COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright Amendment (Digital Agenda) Bill 1999

THURSDAY, 14 OCTOBER 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 14 October 1999

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

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

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

WITNESSES

Committee met at 9.13 a.m.

CHAIR—I open this hearing of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the Copyright Amendment (Digital Agenda) Bill 1999. As you would all know, this bill was introduced into parliament on 2 September after a public consultation process which took some months. Many of you here today have made submissions both to the draft exposure bill and also to this inquiry. As you know, after the introduction of the bill, it was referred to this committee for additional scrutiny of the bill.

The committee has received more than 70 written submissions and, as many of you know, has taken oral evidence prior to today. We decided that today we would use a roundtable format to examine two important provisions of the bill. Firstly, the focus of discussion will begin with the issues related to the fair dealing, reasonable portion, and exceptions for libraries and archives. In the second session later this morning the discussion will be on issues relating to educational statutory licences.

Participants

ALEXANDER, Mr Charles, Legal Adviser, MCEETYA Copyright Task Force

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

BORGHINO, Mr Jose, Executive Director, Australian Society of Authors

BRAMICH, Dr Katy, Manager, Information Technology, National Museum of Australia

BRENNAN, Mr David John, Consultant, Screenrights

BRIDGE, Ms Susan, Consultant, Australian Publishers Association

BURN, Ms Margaret Elizabeth, Assistant Director General, Australian Collections and Reader Services

CAMERON, Ms Jasmine, Manager, PANDORA Project, and Manager, Technical Services, National Library of Australia

CHAPMAN, Mr Terrence William, Representative, MCEETYA Committee, MCEETYA Copyright Task Force

COCHRANE, Mr Tom, Chairman, Australian Libraries Copyright Committee

DONOUGHUE, Mr Peter, Publisher and Member, Australian Publishers Association Copyright Committee, Australian Publishers Association

GORDON, Ms Virginia, Media and Intellectual Property Adviser, Australian Society of Authors

EMERY, Mr David, Policy Officer, Copyright Agency Ltd

LAKE, Mr Simon Thomas, Chief Executive Officer, Screenrights

McLEAN, Mr Ross, Partner, Baker and McKenzie, Australian Vice-Chancellors Committee

MORGAN, Ms Caroline, Corporate Counsel, Copyright Agency Ltd

MULLARVEY, Mr John, Acting Executive Director, Australian Vice-Chancellors Committee

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

WARD, Ms Anna Frances, Executive Director, VISCOPY

WILLIAMS, Dr Mark Robin Winfield, Partner and Legal Adviser, VISCOPY

WODETZKI, Mr Jamie, Legal Adviser (External), Australian Digital Alliance

Session 1—Fair dealing, the reasonable portion test and exceptions for libraries and archives

CHAIR—Welcome. I advise you that the committee does not require you to give evidence under oath, but the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The evidence given today will be recorded by *Hansard* and will attract parliamentary privilege. What I would hope at the outset is that we could have a succinct—and I emphasise the word 'succinct', given the number of people here this morning and the time available—outline of the position or the comments that you have representing your various organisations about the various matters.

Without wishing to sound critical, we would prefer not to have long rhetorical flourishes about the position which you occupy. We understand that; we have heard that in the hearings to date. Today we hope we can get to the nitty-gritty of the concerns that you have. This is an opportunity for others around the table, if they agree or disagree with concerns which are raised, to put that on the record. I hope we can have a free flow of discussion, but in order to try to do it in an orderly way, if you can direct your comments through me, that would be useful. Perhaps we could start with the Australian Copyright Council.

Ms BAULCH—Would the committee like me to start with our position on the reasonable portion provision?

CHAIR—Yes.

Ms BAULCH—The concept of reasonable portion, as the committee is aware, was introduced 20 years ago in 1980. At the time I think it was assumed that the concept of reasonable portion did not interfere with the activities of copyright owners and that it was consistent with the so-called three-step test set out in international treaties to which Australia was a party and which is referred to in the submissions to the committee. Our position is that the existing provision relating to reasonable portion no longer complies with that three-step test and does have the potential to interfere with activities that copyright owners are engaged in. Following from that, we oppose any extension of that provision into the digital arena.

We have also set out in our submissions some other reasons for opposing that extension, including the recommendation by the Copyright Law Review Committee in its recent report that a quantitative test for digitised works would be practically unworkable. We have also set out in our submission similar concerns about the provisions that allow the copying of articles in periodical publications. Again, when these provisions were introduced 20 years ago, it was probably a reasonable assumption that this copying did not interfere with activities that copyright owners were engaged in, but that is no longer the case, largely for two reasons. Firstly, digitisation allows the easy exploitation of single articles and portions of works; and,

secondly, the increase in collective licensing. Do you want me to say something about the library provisions as well?

CHAIR—I think we might deal with one issue at a time. That might be easier for us. To be clear, then, is your proposal that clause 20 of the bill should be removed?

Ms BAULCH—That is right. We would go even further and say that the current reasonable portion provision should be either removed altogether or that it be presumed but not deemed to be fair to copy a reasonable portion of a work.

Mr CADMAN—Could you repeat your last words?

Ms BAULCH—That it could be presumed that copying a reasonable portion is fair for the purposes of the fair dealing provision but not deemed to be fair for the purposes of the fair dealing provision.

Mr MULLARVEY—The universities support the government policy for maintaining the balance of rights between access and use, but we do not believe the bill translates that policy. We are concerned that the bill, if implemented, would lead us down a path of a pay for use system in universities, rather than the current system. That is a major point of concern. Ross McLean has some comments to make about how we would see changes being made to the bill to deal with that. I will leave it to him to comment on that.

Mr McLEAN—We would support the retention of the reasonable portion test. The CLRC looked at this when they looked at the exceptions and found the translation proposed by the government to be in compliance with Australia's obligations. This sort of issue has been looked at many times before. The balance has been struck. When it was done for photocopying 20 years ago, we were told that it would be the death of academic journals. That has not proved to be the case. I think the fears are grossly overstated. It is very important for universities to have an objective test—one that they can implement without having to reach agreements, go to tribunals, go to courts.

From our point of view, this is not the major fair dealing issue with the bill. As John says, the biggest problem is that every reading, browsing or exercise of fair dealing rights by a student in a university will become remunerable under this bill. In a digital age you can only use copied material if you make it available. For a university to make available things to students to read or to exercise their fair dealing rights, we will have to exercise the new right of communication. It will be remunerable. So you go from a pay for copy regime to a regime where every time a student wants to read something, every time they want to copy something to exercise their fair dealing rights, a university will be put in a position where it will be up for a claim for remuneration. From our point of view, that is a much bigger fair dealing issue than the issue that is raised in the issues paper.

Mr CADMAN—You are saying that you cannot separate reading and browsing from copying. Is that what you are saying?

Mr McLEAN—In a digital environment, a university will have to make available the material to students to read, to browse, to exercise their fair dealing rights. The only way

you can do that is by exercising this new right of communication. We will be told by copyright owners that we are exercising a statutory licence, and therefore we ought to be paying for it. All we are doing is facilitating the exercise of fair dealing rights by students, browsing rights by students.

Ms ROXON—Mr McLean, which provisions do you think deal with that, and how would you propose that they be altered?

Mr McLEAN—There are no provisions that deal with the concern I have expressed. Speaking to MCEETYA, there is a sense that perhaps the intention was that section 49(5A), the library exemption, would come to the aid of universities. A library would be entitled to make available electronic holdings, and students could read and make a hard copy. The problem is that we would be making those things available for educational purposes, and there is a statutory licence that covers that. If you look at the Australian Publishers Association submission, they make it quite clear, and it is what we would expect. The copyright owners will come to us and say, 'You are making this available for educational purposes. You are making it available electronically. You have exercised the new right of communication. It must be paid for.' So we will pay once for copying and we will be up for a claim for communicating as well.

CHAIR—To get this clear, what you are saying is that section 49(5A) pertains to the archiving of material. I do not want to put words into your mouth, but I want to get to the nub of the issue. That is, you would say that section 49(5A) should be expanded to cover reading in libraries.

Mr McLEAN—We see that as a library exemption, which is not the best way of dealing with educational use. The problem is that there is a 49(5A) that tells you what can happen in a library, but there is a statutory licence to communicate things for educational purposes. Anything we do is going to be said to have been done under that statutory licence and to therefore be remunerable. We would say the solution was a savings provision that says, 'To the extent that a university is merely making available to enable students to browse, read or exercise fair dealing rights, that is not a remunerable communication.'

We clearly acknowledge that in some cases we would make available as a substitute for copying—I think I read somewhere that, instead of issuing 50 course packs, we could put one on a database and 50 students could access it. That would be a substitute for 50 copies and we should pay for that. So we are not talking about communications that are substitutes for multiple copies. That clearly ought to be remunerable.

Ms ROXON—Would you be in a position at some stage, obviously not now, to provide us with some form of wording that you think would adequately—

Mr McLEAN—In our submission there is some draft wording for a savings provision.

Ms ROXON—Thank you.

Mr WODETZKI—I am appearing on behalf of the Australian Digital Alliance. Broadly speaking, we think the bill ought to be supported on the basis that it does represent a

reasonable attempt at carrying forward the existing balance in the act. To put this in context, I would like to make a couple of quick points. In this forum, the 'users', if we might call ourselves that, are really just trying to cling on to rights that we have. The unfortunate pattern of these reforms is that copyright owners come in and ask for stronger rights, and they get them. We do not oppose that. Then, once they have their stronger rights, they say, 'Now we want to cut back the users' rights.' In this bill the government has said, 'No, you cannot cut back the users' rights. The users' rights should continue.' We support that position.

The bill really stops us from going backwards. It is not radical at all. It simply says, 'Yes, there are exceptions that have existed in the past that should exist now.' I find it interesting that not only does the Copyright Council not support the current reasonable portion test for electronic material but they also want to get rid of the one for print material, as an example of the situation that we have to deal with. Bearing in mind that context, this bill is about us clinging on to rights as users, not about users reaching into publishers' pockets and ripping away their markets.

In terms of the reasonable portion test, we support it. It is not a particularly radical proposal. It simply allows a reasonable portion of electronic material to be copied and gives some clarity to that particular exception. In relation to the age-old allegation that this will put Australia in breach of its international obligations, again I can only say that is not true. It gets said of course, but the fact that it comes out almost as the first argument of some of the rights' holders would tend to suggest that they do not have any arguments on the merits and that they have to fall back on this wild claim that it is going to put us in breach of some treaty obligation. The fact is that it will not, and I can provide a lot of evidence to support that position.

Ms ROXON—What comments do you have to make about how the reasonable portion test would actually work? Do you have any comments on how some sort of qualitative test would work, whether that is possible or not? I find it difficult to understand how a user would know what impact their use has on the market, for example.

Mr WODETZKI—You have a quantitative test because it is the only way of providing some clarity. I think to say 10 per cent of the number of words of a work in electronic form is not an unreasonable attempt at striking a new balance because you have a work that is not a printed work so you cannot count its pages and figure out how many pages is a reasonable amount to copy, but you can say, 'We have a clear number of words. Why not stick to the same 10 per cent rule and say 10 per cent of the words?' It seems like a perfectly logical and reasonable proposal to me.

In terms of an alternative qualitative test, I would fully agree with you that I could not possibly see how anyone could make sense of it. It is open to debate as soon as you go to a qualitative test. Presumably it would fall to the courts to determine ultimately. But I know from dealing with many queries from librarians over the years who are concerned not to do the wrong thing, that those at the coalface clutch to some sorts of clear guidelines. I think it is important for practical purposes.

CHAIR—Mr Wodetzki, is there some need to further define what we mean by 'a work'? Let me take an example. If you are talking about a collection of the High Court reports, is the report of one case a work, is the collection a work or is the judgment of one judge a work? What is 'a work'?

Mr WODETZKI—That is a good question. I would not mind a bit of guidance on that myself. Perhaps with cases, it is a bit tricky because there are specific exceptions that say you can copy those. To use the illustration anyway, it is difficult to know which one is the work that you are talking about. But that is not a new problem. There are already common law rules about whether you can identify a work as distinct from another work. There is probably no need to revisit that. It is not an easy question, but it is not one you can get around, I do not think.

Mr CADMAN—It has to be dealt with, doesn't it? That definition has to be dealt with in this legislation, doesn't it?

Mr WODETZKI—It is dealt with in the legislation by referring to the work. Again, if you want to talk about something that is published as a single piece of text—and it is hard to talk about it in the abstract—you will usually be able to work out what a work is, although not always. Presuming that you can at least work it out in a number of circumstances, then this bill gives you some clarity. If there are some situations where it is a bit harder to figure out which one is 'the work', then the bill cannot give clarity and nothing we do here will help us to do that. In a lot of cases it will be clear what the work is and in those cases the bill will say you can take 10 per cent.

CHAIR—Thank you.

Dr BRAMICH—The National Museum welcomes the proposed amendments to the copyright bill, especially with respect to the explicit definition of museums falling under the definition of libraries and archives, especially in this area when there is a convergence of our business to provide access to publicly funded collections that are largely unavailable in such institutions, unlike in libraries. For the most part, we are very happy with the proposed amendments.

With respect to the fair dealing provisions, we do feel that there is somewhat of a dilemma for the kinds of materials we would propose to make available digitally. The bill deals with fair dealing of primarily text based material. In our situation we would be more concerned with the presentation of pictorial material digitally. It is very hard for us to define what fair dealing would be under those situations—would it be a print-out of a low resolution JPEG image, to get technical for a moment?

We are very pleased with the amendments to the preservation exceptions, especially that they have achieved technological neutrality and will give both staff and the public better access to the collections they have funded. That is pretty much our position.

CHAIR—On the point about the pictorial material, presumably you have to deal with that now, though. I am not sure why there is a specific problem once you move into a digital

environment. Are you saying in a digital environment part of a pictorial representation can be used or communicated that does not exist now?

Dr BRAMICH—We are simply saying that it is difficult to define what 10 per cent of such a work might be, or whether it is covered at all. It is unclear whether there is a general exception then for that sort of material or whether we have to apply some test as well to that kind of material—and not just pictorial material.

Ms BURN—The National Library supports the retention of the reasonable portion test and believes that, as it is expressed in the paper that has been issued, it provides a very practical application for librarians and for users in certainty. The National Library is a member of the Australian Digital Alliance and the Australian Libraries Copyright Committee and endorses the views expressed by Jamie Wodetzki about the difficulty of applying a qualitative test for librarians and for users in libraries.

Ms WARD—In relation to artistic works and the reasonable portion test, we maintain that the test does not apply at all to artistic works. In fact, we reject any quantitative based test. I refer also to the Copyright Council submission because, in paragraph 15 on reasonable portion, you will see their opinion is that it does not apply to artistic works.

Ms ROXON—Can I just be clear: are you saying you do not currently think the legislation covers it or you do not think the proposed bill covers it, or both?

Ms WARD—I will give my opinion then Mark might like to comment. I believe currently the 10 per cent does not apply to artistic works and, therefore, neither would it apply in any digital environment. We also want to make a comment on subclause 49(5).

Dr WILLIAMS—That is our view—the bill at present does not have a quantitative test in relation to artistic works, and the present amendments do not either and should not. Even though methods of digital fixation such as digital cameras have not as yet usurped the unique qualities of an artistic work, the quality of digital capture will continue to improve and artistic works are being created in digital form. Some works in digital form will not be replicas; they will to all intents and purposes be the work and the access of that work in an unauthorised way will damage the economic rights of the creators of that work.

CHAIR—This might sound very basic, but we want to know specifically. As I understand it, you are quite happy with clause 20 in the bill.

Dr WILLIAMS—No, the submission is that clause 20 should be removed.

CHAIR—So you want clause 20 out?

Dr WILLIAMS—We want clause 20 out and we support the position of the Australian Copyright Council.

Ms ROXON—Dr Williams, I do not entirely understand, if you do not think it applies to artistic and pictorial works, which is presumably the interest you are representing, why you have a position at all on whether that should stay in.

Dr WILLIAMS—I think there is always an overlap question on tables, compilations and illustrations. For that reason, we do make that submission. In relation to subclause 49(5), VISCOPY submits this provision will have the—

CHAIR—We will come back to subclause 49(5). I want to keep moving quickly because of the time.

Mr BORGHINO—The Australian Society of Authors also wants to acknowledge the significant contribution made by the Australian Copyright Council, upon whom we have to rely for legal advice and who today will speak on our behalf on technical legal matters. The digital future provides unprecedented opportunities for our members to increase the reach of, and exposure to, their work. We see our relationship with our colleagues in the libraries and other sectors as essential in realising the potential inherent in the new digital technologies for our mutual benefit. However, the reality is that our members are deeply concerned. We have had unprecedented growth in membership over the last year from members across all genres—from people writing children's books to academics writing textbooks for all tiers of the education and training sectors. Principally these authors are worried about how their work will be exploited. They are also worried about seeing their work exploited by others without fair and equitable remuneration. Our key areas of concern are set out in our submission.

We want to acknowledge the considerable improvements to the bill since the exposure draft, but we still have serious concerns about the fundamental premise of the bill. We also hope to ensure that the legislation does not destroy emerging markets for our members or take away the possibility for negotiated relationships with the other sectors of the industry represented here today.

CHAIR—I take it you would also like to see clause 20 removed?

Mr BORGHINO—In terms of the reasonable portion debate, we follow the Australian Copyright Council's recommendations on that—that reasonable portion will be different in the new digital environment and the new bill should acknowledge that.

CHAIR—Thank you.

Ms ROXON—I do not think any one of the copyright owners has yet discussed with us how in practical terms another test will work once you remove the reasonable portion test as it is. I think this forum, when you are all together and can test each other's submissions a little bit, is the opportunity to tell us how it will work if you do not want it to be there. I would like to put particularly Ms Baulch on notice that I would still like that question answered.

Mr CHAPMAN—I am from the MCEETYA Copyright Task Force. This task force of MCEETYA represents all the school education bodies—Catholic, independent and all the state government education departments. I will ask Charles Alexander to summarise our position.

