copying by libraries. The staff of educational institutions, universities, undertake some copying under the statutory licence and other copying under the fair dealing provisions. So the two systems work perfectly well in parallel within the one institution. I see no reason why that could not also apply to libraries.

CHAIR—Ms Roxon raised a point, and forgive me if you believe you have answered it fully but I do not think you have. Maybe I misunderstood her question. I thought her question was: why can't there be a provision with material being supplied to the library whereby there is a kind of one-off fee which covers any uses then made by the library, rather than for there to be a system of virtually counting the uses in order to calculate the quantum under the statutory licence? I am thinking of the ease of the system.

Mr FRASER—In some ways it is six of one and half a dozen of the other, but we would prefer a transactional system. If one were to charge a fee for the author and publisher losing control of their work when the library scans the work on to a database, then one would have to make a higher charge on the assumption that it may be transmitted to tens, hundreds or thousands of users in Australia and overseas. One could achieve rough justice in doing so, but we would like to make a transactional system apply, because it is more like a market. On the basis that this use is now the primary market for transmitting online articles and chapters, we would like authors and publishers whose works are accessed a lot to be rewarded a lot—within a reasonable price—and those whose works are made use of a little to be rewarded a little.

Technically it is very easy to apply a charge for each transaction. When the content goes one way, a transaction can be registered. The metrics can apply very easily. Whether the charge is applied to the user or to the library itself is a matter for the library and for public policy. So long as the author and publisher receive a payment for use, then one will have an active and vibrant market which rewards those whose works are used.

Ms ROXON—I know that you persist in thinking this is facile, but what payments do the publisher and author receive every time someone borrows their book from a library?

Mr FRASER—When somebody borrows a book from a public library, there is currently the public lending right grant from government which is some sort of compensation for this public service use of their work.

Ms ROXON—And the initial purchase of it.

Mr FRASER—And the initial purchase by the library.

Ms ROXON—So there is actually a calculation made which you then distribute through to your members, in the same way that you make a guesstimate or whatever with your statutory—

Mr FRASER—That is not part of our function. This is a grant made by government. It is within the gift of the minister.

Ms ROXON—To whom?

Mr FRASER—To the authors and publishers of those books held in public libraries. It is actually calculated, for technical reasons, on the holdings in the public libraries. But forgive me if I say that that is not the reason why I believe my argument to be correct. It is because I believe it to be facile to equate borrowing a book—getting on your bicycle, bicycling down to the library, going around the shelves, borrowing a book and even photocopying a few pages in the corner of the library and taking away the few pages—with downloading material on a computer. I do believe there is no real equivalence whatsoever between that print paradigm, which has lasted for 500 years of dealing with books, and any person at home, in a corporation, in the outback or in Glebe logging on to the university library or the public library, skimming through all the citations, and downloading precisely the chapters or the articles they need for research and study purposes, when those same works are for sale on the Jacaranda Wiley web site and on the British Library web site, with copyright payments. There is no comparison between those two activities, and that is the paradigm shift which is fundamental to the argument that I am making.

Ms ROXON—I think you have made that point really clearly but what you are failing to address—at least adequately for me—is how that is balanced. Despite my line of questioning, I do not have any objection of course to authors and publishers being paid properly. What I am concerned about is that the information technology boom, which should be something that means people who have previously been in disadvantaged areas—economically, regional or whatever—actually get to take advantage of it, so the information boom does not actually mean you are only going to get access to this information if you have enough money to be able to pay for these things in a way that is unfair. It is obviously a question of balance.

What I do not believe has been adequately dealt with—obviously it is not going to be dealt with in the hearing today but it will be throughout the course of the inquiry, and I will read again your submissions in more detail—is how that balance is properly struck between what everyone wants to call ‘the right of communication’ and your members being able to be properly remunerated so that the market continues. Otherwise, there is no point in us having great access to information that does not exist because people do not bother producing it anymore. That is my concern.

CHAIR—I have a question that relates to that. Assuming we were to accept your proposition, is the point of balance—and I am not sure whether you have said anything about this—that to actually read the material in the library in its digital form on a screen would not be something for which there would be a fee paid, but if a copy is taken then a fee would be

paid? I am just trying to draw a comparison with what Ms Roxon is saying about access by members of the public to libraries and the way in which they have had that.

Mr FRASER—Once one allows the work to go out from the libraries, the libraries become a one-stop electronic bookshop—they are charging a fee—and it is very difficult to distinguish between different sorts of users except by the terms of the licence.

CHAIR—If you had a series of terminals in the library and people who go into the library can bring up whatever the book might be—*The Care of Horses in Afghanistan* or something—and read that on the terminal—just as you can go into the library, take that book off the shelf and read it—it seems to me that there is some comparison in doing that. Whereas, if you have a copy downloaded—whether you do it on to a disk in the library or you do it across the web to your own computer—that is different. Is that a point of division which you would be happy with?

Mr FRASER—That is certainly one way of dealing with this difficult question because there is then a physical limitation on the availability of the copying. The disadvantaged person can bicycle down to the library and read online.

Ms ROXON—That would be a great comfort for them.

Mr FRASER—This is indeed what I take you to be proposing. If we put it into the print paradigm, it is not as if anybody can go into any bookshop anywhere in Australia anywhere and help themselves to whatever is on the shelves and say, 'I'm a poor person. I'm going to steal this now. The fact that somebody invested in it is not my concern because I am poor.' But because they have to overcome a limitation, which is a kind of hurdle which they have to overcome, they can be autodidactic and bicycle down to the public library and sit there and read the book and borrow it.

Because that creates a kind of limit to that kind of use—not open slather—and because it is something that authors and publishers are happy to allow because it does not flood their market, that is certainly a way of dividing the line. It allows disadvantaged people to get a public benefit that is provided at the expense of authors and publishers in a way that we do not ask our farmers to provide grapes and wheat to poor people for free. But authors and publishers are happy to do that, provided it is constrained.

Mr CADMAN—Are you putting an economic constraint here or a geographic constraint?

Mr FRASER—I am putting a physical constraint.

Mr CADMAN—If you can get to the library you are poor? Is that what you are saying?