Mr ALEXANDER—The MCEETYA Task Force supports the submissions of the AVCC. We support the reasonable portion test. Ms Roxon could not have put it better. We do not see how any other test can work in a practical environment than some quantitative test, as opposed to a qualitative test, when you think about all the users that will be relying upon it. I do not wish to say any more at present.

Mr DONOUGHUE—I represent the Australian Publishers Association. The problem we see with the bill is that the fair use provision and the library lending provisions are too specific, too interventionist and too premature in that the economics of trading, the way the commerce will be done, in the digital environment is just emerging. If this bill becomes too determinant of precisely what is fair and precisely what should be allowed by libraries, then I think we will be in danger of getting it wrong. In our view, we should not be that specific. We should allow the marketplace to develop and to work. We should also allow agreements between the parties—between publishers and between libraries.

It is not the case that fair use will not work unless there is a deemed 10 per cent provision. That does not exist anywhere else in the world, as I understand it. There are agreements between libraries and users. There is common understanding of what is fair and what is not. There is the presumption that a certain quantity or a certain use for a prescribed purpose or something is fair. You do not have to be so determinant in the bill of what is fair, it seems to us. It is especially wrong to do it in this emerging digital environment.

CHAIR—Mr Donoughue, are you suggesting that the bill have a reference, as it does in proposed section 10(2A), to 'reasonable portion' but not include the 10 per cent as an indication of what the reasonable portion is?

Mr DONOUGHUE—Yes. I think the act at the moment includes what the Berne Convention considers should be allowable as fair, and we support that. It is not the case that publishers, as I think Mr McLean stated, would want every transaction remunerable. That is not our position. Most publishers, for example journal publishers, deal with subscription models. Once a licence with a library has been signed, all sorts of users are uncounted. They are simply irrelevant. There is a global presumption that all these things that are coming under this licence agreement are allowable—inside and outside the library, access from home, whatever.

Ms ROXON—Why would that change if the bill were enacted as it is at present?

Mr DONOUGHUE—I am just responding to Mr McLean's assertion that we are saying that every transaction has to be counted and be remunerable. Frequently it will not work like that; it will work under a licence where individual transactions will not be counted. There will be types of uses that will be allowable and will be paid for by the licence fee.

Mr KERR—I suppose by inference you might also suggest that potentially institutions may wish to seek to avoid licensing arrangements if they felt they were sufficiently covered by the legislative prescription in terms of text based works. I am not certain, because there is the capacity for de-encoding and access on fair dealing. Are you suggesting on a larger issue that, were we to adhere to this in a digital environment, the capacity to develop commercial licensing arrangements in the normal course would be undermined?

Mr DONOUGHUE—Yes, they would be subverted because that would be the platform and you would begin from there, rather than encompassing that in some way in the licence agreement.

CHAIR—Wouldn't that be likely to lead to increased litigation? It could be argued that the beauty of having a test like this is that it provides a ballpark figure for certainty and it reduces the occasion for disputation.

Mr DONOUGHUE—The problem is that it reduces the potential for commerce. In the analog environment we are not at all concerned, in the real practical world, with the 10 per cent or one chapter of fair use of a student because the primary market exists. Publishers sell to book stores, to consumers and to libraries. But in the digital market that primary market will not exist. It is all these subsidiary uses that become the primary market. That is the radical change which the digital environment introduces.

Ms ROXON—Doesn't the primary market become the sale of your material in electronic form to start with? Why wouldn't your members negotiate a proper payment at that time, taking into account the uses that then may be made of it in digital form?

Mr DONOUGHUE—Yes, that is true. On a subscription model, that is true. That gets back to my earlier point. But you cannot subvert the possibility of a licence by allowing all sorts of free uses as defined under the act as well.

Ms ROXON—That is a choice of your members, whether they are going to put material freely on the net or the web or whatever, is it not? Why will you not control how you sell your material in electronic form?

Mr DONOUGHUE—The act will allow all sorts of free uses.

Ms ROXON—Free uses once the material is already provided.

Mr DONOUGHUE—I suppose we have a choice not to publish. Is that what you are saying?

Ms ROXON—You might have a choice as to what cost you will actually charge for that. I am quite genuinely trying to understand why it is that publishers will not negotiate the sale of their materials in a different way, given that there is a new environment. I do not understand why you persist with the idea that the whole commercial environment will be totally destroyed.

Mr DONOUGHUE—No, we are not saying that.

Ms ROXON—If you can show us what will do that, that would be good.

Mr DONOUGHUE—I do not want to overstate it. It will not be totally destroyed. I think there is a lot of rhetoric in this debate. All we are saying is that the prescribed 10 per cent is subversive of much use that we would want to be remunerable and that we would want to be licensed. Do we understand each other?

Ms ROXON—I understand.

Mr CADMAN—But that means that you do not want anything defined.

Mr DONOUGHUE—Fair use and the principles of fair use are in the act already and should be defined. But, where it interferes with the commercial market, the normal exploitation of the work, it becomes not fair. We are saying that there will be many, many instances in the digital environment where 10 per cent would be not fair because those 10 per cent portions and periodical articles will be available for sale separately. It is not just the 10 per cent of the words; it is the periodical article which will also be deemed to be fair. That will run counter to commerce, because that will be a separately saleable commodity in the digital world. How can that be fair? The fair use provisions are supposed to be such that the activity does not destroy or disturb the normal exploitation of the work by the copyright owner. If you allow an article to be free in all circumstances—and it is also carried over to interlibrary loans in this bill—we would see that as subversive of the normal exploitation of the work.

CHAIR—I think we understand the argument that you are putting.

Mr COCHRANE—I want to make four brief points. I might join in that discussion, as that was one of the points I was going to make. It is very important, since this is such a complex field, to be clear about the distinction between first sale rights and subsequent rights in terms of the provision by libraries of information for the reasonable purposes that libraries exist for—research and study on the part of students and so on. During the second session of this morning's program, where we are talking about some specific university concerns, I can amplify remarks about licensing, the way that seems to be panning out and why it is a concern of libraries that the notion of fair dealing, which is in this bill as introduced and in the exposure draft, is so important to preserve.

Once you have decided that, you are then obliged to consider the most efficacious way of implementing that. It is true that you could have a very long discussion about the issues relating to reasonable portion and the tests that should apply to that, but the libraries support the attempt in this bill to at least get that into the form of words that it is now. We note and understand that the actual implementation of that may be subject to review, which has been foreshadowed.

The second set of remarks I want to make deals with the six specific points which are in the library's copyright submission about possible unintended effects or ambiguities in the bill as drafted that relate to the library exceptions. They are listed in the executive summary of our submission. They concern the notion of removing any presumption that all temporary electronic copies are reproductions in material form for copyright purposes. I will not go over them if you do not want me to.

CHAIR—I think we will come back to it. If we can just stick to one topic at a time, it might be easier.

Mr COCHRANE—I thought this was exceptions and the definition of 'library' and 'reasonable test'.

Mr KERR—Can I also explore the same questions that Nicola Roxon raised in respect of those on the producers' side. She raised, I think very properly, the question of why it is that in terms of commercial arrangements or subscription arrangements they would feel that those provisions in the act would handicap future commercial development. The same question could also legitimately be directed to you. Why is it that you feel the need to retain these provisions when almost all major acquisitions of new electronic published materials will be presumably made available to you on conditions of commercial agreements which determine the basis of which distribution within an institution or external to that institution could be made?

Mr COCHRANE—I might go to the example that I was thinking of. The library at my university is currently negotiating for the purchase at a cost of $580,000 of a product called ScienceDirect, which is marketed by Elsevier/Reed, the biggest academic publisher in the world. It is true that, as part of that, we will go into some licence conditions in which we will be seeking to emulate conditions for our students and staff which exist in our universities in terms of the way that they use library collections up to this point.

We would seek to acknowledge that, by paying $580,000 for those 260-odd titles, once that first sale purchase has been made, the conditions we then have are ones where students and staff members can consult the contents of that collection on the same basis as print collections. That means it would be possible to copy up to a certain amount without infringing the law, and for the purposes of research and study which are contemplated in the Copyright Act back many years. A person would break the law if they copied more than a certain portion. We need, for practical purposes, to have those sorts of tests apply.

It may be that, in the concluding of a contract with a particular supplier, the institution and the supplier may vary those conditions. But, as a basic pattern for the way that we see academic life continuing in Australian universities, that would be the basis on which we would seek to have agreements operate. In the absence of agreements where our frame of reference is the copyright law, we would see the same issues arising. Bear in mind that any copy of something that is being discussed as provided on interlibrary loan or in certain circumstances for users is something that has been paid for at some point at first sale. One of the things that libraries quite strenuously want to point out is that the notion that their basic function is somehow changing, particularly the proposition that they are somehow becoming publishers because of the digital environment, is absurd.

Mr KERR—Can I test this a little bit, because I am interested in the interface between the law of contract and the Copyright Act. If we assume that you enter into an agreement with a science based publisher, and the terms of that agreement provide an access arrangement which is more generous than that provided in the act, presumably you would say that, provided you complied with the terms of that agreement, that was a lawful and proper basis for the distribution of the materials, if it said anyone could copy any of this material. What if you entered into an agreement that was less generous? Would you assert that this act provided you any greater access in that environment where you have actually entered into a contractual agreement with a publisher?

Mr COCHRANE—No, I was not arguing that the act is used as the basis of some instrument in terms of the actual contract. I was saying that, as a set of guidelines on the

way people actually research and study, the provisions that we have had in the Copyright Act to date are provisions which we would like to see preserved in the new legislation. We think that is the overall intent of the bill. We say in our submission that it is possible that a contract might vary those terms in either direction. We understand that.

Mr KERR—If it does, you would still presumably give the third party user, who is not privy to the contract, guidance in whatever direction in relation to those terms. Otherwise you would presumably be in breach of your contractual arrangements. To come back to the bottom line, as a matter of practical application from university libraries and libraries more generally, isn't it the case that these sections relating to prescribed amounts are going to be very residual? Any significant publisher will make their materials available to libraries, as Microsoft does for software. There may be breaches once you get it; I am not arguing about those sorts of things. But won't all providers offer to you a term on which access to that material for subsequent users is facilitated?

In real terms, won't these 10 per cent rules, if they persist, be very much residual? If they are very much residual, why retain them? Why not simply say that, if you have no contractual arrangements, the situation will be that a whole series of precedents will have built up and arrangements will have evolved? I suspect that we are, in a curious way, arguing over a very minor practical matter in the great sweep of how this whole area is going to develop. Are you supplied with any significant amount of material now from any electronic publisher that does not constrain you by a contractual term?

Mr COCHRANE—No. The kind of contract that we envisage is one where, in the case of an institution—and this is more easily defined in institutionally based libraries—you would define the community of valid users in the same way as was done with print collections: in the case of a university, enrolled students, employed staff and so on. I do not think I would use the word 'residual'. I think the fact is that library collections will be hybrid for quite some time. While there might be the kind of development that I described with ScienceDirect, we also will have a dependence, particularly in some disciplines, on continuing provision of print in undergraduate texts and so on.

Mr KERR—Let us separate out the existing print environment. There may be some argument from purists that we should knock over the 10 per cent in the print environment. But let us just look at the argument in so far as it is in the digital area. When you buy a book, there is not normally a contractual arrangement which you enter into with a publisher as to the manner in which that book will be distributed. It has not been done historically. Lawfully it could be done. So Butterworths or some book publisher could say, 'This material is released to you on these terms, this basis.' But that has not been the historical practice.

In so far as digital publication is concerned, to the best of my knowledge, every digital publisher releases all its materials—except if it is putting it free on the net, and that is not subject to this—under the terms of an agreement which will define who can access that material within the institution, what the terms are, that there is a remuneration package of $580,000, presumably the period over which that will be allowed and then a period where you would review the contract and renegotiate. So isn't it the case that we have a completely different market here?

Mr COCHRANE—No. The case in which an agreement is made with Elsevier for a ScienceDirect subscription is one part of the electronic material that students may be able to access. There are thousands of documents that are available on the web that are copyright. A library may want to make a research database available and, if those things are available in a copyright, they need to be governed by the same kind of guidelines for what is responsible use as we are familiar with in our administration. So it does not divide into print and licensed. That is what I meant by the use of the word 'hybrid'. We will have electronic information that is available, and that is copyright and subject to whatever the basic law of copyright is in terms of consulting that material in that university.

CHAIR—Isn't the nub of your argument one of convenience; that is, it is more convenient to have a 10 per cent rule than to have the situation which Mr Kerr was alluding to where it is governed by a licence? That is what I thought I heard you say, in effect, in your opening comments.

Mr COCHRANE—Yes. One thing derives from another.

CHAIR—So, if I can pick up Mr Kerr's line of questioning, it is not an issue of whether these sorts of provisions in the 10 per cent rule, as proposed, are any better necessarily than a contractual provision. You are simply saying, as I understand it—and I do not want to put words in your mouth—that, from the point of view of convenience and of everybody understanding in effect what the rules are, a 10 per cent rule is better.

Mr COCHRANE—Yes.

CHAIR—That is the nub of what you are saying.

Mr COCHRANE—Yes, that on the ground, day by day, where this activity occurs, some guidelines are needed rather than some patchwork of guessing, if you have got a principle which is there for a reasonable portion.

Mr CADMAN—It would seem to me that somebody in the chain of your purchase is responsible for looking after copyright. Probably the provider of your Internet service might be responsible because they are providing material to you or providing access for you to material. Is that right? Who is responsible? Can somebody answer that question? If they are selling you a package or access, surely copyright must be part of the arrangement.

Mr COCHRANE—Normally when one purchases, having purchased under our first sale pattern of acquiring material for libraries, responsibility for seeing that that material is used in an appropriate way on the premises of the library is with the library. Those provisions are in the regulations of the existing act.

Mr CADMAN—Yes. You are not dealing with a book seller; you are dealing with somebody who is providing you with access to a whole world of literature. Is that right?

Mr COCHRANE—I am not sure what you are getting at.

Mr CADMAN—I just wonder whether or not you have a licensing agreement or whether you should have a licensing agreement to cover copyright for material that you may access on the net.

Mr COCHRANE—The agreement will be between the person or agency that owns the copyright or acts for the owners of copyright and the place where the copyright materials are used. Generally speaking, that is free of the lines of communication.

Mr CADMAN—Basically you are saying that this problem of the World Wide Web is no problem at all because somebody is there and a mechanism has been set up anyway.

Mr COCHRANE—No, I am not saying that. I do not know what you mean by 'the problem of the World Wide Web', though.

Mr CADMAN—You adverted to the fact of people gaining through that mechanism access to copyright material, asking who pays the copyright and how we deal with that if we do not have a 10 per cent rule. I guess my response to that is that, in setting up access to that material, somebody has granted you access to that material. Do they have any responsibility to see that copyright issues are covered?

Mr COCHRANE—These conditions already exist. I can go to a URL on the web. I can get a document which says, 'This document is copyright.' The author, by having made that document available on the web, obviously intends people to use it, consult it and so on but would wish people to use it in a way which is consistent with the principles of copyright. There are some transnational issues there but, putting them to one side—

Mr KERR—Precisely. You mention the transnational issues. Much of this material is transnational. Every other country has a fair dealing provision, or something akin to it. They do not have the 10 per cent rule. If somebody puts up material on the web for public consultation, you would infer that they intend, by way of fair dealing, for people to be able to refer to it, use reasonable extracts of it, use it for research purposes and the like. You do not need a 10 per cent rule.

Mr COCHRANE—To respond to that: the case for supporting the 10 per cent rule is simply administrative simplicity. I do not have with me facts and figures about the extent of litigation on this issue in other jurisdictions, in Canada, the United States or whatever.

Mr KERR—I reckon you would be a pretty hopeful litigant if you put your material up on the web and then started to bring some litigation because somebody started to use it by way of reference. If they published it themselves in hard copy or published a book and sold it themselves commercially, then obviously it is not fair dealing.

Mr COCHRANE—I know of cases where an author has become aware of a use of a web based document where it was copied in full and has objected.

Mr KERR—Of course, but you do not need a 10 per cent rule to know that somebody who steals your work and publishes it and makes commercial advantage of it is not dealing with it fairly.

Mr COCHRANE—I think perhaps my response to this is that there is nothing magic about 10 per cent. What there is magic about is a quantitative provision that makes it easy in day-by-day administration to give a vast number, a great variety of users, with very diverse knowledge and understanding about the law, some guidance about what a reasonable kind of behaviour is and some guidance, by implication, of what an unreasonable kind of behaviour is. To the extent that 10 or 12 or eight per cent allows that possibility, then it has been easier in Australia to do that than in some other jurisdictions.

Ms ROXON—I know that you can only speak from the point of view of your own organisation, but does the 10 per cent rule get used, if you like, in your negotiations as a tool that is to your advantage when you are negotiating what you will pay for and what you are not prepared to pay for?

Mr COCHRANE—I cannot comment on a specific negotiation, but obviously a doctrine of experience that has been used in Australia as a result of administering the effect of these laws will be useful in licence negotiations. Remember that quite often those licence negotiations in future may well be with a quite diverse body of suppliers.

Ms MORGAN—I would like to make a few brief comments about reasonable portion and then perhaps respond to Ross McLean's point about communication by students. I think that CAL's concerns with the definition of reasonable portion can be summed up by saying that it is a blunt instrument. It treats all works and all uses as the same.

We have two specific concerns with the use of reasonable portion in the act through the library provisions and the educational provisions. Because of the definition, the copyright owner no longer has control over whether or not their work is converted from print to electronic format because of the way the reasonable portion works in the act. In addition to that, because of the reasonable portion definition including an electronic quantity, that conversion into electronic form is not something that you can consider when looking to see whether a dealing is fair or not. It is automatically assumed to be fair because of the reasonable portion test.

CHAIR—You are saying that, when you convert a work from a print form into an electronic form, that conversion ipso facto is fair.

Ms MORGAN—Yes, by virtue of the reasonable portion and 40(3); in my understanding that is right.

Ms ROXON—From our session in Brisbane, I think that is not a view that everyone seems to share.