Mr FRASER—No, I am saying that a poor person can still get access to the material for free by physically getting to the library.

Mr CADMAN—So you are putting an economic constraint on it. 'Is this person poor?' is the first question you are asking.

Mr FRASER—Yes, and they can then borrow. It is just like what has happened with books. Some eminent and great people in our history have educated themselves in that way, and it is something that we would want to protect. But once you allow it onto the Internet you do not know whether that user is a lawyer sitting in Allens, a farmer on his verandah in Gilgandra, a disadvantaged pensioner or a student who does not want to buy the textbook that is set. It is available to 45 million computers around the world, and at that point it floods the legitimate market of the author and publisher.

Ms ROXON—I just have one other question, which is slightly different to this, which deals with our copyright inquiry into issues of enforcement. The bill deals with some changes so that Internet service providers are not going to be liable for any copyright breaches as long as they are essentially just providing the service, rather than putting the material on. Do you or your members have any objection to there being some sort of mandatory requirement that sites that display material have a marking of some type which ensures that the person responsible for putting the material on is identifiable?

We know that in the environment pre e-commerce often there have been difficulties in knowing who owns the copyright, who is responsible for publishing it and whose material it is, particularly with films and things like that. One of the concerns that I have is that there does not seem to be anything that requires in this new environment that when you actually go to a web page or to any site you actually know whose site it is or who has put the material on. I suspect it is something that you would support, because it would make it easier for your members to take action against anyone who might be breaching their copyright. I would be grateful for your views on that. You can take it on notice or answer today.

Mr FRASER—I would, respectfully, adopt that view. I think that one of the hallmarks of the digital environment is that you do not know who you are speaking to; you do not know the providence, the authority, the authenticity or the integrity of the information, and if the law can provide for that, so much the better for the author, for the publisher, for CAL for its administration purposes and, in fact, for the user, because they would know that the information that they are accessing is the authorised version in its integrity, because it bears that information, and they can rely on it.

Ms ROXON—Thank you.

Mr CADMAN—Can you make some comments in writing in response to my previous question about the limitations on an author saying, 'I want my work confined to hard print, hard copy. Do not put it on digital. My works are not to be digitalised.' What constraints should there be under this bill? I do not need it answered now; later on is fine.

Mr FRASER—These exceptions that we are objecting to prevent the author from controlling the copying of his work. These library provisions are an exception to that exclusive right. So we say that, if the exception applies and the author loses the power to say no—which he would otherwise have—at the very least he should be able to licence that copying and get paid for it.

Mr CADMAN—Okay.

CHAIR—Mr Fraser, I thank you for your additional submission. I thank you, Mr Gamertsfelder, for your submission and for the discussion this afternoon. I think in both cases you have made your position quite clear to us, and it has been quite useful.

Mr EMERY—We have two books that refer to specific examples we used in the back of our submission that we would like to table. Can we table them with you and have them circulated to the members and returned to us?

CHAIR—Yes, we will receive them as exhibits to the inquiry. Thank you.

[3.43 p.m.]

Roundtable forum—session 2

CHAIR—I welcome the representatives of the university librarians. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I will ask whoever is leading off to make some opening comments.

Mrs WOODBERRY—Thank you, Mr Chairman. As you have stated, we are representatives of the university libraries. Therefore, our major considerations will be with the library provisions of the bill. While our main focus is on the university libraries, there are a number of issues which we will touch upon in a broader context, such as the definition of 'library' and also the statutory licences. The universities themselves consist of owners and producers of intellectual property, and they are also users of the same. Therefore, it is very important that we have a balanced bill for us to be able to fulfil our brief effectively.

It is our belief that the bill has made a fair attempt to take the library provisions into the electronic environment, by including fair dealing, but we have some concerns regarding the bill. The key issue that we have is the understanding of what characteristics there are for information in electronic format. Reading the bill and listening to the discussion beforehand, I think it is worth while giving a very brief overview—and I will keep it brief—of how libraries use information.

The majority of information in electronic format that libraries utilise comes to them by subscription and under licence agreements. It is information either in CD format or in databases which they purchase and load locally for access to their students or staff. In large cases, we purchase access to databases which are located overseas. So the information that we are utilising is not located in Australia. More often than not it is in the US, but sometimes it is in England and in Europe. Access to this information, especially the overseas information, uses the Internet as a delivery mechanism. So the information itself is not sitting on the Internet as you see it in web pages. It is a delivery mechanism, and access is by authentication, which is quite often by IP address. That restricts access to where you are or by password. So this information is not generally available.

In addition to that, there is information which is published on the Internet. That information published on the Internet is readily available wherever people are located. So, in that case, libraries are only one point of access for people. If you have a computer at home and access to the Internet, whether you are in Gilgandra, Sydney or wherever, you have access to that information. All the libraries do is provide another point of access.

The issue that has also been raised, which is that of transferring print information into electronic format by libraries, is not something that libraries are particularly interested in doing on a large scale.

Ms ROXON—Sorry, can you repeat that?

Mrs WOODBERRY—The transfer of information that is currently in print format into electronic format and the creation of major databases is not something that libraries are particularly interested in. The cost of storing data is incredibly expensive, if you have to provide the infrastructure for doing that. As more and more information becomes available in electronic format, it is not something that we deal with. I would like to leave the opening comments at that.

CHAIR—Do you want to take us through the provisions about which you have some concerns at this stage?

Mrs WOODBERRY—We have divided up the list that was provided to us, so between us everything is covered. As Mr Black is appearing by teleconference, I do not know whether you would like to talk with him first. We will keep it short.

CHAIR—Can you run through the areas that you have concerns with, and then we will come back to the general issues. If we can deal with the specific items, it will be useful. Whichever order you want to take it in, I do not mind.

Mrs WOODBERRY—We will start off with Graham Black.

Mr BLACK—The points that have been allocated to me are the extension of the library and archive provision to the reproduction and communication of copyright material in electronic form and also item 54, which is subsection 49(5A)—library to user copying. Generally, the extension to the provision is welcome; however, libraries are concerned that the bill lacks the understanding of the nature of information in electronic form and its application to the university environment—particularly those universities that offer online courses and/or distance education.