Ms MORGAN—Yes. Maybe the Copyright Council might want to speak further about that.

Ms ROXON—I can understand your concern about people purchasing the book and then transforming it into electronic form and then using it in some other way. But I think we had representatives from the library organisations fairly adamantly telling us that that was not

what the libraries would be doing. But you probably have a broader concern about who else might be doing it.

Ms MORGAN—And whether or not the libraries choose to do it is a different matter than whether the legislation permits that to happen, I think. In relation to the need for certainty and the quantitative versus the qualitative test, CAL's view is that the reasonable portion definition should be deleted. If not deleted, it should not be extended to electronic publications. But we think that the Copyright Council has made a very useful suggestion that, rather than deeming a reasonable portion to be fair in all circumstances, there be a presumption that it be fair. In our view, that would provide the certainty to users that the libraries were talking about. But also it would provide for the opportunity, where there was a particular circumstance that was not fair, that that presumption would not prejudice the copyright owners in those circumstances.

Ms ROXON—What type of example is there, just so that we have a picture in our minds? I am sure that there are some, but it would be helpful if you would give us an idea.

Ms MORGAN—I think our concerns are particularly to do with commercial users and the fair dealing provisions. So, if you are copying for research or study, which is a very broad term, you can make a copy of a whole article automatically, without any consideration about whether you are employed by BHP and doing commercial research to further BHP's commercial objectives—whether that copying that you are using as an input into that process is fair or not. It is automatically fair.

Mr KERR—Would 10 per cent of an electronic directory come within that?

Ms MORGAN—That would be a similar kind of example, I think.

Mr KERR—That is a literary work, under the expanded definition. So there is a whole range of lists.

Ms ROXON—They are specifically excluded, I think.

Mr KERR—Are they excluded?

CHAIR—Yes, database is excluded.

Mr CADMAN—What about a video clip of some dramatic or musical presentation? To illustrate a point, multimedia allows us the capacity to make illustrations more than by graphs, charts and pictorial stuff.

Ms MORGAN—The reasonable portion test only applies to print, to words. I would assume that they automatically would not be fair uses; that you would need to either enter into a licence or deal with it in the circumstances.

CHAIR—Do you have a draft of what you would propose?

Ms MORGAN—A very simple one: delete the entire section.

CHAIR—But you spoke about a presumption of fairness.

Ms MORGAN—That is a Copyright Council suggestion that we would endorse, I think.

CHAIR—We will come back to them.

Ms MORGAN—On the issue of the quantitative provision, we do have a view that the legislation, in a sense, does not need to stand alone; that you do not need to have a quantitative presumption in the legislation; that you can rely on qualitative tests in the legislation. Then, as in other countries in the world, you can have guidelines or other pieces of guidance for libraries that would give them the certainty that they need but would be more flexible because they would not be enshrined in legislation, they would be developed by specific negotiation and they would be specific to types of publications, et cetera. We would prefer that flexibility.

CHAIR—Let us be practical. The advantage, as Mr Cochrane is saying, of the 10 per cent test is that, in the non-digital world, you can stick a sign above the photocopier saying that the Copyright Act allows you to copy, in effect, up to 10 per cent. What will you stick beside the computer screen, where somebody is using material in a digital form, which gives some clear understanding of what they are able to fairly do in terms of the fair use provisions?

Ms MORGAN—I might refer to the situation as it is developing in the United Kingdom. In the United Kingdom, there is no quantitative provision in the Copyright Act. There are however some guidelines that were developed some years ago by the publishers association which set out what reasonable publishers in the UK would consider to be a fair use. My understanding is that it is five per cent of a book, with the splitting of the percentages. That applies only to photocopying.

In recent years, the library associations and I think the universities and the publishers in the UK have developed a guideline of nine particular fact situations that they would consider to be fair dealings with copyright material in an electronic environment. Therefore, it does not refer to how much of a particular work you could copy or communicate, but it says, 'If you are a researcher and doing this, we would consider that to be fair.'

Mr KERR—From the point of view of access, this will be a more complex environment anyway simply because most will be subscription. So, if you are looking at it from the point of view of a university library or a mainstream library, they will have to ask two questions. One will be: what are the terms of the contract that govern access in relation to this particular material? That may mean that it is wholly available without any restriction to a particular audience. It may have then subdivisions of who can have additional access.

So you will first go to the terms of the subscription. Then you are suggesting there be a residual provision that says that there is a presumption. If this is not covered by any contractual term and is not open access, if it is not being made available for public distribution, there is a presumption. If it is a text based material, it will be 10 per cent or whatever, and you will put a note there. But, if this were exceptional material where that would not be fair, you would put 'Take heed and consult with your management', or

something like that. I do not know. Obviously, inevitably this will be a much more complex environment.

CHAIR—Before you answer that, I would like a practical solution. Instead of walking into the library today and getting a periodical or a book off the shelf and taking it to the photocopier, where I know that I can copy 10 per cent, I go to the bank of CD-ROMs that have on them Science Today, or whatever it is called, and the other things in the library—and this is becoming the library of today and certainly will be the library of the future. I take that CD-ROM and put it in the machine, and I do not need a printer because I have my own CD-ROM which I can copy onto or a floppy disk or send it down the wire to my home computer or however the technology allows that to occur. What happens in the UK? Surely there is not a sort of encyclopedia of guidelines up on the wall. As a user I cannot know whether the agreement that the library has entered into with publisher A is the same as that with publisher B or with publisher A's work No. 1 and publisher A's work No. 2, because there might be different licence agreements pertaining to those with different parameters as to what they and the library regard as fair dealing.

Just as an ordinary user of the library, surely there have to be some clear, easily understood guidelines as to what generally will happen. I cannot see how you will have a practical situation where users will have to consult some sort of directory virtually to find out what are the licence agreements and what is fair in relation to this work versus that other work. I think that would be the worst of all words. We would just have an administrative, bureaucratic nightmare for ordinary users of the libraries, let alone the libraries themselves. If you say that you do not want the 10 per cent rule because it does not apply in the digital world—and I can see the argument for that—I still do not see how a practical, easy to use, easily understood system will work so that we do not have the law becoming even more complex and unfriendly.

Ms ROXON—Or honoured more in the breach.

CHAIR—Yes.

Ms MORGAN—I do appreciate your concerns. I do think, though, that it is not going to be as simple as it is now. I think there will need to be the situation that was outlined earlier: the library will have to explain to you the terms of the licence agreement that they have in relation to a particular product, and you will need to be aware of that. I suppose, in relation to the quantitative test, our main objection is that we do not feel it should be deemed in all circumstances to be a fair dealing because circumstances vary. We appreciate the need for certainty, but we do not believe that that certainty should be provided by putting it into legislation. We feel that the certainty could be achieved through other means such as joint industry developed guidelines similar to what has happened in the United Kingdom.

CHAIR—Can we obtain a copy of these nine fact situations that are used in the United Kingdom, please?

Ms MORGAN—I will be happy to provide those.

Mr MURPHY—Ms Morgan, you have made reference to qualitative reasonable portion tests and relying on them. How would you envisage that working?

Ms MORGAN—There are already in the act a number of things that tell you whether or not a dealing is fair, such as the purpose and character of the dealing. The concern of users that they have no certainty at all in that situation is ill-founded. It is quite clear that the purpose and character of a dealing, if it were an individual student copying for a certain subject, would fall within that and possibly not have to be confined to the 10 per cent. The issue is that not all dealings are the same. So the taking of 10 per cent of a work when all the works are different, particularly in an electronic environment, is too blunt an instrument.

Mr MURPHY—So you think it is administratively workable?

Ms MORGAN—The alternative of relying on quantitative provisions within the act with other guidelines I believe is administratively workable.

Ms ROXON—When we come back to this issue, I would like the user groups and perhaps the library representatives to give their view on how they would feel about a presumption rather than a deeming provision in relation to the 10 per cent. I just thought I should raise that so that people have some time to think about what their position would be on it.

Mr KERR—I just wonder whether in a way we are going up a blind alley here. The 10 per cent is not a strict cut-off, as I understand it. You are not restricted to 10 per cent. It can be a fair dealing and there can be the use of more than 10 per cent.

Ms MORGAN—That is correct.

Mr KERR—But you have to rely then on the general fair dealing provisions anyway. I suspect that more than a few university students, as they pose themselves over the photocopier in the same position as the chair, might have sometimes given themselves some licence with respect to what is fair dealing. So the 10 per cent rule presently, in a sense, says that you do not have to ask yourself those questions if it is 10 per cent, but you do have to if you exceed that. You have to ask yourself those questions in the non-print environment. You have to ask yourself those questions if you are going to draw down or copy a photograph or something of that kind.

There is all this fear of litigation. I do not really know of too many instances where people have been vindictively pursued for copying 11 per cent of a text on a photocopier. Let us put the debate to a more practical point of view. It seems to me that this is an argument being conducted on the extremes. If you did have a deeming provision, it would not be much different than that presently applying. People will just have to apply a little bit of judgment. It is inherent already in the act as it is. If you wish to move slightly above the 10 per cent, you have to apply that little bit of judgment.

Ms MORGAN—Yes, that is right. That is why, in our mind, losing the deeming provision is not the disaster that it might have been painted as being. For example, even if the section were deleted completely, in litigation in the future over the copying of 11 per

cent from a book I would imagine that judges, in their consideration of the issues, would look at the fact that until this date there had been this provision and those sorts of things.

Ms ROXON—They would probably take into account that we specifically provided for the removal of it too; that is what happens.

Ms MORGAN—Probably. But I do not think it will be open slather on suing people for copying 10 per cent of books if that provision were to be removed.

CHAIR—But there is also a practical reality here. Who is ever pursued for copying sections of a book, unless they go out and use it commercially in some way? If I go into a library as a student and copy 50 per cent of a book, firstly, the library probably will not know—

Mr KERR—They will now, electronically. They will be able to audit it now electronically, and that is a difference.

Ms ROXON—They will not necessarily know it was Kevin.

Mr KERR—I am sure that he would put his electronic code in there. Perhaps he would put Roxon's code in, with 33 per cent of a book.

Mr MURPHY—But wouldn't they employ the salami method?

CHAIR—A slice at a time.

Mr MURPHY—Exactly. After a period, you could have the whole document.

Mr KERR—I suspect that this is one of the reasons why, in practice, you will get more and more subscription arrangements which will actually contract. Within a library, the library is entitled to provide very generous access because people will expect it in the electronic environment—and they will charge a price for that.

Ms ROXON—Could somebody confirm this for me? If someone copies less than 10 per cent of a work and then uses it commercially, presumably in the current environment they can be prosecuted for doing that. I just want to confirm that that is right.

Ms MORGAN—By 'uses it commercially', I assume you mean sells it to somebody else or something like that.

Ms ROXON—Yes.

Ms MORGAN—From of the copyright owner's perspective, I think, if you are an employee of a commercial for-profit organisation and you are allowed to copy and use 10 per cent of a book or an article from a journal for free by virtue of the provisions in the act, you are using it for a commercial purpose.

Mr McLEAN—That is a radical rewriting of the existing balance, which has allowed that from 1968. That is not about the migration of the balance into the digital world. That has always been the case.

Mr COCHRANE—I think that the quantitative test to date has probably operated to protect the interests of copyright owners because, in the hustle and bustle of activity around the country in our schools and universities where copying occurs, it has given a basis for people to say no rather than get into a debate about intent or any other kind of test. My view is actually that the reasonable portion test has probably operated in the interests of copyright owners. It is certainly not a thing that libraries, as institutions, ever had any kind of social or ideological position on. It is really about administrative simplicity. This is the law; this is how we want to give effect to it; how can we do that easily?

CHAIR—I think we understand that. I now propose to go back to Ms Baulch for the question that was put on notice to her. If after that anyone has a pressing point to make on this issue, I will invite you to make it very briefly. But we should move on to other issues.

Ms ROXON—There is also the issue of the presumption.

CHAIR—Yes.

Ms BAULCH—Our position would be the same as Copyright Agency Ltd's on this issue: that the approach is through guidelines developed in consultation between the owners and the users; that there are precedents for that; and that those sorts of guidelines have been developed in other jurisdictions, which demonstrates that it can be done.

Ms ROXON—Why will it be easier to form guidelines than to get you all to agree on this?

Ms BAULCH—I do not know that we would have enough time. On the access to electronic material, as I understand it, libraries are already acquiring material subject to contractual provisions that they have to notify to users of the library. So already there is the situation where libraries have an obligation to notify their users about how they may use the electronic material. So that is not a new thing; obviously that will increase. But, for access to electronic materials, we are probably looking at a notification, maybe on a case-by-case basis, of what the library user can do with that material where it is subject to contractual obligations on the part of the library.

CHAIR—What is your response to Mr Cochrane's point of view, that in fact the 10 per cent rule does operate to the advantage or the favour of the copyright owners?

Ms BAULCH—It probably goes both ways, I would think. From our experience, there is some misunderstanding of the way that the reasonable portion test works where users think that allows them to copy 10 per cent of a book which may include a whole lot of separate works. That is not the way the provision is intended to operate. So I think that argument can cut both ways.

Mr WODETZKI—I would like to address a couple of points that have been raised. I note that Duncan Kerr keeps raising this issue of licences and saying that it is all irrelevant because the licence will govern how you use electronic material. Probably most of the time the licence will govern how much you can take. We are not in a position to oppose that. It does present a problem, but you set a policy balance and then the contract overrides it. We accept that that is probably the position we will end up in. In many respects, the reasonable portion is a storm in a teacup. It will not do enormous damage to the publishers because, as they say, this is all governed by subscription.

However, that does not cover the field. There will be situations where there is not a licence or not a clear licence. I can think of a couple of examples. Tom cited some things up on web sites with no clear terms of use. Another example would be that you might get some proceedings from a conference just slipped onto a disk, a CD, and thrown in with the proceedings. No licence agreement, no nothing; it is just, 'Here's a CD that goes with these conference proceedings.' You do not know how much you can copy, unless you have a 10 per cent rule. So it is a storm in a teacup but it solves certain practical problems. It will not do any great harm. I would again fully endorse what Tom has said: it probably protects copyright owners. Around the country, librarians stick to the 10 per cent rule like glue. If someone ever asks them what they can copy, they answer, 'You can copy up to 10 per cent.' As far as I am aware, it has not caused the publishing market to collapse in the print world, so I really cannot see how it would cause it to collapse in the electronic world.

On the presumption: I guess I would say that the presumption is better than nothing, but it does then leave the question open, 'Well, we can't really be sure that what we are doing is right and we are still at risk of being accused of infringement.' I still have not heard from a copyright owner an example of where the presumption falls down.

Mr KERR—Take your example with the CD of the conference proceedings. Is it a literary work of which you can take 10 per cent, or is it a series of articles of which you can take one?

Mr WODETZKI—There is probably no easy answer to that. But at least with the 10 per cent rule, you could be sure that you could take 10 per cent of one of the proceedings, one of the articles.

Mr KERR—You could take a whole article, if it is an article.

Mr WODETZKI—You could probably take a whole article, except that it is probably not a periodical publication and, therefore, those provisions do not—

Mr KERR—There are 30 to 100 papers in proceedings of the Medical Association on embryology, and you have a disk. Is it a single work; is it a series of articles?

Mr WODETZKI—It is a series of separate works, most likely.

Mr KERR—Don't you have to apply some judgment? It is published as a proceedings and becomes a book or it is published on disk. Don't you have to apply some sort of judgment here?

Mr WODETZKI—Of course you do. The point of having a deeming provision is to give you some quantitative guideline rather than having none; that is all. I do not see the harm in it.

Mr McLEAN—On the deeming: it sounds attractive, but I think the issue really is certainty. We have not heard any example of situations which would not be fair, when you could take 10 per cent and it would not be okay. I hear what Peter Donoughue says in terms of the owner's concerns about digital markets. But what does that mean for the ability of a university to copy 10 per cent of an electronic work? When will that be fair and when will it not? Without knowing the detail of what the exceptions might be, it is very difficult to see what level of certainty a deeming provision would give. What are the exceptions? I think you would have to understand what those exceptions were to know whether you had a lot of certainty or very, very little. As I am hearing it from the other side in the digital world, you would have very, very little certainty.

Ms ROXON—Presumably also there would be some confusion—correct me if I am wrong—if you had the 10 per cent rule applying in print form but you did not have the 10 per cent rule applying in—

Mr McLEAN—Certainly it would mean that, if you kept things in two different versions, you would have a situation where, for certainty, you would revert to hard copy. But that probably will not be the case for too much longer in that many libraries.

To pick up a couple of small points on the contractual issue, the base position on fair dealing is very important because contractual negotiations are against that background. If there were no fair dealing provisions, you could expect in your negotiations with licensors that you would be charged for everything and there would be negotiation about how much you would pay. There would be no carve-out of things that it was accepted you were entitled to do for free from the start. It is a hybrid world and it will remain a hybrid world. Jamie's example is one. There will be hard copy holdings in libraries for a long time. Libraries will want to scan one-off articles out of books, journals that they already hold in hard copy and make them—

Mr KERR—The point has been raised that people will want to scan, and then electronically we were told that that was not facilitated by this.

Mr McLEAN—No, it is not facilitated by this. Universities would pay under the statutory licence, they would scan in and students would browse and read. That is allowed under the statutory licence. It is just a reproduction in the communication. That sort of thing will continue to happen, and in that situation there need to be fair dealing provisions.

Mr KERR—I do not understand this. There was a debate in Brisbane about this, but I understood that the libraries expressly indicated that they did not intend to scan works from hard copy to electronic and then provide them.

Mr McLEAN—There are two separate things here: there are public library exemptions under which libraries can do various things, and there are statutory licences which allow

universities to do things for educational purposes. Under the statutory licence, reproducing for educational purposes in hard copy or electronic form will continue.

Mr KERR—But that is a remunerated use.

Mr McLEAN—Yes, exactly. But when a student comes to browse or to make a copy as a student, how much can they copy? That is a fair-dealing question.