The bill extends the library and archive provisions to cater for electronic material on one hand, however it is very limiting and restrictive on the other hand—limiting viewing, communications and reproduction in various instances. I believe that these restrictions do not acknowledge the role of information in the development of the nation into a smart society. I will give you one example: item 75, which covers subsections 51A(2) and 51A(3) dealing with preservation. Under the existing Copyright Act, a library can make a hard copy of an item if it is for preservation purposes. That copy can then be put on the shelf and made available to staff, students or registered borrowers of that particular library.

Under this amendment to the bill, 51A(3) permits copies to be made available through computer terminals on library and archive premises, but only to officers of the library and archives. In other words, material copied for the administrative purposes exception cannot be made available to other library users, even within the library premises. In a similar vein to material which is hardcopied for preservation, libraries generally do that only for access by users. What the bill has effectively done is to say that libraries can make an electronic copy but they cannot make a copy available to anybody else. Because access is restricted, library users cannot access that material electronically. That is the only preservation copy that has been made.

CHAIR—If that were similar to other provisions in the act so that there could be access to that electronic copy by users of the library, but only within the library, would that satisfy your concerns?

Mr BLACK—I am going to make a comment on that shortly, but I believe it should be consistent with the general statement as to what can and cannot be accessed.

Mr CADMAN—So you would say that the wishes of an author of an original work who does not want his work to be digitised in any way should be overridden in allowing not only an archive copy but additional access—despite the author's expressed wish. His wishes are overridden by this clause, which says that the library can make an archive copy.

Mr BLACK—I guess it comes back to why the library wants to make the archive copy. If it is for preservation, libraries generally make a preservation copy only if the material at hand cannot be purchased or if it is old and will be substantially damaged and no longer useable. By taking this as it reads, once the item is preserved nobody will be able to have access to it.

CHAIR—I think we understand your contention, Mr Black. You can move on.

Mr BLACK—Now I would like to comment on paragraph 49(2A) in relation to a comment Mrs Woodberry made about the nature of electronic information, particularly material available on the web. The last portion of that paragraph reads:

. . . being a periodical publication or a published work held in the collection of a library or archives; and

It may very well be an electronic journal or an electronic periodical, but if it is freely available it is not necessarily acquired by a library. So there is a lack of understanding about the nature of the information. If it is available free of charge and on the web, users within a library may not be able to access it if it has not been acquired by the library. In other words, because it is freely available, no consideration may have been given, nor has the item been physically placed in the library.

Mr CADMAN—What is the point you are making?

Mr BLACK—The point I am making is that freely available material on the web, if it is published in journal format, may not be able to be accessed.

Mr CADMAN—Through the library.

Mr BLACK—Yes.

Mr CADMAN—You just give the client the web address, though, don't you?

Mr BLACK—Yes, you can, but then they have to go outside the library to access it.

Mr CADMAN—You cannot use the library to get a web page?

Mr BLACK—You can get a web page, but if it is an electronic journal it could be considered to be a periodical publication.

Ms ROXON—I am sorry, Mr Black; I think we are not 100 per cent with you. Are you saying that this provision makes it more difficult for the library to provide access to periodicals than to any other information that might be accessible on the Internet?

Mr BLACK—It could well do, depending on how strictly it is interpreted.

Ms ROXON—And you are saying that means libraries are not even able to do what a home user is able to do?

Mr BLACK—That is how I read the bill, yes.

Mr CADMAN—I think you are saying that the limitation is that it is held in the collection of the library—aren't you?

Mr BLACK—Yes.

Mr CADMAN—And if it is not in the collection of the library because it is a free publication, then this section cannot be fulfilled.

Mr BLACK—Yes, that is right.

Mr CADMAN—I am saying to you: why don't you give your client the web site address and let them use your computer?

Mr BLACK—Under subsection 49(5A), material that has been acquired in electronic form can only be accessed on the premises of the library or archive, and the library does not permit users to communicate or to make electronic reproductions. One part of library practice that is quite common today is that libraries receive a number of publications that are free. They are physically included in the library and entered into the library catalogue. But with the nature of electronic information on the web, libraries do not necessarily go through that process.

CHAIR—We understand what you are saying to us. We will seek further advice from others as to whether they interpret that section the same way.

Mr BLACK—Okay, thank you. I will move on to subsection 49(5A) in more detail, relating to library user copying. This subsection, by making information accessible only in the library, severely disadvantages students studying online and distance education students.

The nature of electronic information in libraries, as outlined by Mrs Woodberry, was that it is widely available and accessible. By limiting this material to library opening hours and access within the library, it puts users at a severe disadvantage. For example, even our own academic staff who may be on the university campus cannot access an electronic journal or publication which the library has acquired from their offices. This means they have to come

to the library. It is even worse if students are studying remotely. I do not think this particular section takes into account those situations.

Ms ROXON—Mr Black, are you talking about a situation where the library would actually be purchasing a hard copy of some type and then putting that into electronic form for the use of its staff? Or are you still talking about material that is supplied to the library in electronic form?

Mr BLACK—This is relating to material supplied to the library in electronic form.

Mr CADMAN—Would there be anything to stop you creating a document yourself and emailing it to your client?

Mr BLACK—There is a section, I think it is 64, where that can be done. But that creates enormous overheads for libraries and inconvenience for users.

Mr CADMAN—I understand the work involved, but that is like sending them a photocopy or a fax, is it not?

Mr BLACK—Yes. Also, some electronic journals do not just contain text or images. They could contain music or film clips or a number of different media.

Mr CADMAN—It would be pretty hard to get that down the telephone line if you are living in Bourke.

Mr BLACK—If you listen to Telstra, once they get their satellite service up, it will not be.

Mr CADMAN—I know, but you are comparing the current situation with the electronic environment, are you not?

Mr BLACK—Yes.

Mr CADMAN—I am just pointing out to you that the electronic environment does offer opportunities, and maybe they have to be paid for, but you cannot get those opportunities now.

Mr BLACK—Yes, it is an improvement, but it is a very limited improvement. For example, on our own campus—and it is the case on any other campus—we have academic staff littered all over the campus and in other parts of the state. If they are not in a library, they cannot access the information.

Ms ROXON—Mr Black, do you have a large number of students who study through your correspondence or distance education courses?

Mr BLACK—Yes, approximately 50 per cent of our students. We have a full-time enrolment of something like 8,000 students.

Ms ROXON—Do you mean 8,000 students are not actually on your sites?

Mr BLACK—No, it would be about 4,000 who are effectively full time.

Ms ROXON—How do they currently get their materials provided to them?

Mr BLACK—They would make a request under section 64, and we would supply it to them.

Ms ROXON—Do you supply it in electronic form?

Mr BLACK—I do not think we can at the moment. It is not so much those students; it is staff on other parts of the campus who may not be in a library, but the information is readily accessible on campus.

CHAIR—Where you supply information to a student who is not on campus, presumably by way of a photocopy—

Mr BLACK—Yes.

CHAIR—Is there a charge or a fee payable to the copyright owner for that?

Mr BLACK—Not that I am aware of, unless it is done under the statutory licence agreement that the university has agreed to.

CHAIR—That is in essence what I am asking. Does that fall within the statutory licence provisions?

Mr BLACK—I am not entirely sure. One of the other representatives might know.

CHAIR—Mrs Schmidt is nodding, which I take means yes.

Mrs SCHMIDT—Yes, it would.

CHAIR—If that falls within the statutory licence provisions, why shouldn't a digital transmission?

Mr BLACK—That is fine, I have no objection to that. It is more to do with the inconvenience and the limiting nature of having the electronic material available only when the library is open.

CHAIR—I do not want to put words into your mouth, so tell me if I am misunderstanding you, but is your contention that there ought to be access to this material even if it has to be paid for under some statutory licensing provision?

Mr BLACK—I think it defeats the technology if users cannot access it any time any place, which is where the technology is going. The information should be paid for, and statutory licence or some other agreement would need to be agreed to.

CHAIR—Do you have anything else, Mr Black?

Mr BLACK—No, that will do for now, thank you.

CHAIR—Do you want to stay online and listen to the rest of the proceedings?

Mr BLACK—Yes, thank you.

CHAIR—If there is a comment you want to make at some stage, please do so.

Mr BLACK—Thank you.

Mrs SCHMIDT—I might hark back to a couple of things that Mrs Woodberry said, because I would like to make clearer the environment in which we are currently operating. There was a lot of discussion before and I think some misunderstandings about our current environment. If I look at my library as an example, we currently buy books, printed journals, electronic databases, electronic journals, multimedia, analog videos, et cetera. We are paying nearly $10 million a year for those resources. Some 85 per cent of our budget currently goes to print.

Of 18,000 journal titles we receive at the University of Queensland library, over 3,000 are now in electronic form as well as print. These electronic journals are purchased primarily from the publisher, who owns the copyright, or from an aggregater who has made agreements in relation to the copyright. The publisher typically charges five to 30 per cent for the electronic version on top of the print. A contract is signed by me for use which relates either to a particular campus—there being a number within the University of Queensland, and we would be just the same as any other one around—the number of simultaneous users, that is, whether one person, three, five or an unlimited number can access this electronic journal at a time; or, as Ms Woodberry has indicated, we nominate an IP address for designated work stations which can access the data. There is then a complicated authentication regime which can be put in place.

I think it was implied before that you could look at anything regardless. I was hoping to be able to demonstrate our web site. If you want to have a look at our University of Queensland web site, you will get stopped from looking at various forms of electronic journals because you are not an authorised user of the University of Queensland library and are not covered by the contractual agreement that has been signed.

CHAIR—What is your email address?

Mrs SCHMIDT—www.library.uq.edu.au.

Ms ROXON—You have a system so that any student can use their student number or code or has some way of accessing—

Mrs SCHMIDT—To access certain parts of the database, yes. To access the catalogue of the library, to access information about our opening hours and that sort of information, you can access that as an ordinary member of the public. At the QUT, as my colleague

Michael might explain, they have a much tighter authentication regime. All of us across Australia are looking at various authentication regimes, which means we are trying to ensure that there is a balance within. But I am also trying to ensure that libraries continue to exist. If we had to pay some of the prices that have been suggested, we would have no money left to buy anything to use. It is a question of balance.

I can show you a site on the Internet today where you can download a journal article from the United States and pay for that privilege. It is less than some of the amounts I have heard spoken about. So the user then chooses to read on screen. A user is a staff member or a student of the University of Queensland and is covered by that contractual agreement. It seems to me that the marketplace is therefore choosing how to deal with some of its own copyright arrangements, and those are in place.

Ms ROXON—Mrs Schmidt, can I just stop you there. If you are a registered user and you find whatever it is you are looking for on the screen, if you do not want to read it on screen, is there anything to prevent you from printing it out?

Mrs SCHMIDT—No, there is not.

CHAIR—Can I also stop you there. This electronic journal material for which you have paid a licence fee to—

Mrs SCHMIDT—To the publisher. I think there is only one publisher who provides it free with the print, and that is Springer Verlag, and there are a few American institutes of physics, I think. The others are different amounts. There are also aggregaters who bring together a group of journals, and to access one of those we would pay up to $90,000 a year.

CHAIR—What I am getting at is that this is not really an area of contention, is it?

Mrs SCHMIDT—No. But that is what I wanted to point out—

CHAIR—It is what is not within your licence fee arrangements that is the area of contention.

Mrs SCHMIDT—There is very little electronic material that is not within that.

CHAIR—Can I put what I think is the crux of this to you.

Mrs SCHMIDT—Yes.

CHAIR—If you work in a system in which you are purchasing access to electronic journals, which you are, or you have free access to material which is published for all and sundry on the web, why should that same regime not apply to other material which can be obtained commercially on the web? That is, you do not get access to the electronic journal unless you have entered into some licence arrangement.

Mrs SCHMIDT—Yes.

CHAIR—Why should you get access to non-journal material, namely, a textbook, via the web unless you also pay some licence fee?

Mrs SCHMIDT—I am not proposing that we would.

CHAIR—If that is the case, we may have saved a lot of time.