Mr KERR—But that does mean—at least in the university environment; the very point that I think Mr Cadman raised—that you are transferring from a print based environment to a digital environment, and you are then further redistributing that work. In other words, you are making that transition. I understand that there is a statutory licence. But the further utilisation of the fair dealings through the reproduction of the digital material is an additional point; it is a further copying which currently is not remunerated.

Mr McLEAN—It is remunerated now and it will continue to be remunerated. It is remunerated under the statutory licence today; the new statutory licence will continue to make copying a remunerable event. Then there is the question: when students access it, what is the fair dealing regime? A university could copy an article from existing hard copy and put the copy on a shelf-enclosed reserve. A student could then take it down, read it and make a photocopy, or they could scan it into a database and a student could access it on a screen, read it and make a copy.

Mr CADMAN—But then email it to somebody else.

Mr McLEAN—Not under any fair dealing regime. There is no statutory right or fair dealing right to do that. That is not something that they are allowed to do.

Ms BURN—I am speaking as someone who has faced the practical situations in libraries rather than from a specialist or technical knowledge of the law. I can say that I have negotiated licensing agreements with publishers. I am not talking here about high end commercial publishers; I am talking about educational government publishers—the Australian Bureau of Statistics is one example—with educational CD-ROMs, where the standard licence that has been presented to the library has allowed no copying by a user. The existence of the fair dealing provisions has given me, in the state library situation as it was, the ability to strengthen my negotiating power with the publisher and to argue that the contract could only be acceptable if it allowed the fair dealing copying that was permitted under the reasonable portion provisions of the Copyright Act.

CHAIR—But the 10 per cent does not. You could use the 10 per cent as a bargaining position, but with the Copyright Act, even if some changes were made, there would be still some fair dealing provisions which you would still be able to rely on.

Ms BURN—That is right. Coming back to Duncan Kerr's interest in the intersection of contract law and statute law, the existence of statute law is of considerable assistance to libraries and users in negotiating better contract provisions.

Ms BAULCH—I would be grateful for some clarification on the point raised by Duncan Kerr about the intention of libraries with the digitising of non-digital material. The provisions in the bill certainly allow that to happen, but one of the areas of major concern to copyright owners is that they lose the opportunity to control the first digitisation of their material. They lose the opportunity to impose technological measures, to attach rights management information, et cetera. It also relates to the question that Ms Roxon asked of the Publishers Association, 'Can't you control this by contract?' The situation is that the bill allows the first digitisation to occur without the control of the copyright owner. If the libraries are intending to do it, then there is no reason for the bill to allow it.

Mr COCHRANE—I will have more to say about that in the second session, but I could make a brief comment referring to that now?

CHAIR—There is a reference in this first session.

Ms ROXON—It is the third issue. We are still on issue one at the moment. We will come back to it when we deal with section 49.

CHAIR—Can we put that on hold for the moment and come back to it? If we have not dealt with it later, please raise it again. I propose to move on to the second issue. This relates to the definition of 'library' in the legislation. For time reasons, I would ask this: if you have no problem with the definition, could you simply say that you have no problem with it. We then will take as read all the arguments you would wish to advance for preserving what is there at the present time. If you have a problem with it, could you succinctly say what the problem is and how you would change the bill in order to meet the problem.

Ms BAULCH—We support the government's policy in relation to the definition of library. We have put forward in our submission a suggestion as to how the drafting would better implement that policy. We think the drafting does not properly implement that policy, and we have made a suggestion about that. We also have proposed that libraries in profit-making educational institutions should be excluded.

Mr MULLARVEY—We support the proposition put forward by the libraries. But it is important to have access to specialist collections, and this might exclude some of those specialist collections which, as a country, we need to have access to.

Mr WODETZKI—We strongly oppose the proposal. It is nothing to do with the digital agenda; it never has been, and probably never will be. It was never consulted on. It is much more appropriately dealt with in the context of a response to the Copyright Law Review Committee's review and simplification reference which looked at all these issues in gory detail and recommended exactly the opposite, and there has been no consideration on that. There is a pre-emptive strike on a much more thorough process, which is, as far as I am aware, without any supporting policy rationale. It completely divorces the library issue or, if you like, the corporate library issue from the question of whether companies can engage in fair dealing. This, again, is an open issue which this bill does not address. It seeks to have a halfway house pre-emptive strike on that issue, which is completely inappropriate. It excludes from all the public sector libraries access to any specialist collections, and it

excludes from all the corporate libraries access to any public collections. It drives a wedge through the heart of the library system, which is completely unnecessary. It is basically a really bad idea.

Dr BRAMICH—The National Museum supports the Australian Digital Alliance's position on this matter.

Ms CAMERON—The National Library is very concerned about the change to the definition of 'library'. We support what Jamie has said. For the past 15 years, we have promoted the concept of a distributed national collection which recognises that the body of Australian libraries share their collections. In our submission, we refer to the Australian Library Collections Task Force, which is a cross-sectoral body that has recently identified the collections of corporate libraries as being of great value in the Australian library scene. We were engaged in developing a strategy to try to encourage those libraries to expose their collections through the national bibliographic database; we were in that process when we saw the change to the definition of 'library'.

The National Library knows that there are unique Australian materials held within those corporate libraries. We would be very concerned if there were loss of access to the research community to those materials.

Ms BURN—Just to follow up on that: 39 per cent of the corporate libraries that are listed on the Australian libraries' gateway are also listed in the Australian Interlibrary Resource Sharing directory, indicating their willingness to supply their resources to not-for-profit libraries. Thirty-three per cent of Australian corporate libraries contribute catalogue records to the national bibliographic database. That is an additional cost burden for those libraries and, again, it indicates their willingness to supply to not-for-profit libraries.

I would also point out that another of the government's policy agendas is innovation. A number of Australian corporations are very much involved in planning the innovation summit, including companies such as Carlton and United Breweries, BHP, Invetech, Kodak, Rio Tinto and Telstra. They are just a few of the stakeholders currently involved in innovation summit planning and are examples of those corporate libraries contributing records to the national bibliographic database and to Interlibrary Resource Sharing in Australia. Innovation does not just happen in the corporate sector; it happens in other sectors of the Australian research community. It is important that those libraries can supply to the distributed national collection. This should not just be seen as an issue of 'companies can afford to pay'.

Dr WILLIAMS—VISCOPY supports the narrower definition of 'library' in the bill, but it is concerned about the blanket inclusion of educational institutions in item 11. VISCOPY submits that 'library' should not include a library conducted by an educational institution conducted for profit.

Mr BORGHINO—We welcome the government's new definition of 'library' and we also strongly support the Australian Copyright Council's position on this. We reject that copyright creators should be the ones who are subsidising for-profit library use, whether that be in a corporation or within an educational institution.

Mr ALEXANDER—We support the Australian Digital Alliance's position.

Ms BRIDGE—The Publishers Association supports the government's policy and the Copyright Council's redrafting.

Ms ROXON—Do you have any comment to make about whether it is more appropriately dealt with at another time through this other review process?

Ms BRIDGE—Our submission in relation to the library copying provisions is that they should be delayed and looked at in more detail. That is important in relation to the definition, from our perspective, in this way: we would have less problem with corporate libraries having access to these provisions if these provisions were more realistic in terms of preserving our market for the commercial publishing of books. So they are connected. If there were very narrow provisions for libraries that allowed them to conduct their traditional business of assisting in an ad hoc way with an individual who required an article here or there for their individual study, then there would be less objection to having a broader definition of 'library'.

But while we have provisions that allow a library to compete with publishers—and we say, in an unfair manner—with document delivery services and servicing a market on a commercial scale, then obviously our option will be to say, 'Well, we should contain that to as small a number of libraries as possible.' It is logical to say that perhaps the argument is strongest for a cultural institution, a public library to be permitted to carry on this role, but it is absolutely without any merit to say that a library conducted by a profit making entity or business should be able to usurp members' rights in that cavalier fashion.

Ms ROXON—Just so that I am clear, you think it would be useful to have the other issues determined first and then revisit whether or not the definition is appropriate?

Ms BRIDGE—Yes, that is right.

Mr DONOUGHUE—Yes. We would think, as Paul Keating used to say about the privatisation of Telstra, it was a 10th order issue—until it became a first order issue with different political circumstances. Who owns the library should be a 10th order issue. Unfortunately it is a priority issue, given that this bill allows, under section 50, interlibrary loans and other intrusions on commercial terrain. That is our position. If they were fixed, we would have no problem.

Mr COCHRANE—I would say first that the notion of containing the number of libraries that might start behaving in this different way really does highlight for the ALCC's submission the notion that it is perhaps the not-for-profit distinction that is as critical as the more general view, with which we have great disagreement, about libraries changing their fundamental business. The position of the ALCC is that the definition should not have been changed; that a process had been foreshadowed in a copyright law review process in which much resource was invested. We support that intended direction as being the one that is actually pursued.

I would also say that there is no misunderstanding here that the bill actually bans the activity. By virtue of the way it would work, it would take the activity for these corporate libraries outside of the provisions for library exceptions. That means that licensing of that activity could occur. But I think, as you may have seen from some of the submissions, the effect of that would actually be the non-participation, in effect the exclusion, of those library operations which, as I think the National Library has pointed out very ably, actually are a fundamental part of this notion of a distributed national collection supporting Australian educational research and cultural activities. So, in short, we would like the bill to go back to where it was on definition.

Ms MORGAN—On the definition of 'library', CAL agrees with the Copyright Council that there be some technical finetuning of the definition, and we support the alternative definition proposed by the Copyright Council. Our comments about the possible delay: in CAL's view, the insertion of a definition of 'library' is long overdue. The position is consistent with that in the United Kingdom and the United States. As for Jamie Wodetzki's comments that that would not allow access, I think very strongly our point is that access is not only achieved through unremunerated exceptions; access can be achieved through a statutory licence with remuneration or through a voluntary licensing arrangement. Our concern is not with denying access; it is with the scope of unremunerated exceptions in the Copyright Act.

Mr WODETZKI—I will respond to that. Caroline's point really reinforces my earlier point that we are dealing with half an issue here; that is, whether the private sector can engage in certain limited amounts of free copying for research or study. This is an unresolved question. At the moment they can, as far as I read the act. If you cut them out, if you take the corporate libraries out of the system, Caroline seems to be suggesting that they will still be able to get access and will still be able to participate—presumably under a licence from CAL. But, as far as I am aware, a licence from CAL is not a blanket licence. You have to look up CAL's directory of members to see who it represents and who it does not represent. That is probably a practical impossibility.

More importantly, CAL has very few rights—I am not sure; perhaps CAL could clarify this for me—to authorise electronic copying. So even if you accept that corporate libraries should be cut out pre-emptively—which I do not accept—you will be placing them in a position where their only real alternative is to get a collective licence from CAL. That will not cover all rights holders, and perhaps CAL can tell us what percentage of electronic rights it has.

Ms MORGAN—CAL acknowledges the concerns that libraries have about voluntary collective licensing. This is why, in our submission, we proposed an alternative of the statutory licence, similar to that for educational institutions to deal with these issues. In our submission, we also suggest some options to improve that position for libraries—so, rather than to have a directory style, the facility for us to license by exclusions.

In relation to whether or not corporations can rely on the fair dealing exceptions, in our last discussion about reasonable portion I rather flippantly made a note to myself to invite both Jamie and Tom Cochrane along to my next negotiation with the corporation. It quite clearly assures us that yes, it does copy copyright material, but that all its copying is covered

by the deeming provision in section 40 and by the library copying provisions and that, therefore, they do not need a licence from the copyright owner.

Mr WODETZKI—That is my view.

CHAIR—I think this is one these areas where there are two sides of the fence. Let us move on to the third issue, which is the extension of section 49 to electronic reproduction and communication.

Ms BAULCH—As set out in our submission, we oppose these provisions. We set out our reasons for that in paragraph 10 of the submission, but we have gone on in paragraph 11 to say that, if this is going to occur, there are a number of conditioned which we have put forward, that need to apply in order to safeguard the interests of the copyright owners. Some of these relate to the issue that I raised earlier about the copyright owners loss of opportunity to control the first digital publication, in effect, of their work.

Mr MULLARVEY—The AVCC supports the library position on this and this amendment.

Mr WODETZKI—The Australian Digital Alliance, broadly speaking, supports the provisions in section 49 as, for obvious reasons, they do what the government intends to do and they carry forward the existing balance to digital copying. They do not, however, do that perfectly, and there are a couple of areas where it seems that digital copying is being treated as a special case with lesser rights for libraries. Particularly of concern are certain issues with sections 49 and 50. The particular concern that we have is that some of these provisions apply different tests to the amount that you can copy, particularly in relation to commercial availability, with which we do not agree. We think there should be a provision that says that you can copy a reasonable portion and supply it. At the moment section 50 says that you cannot copy even a reasonable portion if you can go out and buy the whole work. We do not think that is a genuine reflection of the existing balance.

In relation to certain other aspects of these provisions, there are concerns with the new right to make material available under section 49(5A). Although it allows a user to browse material on a library screen and make hard copy reproductions within the reasonable portion limits, just as they could go and grab a book off the shelf and make a copy of a reasonable portion at the photocopier, it is not truly technologically neutral. It says that the student of the new millennium could not go into the library, browse the work on screen, copy 10 per cent onto a floppy disk and walk out, and I do not understand the reason for that. Broadly speaking, we think these provisions are reasonably good. We just think they need to be clarified in relation to that commercial availability test and certain other technological neutrality issues.

Ms BURN—The change to the definition of a publication under section 49(1) means that the work must now be held in the collection of a library and archives before it can be supplied to a user. There will be some difficulties in interpretation for some libraries as to what constitutes ‘in the collection of a library and archives’ when we are talking about an electronic resource. For example, there is now masses of government publishing information which is available gratis on the Internet as well as a lot of other gratis Internet publications.

Certainly some libraries and librarians, particularly those with a concern to address the issues of equitable access by people who lack PCs or people who are remote from large library services, have expressed some concerns to us about the implications of this in terms of the interpretation of providing that access to a user.

Ms WARD—I am Anna Ward and I represent VISCOPY. We have a number of concerns in relation to section 49. I will just mention a general point and then Mark Williams will take it from there. We are particularly concerned about the new section 49(5A). We are concerned with that change in the exposure draft insofar as it applies to artistic works. There is an analogy in the explanatory memorandum with displaying books in a library, but it is inappropriate for artistic works that may be contained in articles or periodicals or published works.

One of our major concerns is that, pushed to its limits, it really will offer a de facto site licence for artistic works to be viewed in a public institution, for example under current arrangements—and I can be corrected on this—certain state libraries which have kiosks control the use of copyright material very carefully in those kiosks, they restrict images to stuff stored on CD, and they use images which they have out of copyright from historical collections. That is probably as much as I should say at the moment. We see that that would provide a galloping situation for the exposure of artistic works in the online environment.

Dr WILLIAMS—I have only one really brief comment. Section 29 provides that the exhibition of an artistic work in public is not a publication, but the other unintended effect of section 49(5A) may be that you will have a publication of an unpublished artwork, and that is certainly opposed, as well as the other issues that Anna spoke of.

CHAIR—Excuse my ignorance here, but I do not quite understand how you are going to have the publication of the unpublished artwork. It must exist somewhere before somebody looks at it on the screen.

Dr WILLIAMS—This provision of course applies both to libraries and archives, and the archives may have acquired preservation copies under other elements of the bill. By having a publication here and making copies available to the public—and again there is plenty of law on the topic of whether visitors to a public space are the public—this may then start time running contrary to the interests of the copyright owner.

Mr BORGHINO—The ASA supports those proposed amendments to section 49 which would limit the application of the section to material held in libraries' collections. However, we oppose any extension of the section, in particular to allow the making and communication of electronic reproductions. We submit that section 49 should not allow a library to make or supply an electronic reproduction of a work to a client if the client is able to access that work in an electronic version at a commercial price. We also submit that a library's making available of material online should require the permission of the copyright owner where possible, because making it available online is a normal use of that work.

Mr CHAPMAN—The Copyright Task Force supports the ADA's position on this. They have nothing else to add.

Ms BRIDGE—The library provisions are of the greatest concern to the Publishers Association, particularly when coupled with the proposal that circumvention devices might be available to libraries to access works in order to copy them under these provisions, so I would like to spend a few minutes on it. I am conscious that I am sitting next to the managing director of a large publishing house. We would be grateful if Peter and I could talk together so that he can give us his experience on the way this works in practice.

We can assist the committee by talking about electronic publishing as it is emerging as a business. In response to the proposition that when you take provisions in the act that relate to print and you copy them into the digital world, you are doing no more than allowing the existing balance to continue. We think there are a number of reasons why the balance has drastically changed, and therefore, what is okay in a photocopying environment is damaging to incentive for continued publication in a digital age. Some of those things have occurred already in relation to the changed practices of libraries and the increased ability of libraries to be proactive and entrepreneurial in the division of their collections—all of which we support but not necessarily without payment.

Secondly, there is a change in the way material is available under licence, because the collective licensing structures represented by copyright agency and other collecting societies were not in place at the time these photocopying provisions were originally conceived. Most importantly, the market for electronic publishing has changed dramatically so that the availability of the reasonable portion—the 10 per cent—or the article which was not so damaging before, now becomes the principal market.

At the moment there is a great deal of uncertainty about the way electronic publishing marketing models will move, and that is why we see so many subscription based models—because there is not yet the technology to allow transaction based models for the very small portions, for the individual articles. There is a heavy investment in digitising works and there is another heavy investment in the e-commerce software that would allow individual small portions to be made available for sale. There is a great deal of work being done to develop those systems and they are the future. The idea that you just subscribe and pay an annual fee and, for that, you can do whatever is available within the licence terms, is a model we think will diminish. Instead, there will be a much more precise model where the user says, 'I want this little bit, and I am prepared to pay for that little bit.' That little bit will be delivered. There will be micropayment systems and electronic commerce software more readily available.

So there is no need in this environment to have access that is determined by the copyright act; the access will be determined by the market. We are moving from an environment where a small number of dealings on an ad hoc basis for research and study that did not damage the principal market were permitted, but now we are moving to a more systematic use. Libraries are more systematic and much more coordinated in accessing this material and they do not need any longer to do that for free, because the material will be available on fair terms.