Mrs SCHMIDT—I think we are looking at the fair dealing provisions. We are pleased with the fair dealing provisions as they stand. I will allow some of my colleagues to speak more on that. No-one is proposing to make a complete digital copy and make it available holus-bolus. My colleague before was talking about preservation copies or other particular circumstances. I think we are all trying to get balance out of this.

CHAIR—But this is an important starting point for our consideration, and I want to be clear about it so that I do not misunderstand you or misrepresent your position. The general proposition that I hear you accepting is that, whatever the material is which can be transmitted to you electronically, unless it is provided free of charge, then the general principle, as a starting point, is that that should be paid for subject to whatever negotiations or statutory provision is in place.

Mrs SCHMIDT—I suppose what I was concerned about in the previous discussion was that there would be another collecting agency involved. I do not think we are looking for that sort of involvement.

Ms ROXON—So you were concerned that there was going to be another layer of cost?

Mrs SCHMIDT—Yes.

Ms ROXON—What I think Mr Andrews is getting at is, when you negotiate your five per cent or 30 per cent on top of what you would pay for a hard copy, that is negotiated on the basis of how many people are likely to have access to it and some sort of calculation or estimate of how much use there will be for it.

Mrs SCHMIDT—I think what we would like to see is some sort of minimalist approach which could be taken care of within the bill. Because each of these is a different contractual agreement. They take a long time to negotiate. Some of them appear to us to be inequitable and perhaps outside of what you might think are normal trade practices requirements.

Mr CADMAN—Such as?

Mrs SCHMIDT—Why should we pay one publisher five per cent and another 30 per cent?

Mr CADMAN—It depends on how good his stuff is.

Mrs SCHMIDT—I suppose you might be—

CHAIR—Isn't that an argument for having a statutory scheme?

Mrs SCHMIDT—I am suggesting that there could be some minimalist contractual approach. But I would like to hear my colleague Mrs Woodberry make some further points on this, too.

Ms ROXON—The point that I am trying to understand, and I think Mr Andrews is too, is that there is not as yet any suggestion from you that the libraries cannot survive if they are expected to pay some fee. Since we are searching for a balance, it would be helpful for us to understand what you currently pay and what is reasonable.

Mrs SCHMIDT—There are two concerns. One is what our own users do in our library; the other area is—

CHAIR—This is the point that Mr Black was making?

Mrs SCHMIDT—Yes. And the other is inter-library loans, which we have not really touched on, and I think that is an important area for discussion. Then there is the fact that we have 85 per cent still in print.

Ms ROXON—That is the other issue I want to raise. Presumably that is only a matter of time. It would be a little naive for us to support either the bill or amendments to the bill on the basis of what you currently have, when we know that we are on the edge of that changing dramatically. I guess another area that we also need to address is an understanding of what restrictions would be reasonable from your point of view in converting hard copy to electronic copy yourself and then using it, other than for preservation purposes. That is a fear that is quite legitimate.

Mrs SCHMIDT—I think Mrs Woodberry has addressed that already; most of us do not want to do that. There would be some exceptional circumstances, but it is very expensive thing to do.

Mrs WOODBERRY—One of the issues that has been on the agenda for quite some time is this issue of copying from print into electronic for an electronic reserve collection within the libraries to make the information more readily available to students. This would be restricted to students at the university. That is a specific case which we have been addressing over the past few years which, because of the changes in technology, is fast disappearing. It is also one small part: apart from preservation copying and possibly copying for electronic reserve, the universities really do not have any interest in transferring from print to electronic because there is no need to. The majority of the material that you want—

Mr CADMAN—What about diagrams, illustrations and works of art? Surely they are critical parts of courses that are not text?

Mrs SCHMIDT—But most of that we probably own the copyright on, so most people would be producing those themselves for teaching purposes. In my own environment that would be the case. It would be fairly rare. I have just been around to some of our medical school this week and they all have their own photographs, taken over many years, to build up for teaching purposes. But the point I probably did not make clear enough earlier is that our concern is with the transactional approach. All of us think that would be quite iniquitous

and, in dealing with the university community, where most students cannot afford to pay large sums of money, it is the transactional use. What we currently do is obtain unlimited licences or licences which are limited by concurrent users. If you look at the whole history of library development, I think you will find that the real concern we have is that transactional use.

Ms ROXON—Could you explain something to me again: the concurrent use, or the terms of the licence which you might negotiate, is that so that you can say, 'This is the equivalent to having five copies on our shelves, because at any time only five people are going to be able to use it'?

Mrs SCHMIDT—More or less.

Ms ROXON—Is that effectively to restrict the use so that you know what you are negotiating for and the amount you have to pay? If you want it to be unrestricted at any time, presumably they are more likely to charge more for that use?

Mrs SCHMIDT—That is right. Some people negotiate on the number of students, for example.

Ms ROXON—The number of students at the institution?

Mrs SCHMIDT—Yes, at the institution. There are so many versions of this, but it is the transactional element that we wish to avoid.

CHAIR—Isn't the transactional approach the one that is being utilised—

Mrs SCHMIDT—It is a fee for reading.

CHAIR—in relation to the copies you make in hard form?

Mrs SCHMIDT—No, because you can sit and read for nothing, as was pointed out by Ms Roxon. But if it is an electronic form, you cannot read it unless you look at it on the screen. It is very difficult to stop people printing.

Mr CADMAN—But read only is a common electronic process.

Mrs WOODBERRY—But if you are talking about transaction based costing, what we are afraid of is that you will have to pay for that reading.

CHAIR—There are two issues here, I think. Let us leave the reading aside for the moment—I will come back to that. At the moment, if you in the library photocopy an article and send that off to someone, you pay a transaction fee under the statutory licensing provisions, as I understood you earlier—

Mrs SCHMIDT—No. Perhaps I could just clarify that. There were two issues being discussed: one was the remote students. Usually a package of materials is prepared and sent to students—

CHAIR—Course notes?

Mrs SCHMIDT—Yes, course notes, which are subject to the educational copying provisions. That is not charged to the student because there is legislation that prevents us from doing that, as you may be aware.

CHAIR—Yes; nonetheless it is paid for on the basis of the item, isn't it?

Mrs SCHMIDT—It is done, of course, on a sampling basis at the moment—it is not transactional.

Mr CADMAN—But is paid for. Somebody buys it.