Ms ROXON—I want to make sure that I understand your point correctly. There were two separate areas that I was hoping you would address, the first one being the issue of a library transforming a print copy into electronic form. I think there are very legitimate

concerns about whether payment should be made for that first transformation, but you are also dealing with what a library should be able to do with any material it has in electronic form in the future. Is that right? I thought we were focused on the first point. I would like your view on that. Am I correct in saying that you are also concerned about ongoing use of electronic material? If what you are saying is right, it fundamentally changes the total environment that we work in and that libraries work in, presumably.

Ms BRIDGE—Correct me if I have not understood your question, but the proposals in the bill would allow libraries to take a paper based work, digitise it and make it available to other libraries for supply by email or by web site with password protection—make it available to library users who declare they need it for research and study. That document delivery system is an emerging business model, so the libraries would be able to do for free what publishers are setting themselves up to do for a living.

Mr KERR—I do appreciate the point you are making, but isn't it true that that is one of the things that libraries have always done? Libraries have always made available for free things that people are making money from. That does not seem to be the end of an argument.

Mr DONOUGHUE—No, not precisely, Mr Kerr. The small parts—chapters—were not individually saleable before. Parts of books and periodical articles were not individually saleable, but they are in the electronic environment.

Mr KERR—That may be so. I am overwhelmingly on the side of content producers and the need to create markets and things like that, but I suppose the other side of me says that part of the whole Labor tradition is access in the early days, through working men's associations and a whole range of things, to the library movement so you autodidact, and so the person who wishes to read widely and who needs access to information is not held back by reason of their economic resources. I do have a genuine need to be assured that that material is not closed off for free access to a community. I do not want to stop you selling your materials to people who legitimately commercially would otherwise acquire it, and I do not want to have a situation where we find, as more and more material goes on line, that the traditional value of a library becomes less because people cannot do what they ought to be able to do through the public access as a citizen. That is the balance that I am looking for.

Ms ROXON—That is the point I was trying to make. I understand the issue of ensuring you get your proper payment at the initial stage, but I think everyone agrees we want to have some model where libraries can still provide information to people who otherwise could not afford to get access to that information.

Mr CADMAN—I think you are proposing something more than that though, aren't you? Aren't you saying that the library becomes a supplier of material? Could you explain that?

Ms BRIDGE—The library can become a supplier of material on two bases. Under the proposal that we have in the bill, they may become a supplier of material on the basis that they do not pay any copyright royalty. So the author and publisher receive nothing from digitising the material, thereby making it available to researchers and students and also building the collection of one library by copying for free the collection held by another. As I

understand it, the concept of the distributed national collection is to make sure there is a library somewhere in Australia that has that journal or work so that every other library can access it without having to subscribe to that journal itself. Obviously that kind of cooperation—it is wrong to use the word 'collusion'—diminishes the potential market for journal subscriptions and sales. So that is damaging in itself.

CHAIR—Isn't that in a sense market forces at work anyway?

Ms BRIDGE—We would argue: why should the author and publisher be unremunerated for their very valuable use of their material? Why should that be free? Publishers want works to be widely available. Publishers are in the business of publishing—they want maximum use of their works, and they want people to have access to them. They are just asking, first of all, that they may be able to fill the market demand themselves. If they do not do that, the fall-back position for them is that someone else can fulfil that market need but why should it be without any royalty payment back to them.

Mr KERR—A market by its definition excludes people who have no capacity for market access. I represent a whole bunch of people out in the northern suburbs of my electorate who do not, presumably, have much money to have market access. I appreciate you cannot do these transitions from one environment to another, but I have done everything I can to get mobile libraries and to get greater penetration into these households. I am wondering whether we have the wrong model here—whether we ought to have something in the nature of a statutory licence. It seems to me to be a wholly wrong principle that publishers can say, 'It should be a market based transaction only, and it is all very tough, and you have to do it only in the library box.' That is what this proposes—access only in libraries and things like that. I just wonder whether we need to have a different model that encourages greater free access but does have a remunerative element.

Ms BRIDGE—Mr Kerr, perhaps I have not made the publishers' position clear enough. The publishers' position is not that everything should be remunerated through the market; in fact, I think it is quite extraordinary that the publishers association have come so far as to say, 'We will allow a statutory licence in our principal market,' but that is indeed the submission. If the publisher makes the work available, then we say that the user should access it through that mechanism. If it is not available, then we would accept a statutory licence mechanism because that at least would give a payment back.

Mr KERR—The problem I have here—and maybe I need to separate it out—is that here is a commercial market for a lot of things, but there is also an issue of public access. It seems to me that we need to deal with it differently. One of the things I tossed into the ring before was the idea that libraries would not be entitled to make any charges—no cost recovery for this. You have to have some restraint in relation to any distribution process; I do not want them to be providing an alternative commercial source of materials. But I am very worried that, as we are becoming an information rich and an information poor society, we are exacerbating that difference, that divide, by operating on a market based model. I am not a market based model person, so you are not going to persuade me by that. I need to know what the public policy response is. How can people in the western suburbs of Sydney who do not have access? How do you deal with regional towns where people are information poor? How do you get material to them, at the same time protecting your legitimate

commercial interests? You cannot persuade me that it is only if they cannot buy it that they can get into this other system. I will not be persuaded by that.

Ms BRIDGE—There is difference, I think, between ad hoc access to material, which was the traditional model and which the publishers have no objection to. The idea that an individual who is educating themselves should be able to copy portions or chapters does not offend us at all. We recognise in a sense some analogy to a community service obligation there. The Publishers Association have not objected to fair dealing provisions, nor have they objected to statutory licence modelling. We say now that this is much more systematic and the proposals in the bill would go too far. There would no longer be this ad hoc, individual helping themselves. It would be the libraries in a position to become publishers, in competition, without paying royalties back to authors, who would probably jump up and say that there would be a philosophical debate about whether the social obligations that we have to the individuals you have been describing should necessarily be met by the authors foregoing their royalty. I do not want to have that debate, but there is an issue here about whether the subsidisation of those noble causes should necessarily be out of the pockets of authors and publishers.

Ms ROXON—When we are talking about the provision of information, there are not really many other alternatives of whose pockets, to use your words, it is going to come out of. I am surprised, and perhaps you can give me some more information as your markets are developing, to hear you have such concern in respect of the libraries. My expectation would be that the same thing that pretty much happens now will continue, to the extent that people who have sufficient funds would still prefer to read their own copy of their own book and put it on the bookshelf afterwards. The people who do not necessarily have that much money might borrow it and use the public library system more heavily. I know that probably operates differently in academic and research areas, and that might be one of the areas that you are trying to concentrate on, but that is also the area where the public good in making sure that information is widely available are concerns that we have to take into account. It is difficult for us. I am still not sure what your position is. If you were able to control the first digitisation, I think were your words, of any material so that you would be able to negotiate, the market would be the sale of that first copy going to the library. I am still unsure as to why you think that will not adequately protect the interests of publishers.

Ms BRIDGE—First of all, that would be a change to the bill as it is tabled.

Ms ROXON—I understand that.

Ms BRIDGE—The protection for the copyright owner comes in three possible ways: the legislation which makes it illegal for unauthorised use to occur, so that gives you a right of action. Secondly, you could add to that a contract that would bind the particular parties, so you can negotiate a deal one to one. Thirdly, you could use technological measures to try to prevent access. Our concern is that the copyright act is, in our view, now going to be an inadequate model of protection against principal market use.

As to contract, there are only limited circumstances in which contract will replace your rights under the copyright act. If contract were the answer, then Peter and I would not be here. Contract is inadequate for a number of reasons: most importantly, that there is not

always a contract between the publisher and the end user. You might well have a contract with a library, which would not occur very commonly with books but it would occur with journal articles; nonetheless, this material would then be available, particularly in an electronic form where it is very vulnerable to copying, and it might be used by a person who was not a party to your contract.

The third measure of protection would be, and in fact this electronic publishing is supported by it, encryption and digital watermarking and the whole digital rights management software that is being built up, which will allow you to exercise that control by technological measures. Our concern, and the reason we become pretty emotional on this point, is that the proposal in this bill is to allow librarians, statutory authorities, government departments, educational institutions—a vast number of people—to override those technological measures, so you are left without these fall-back positions. We say all of the possible avenues in which we could protect ourselves will be challenged. Again, there is a difference between paper and electronic because of the vulnerable nature of material in the electronic format—that it is so easily copied, so easily distributed around the globe instantaneously, as we have talked about.

CHAIR—The nub of the problem seems to me—and correct me if I am misunderstanding you—as I understand your concern, that the market has changed. You suggest that the libraries really do not act as a series of independent, stand-alone entities but that there is now a network and that this bill provides for the further implementation of that network so that in fact you need only one copy somewhere in one library that is part of that network and it is available to everybody else within that network and therefore to every user of that broader network. You say that that, in effect, destroys what market is there. Is that the crux of what you are saying?

Ms BRIDGE—Yes, that is right.

CHAIR—I am not sure that the legislation is going to be effective in necessarily overturning that. I suppose what I am interested in is, if there are two competing principles, which there are here—I do not think anybody doubts there are two competing principles, both of which are worthy of some consideration—is there a way through this which meets the interests of your members, the interests of the creators and the copyright owners, but also meets the interests which Mr Kerr has been raising in terms of some sort of public access to material? If there were a way in which the people around this table could say was a way of balancing those interests, which is not a win-win, lose-lose sort of outcome for one side or the other but provided a realistic way through it, then, from a commonsense point of view and a public policy point of view, I think that would be attractive. I would certainly be interested in any proposals from either side of the debate, if I can put it that way, as to how we can properly recompense the creators yet, at the same time, provide some access in an information world, which we are increasingly moving into, where the value of a whole lot of things depends on access to information. The proposal to find the middle road which would meet both sides, I think, would be very useful.

Ms BRIDGE—If there were an easy way to describe in law the difference between these ad hoc individual transactions and the systematic publication, that would be great. But I think that is hard to do.

Mr KERR—Can I propose something that I would like to have tossed around. I do not like the way the bill is at the moment. I do not think it gives proper regard to any interest that is represented here. I do not think it allows the public sufficient access to material which should be available free, and I do not think it gives you a commercial advantage. But it seems to me that if you had a model which facilitated libraries being able to provide this material online but subject to a statutory licence, but only on terms that they provided it without charge—which I think would be a very significant restraining capacity on them, because they would not do it in circumstances where they would bear the cost of transactions for organisations which have a commercial reason. Why would they? Why would a library, for example, seek to distribute or facilitate an arrangement on behalf of BHP when BHP has the resources and means to do it? If you excluded the possibility of any commercial cost recovery at all for the provision of this material—in other words, they have to meet the costs of this from whatever funds the state provides in relation to this—isn't there a constraint, and they would decide 'we will only supply this for proper management reasons in instances where there is a public interest, but, where we do, there is a statutory licence'?

It seems to me that you would actually have a scheme where, for a modest cost to the libraries, they are able to continue a much more extensive distribution of this material than the bill facilitates. Secondly, it would mean that the libraries would have no incentive whatsoever to supplement a commercial market, to enter a commercial market, because they could not cost recover. They could not meet those charges and they could not compete against you because, every time they made a transaction, they would lose money.

In the digital environment there are inescapable things that you should be worried about, which are that once it gets into the hands of third parties, they can misuse it. That applies to licit and illicit transactions. It applies whether you supply it under a commercial arrangement, under a statutory licence or whatever. This market is not going to go away, and the possibility of end user abuse will be there, irrespective. We have had to live with end user abuse in the photocopying environment and in a whole range of things. There is perhaps a range of technological capacities that we can develop to minimise it, I do not know. But it does seem to me that the bill does not get it right and that your proposal does not get it right. I do not know what others think, but that is the only thing I have been thinking about: to try to get a model that gives a wider distribution of this material to the people I am concerned about but at the same time gives the library a positive economic disincentive to compete with you.

Ms BRIDGE—I guess we would say the model we have put forward is the one that gives the widest access. Under the model the Publishers Association proposes, there would be nothing that would not be available to a library. A library could have anything. Either it could have it by purchasing direct from the copyright owner or it could have it under statutory licence. In either case, the copyright owner would be paid, unless they chose not to be. Where we create a disincentive for the libraries to compete with us has a commercial advantage to us, but I do not think it solves the government's policy approach of trying to maximise the availability of works rather than reduce them. There is nothing necessarily wrong with a library setting up in this very systematic and efficient delivery mechanism, and they can do that in a number of ways. What we object to is them doing it without payment to copyright owners.

Mr KERR—I understand that. Just for debate, I am proposing this as a model. On top of that, you could license them to make your material much more widely available, and you would have a commercial incentive to do so as part of negotiations.

Ms BRIDGE—Yes.

Mr KERR—The thing that troubles me is that the model being proposed is essentially that unless there is a payment, unless the material is commercially available, the material cannot be accessed through a statutory licence. I do not know how we deal with the end user problem. There are two issues here that we have to resolve. One is that we do not want a scheme that further enhances this divide in our community between information rich and information poor people. I am grappling with that, and educators and God knows who else are grappling with it. The other thing is that we do not want to do anything that impedes the development of the commercialisation of information technology, in which we would have a natural advantage in Australia, being a highly educated, English based community. There is big money to be made if we can get this right. I do not want to move too far down the end of the big money to be made at the expense of our social harmony.

It troubles me that the compromise the bill has is so limited in satisfying regional communities, outreach—all those sorts of things. People have a legitimate and traditional reliance on libraries as providing that material to them. I am just trying to see whether there is a commercial way of satisfying you, that you are not going to be gobbled up by libraries competing in your marketplace, by banning libraries from making any charge for cost recovery or for profit in terms of those transmissions. So, they have to absorb that, just as when they buy a book they have to absorb that as part of their services. They have to reflect, if they get a request from a commercial organisation why would they supply it? Why wouldn't they have to go directly to the publisher and get a subscription?

CHAIR—We are already over time. Can I suggest that everybody take the question that Mr Kerr has posed on notice. If you want to give us some response to it in writing, do so. Mr Borghino has been wanting to say something, and we have not finished yet from the others. Perhaps we will hear from Mr Cochrane, Ms Morgan and Mr Borghino. I think we are then just about out of time on this issue. I still have a couple of other issues that people might want to be heard on, briefly, but we cannot really take this session beyond midday because the second session starts. I think we are out of time. So can I ask everybody to be succinct.

Mr COCHRANE—I will try to be brief. I would like to respond by saying that I think there are a lot of complexities in the debate we have just heard. It is useful to remember that section 49 was developed in the first place to allow libraries to provide under certain circumstances, and compliant with the overall copyright environment, works to users. It has been modified a couple of times. This modification attempts to port the current arrangements into the digital environment. The Australian Libraries Copyright Committee supports that and has a couple of recommendations where it is concerned about some unintended ambiguity.

What I would say about the previous discussion is that I think that, in general terms, there is far too much autonomy being bequeathed, if you like, to libraries in how they make decisions and operate in this discussion. The library in the university that I work in will do

precisely what it is required to do to deliver a charter of services that supports scholarship and education in that institution. If a library is not the best way of doing it, we will close the library. We are talking about a variety of things here. On one line of argument, and in a non-adversarial way you could probably discuss this in some philosophical way, the position of the APA would suggest that perhaps we should dismantle the national interlending system. If it is not the intention of the parliament at this time to do that, then we have to look to the exceptions we have under section 50 and section 49 and see that we are doing the best we can to do that porting in a technology neutral sense from one environment to another.

Another point I would make is that in the discussion about how there is some kind of advantage in access and use that is provided in a library compared with other ways of obtaining a copyright work, we should be aware and we should keep in mind that the pricing of much of the market actually has that in mind. Many of the research journals that universities spend so much of their money on are priced at 10 or 20 times the individual subscription rate precisely because of the notion of multiple use. It is a fact that the concept of multiple use has extended over a period to incorporate the notion of certain uses in certain circumstances—which people who operate in libraries have brought to the attention of law makers over the years—and has extended to the notion of cooperative provision because no library in Australia and no government in Australia would invest in a library in Australia to be a totally adequate national resource, hence the distributed notion. If that is to come under challenge, then that is a debate that should be had. But it is not our understanding that that is being challenged with these changes. We would simply argue that if there is a notion that there is a loophole which would lead to catastrophe, under the provisions of section 49, there should be much more evidence to the committee and the House to respond to that than there is. So we support section 49 changes but believe the bits we have raised in our submission that are ambiguous should really be looked at before the bill goes through.

Ms ROXON—Would you quickly give me your view on what sorts of problems it would cause or would not cause if there was a requirement for libraries to pay or negotiate some type of payment for a transformation from hard copy to electronic copy, this issue of the first digitisation?

Mr COCHRANE—I think it is the context rather than the action that is important. It is provided for in the bill, for example, that if we want to make certain copies available for educational purposes, whether in library premises or more generally in an institution, that activity of converting from hard copy based to electronic copy future would be subject to statutory licence. But the actual transactions that are possible are hard copy to hard copy, hard copy to electronic copy and electronic copy to electronic copy. All section 49 is about is the provision of that as a fair use under certain conditions.

Ms ROXON—That does not answer my question. Is there any problem that is presented by you paying for that digitisation?

Mr COCHRANE—That would be the problem. It would be fine except in areas where you were infringing fair use. One of those might be, for example, that you did have a community of users that you wanted to provide access to and you were doing no more than provide access to them in a circumstance where they could not travel to premises which used to be the original basis for 49. Take the public library serving an urban community. It may

be possible to provide certain users a copy which they could obtain themselves if they were there, and that may conveniently be offered as an email service rather than a mail service. The notion that something somehow is going to be done much more in one kind of medium than another is an unproven notion.

Mr KERR—But it will.

Mr CADMAN—Of course it will. I agree with you.

Mr KERR—Just have a look at my email and it is bloody well proven for me. I have more crap coming through at the moment, solicited and unsolicited, than ever before.

Mr COCHRANE—Yes, but very little of the email that I get, and I get a huge amount too, is actually copyright material. It is works of original authorship, I think.

Mr KERR—I frequently ask for things that is I wouldn't have before from the parliamentary library, which comes down on a little attachment because it is out of the law cases and God knows what else. You have a quick browse and you get rid of it. I am not republishing the damn stuff. The point is that it is much easier now and it happens much more.

Mr COCHRANE—I am sorry, Mr Kerr, I was trying to respond to what I thought was an articulated circumstance by you earlier in answer to this question, which is are there circumstances in which it should not be charged for, and the answer is yes. At the moment the scope of this provision is to provide information to users in certain circumstances; that is where it came from. What we understand to be the intent here is that in the digital environment there will be cases where that is hard to digital rather than hard to hard.

CHAIR—The point to be made surely, Mr Cochrane, is that in this new environment, as Mr Kerr says, there is going to be much more copying, and not simply for convenience—as you say, it is easier to send it through an email rather than send it through the post. There will be much more digitisation of works. It seems to me there is some fairness in the suggestion that at least the first digitisation should attract a charge. You can say this is done for reasons simply of convenience where there was an alternative way of doing it but, even with such exceptions perhaps, shouldn't some statutory licence apply to the first digitisation?

Mr COCHRANE—In a practical example, at the moment a library in a university or other libraries might provide under section 49 a copy made within all of the prescribed limits of an article or a chapter from a published print work. What we understand to be the simple intent here is that that capacity could be provided but the end product provided might be electronic rather than print. The question of whether there would be some wholesale scanning activity that gets generated by this change in the law is not really a question of whether those needs are being responded to in the same way or not; it would be a question of intent. I can assure you that in the case that is closest to me and my administrative responsibilities, we have no intention of having a library that starts branching into publishing. It is not something it is set up to do and it will not be doing it.

Ms ROXON—So the answer is that it would not be a problem for you if that sort of activity was prohibited.

Mr COCHRANE—If it was prohibited as a commercial activity in the way painted by the APA?

Ms ROXON—Or even in a more wholesale use than the particular circumstances you are talking about.

Mr COCHRANE—If you had some wording that denied the scenario which is the basis of the fears expressed in the APA submission, I do not have any issue with that. The devil might be in the detail when you come to drafting that particular provision in future. The point I wanted to make simply is that the technology neutrality that I think the bill is trying to uphold is something which would allow an activity which has been occurring in the previous environment. There has not been, to my knowledge, a huge exploitation of that provision to start doing thing that is were not intended by the original legislation.

Ms MORGAN—I think the committee is probably already familiar with CAL's view on the issues surrounding this provision, so I will not touch on those. I would like to agree with the comments made by Susan Bridge on behalf of the Australian Publishers Association and also support VISCOPY's comments in relation to the particular vulnerability of artistic works in this context. I look forward to responding to the suggestions made by Duncan Kerr in relation to the distinction between charge and non-charge.

CHAIR—Can I ask you to respond by the suggestion made by Ms Roxon to Mr Cochrane, that is, if it is possible to draft a provision which meets the fears that have been expressed by the APA but also takes account of what Mr Cochrane said, what would your view be about that?

Ms MORGAN—I would be pleased to look at that drafting. Something that was interesting which came out from that conversation was that really what was being talked about and what Tom Cochrane was saying was that there would be certain circumstances in which it might be reasonable to digitise a print work and there are other circumstances in which it might not be reasonable to do so. He was using terms like context and intent, which are all qualitative tests. Our point is that the reasonable portion denies that consideration. If those kinds of works that looked at those kinds of things like context and intent could be prepared, we would be very happy to have a look at it.

CHAIR—Has anyone got any burning comment they have to make about this that goes beyond what they have already said?

Mr WODETZKI—First of all, on that point about paying for first digitisation, section 49 now allows you to digitise in so far as you could scan something in and email it to an end user and then you have to destroy it. I do not know what is being suggested, but does that mean the library is supposed to pay for first digitisation every time it supplies the article to another user? It is inconsistent with the current provision.

More importantly, I want to address this perception that these provisions allow for systematic or wholesale copying. It is just not sustainable. It is made as a statement which just does not stack up. This provision allows supply by a library to a user who has supplied a written and signed declaration that they require a copy for research or study. This is the first step in allowing wholesale and systematic copying. It is not an easy process. Persons who make those declarations cannot do so falsely, because in the back of the act there are criminal penalties for making false declarations. This is the next part of this wholesale copying regime, apparently. Libraries have been doing this for a long time, and it is not destroying publishers' markets. It did not in the past, it is not now, and to suggest that it is going to just because everything becomes digital is completely without basis. It is just a statement that is being made with no evidence to support it. It is being made as the basis for cutting back library rights, not for anything else. It is not 'Let's try the balance in the digital environment and see if there is a problem'—it is 'We think there might be a problem, so let's kill off library rights as much as we possibly can.'

These statements should not be allowed to go untested. The suggestion is that the bill is somehow opening the flood gaits, and I do not understand how it can be backed up. Yes, you are going to have situations where people can go ahead and infringe, but the bill is not going to control whether people go ahead and infringe. That is a completely separate and irrelevant issue to this whole public policy debate. This policy debate should say what can be done and not try to kill off rights for legitimate purposes just because someone might go and do something illegitimate. If a user gets an electronic copy supplied to them under these provisions, they cannot do anything else. The act now says you have to put a special notice in warning them this has been made under the library provisions, is supplied for a particular purpose and cannot be used for any other purpose. There are warnings and notices, constraints and shackles all over this stuff. To suggest that libraries will compete with commercial publishers is laughable. As I said at the previous hearings, if it wasn't so serious it would be laughable. It is just completely without basis.

Libraries currently provide document supply services, and the publishers would have us believe this is probably going to prevent publishers from supplying services. If the library can do it under an exception, how on earth could a commercial party do it under a licensing regime? The fact is they do, because the commercial players provide a better service. They are not subject to the shackles in the act. Exceptions do not kill off markets; they allow legitimate activities to go ahead for very good reasons. I just wanted to make that point very strongly.

CHAIR—As a judge once reminded me when I was at the bar, repetition does not improve an argument. We might stop there.

Mr BORGHINO—I would like to add to what Mr Wodetzki was saying. Apparently in other jurisdictions, in the US and Europe, they are not willing to test the joke at all. They are not extending the exceptions in the library environment to the extent that the bill would in this case.

I wanted to come back to what Mr Kerr was saying before. The point needs to be made that most of the libraries we are talking about now are publicly funded, and therefore there is an obligation for access and equity. Libraries in that context already make different decisions

about how they make material available, from document delivery through to closed reserve. The Australian Society of Authors and authors in general do not have a problem with cost recovery; the fact that cost recovery rarely stretches to include the copyright creator is where we start having a problem. Our submission said words to the effect that the ASA maintains that in all such activities—in other words, cost recovery type activities within libraries—there can and should be provisions made for the remuneration of copyright creators in each of those exchanges. There could be differing rates of payment to reflect differing categories of libraries, enabling a zero rating or shifting scale of remuneration for those transactions deemed to be for the social good or fundamental to core principles of access and equity. We have no problem with more people in diverse geographical locations or who for whatever reason cannot access a physical library having access to the work of Australian authors. We just think there should be some part of that package that includes cost recovery for the investment of time and expertise that those copyright creators have invested.

Mr WILLIAMS—One final comment: there is a tension between section 116B, the regime concerning preservation of circumvention devices, and the apparent blanket licence which has occurred in item 54, 49(5A). We would submit that section 116B should be brought into the regime if, contrary to our submissions, section 49 is amended as suggested.

Ms ROXON—Can I invite Ms Bridge and Mr Donoughue, if in response to the issues raised by Mr Wodetzki there is other evidence, to provide that information to us, though not necessarily at this point. We have had a fairly short time on what is a fundamental issue for you. If there is other material you want to put to us about why you think this damage will occur, do feel free to provide that information to us. It is obviously not something that we can go through today.

CHAIR—We are fast running out of time. There are two items left, one the interlibrary supply of copyright material. The library people I think will be here in the next session. If we get time, we could pick that up then.

The final issue in this section is the preservation copying of artistic works. I am going to have to ask you to be very brief. Only those who have a specific interest in this issue should comment. If you do not have a specific interest in it, could I ask you to desist at this stage. Can we start again with the Copyright Council.

Ms BAULCH—The way that the new provision would operate is that the reproductions would not in fact be made for preservation purposes at all but for publication purposes within the premises of the library. For that reason, we oppose the provisions. I also support the submission made by VISCOPY earlier that the effect of this provision may be that a previously unpublished artistic work may then become published and therefore be subject to 49 and be able to be supplied to library users where it would not be able to otherwise.

Mr MULLARVEY—We will leave it to the library committee and Digital Alliance.

Mr WODETZKI—We support the provision. It simply allows galleries and museums to make a digital version of things in their collections and show it on a screen in the premises.

CHAIR—What do you say to Ms Baulch's suggestion that this is not simply reproduction?

Mr WODETZKI—It is reproduction, but it is reproduction on such a limited scale and providing such limited access and addressing some of the concerns that Duncan Kerr raised earlier, that people can waltz into a museum and have a look at something on museum instead of it being locked away in the museum bowels.

Mr KERR—Aren't we at cross-purposes here? I think the main point you are concerned about is that this puts it into the public domain. I do not think you are trying to stop them being able to do that. Am I getting a mixed story here?

Mr WODETZKI—I do not think it puts it in the public domain just because it is displayed on a screen in a museum.

Ms BAULCH—We do not have a difficulty if it is done on the understanding that that access is limited, that it is done for the purposes of preservation. But that is not what this provision is about. This provision is about providing publication, and we say that that should be paid for.

CHAIR—Let me just get this clear. With something that is held in the bowels of the National Museum or the National Library or whatever, rather than having it out on display once every rotation you could actually go into a kiosk and look at the complete collection of the National Museum or whatever institution it is. What is your view about that? Is that appropriate, or do you oppose that?

Ms BAULCH—It is appropriate if it is paid for; that is our view.

CHAIR—I understand that. I understand where you are coming from, too.

Ms BURN—There are significant preservation implications in being able to make something available on the screen on the premises rather than in dragging it up from the bowels—to use your analogy. The National Library has other concerns about preservation and about circumvention devices not considering preservation as a permitted purpose. But they are referred to in our submission, and we would invite committee members to look at them.

Ms CAMERON—I would raise the point that the National Library does a lot of preservation copying for reasons of media instability and for no other reasons. In other words, the medium is deteriorating and no preservation action can prevent that. A lot of our copying relates to newspapers, which are acid based and poor quality paper, and to nitrate and acetate film, which affects photographic negatives and microfilm. So it should not be assumed that a lot of our copying work is for provision of new types of access; it is to avoid deterioration and loss of the item altogether. That is quite a substantial issue for us.

Dr BRAMICH—I think I stated our position earlier. But there is a particular issue of achieving technological neutrality in this provision. If we had done our preservation copying on microfilm, we would be doing that for an access reason. Preservation is not done for its

own sake; it is done to preserve access. If it were on microfilm, that material would be displayed on a screen. This is no different.

Ms WARD—This is of fundamental interest to VISCOPY. In the first place, I think we should say that there is an issue of principle but there is also an issue relating to the practical application of the act if it were to be introduced. In terms of principle, the extension of a library's archives provision for preservation purposes to museums and galleries would seem to be acceptable. However, having had a very careful legal examination of this proposed digital bill, we have been clearly advised that the exceptions in a whole range of provisions are far too wide to adequately restrict the use of those artistic works to preservation purposes such as were just described by the people from the National Museum. That is our major concern—that the exceptions are far too broad.

In particular, our concern is with the extension to the proposed section 51(3A) which was not in the exposure draft and return to plain English—that is, the exception that would allow an image from the bowels of the collection to be displayed on a terminal or kiosk within the institution. That can lead to a situation where it is not merely a terminal in the institution that people might look at; it could be a whole exhibition mounted in that way. A few years ago, in a museum Canada I saw a 'blockbuster' of Michelangelo's works sponsored by IBM which was totally digital and took up as many rooms as any major exhibition at the National Gallery of Australia or any of our state institutions would take up.

I return to the very simple point that Libby made from the Copyright Council: if the word 'preservation' were applied literally and we had a very clear and restrictive definition of 'library use' and if we had a restrictive definition of 'administrative purposes', then we would have much more clarity and the clarity that we need.

CHAIR—We could meet your point. It is presumably the role of the National Gallery, in the overall interests of the development and promotion of art in Australia, to make its collection available for people as much as possible. If someone wants to see a work which is not on display, it may be impossible to simply take them down to see it. Are you saying that it is okay to walk into the National Gallery and look at a kiosk image of some of the work of the artist kept down in storage as part of the collection of the National Gallery and not out on display at the moment? That seems to be one thing—that it is appropriate to be able to dial into the computer system and bring up the image of whatever it is they want to look at. It is another thing to put a whole display on, as you are suggesting with the works of Michelangelo, in a dozen rooms and probably with life-size digital displays and all of that. If that is the damage which you are concerned about, then surely that could be fixed simply by some minor amendment to subsection (3A).

Ms WARD—If I could just return to the first question that you asked: whether it was okay. Certainly the possibilities that technology offers are very exciting and important to the entire community in Australia. However, we do not believe these are preservation purposes. We do not believe that these are for administrative purposes. That is why I referred back to the point that the Australian Copyright Council have made: this type of reproduction is, in fact, a separate reproduction. It is for a purpose other than preservation or administrative use. It is not about collection management. We believe an appropriate payment should be made to the copyright owner for the reproduction of that work.

Ms ROXON—What about, for example, something that is close to all of us here? Parliament House has an extensive artistic collection. When new members first get elected, they get shown down to the auditorium to look through a photographic or slide show of all of the different pieces of art to decide which pieces they would like to have hung in their room. That material is used for other purposes too. The piece of work has actually been purchased. Is there a suggestion that that type of activity should not be allowed?

Ms WARD—From my own professional opinion, I would say that came into the collection management category.

Mr KERR—It is still a reproduction of the work.

Ms WARD—Yes, but it is for collection management or administrative purposes.

Ms ROXON—But isn't the National Gallery doing the same thing when it says, 'Our collection management means that we can only have 10 per cent of our works on display at any one time because we do not have a football stadium'?

Ms WARD—No, that is exhibition; and in this case, it is reproduction, exhibition and maybe transmission.

Mr KERR—It is a graded line. It is a question of where it comes. At one end, you could have the gallery providing books of photographs of the works—where they are clearly a publication—and you would expect remuneration from it.

Ms WARD—They pay for them. They do currently license and pay for those books.

Mr KERR—The only argument is the one that Libby raised earlier: nobody really objects to this happening. The question is whether it should be remunerated and, if so, how. Presumably institutions are just worried that this will be one extra overhead, and you think it is something that will give you a little bit of extra money. That is the public policy choice we are presented with, is it not?

Dr WILLIAMS—Visual copyright owners would be delighted if there were a proper published catalogue resume of the entire Parliament House collection. If the copyright owners were consulted through the collecting society, I am sure that an appropriate balance could be struck by negotiation. We would be opposed to allowing for a blanket whereby an entire potential market for the electronic publication compilations is wiped out at the stroke of a pen.

CHAIR—The National Gallery has *Blue Poles*—to take a well known piece of art which is on display most of the time. There is no further payment to Mr Pollock for *Blue Poles* being on display. The painting was purchased and the fact of it being out there for 365 days of the year—if it is—does not attract some further payment by way of a licence fee to the artist, does it?

Dr WILLIAMS—You are correct. It is one of those historical anomalies. If you own a picture, you can charge admission to come and see it. If you choose, as a matter of public

policy, to hang that picture in a public place, the copyright owner does not get any remuneration for that. But the maker of a film which is displayed in public or the maker of a dramatic work which is performed in public or a literary work which is read in public is entitled to remuneration, because that is a right that attaches to those works. In the case of artistic work, you have to ask yourself: qualitatively, does this conversion of the thing into an electronic form look more like a broadcast or a transmission to the public, or is it an enjoyment of the artistic work? Clearly, it is not an enjoyment of the artistic work as an artistic work—as an original thing made by the product of the mind and the hand. There are also a large number of artists who would object to the suggestion that a simulacrum of a sculpture that you cannot walk around or touch is the work; it is a downstream economic use of that work.

CHAIR—When you have galleries that could hold the entire collection of the works and they are all on display, there is no argument about this. But the reality these days is that galleries cannot put on display their entire collection. From a national point of view of promoting the arts, if the gallery purchases the painting, I really cannot see what the great evil is in having it available for a temporary display. I am not talking about being able to print from it or send it down line or somebody being able to make a copy of it electronically. Simply, if painting X is not on display but is owned by the National Gallery, there could be a kiosk within the foyer of the National Gallery where it could be seen. I cannot see why a member of the Australian public cannot go in a say, 'At least, can I have a look at a painting which I know is in this National Gallery? After all, I as a taxpayer contributed to purchasing and maintaining it.' It is different to doing a catalogue of publications of the work of so-and-so and selling that. That is fair enough. But is this not really just an extension of the purpose of the gallery itself?

Dr WILLIAMS—May I respond quickly and then throw to Anna? You are talking about something that is qualitatively different from the normal incidences of enjoying a piece of art work.

CHAIR—Say I visit Canberra with my children at school holiday time. It is the first time and probably the only time in the next however long that I get to Canberra. I know that the National Gallery of Australia has within its collection some works by artist so-and-so.

Mr KERR—I think there is a difference. I think it could be badly photographed. It could be poorly presented. There is a whole range of things. In any case, there is a difference. If the library sends *Blue Poles* away to London for an exhibition but still maintains a visual representation of it in digital form here, it is getting two bites of the cherry. It has sent away the work. I think a legitimate point is being raised. The only question is the point that Susan raised in another context: who bears the cost of this? I think they should have access to it.

Dr WILLIAMS—With the greatest respect, the point of the bill as tabled is for the preservation of the work. It is not for the downstream use of the work.