Ms ROXON—But there is an important difference, Alan. If the current system provides for some sampling and payment, depending on how many students you have and how often photocopies are normally used and roughly distributes it through, it is a guesstimate with the sampling process; it is not for every individual transaction. If I am correctly portraying what you are saying, your concern is that it would require more work to measure each transaction. I think the other witnesses have been saying, 'Well, we can do it easily because copying in electronic form can happen in some automatic way, but is it right that the statutory licence scheme that works at the moment is a guesstimate? It is not transactionally based. It is a calculation using numbers of students, use of photocopiers and some rough percentage of who gets what.'

Mrs WOODBERRY—Yes, is it. The sampling system runs over the full period of a year, taking in a certain number of universities every year. It is a rolling average that takes it through a three-year period and says that this is the estimated amount.

Ms ROXON—Is your concern only that you don't have two systems, that you don't have to negotiate with the publisher and have some statutory licence system? You have made clear that there is no objection to payment in some way that is fair. You think it is administratively difficult to do it transaction by transaction, but there are a whole range of options that could be discussed as to how you could equitably pay for the use of those materials?

Mrs WOODBERRY—Yes. We have a whole raft of material which, as Mrs Schmidt has explained, is already paid for, which is covered. A query I would like to raise is where does the contractual agreement in the bill cross over. You have this other range of material that is available and, while it is not restricted to the libraries, it is available on the web and therefore is effectively available anywhere. That is the point we are making. However, if you are going to look at some sort of basis for statutory licensing and payment for that scheme, it must not cover something like reading, and it should also include the fair dealing provisions.

CHAIR—On the point about reading, you might have heard the proposition that I put to Mr Fraser. If you restrict what is in digital form in the library to those terminals in the library where you can simply read the material—which is the same as taking a journal out of the folio collection or a book off the shelf and reading it—then that seems to me to be a

technically feasible distinction which you can draw. You can bring up any item on a monitor which you can read there, but you cannot print it off. Doesn't that meet your concern that the digital collection be available for reading in the library?

Mrs SCHMIDT—We have 3,000 seats in the library and 700 PCs.

Mr CADMAN—Okay. But why can't I access that from Bourke and read only? There is no problem. I can listen to it, I can view it. When I start copying it is when the problem starts.

Mrs SCHMIDT—No, you are printing it. If you can figure out how to disconnect a printer from a PC, then it would be okay. But you cannot do that.

Mr CADMAN—You can stop me printing it.

Mrs WOODBERRY—In Bourke? If you were accessing it from Bourke?

Mr CADMAN—Yes, you can stop me.

Ms ROXON—This question may be something we need to ask our minders from Attorney-General's, when we no doubt get them back later in the course of this inquiry. I do not know if the provisions of the act can stop this or not, but are you suggesting that libraries are actually going to be more restricted from enabling people to print material from the Internet that a person would be able to at home? I have a great concern, which I have expressed before, that the people who do not have sufficient funds to have their own computer should be able to go to the library, pay whatever fee you may pay for the use of a computer—as you do at any Internet Cafe or anything else—$5 for your hour of use, and print and have access to any material that is freely available on the Internet. Are you suggesting that these provisions may actually prevent libraries from being able to provide that service? We are not dealing with information you have paid for; we are not dealing with restricted use that other home users would not be able to use. But I think that some of the other witnesses have suggested that.

Mrs WOODBERRY—It does now. It states that in the bill, for material that can be accessed only on the premises of the library and about having particular equipment to restrict that use.

Mr BLACK—Could I make a comment there? That was the basic thrust of my argument: restricting it purely to library premises is disadvantaging a vast number of people.

CHAIR—Right.

Mrs WOODBERRY—Under section 49(5).

Ms ROXON—Sorry, Mr Black; I thought you were dealing more with people who can access the library's own materials from another site. I am even talking about people who go into the library, because they do not have their own computer in order to access that material, but are not allowed to print that out. This is more restrictive that it would be for

home use because, whilst that might be something that the authors and publishers are be concerned about, it is something that is already an issue and should not disproportionately disadvantage or burden libraries when everyone else can get that information.

Mr BLACK—Yes. I did not articulate it particularly well, but that is inherent in my argument about the limitation on availability only through library premises and that you are creating two classes as a result of that.

CHAIR—To take an example, Mr Black, are you saying that if I am at home I can go into the website for the *New York Times*, look at it and print off an article from it, but if I were to go into a library under these provisions, and access the *New York Times*, I could not print off it because it would be in contravention of the provisions of the bill?

Mr BLACK—I think you can take a photocopy under fair dealing, but if you are at home and you want to do some research or study on that particular article, you can copy it and take out extracts or whatever, which you are not allowed to do in the library.

CHAIR—So you are saying that you should be able to do in the library that which you can do at home in relation to freely available material?

Mr BLACK—Yes, under fair dealing.

Mrs WOODBERRY—One of the issues we have been trying to deal with here too is the matter of wording—that issue which says, '..held in the collection of a library or archives' when you are applying that to electronic material is at odds with the nature of the material itself. If you apply that, you are restricting it much more severely than would be the case to someone at home.

Ms ROXON—Then it is obviously very important for us to be clear about the way you deal with material that is freely available and the way you deal with material that you have paid for under licence for a restricted use. That is a distinction I think we might have been missing earlier on.

Mrs WOODBERRY—I would not be surprised. The technology has changed so quickly since the beginning of discussions on this bill.

Mr CADMAN—How long will it be before you have laptops with all the course material on them that your students need?

Mrs WOODBERRY—I think that is highly unlikely.

Mr CADMAN—They are doing that in the United States. I understand that it is being done in 38 universities there and that Australian universities are investigating the technology themselves.

Mrs WOODBERRY—That is ubiquitous computing, which is the provision of a laptop to each student as they register at the university so that they have access. You do not

provide the information on the laptop, you provide the laptop and the plug in the wall so that they have access to the information that is delivered by the university.

Mr CADMAN—And the course material and notes are already prepared for them basically?

Mrs WOODBERRY—Yes.

CHAIR—We have got only about 15 minutes left, so it might be best if you run through the major points that you still want to make, and we will try to do what politicians are not renowned for doing, and that is to keep quiet.