Ms ROXON—I think that point is understood.

Mr KERR—I think you have made the case that it goes beyond preservation. We only have to decide now whether it is a good idea or a bad idea and, if it is a good idea, whether

Libby is right in that you should get paid for it. The next question I would ask you is: should an artist whose work is in the National Library have the right to say, 'No, Sir. You're not going to photograph my sculpture because the only way I want to present is that you walk around it 360 degrees'? So you have a catalogue which is not of a comprehensive nature. If you are saying this is not just a preservation—and I do not think it is just preservation—I think you need to address us further on the public policy issues. I agree with the chair at this level: as a matter of public policy, when we have nationally funded institutions I do not think there is anything wrong with them being able to make simulacra of the collection available on site.

Dr WILLIAMS—May I suggest to you that it is a fundamental incidence. A fundamental right associated with copyright is the right to make copies of a work available to the public for the first time; that is fundamental. It has been fundamental since 1708.

CHAIR—Yes, but not everything that was done in 1708 has always been preserved.

Mr CADMAN—But it is not a copyright thing to list titles or brief descriptions of books in hard copy form. How do you describe a painting? You do not describe a painting; you put a copy of it up for somebody to look at, even if it is a poor one. I agree with these two guys: I do not think you have an argument.

Dr WILLIAMS—Until cheap colour photography came along, there was a well-known accepted practice about that. The way art works have been historically exploited has always associated that right to access and that right to first publication.

CHAIR—I think we are rehearsing the arguments now. Are there any further comments from anyone on this issue?

Mr BORGHINO—The Australian Society of Authors includes a large number of picture book illustrators and we would support the Australian Copyright Council's position on this.

Ms MORGAN—The Copyright Agency supports the Copyright Council's position on this.

CHAIR—I took that without being stated. I must draw this session to a conclusion. I thank all of you who have participated in this round table this morning. I think it has been very useful from the committee's perspective. It has enabled us to hear a variety of points of view and also for them to be tested against other points of view. It will assist in our deliberations in relation to this matter. So I thank you very much.

Mr KERR—Upon reflection, I realise that, on a basis of moral rights, I think an artist should have a right to object to a poor reproduction or something that doesn't represent their work properly.

Proceedings suspended from 12.18 p.m. to 12.30 p.m.

Session 2—Educational statutory licences—Part VA and VB

CHAIR—We propose to deal in this session with educational statutory licences, part VA and part VB. I understand that the AVCC has proposals in relation to part VA. Am I correct?

Mr McLEAN—And Screenrights.

CHAIR—Perhaps we will take your proposals, then Screenrights and any others who also want to comment on these matters.

Mr McLEAN—The first point is that the lack of any statutory licence with respect to the new right of communication for broadcasts will mean that, while universities can copy broadcasts, they cannot make them available electronically to students to view in classrooms or to access and view in libraries. As things become more and more digital, this will mean that we have a useless statutory licence: we can copy things, but we cannot make them available. Indeed, it is arguable that even now, in order to make available broadcasts, you have to put your video cassette into a machine which then makes it available electronically on a monitor. So, without a statutory licence with the new right to communicate, we are effectively denied access to an important teaching resource.

I understand that Screenrights agrees with us that there ought to be an extension of the part VA statutory licence to cover the right to communicate. We have had some discussion about how that might be done. That is a drafting question. We are apart on a couple of details. But I think we are hoping to meet after this to see whether we can thrash out those issues.

Mr LAKE—I would reiterate the points which Mr McLean has put. Basically, we have a simple proposition to put to the committee. We have what we think is a simple practical solution which we believe to be of overall benefit to both users and copyright owners. That is, simply, that the same provisions which apply in terms of part VB on the right to communicate apply in the part VA environment.

The reasons for our proposal are that the proposed amendments would, as a matter of practice, provide for similar copying and communication rights between part VA and VB, the consistency question. The terms of the statutory licence would be for educational institutions to communicate part VA copies only to persons—that is, students and teachers—for educational purposes. So we are talking about the right to communicate within the four walls of the statutory licence; we are not talking about going beyond that.

The addition of the right to communicate to the part VA scheme will enable new and more powerful—in our view—educational uses of audiovisual material. Again, being a statutory collecting society, we are obviously committed to the use and availability principles. The coverage of the communication right in part VA saves transaction costs for educational institutions that wish to communicate under the part VA scheme for their educational purposes, and it will provide a framework for dealing with copyright which

minimises the risks of infringement. This is one of the major concerns that both parties have: that we do not want to create an environment of infringement.

Finally, payment for these additional powerful uses of audiovisual material ensure equity for copyright holders and encourages further production of educationally relevant documentaries, film and television programs. They are our five reasons. The secretary of the committee asked me to provide a one-page summary of our arguments, and I will do that.

CHAIR—I understand from what you have said, Mr McLean, that you are having some further discussions.

Mr McLEAN—Yes. I think you will see in front of you two different drafts of how this might be done. I guess we only depart from Screenrights on the drafting issues, but they are two important issues for us. As you will see when we come to part VB, one is that we believe the educational statutory licences should be as simple as possible. There should be one single licence that covers copying and making available, with differentiation between what is copied and how it is made available dealt with in different rates of remuneration for different situations rather than having a multiplicity of statutory licences. That is one difference. We believe that it is quite a simple matter to wrap the two together. One really ought to focus on the use that is being made, not on the variety of different rights that are being used.

Secondly, to the extent that universities are merely making available in class or in a library for exactly the same use digitally as they were in a hard copy environment, with no extra educational benefit and no extra damage to the copyright owner, there ought to be something making it clear that the remuneration would be the same as it was before. They are the sorts of things that we are discussing with Screenrights.

Mr LAKE—That is right. So there is a furious agreement on the principles and minor disagreement on the practicalities which we are confident between us we will be able to sort through.

CHAIR—Does anyone else have any comments on part VA?

Mr ALEXANDER—MCEETYA has been discussing the matter with Screenrights and also with the AVCC. We are ad idem with the drafting of the AVCC but we are happy to keep on discussing with it Screenrights.

CHAIR—We look forward to your coming back with a draft that you all agree with. That will make our job very easy.

Ms WARD—On behalf of VISCOPY, Screenrights effectively represents our copyright owners and therefore members' interests in this negotiation. We support their position.

CHAIR—That means we have dealt with VA. We will move on to VB.

Mr ALEXANDER—Two documents have been distributed, and I hope that they are not too confusing for people. The simplest way of getting our suggestions across might be to go

through these versions, or one of them. One is a compare version with the current bill and our proposals; the other one is a clean version with the amendments in it, without the previous provisions. The easiest one to refer to probably is the compare version because then I can draw attention to certain things and you can put ticks or crosses in margins at relevant places. That might be the easiest way to approach it.

In short, one of the educational institutions' major concerns is that we are opposed to a separate electronic use notice. We see electronic use being closely associated with reproduction and, therefore, it should be looked at as one simple transaction. We are not saying that that might not affect down the track remuneration; we can have an argument about that later. But we are trying to get the drafting down so we just have two types of notice which educational institutions can give, one being a records notice and one being a sampling notice, without the need to give a further electronic use notice. That on the present draft would only last for a year anyhow and 90 per cent of institutions would forget to renew it.

I go now to the compare version. You will notice that the reference to electronic use notice is taken out at item 125. At item 128, we introduce the concept of a licensed communication, meaning communication of a licensed copy. 'Licensed copy' is defined over the page at item 131. That is, with proposed section 135ZFA, licensed copy, the only addition is subject matter and hard copy or electronic form. So a copy now can be hard copy or an electronic copy.

We have left division 2, which relates to reproduction of works that are in hard copy form, largely unaltered. There have been deletions to section 135ZXA because, with the way we have drafted it, they are unnecessary. But otherwise that division, which relates to copying of hard copy materials, is the same. However, division 2A, which is at item 151 of the bill, now refers to a reproduction communication of works in electronic form. We say that subsection (1) should provide that it applies to the reproduction of a work and the communication of a work. That is where the difference comes in.

We have said that subsection (2) includes an electronic form of a work made from hard copy form, and this came up indirectly perhaps in discussions this morning. We are anticipating, as happens now, that electronic versions can be made of hard copies; in other words, they can be scanned up to the permissible limits. We are not saying that they would not be paid for; that is a different issue. But we want to include that in and, just to make it clear, we have tried to incorporate that concept in 135ZMA(2).

In 135ZMB there is a slightly different issue. You will see that some words have been crossed out there. The bill at the moment refers to 'reproductions or communications carried out on the premises of an educational institution'. We have a difficulty with what constitutes something carried out on the premises if it goes outside the institution. To be consistent, we think it should be for the educational purposes of an educational institution or another educational institution. That is what the other provisions in the bill contain anyhow. That seemed to be a slip, and we could not quite work out why the differentiation was made there.

Mr CADMAN—I suppose that would mean open learning television programs as well.

Mr ALEXANDER—No, this is only part VB, the copying of works, not broadcasts.

Mr CADMAN—Not transmissions, not communications.

Mr ALEXANDER—It is a communication of a work. The concept is that, if for example there is a work which is held in electronic form, a student studying at home could dial in and look it up. That is one simple explanation.

Mr CADMAN—But wouldn't it also allow communications by free-to-air television?

Mr ALEXANDER—No, because this part VB provision only relates to copying of works. The copying of broadcasts is contained in part VA.

Mr KERR—I think that is right.

Mr CADMAN—I am trying to use the concept of something that you have copied being communicated by free-to-air television.

CHAIR—That is part VA.

Mr ALEXANDER—That is part VA. It is a different part of the act. Part VB of the act, which is what we are referring to now, relates to copies of works. Television broadcasts and underlying works which are televised are subject matter other than works, as set out in the act.

Mr CADMAN—I am sorry, I was dealing with section 135ZB, licensed communications.

Mr ALEXANDER—It is the communication of a work, not of a television broadcast. I must say that we get terribly confused too, I must say. We can then take a fair jump to item 178. At the bottom of that page, we have included a new provision which allows an administering body to give a notice to pay equitable remuneration to a collecting society for licensed copies and licensed communications. That is where you pick up the payment for the communication as well.

Mr KERR—That is under 183 at the moment just for ease of reading.

Mr ALEXANDER—Yes, you are right. It is just that we had crossed out 183.

Mr KERR—I understand.

Mr ALEXANDER—We have included a paragraph (b) of that section which picks up a previous provision in the bill, which says there is also an undertaking to comply with the processes that are necessary or convenient to be adopted for the purpose of measuring the extent of licensed communications. That is really picked up from another section of the current bill. But we do understand and realise that somehow or other we have to work out how this will be measured. So we put it in this way to say that you would undertake to do that. Again to be consistent, we have said that if an institution or administering body did not

comply with the undertakings then, in effect, they would be infringing copies. So there is the enforcement provision in there as well.

Moving on, all the electronic use notice provisions come out because they are no longer necessary. The final matter which was necessary is just above item 186. We say there that, if a work has been electronically reproduced and remains available for communication for a period of more than 12 months, there is a deeming that it has been reproduced again. Again, it brings in the concept of the act that you cannot put it on and leave it on forever with the one reproduction.

Those are the major concerns we had with the current bill. We thought the simplest way of addressing those concerns was to show you how we would do it. No doubt parliamentary counsel will find a neater and more effective way. Be that as it may, at least we would like those concepts to be introduced.

The only other thing not covered here is that we were concerned that, in the exposure draft, there was a reference to temporary reproductions which were made in the course of 'browsing'—if you like. In the current draft, the words which were previously there have been removed. We are concerned that the bill should make it clear that, where a person browses—that is, a student at an institution—that it is not a remunerable activity. It is my understanding that that is the intention; we are just not sure whether it is conveyed in the bill because of the change between the exposure draft and this draft. In a nutshell, that is it.

Mr KERR—Are these proposals contested?

Mr ALEXANDER—Certainly not by the goodies; only by the baddies.

Mr McLEAN—We support the proposal. I will outline a few brief reasons. The bill as drafted provides for a multiplicity of statutory licences to do one thing: to copy and make available material for educational use. In many cases a university would need three separate statutory licences under the current bill to do that, three separate remuneration notices, three separate negotiations. You might join them. But, if you could not agree on any one of them, there would be three separate possible matters to go to the Copyright Tribunal. Our experience has been that these are very complex things, that they are quite difficult to negotiate and for both sides there would be large amounts of money involved. The Copyright Tribunal struggles to resolve those kinds of disputes. So the less licences, the less notices, the less multiplicity the better. Hence, we feel that a type of system such as the schools have proposed is much to be preferred.

A second reason: in the hard copy environment, we have choice between a sampling system and a records system. This means that if a university or a school does not wish to take the sort of rough and ready approach of sampling and get the administrative convenience of that but wants to pay and be assessed on what they actually do then they can opt for a record keeping system. In the digital environment, there will be a wide variety of different types of use and levels of use by different institutions. It is vitally important that that option remain. Charles Alexander's draft preserves that option in both hard copy and digital environment.

The last point to make is to reiterate the point I made this morning: it is very important that there be a savings provision that makes it clear that the statutory right of communication is not remunerable when all you are doing is making available work for browsing or fair dealing by students. In cases where universities or schools have copied the work to make it available, they will pay under the statutory licence for copying. Currently, if a student takes something down off the shelf and reads it, we have made it available physically. If we have copied it, we pay, but we do not pay to have them read it.

If there is no saving provision under a statutory licence, we will have made it available electronically and we will be asked to pay for having done that. So what was free browsing or free fair dealing by a student will be paid for in every case by a university. We would add that very important saving provision to the suggestion of the schools.

CHAIR—Now we have heard from the forces of light.

Mr McLEAN—I could not have put it better myself.

Ms ROXON—I think it is very unfair to suggest that you are representing anything other than appropriate interests in this debate. I know that the chair would not have been suggesting that; you should not feel so under attack.

CHAIR—I am simply adopting the words that were used by some witnesses. But no.

Ms MORGAN—Ross McLean might be somewhat surprised to discover that I do agree with a number of the points he has just made about the complexity and the difficulty of the administration of these multiple remuneration notices and multiple schemes. I am very happy to consider the proposal by the schools. If it is a sensible way forward, we would support that proposal, generally.

From the comments made by Charles and Ross, there are a few points that I would like to respond to. In relation to the schools proposal, I would like to respond in relation to the change they propose to section ZMB. I am not sure which item it was, but it was the proposal to change 'on the premises' to 'for educational purposes'. We have some other comments about ZMB in our written submission. But I would like to make it clear that that is a free exception—for educational institutions to copy those portions without payment. They are not part of the remunerable provisions under the statutory licence. Because it is a free provision, our position is that it should no longer remain. But, if it were, and because it is free, there are some fairly high fences about the types of uses that can be made for free. One of those fences is that it can only be on the premises of the educational institution. The proposal that it should just be 'for educational purposes' puts that fence down and makes more use of that provision for educational institutions when they can still maintain and obtain the access that they are requiring under the paid remunerable provisions of the Copyright Act that are subject to the Copyright Tribunal taking all of these considerations into account in determining what the fee is. So we would oppose that part of the suggestion and, in fact, we would propose that the entire ZMB be deleted.

In relation to item 183 in the schools proposal regarding the information to be provided by the educational institutions, it mentions providing information in relation to the

measurement of the use. We do not want to lose sight of the fact that a really important part of the administrative provisions in this act is about identifying the copyright owners whose works have been used, so that the individuals whose works have been used can get paid. It is not merely about the volume of the use; it is about whose works were used. There has to be a mechanism for identifying whose works were used.

That leads me into a comment I would make in relation to something that Ross McLean said regarding the option of educational institutions to choose record keeping or sampling. In CAL's view, we hope that in a digital future all of the copying under this scheme could at some stage be recorded automatically and a full audit or a full record of all the copyright owners could be maintained so that they could receive payment. But at present that is not possible. We take the view that it is unfair that one party to the licence can elect whether the information the copyright owners receive about what is copied is based on a full record or a sample. One of the features that we applaud about the system that is proposed by the government is that that is a matter for the Copyright Tribunal to decide, after hearing representations from both parties. That is all I would like to say in relation to the proposals at this stage.

Mr KERR—What about the browsing issue? Do the forces of whatever darkness or light—however they choose to assign the hats around the place—have agreement that browsing is a permitted use?

Ms MORGAN—CAL's position is that browsing and caching—just in case the schools and universities forgot to mention caching—are uses of copyright material. They are not technical temporary copies; they are, to use a phrase, a consumption of that copyright material. They should not be permitted either as an exception to the copyright owner's rights or for free.

Mr CADMAN—No browsing for free.

Ms MORGAN—Certainly not in this context.

Mr KERR—Just to clarify, obviously that is a disagreement. Presumably, even if you say that it should not be for free, there should be a different pricing structure in relation to a transient use, which is really a quick flick over something to see whether you would wish to have more detailed access to it; or would you see it with its popping up on the screen, albeit just to be dismissed, as carrying the same price?

Ms MORGAN—My view about the operation of the educational copying provisions or communication provisions is that they are a package. If an educational institution makes available for browsing by a student a particular copy of a work, it is the same as making a course pack and handing it to the student. They are facilitating the student's access in a systematic way to that copyright material. That should be one of the things that the Copyright Tribunal will take into account in setting its fee for the licence. It should not be carved out as a free exception.

Mr KERR—I understand that.

CHAIR—Presumably this is not material which the library has purchased. If the library purchases science works on CD-ROM for $580,000, presumably it also purchases the right to be able to look at it.

Ms MORGAN—I am not arguing with the licence agreements that are entered into between the library and the copyright owners. I am referring to copies that are made and communicated under the statutory licence for educational institutions, not those that are made under contract.

CHAIR—You say that it is purely in those cases where the library itself makes a copy.

Ms MORGAN—Or a copy is made by the educational institution under this statutory licence, yes.