Ms ROXON—I think that is a gentle hint to us.

Mrs SCHMIDT—One thing is the definition of library which we were asked to look at and which is causing us concern. The library world cooperates extensively, and we are not sure what the rationale is for the differentiation of for-profit libraries and changing the act in that way. Although libraries in law firms and corporations exist to support the aims of the parent organisation, they also serve as agencies of continuing education in support of research. So individuals within the firms concerned can presumably still use the fair dealing exceptions but in a more convoluted manner. We are not clear why law firms are specifically referred to when fair dealing is permitted under section 43(2) for the purpose of giving professional advice by a legal practitioner or a patent attorney. Again, it does seem unusual.

We see that other arms of government are encouraging collaborative research between universities and corporations, and the ultimate result of the isolation of libraries in corporations would be to restrict this collaboration. It would mean that not-for-profit libraries, particularly university libraries, could not obtain items from for-profit libraries, and for-profit libraries could not obtain materials from not-for-profit libraries. A very strong and viable network of libraries has developed within Australia. We would really hate to see that change.

Many corporate libraries have been closed in recent years—BHP, Telstra—and this differentiation, we feel, would further hasten their disappearance. As we have said, we are not clear what the reason for the differentiation is. If it is that it is affecting the copyright owners, we are a bit doubtful about that, because if you have got a small research company with four people, you cannot afford to buy a lot of materials anyway. So we are not sure what the rationale has been. It was not in the earlier discussions of the bill, and I suppose we are a bit puzzled to see it. We also believe that there would be many organisations which are difficult to categorise as not-for-profit or for-profit. I am sure that all of those things have been brought to your attention elsewhere, so we would merely add them again today.

CHAIR—Thank you.

Mrs WOODBERRY—Could I add one more thing on the definition of library. The CLRC, looking at the simplification of the Copyright Act, has had quite extensive discussions with different groups, and the definition of library is in their first report. The definition of library in the CLRC report is different from the one you have come up with in

the digital agenda bill. If we are going to have a definition of library, then I think it is very important that we do have a look at all of the issues that are with that and make sure that we do not get at cross-purposes with it.

Mr LEAN—I would like to add that the Queensland University of Technology shares that very deep concern about the definition of libraries and the possible destruction of the intellectual resource commons that the Australian network of libraries shares at the moment.

CHAIR—So I take it that you would prefer the position in the exposure draft to this bill?

Mr LEAN—Yes.

Ms ROXON—I do not really understand why you do not think there is a difference between commercially operating libraries and educational or not-for-profit libraries. I understand that you might think it is sometimes difficult to categorise them, but isn't there a very clear difference?

Mrs SCHMIDT—In what way?

Ms ROXON—Isn't there a very clear difference in that, in essence, you are making a judgment at some point as to who can afford to pay for it and who cannot, or whether there are other public good purposes that are linked with it? I do not think providing Allen, Allen and Hemsley with the same status as the University of Queensland in respect of their libraries is sensible, although I do think exchange between the libraries is very important. I think that can be separated as a different point.

Mrs SCHMIDT—I think that is the point: the way the act is worded, we could not exchange materials.

Ms ROXON—But that is different from having them treated as public not-for-profit libraries for all other purposes.

Mrs SCHMIDT—It is not clear what other purposes that would then apply to. For instance, Allen, Allen and Hemsley, under fair dealing, would be able to do their copying, because the particular section actually says they can.

Mrs WOODBERRY—There is a conflict in the bill.

Ms ROXON—But your concern is only to continue to have access to any materials that you might exchange with them. Is that the limit of your concern?

Mrs SCHMIDT—I think it is a wider interest. If we read the documents on the information economy, I think we are trying to look at a free flow of information. We see it as a real issue in the free flow of information in the future of this country.

Mr CADMAN—But creators need to have protection or they will not create. Isn't that right?

Mrs SCHMIDT—Yes, but this came out of left field, in a sense, and there is no statement or backup evidence that copyright owners are disadvantaged by the current situation.

CHAIR—In other words, you do not understand the policy behind it.

Mrs SCHMIDT—No, we do not.

Mrs WOODBERRY—And why just law libraries? Why not accounting libraries or something else?

CHAIR—Yes, or medical research—

Mrs SCHMIDT—When you come down to it, you find very few of them are really sure of the difference in for-profit or not-for-profit.

Mr CADMAN—So you think there should be copyright legislation and people should live by that, whether they are libraries or not?

Mrs SCHMIDT—No, we are saying we think the definition of library that we have been working on is adequate.

Mr CADMAN—Okay. Thanks.

CHAIR—Are there any other matters you want to raise with us before we have to close?

Mrs WOODBERRY—Could I mention something very briefly?

CHAIR—Yes.

Mrs WOODBERRY—I was going to look at the amendments limiting the operation of the library and archives provisions to material held in their collections, which are items 51 and 59, and I think we have covered that reasonably well.

CHAIR—That is in a sense what Mr Black was speaking about.

Mrs WOODBERRY—There is one other point that I would like to raise. The bill and the explanatory memorandum have two different versions of the wording. The bill clearly says that the information has to be in a library or archives, which effectively says that this is maintaining the status quo. The explanatory memorandum says 'in the library or archives'. So it is a matter of what the wording is going to be rather than having a conflict. That is in item 51 of the bill, paragraph 49(2A), which says:

. . . being a periodical publication or a published work held in the collection of a library or archives . . .

Also, as we said, there is a problem with the definition of 'held in the collection' when you are dealing with electronic information, which actually is not in the collection itself.

The recommendation I would make is that you leave off those additional words—which is how it is in the current act. It then just reads that it is published work. It stops at published work. Or, if you are going to leave it in, then leave it in to make sure that it says 'in a library or archive' and does not restrict it further.

The other item I was looking at is item 64, which is to do with the commercial availability side of 'a reasonable portion'—not the reasonable portion itself. When you are looking at commercial availability, currently it is such that unless it is more than a reasonable portion you do not have to check it. At the moment what you have got in the act, in this specific one, is only for electronic material, because in hard copy it stays the same. But if you are looking at electronic material, it is much stricter. It is saying that the supplying library must check for commercial availability for every request, regardless of how much of the article is to be copied.

That is a real problem when you go back to what we have been talking about. The article someone is after—or the pages—may well be available within a database that is going to cost us $90,000 to access. So it is commercially available, but all they are after is that one little part of it, and that may not be available commercially except through this database. So if you are looking at the commercial availability, it needs to be tightened up to say what you mean by commercial availability. Is it commercially available to purchase just that part or is it necessary to buy the whole lot?

Ms ROXON—Mrs Woodberry, do you have anything to say about the comments made by earlier witnesses in respect of the reasonable portion test, the 10 per cent rule?

Mrs WOODBERRY—I think the reasonable portion test for libraries in the current form in the way that it has been in print format is essential for libraries. It has provided us with very clear guidelines. The bill has made a good stab at taking it into the electronic environment. It is a difficult thing to do, to restrict it to 10 per cent of the words. I also think that, given time, the technology will override that. It has changed so much now. You can pull up a web site and you will often get an abstract. If you want the full thing, then you pay for it. You do not get the rest of it until you have paid for it.

Ms ROXON—Wouldn't that mean that you would be quite comfortable with the suggestions made by Mr Fraser that you have indicators of what should be looked at, but the tribunals or courts would determine what is reasonable in any situation?

Mrs WOODBERRY—I do not think it will go to the tribunal. I think it will be a technology thing. It will be a decision that is made by owners. They might say, 'I don't want this to go out freely to everybody. I want to have some sort of mechanism of managing this.' I do not think it will be a tribunal decision or a court decision. If it is up there, and you have put it up there and it is freely accessible, then technologies will be developed to manage payment for it, if that is what you desire. It will be up to the owner to then say, 'This is how we are going to use it.'

CHAIR—So we are getting back to almost a tripartite categorisation of materials that are freely available, and if it is freely available, it is freely available, so to speak. Then there are those which are licensed in the periodical sense. Then we have this commercially available

material, which I think is still the nub of our problems, at least so far as I can understand the various points of view about this bill.

Mrs WOODBERRY—Yes, I think you are right. Getting back to what I was saying about reasonable portion, you should only need to check if it is commercially available when it relates to more than an article or more than a reasonable portion. If it is outside that reasonable portion, then, yes, apply the commercial availability check.

CHAIR—Isn't Mr Fraser's point correct? If you go to the High Court of Australia's judgments, what is a work and what is a reasonable portion? Is it a reasonable portion of one judgment? Is it a reasonable portion of one judge's judgment? Is it a reasonable portion of the entire judgments of the High Court?

Mrs WOODBERRY—That is right.

CHAIR—There are difficulties there because of lack of definition.

Mrs WOODBERRY—Yes.

CHAIR—You can either try to impose definitions, which no doubt will prove troublesome because future changes will cause problems, or you can have some general test and allow that to be sorted out in particular cases if somebody does not like the way in which it is being used.

Mrs WOODBERRY—If the bill is reviewed in three years time, you will probably find something then that is quite acceptable. I think in the interim three years it is a problem.

CHAIR—If that is the case, shouldn't we start with a non-regulatory environment and see if that works?

Mrs WOODBERRY—That is preferable.

Mr LEAN—Mr Chairman, I am mindful of the time.

CHAIR—I am sorry about that, Mr Lean.

Mr LEAN—I speak for the QUT. I am not a librarian. I was going to address the more broader educational concerns in the bill. I will very briefly talk about those. Probably the greatest concern that the university has is raised by the introduction of an electronic use notice. Whilst the university reluctantly accepts that some remuneration may be due to copyright owners for the right to make something available online—that is, the right to communicate—we have been used to a regime where students are able to access material in the closed reserve section of the library at no further cost to the university. It would appear that the electronic use licence will now force us to pay for use, rather than making a copy. This has been covered before, but I want to reinforce it.

There is no record keeping option for digital copying. This removes an important and equitable safeguard from the university and opens the way for systems of assessment which

can be entirely unrelated to actual use. Again, this can be fertile ground for disputes. There are no guidelines in the bill as to when the right to communicate is remunerable, as opposed to the right to reproduce, and no guidance as to rates if it is remunerable. I will tender a copy of this to save time. I would just like to address Mr Cadman's question about his author who may not want to have his work published on the Internet. The Copyright Act, as we know, gives exclusive rights to copyright owners and authors—

Mr CADMAN—Except for archived copies.

Mr LEAN—Well, it gives certain exclusive rights to copyright owners in return for taking unto itself the right for libraries and archives to do certain things with those works. As far as I can see, the only way that an author is going to overcome that is if the impinging moral rights legislation is enacted and includes a right to withdraw or to not publish. Until such time as that, I think that balance is going to stay there in the Copyright Act, and your author will have certain exclusive rights—the right to publish, et cetera—and other rights will be taken away from him.

Mr CADMAN—I understand what you are saying, Mr Lean, but I thought the argument you were presenting was that even those archived copies ought to be more widely available than just within the library. That is the way I understood your argument. Was I mistaken?

Mrs WOODBERRY—No, because they are not available within the library. They are only available to an officer of the library.

Mr CADMAN—Yes, exactly. You want that more widely available?

Mrs WOODBERRY—Available to users in the library.

Mr CADMAN—Even though it is the author's express wish. That is interesting.

Mrs WOODBERRY—Preservation copies only, we are talking about.

CHAIR—Mr Lean, you are going to provide us with that document?

Mr LEAN—I will provide you with a copy, yes.

CHAIR—If you do that now, I can authorise its receipt into evidence and it can be more generally published. Thank you for your submission and for coming along and discussing it with us this afternoon. Obviously there are some points of contention, which is why we are addressing them. We appreciate the input that you have given us. We will continue to deliberate about the matters that you have raised. Mr Black, can I thank you for participating in the hearings this afternoon.

Mr BLACK—Thank you.

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

That the submissions from the Copyright Agency Ltd and from Michael Lean presented to the committee today be received as evidence to the inquiry and authorised for publication.

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

That the materials provided by the Copyright Agency Ltd be received as evidence to the inquiry and accepted as exhibits.

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

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

Committee adjourned at 4.49 p.m.