Mr COCHRANE—May I take that point up? A practical example might help illustrate what I think the real bone of contention is here. Suppose that we made an article available on what we might call the QUT intranet, my university's electronic environment for staff and students. Suppose that we made that article, a copyright work, available under the provisions of the legislation as proposed by MCEETYA and the AVCC. The position would be that we would have paid for that provision under the statutory licence provisions in the same way that we would pay for the distribution of course material now—the point that Caroline has just mentioned. What would be a very significant departure, and it would be unacceptable operationally in terms of its economics, would be if there were then instituted a system in which use—and the word 'use' has been used previously a bit—was then a remunerable activity. That is an absolutely fundamental point.

If we are paying under a statutory licence scheme for a right of making available for the educational purposes of our institution, we do not want to pay again on the basis of a use charge. If that is what is rectified by these proposals—and it then would be—from the point of view of the actual operation of this in university and university library environments, it is absolutely fundamental.

Ms MORGAN—I would respond to that. We are not talking about a system in which you pay here and you pay here and you pay here. Our proposal would be that all of the steps in the chain be considered in arriving at what is the equitable remuneration to be payable. To put in a provision that says 'for the university to make it available is free', that does not allow the Copyright Tribunal to take into account that value in determining the fee for the initial use.

Mr CADMAN—Could you explain to me: how is what you are proposing any different from my going, say, along to the university library and pulling down a text that I particularly want to study in regard to my professional development? Copyright is already paid on that. I can read it there. I can even take photocopies of 10 per cent of it. A browse will not allow me to copy anything. I can sit there and look at the thing, but I cannot do a dash thing with it.

Ms MORGAN—My understanding is that we are not talking generally about browsing at the moment. I am talking about the system of use of copyright material by educational

institutions under this particular provision; some of that is copying and some of that is communication. But I think the hallmark of it is that they have identified to the student that they will require access to these materials to complete their course requirements. To my mind, that is a use of the copyright material that is encompassed within the educational purposes of the institution and it should be taken into account by the Copyright Tribunal when determining a fee.

Mr CADMAN—I find it hard to come to grips with that.

Mr McLEAN—I would perhaps respond to that. There appears to be some confusion as to what we are talking about. We are not just talking in the sense of temporary reproductions and browsing and caching. There are a number of examples. We are talking about things that are just held in electronic form in a library. If a student wants to read those on a terminal, a university has to make them available electronically absent a saving provision. There is a making available, there is an exercise of the statutory licence, we will be asked to pay. We say that is not a proper translation of the hard copy world into the digital world.

A second example: we have an essay or a range of essays, a range of possible resource materials. That range will be needed intensively over a short period. We make four hard copies and put them in closed reserve. Students come and read them. They do not get charged for reading them; that is just reading. We do not get charged for making them available. We might scan one of those into a database and pay for it four or five times over because it is a substitute for four or five copies—and we accept that, to the extent that digital communication enables us to make less copies, we ought to pay. But every time they access it, they are just reading it. We ought not be required to pay under the statutory right of communication for their accessing and reading it. If they then make a copy of a part of what they have read under the fair dealing provisions, again we ought not be required to pay under the statutory licence for making available in the digital world something that was free in the hard copy word.

Mr BRENNAN—Just as an analogy, under the existing print copying provisions or under the existing VA provisions, if an educational institution wants to make 300 copies of an item available to students in a course, 300 copies would be made available. Under either sampling or record keeping, each one of those units would contribute to the equation of what amounts to equitable remuneration; each one would be an additional use. If we translate that over to the new communication right, an educational institution may have one copy, one digital copy, which could be made available to those 300 students and they may access it just as readily as they could access the hard copy.

I think the position of CAL and Screenrights in this argument is that there should be some parity between the situation where 300 copies are made available to the students in hard copy form or an educational institution for its educational purposes exercises the communication right to make available to 300 students a single copy. I think that is the appropriate analogy in which to consider the infusion of the communication right into both the VB scheme and the VA scheme.

Mr McLEAN—We would heartily endorse that. In the savings provision we propose, we straight out say ‘this section does not apply to any exercise of the right of communication

which is intended by the administering body as a substitute for the making available of copies,' et cetera. So that much we are in furious agreement with. But, when it comes to making available things so that students can read them or making them available so that students can exercise their fair dealing rights, that is a totally different regime to the one that has been enjoyed in the hard copy world. It would radically alter the balance of interests between copyright owners and copyright users.

Mr KERR—I think Mr Alexander suggested that his understanding was that browsing was not caught in the draft that presently exists. I suspect that you have a different view. Is that right?

Mr ALEXANDER—No. I was suggesting that I was concerned that, under the exposure draft, it was quite clear that browsing was not caught. Under the present bill, I do not think it is so clear.

Mr KERR—We both have policy choices in respect of this. But perhaps CAL could come back to us with language that it would prefer in relation to clarity, and you could come back to us with language that you would prefer with respect to clarity. We then will beat ourselves about the head in closed committee and decide where we come down in the end. But at the moment, both of you are saying that you are not satisfied with the drafting because it is insufficiently clear. I suppose that might be the best position for us to take and we will satisfy nobody.

Mr McLEAN—I do not think it is a drafting issue. While we are in furious agreement with David Brennan's example of the 300 copies, as I understand it, Karl's position would be, even if we paid for 300 copies because 300 students were going to have access to this communication, every reading or use would still need to be remunerable somehow or other.

Ms MORGAN—Taken into account in the calculation of the fee.

ACTING CHAIR (Ms Roxon)—I want to draw everyone's attention to the fact that we are still aiming to finish at our deadline of 1.30 p.m., and we want to return to the libraries issue that we were not able to deal with briefly this morning. I think Mr Cochrane has some more comments. Is anyone else bursting to add anything else on this issue?

Mr BRENNAN—I would like to go back to the issue of the 300 students.

ACTING CHAIR—We will do it in order. We will hear Mr Cochrane, Mr Brennan and then Mr McLean.

Mr COCHRANE—I actually wanted to pick up that issue of the one copy for 300 students. Under statutory licence, payment is collected. The next issue is that nobody uses that material because of some change in the course delivery, or it is used intensely. My understanding of this position here is that there is then a further payment that relates to the extent of use. There may be a whole set of arguments in the future about the relationship between information production and consumption, but that is not what this is about in terms of the situation that we are in with statutory licensing, and the translation of what we now do by way of making material available for educational purposes and what we would

propose to do in the electronic environment in the same way. If it is the finding of this clarification that Mr Kerr has suggested that there is that, then that is something that educational institutions and libraries within them would have a major problem with.

Mr BRENNAN—If the work is made available to 300 students but no-one looks at it, under the existing provisions if 300 copies are made but no student looks at it, the 300 copies will still come up as a remunerable activity, as they should, as it is the judgment of the educational institution as to what it chooses to copy or what it chooses to communicate.

On Caroline's point, if a work is made available to 300 students in Psychology 101 in 1999 and the same work is made available to a new cohort of students in the year 2000, that should be treated as a new communication to those additional 300 students. So the concept of a communication in respect of the one copy has to be a fairly malleable concept that can pick up continuing use. I suspect that is CAL's position, as it is ours.

Mr McLEAN—We do not disagree with that last point. I think Mr Alexander is about to make the point that this 12-month refreshing to take account of communications that are substitutes for further copies is something that we have foreshadowed. I have two very small points, and I am happy to agree with Caroline on both of them to a point. We agree that record keeping is the best way. We agree that a tribunal ought to have the ability to fix a sampling or other such system that might do even better justice. But we are saying, at the end of the day, if the tribunal cannot fix a system that does the job to the satisfaction of both, then there needs to be a record keeping option to enable universities to pay for what they actually do.

Mr CADMAN—That is fair enough.

Mr McLEAN—On the information that needs to be recorded, I quite agree with Caroline that distribution is an important thing. Again, what it is that has to be kept in terms of records or under some other electronic use or sampling system does need to take account of that. We would be open to suggestions.

Mr ALEXANDER—I agree with that. The only other point I would make is that, in relation to section 135ZMB, CAL's opposition is really a philosophical opposition. They do not agree with it being there in the first place. We say that all it does is reflect the present position.

ACTING CHAIR—I am not sure whether everyone wants to stay for our return to the section that we did not deal with this morning, which was the interlibrary supply of copyright material. If anybody does not want to stay, feel free to leave. We will cover this issue quickly. Mr Cochrane, it is probably easiest to start with you. I think you are the only official library representative left, Mr Cochrane, so we might start with you.

Mr COCHRANE—The comments that we make about section 50 include issues that relate to clarifying the meaning of reasonable portion and so on. Our biggest single issue here is that the current system that we have is affected by the library definition. That is the overwhelming and overriding concern in terms of the effective operations of section 50 in the new environment. There are some issues that relate to actual clarification that we have

stated in the submission. I do not really want to rehearse those, unless there are some issues that people want to raise.

There is concern about the commercial availability test, because there is so much ambiguity in the way that it is phrased that there are questions about, in particular, the issue of work. This goes back to the question of what kind of electronic bundles in future we might be talking about. Again, I would refer to the ScienceDirect example. We go into that in terms of the clarification which we think is needed. The new test in this version of the bill needs to be addressed. The definition of 'library' and therefore the participants in the activity that is catered for with section 50 needs to be addressed. They are the two fundamental points in our submission.

ACTING CHAIR—I assume CAL will also want to put a position on this.

Ms MORGAN—I would be interested in hearing what the Copyright Council have to say.

Ms BAULCH—We begin by opposing the so-called extension of the existing section 50 to the digital environment, for the reasons set out in paragraph 10 of our submission. The committee has access to those. We have gone on in the submission to say that, if this is to occur, we have set out some requirements that would need to be met in order to safeguard the copyright owners' interests.

A major concern for us is that this is a way of adding material to libraries' collections that involves no payment to copyright owners. We also have concerns about the ability to collect digitised information into valuable products, in particular, databases. That is not really analogous to what can happen in the print environment, but there is certainly enormous opportunity for that to happen in the digital environment. That does not require any payment to the copyright owners and may well unfairly compete with the activities of publishers who are attempting to do this. It takes much longer for a publisher to do it. They have to acquire the rights from all the rights owners. They have to set up a system of royalty payments. They probably want to develop technological protection measures and rights information. Obviously it is a much longer exercise that requires a lot more planning, but allowing use for free is going to interfere with those developments for publishing.

ACTING CHAIR—Thank you. Mr McLean or Mr Mullarvey, do you have anything you want to add?

Mr MULLARVEY—We will leave it to the libraries.

Mr WODETZKI—On behalf of the ADA, and I think these views are shared by the Libraries Copyright Committee, we have a problem with some of the changes to section 50 insofar as they do not truly carry forward the existing position. Again, the situation with this provision is that the Copyright Council, CAL and a number of others oppose the provision probably because they oppose the provision anyway—anything that is an exception they do not like. We need to clarify that our view on this is not because we want to extend anything; it is because we want to preserve a right in the digital context, not get a new right.

In relation to digital copying, when a library wants to copy and share with another library something from an electronic source, this provision is intended to cover that situation. Normally a commercial availability test has to be applied to print material. That is, where the library is requesting more than a reasonable portion, it has to make an inquiry about whether it could buy the work. If it could buy the work, then it cannot engage in the process of interlibrary copying. That is designed to protect the publishers' market and we do not question that.

In the new provision, the test has been changed so that, if a user goes into a library and requests a reasonable portion from an electronic source for research or study, the library cannot now request it from another library which has that material unless the other library applies a different commercial availability test. The different commercial availability test kicks in no matter how small the amount requested. Instead of only kicking in once they have requested more than a reasonable amount, it kicks in if they request anything. It effectively negates the whole provision for electronic material because the publisher will say, 'They can go out and buy the full CD-ROM or the full online subscription,' and effectively you might as well not have the provision for electronic source material.

We strongly oppose that because it is not a truly neutral carriage forward of the existing balance. It is accepting what I think is a spurious argument that digital is different. Yes, digital is different; it is a different form of technology. But the rights should not be any different. It means that, if the source material held by one library happens to be in electronic form, you go to another library and say, 'I need to get it through the interlibrary process. I only want 10 per cent. There is a snippet that I need for my research', they cannot do it. They will have to make an inquiry as to commercial availability. The publisher could say, 'You can buy that full CD-ROM.' So the other library has to buy a full copy because one of its users wants to look at 10 per cent or wants a copy of 10 per cent. That is a change that has occurred since the exposure draft, presumably as a result of complaints from various content owners. Those complaints are directed at disliking the provision, not at preserving an existing balance. I think that is where we differ.

ACTING CHAIR—I am sorry to have to do this, but I need to leave. Until Mr Andrews returns, I will ask Mr Kerr to continue to chair.

Mr DONOUGHUE—The Australian Publishers Association welcomes the new commercial availability test for obvious reasons, reasons that Mr Wodetzki does not yet appreciate. The reasons are, if we go back to what we said in the fair use agenda, that bits and pieces are for sale. That was not the case in the analog environment. Where the material is available only for a high price subscription, for example, an $18,000 a year journal, you might say, 'That is commercially available. Go buy it.' That will not work. I do not think the commercial availability test should come into play to stop someone accessing an article. If the article is not available electronically, it will certainly be available through facsimile copy or hard copy. Those document supplier services are well and truly up and running, and have been for years. There is simply no denying that access to that particular article is available, even if that particular article may not be available electronically.

I can assure you that in five years time every article will be available electronically and will have a price on it. In that circumstance, why should libraries be able to trade those

articles amongst themselves for free? That is an impingement on the commercial terrain; the point we have been making all the while. It is nonsense and a failure of thought to keep on saying that digital is not different. Digital is different because it makes the whole rules of access and the whole rules of how you pay for that access utterly different. That is why it is different.

Mr WILLIAMS—VISCOPY would also take issue with Mr Wodetzki. The attempt at technological parity which is occurring in the bill should not be confused with the overall aim of technological neutrality, which is what we are talking about. In particular, with regard to the provisions of section 50(7A)(e)(ii), which is probably what everyone is focusing on, and this definition of commercial availability, VISCOPY would suggest that in an electronic environment the availability of a licence from the relevant collecting society should also constitute commercial availability. The provisions in subsections 7A and 7B are still stuck in a concept of hard copy and hard copy availability. We are now about trading in electronic rights. If a collecting society's licence is available, then that should constitute commercial availability. The issue of publication here is an issue with artistic works.

Mr CADMAN—I think there is validity in this argument, because you will not excise a small portion to sell electronically, you will send the whole document electronically; whereas, if you are photocopying or faxing, you will take a page or two. In practical terms, I see that as the difference. Would you care to respond to the practicalities of how it will actually work? Digital seems different because of the convenience of hitting one button and then having the lot down the wire. Students can then choose for themselves the part they want, rather than saying, 'I think it is page 32.'

Mr COCHRANE—In response to that, this is a provision which is about libraries. The organisations we are talking about that are going to have these intents are those which run libraries and those which operate them. If the law lays down that a portion is a certain size, and that is what would be transmitted in terms of an interlibrary loan, then that is what will happen. You could have mounted the same argument by saying, 'If it is more convenient to send a whole copy of a journal rather than the article, do that,' but that is not what happened. If something must be provided not beyond a certain limit in terms of the volume of information because that, in turn, is an activity that upholds the law in terms of fair dealing and reasonable portion and so on, then that is what will have to happen. If that process is a more complicated process than dispatching a greater entity, then it will be a more complicated process.

Mr CADMAN—What are the implications of the bill's proposals if the original is in digitised form rather than in hard copy? Your arguments are not valid if the original is digitalised; is that right? The 10 per cent need not apply.

Mr COCHRANE—I was responding to what I thought your comment was, which is that you will do whatever is easier. I am saying that is not the case. You will do what is required to conform with the law. We are talking about public institutions, for the greater part.

Mr CADMAN—I understand that, but I also understand that the curricula for secondary schools through Victoria is likely to be the same in any one year, and the requirements of libraries right across the whole state are likely to be the same at the same time. That to me

lends strength to the argument of the publishers that the networking process has a significant commercial impact.

Mr COCHRANE—My response to that is that, if you are talking about major curriculum support, you are not talking about interlibrary loans. That is not what it is for. That is not why it developed. It developed to produce specific research and study requirements across Australia. It did not develop to provide educational material in lieu of first sale. If you look at the indicators about success in academic publishing in terms of overall trends, if you look at indicators of actual acquisition dollars, then the lie is given to the idea that there is some major seepage in the provision of educational material that is operating through loopholes in the Copyright Act.

Mr KERR—Maybe I am dopey, but why, in an online environment, if I make an inquiry in relation to the availability of a particular piece of material would I go to a library which does not have it?

Mr DONOUGHUE—That is a good point. We would redirect you presumably to the library that does have it.

Mr WODETZKI—That is how the interlibrary system works.

Mr KERR—I know, but in a digital environment why would you make an inquiry of a library that does not have it?

Mr WODETZKI—Would you rather talk to the Parliamentary Library or any choice of libraries around the country?

Ms WARD—I agree with you, Mr Kerr, that you can look up directly which library has which holdings and presumably apply to them directly.

Mr KERR—I do not know; I am just asking a question. Your answer may be because you get better service. There is no doubt that the Parliamentary Library saves an immense amount of brain power that normally the individual borrower undertakes. But most people are not privileged enough to have access to it. It takes a bit to become a member of this club, and most community members do not have similar access to high service libraries.

Mr WODETZKI—Some of us only dream about it. It does not change the fact that you have other people who are served well by their prime library, if you like.

Mr KERR—Indeed. If they are well served, won't the library simply say, 'I am sorry, we do not have it in electronic form. It is available at X. Go online and get it'?

Mr WODETZKI—The point I am trying to make is that postgraduate researchers in a particular university will deal with their university library. If the university library does not have everything in a specialist range of research, rather than the researcher ringing around or emailing different libraries, they go to their library and their library will engage in the interlibrary process. That is how it works.

Mr KERR—I reckon this is a great thing for libraries. They just say, 'Piss off. Go to another library which actually has it.'

Mr COCHRANE—That is not consistent with the service.

Mr KERR—Clearly, there is a different level of ease of transaction with distant institutions that will now be present. Instead of having to write or fax a letter to the University of Queensland, for example, you can just key in your request. I do not want to lose the research community the ability to get things, but I am not so sure that, with that ease of access, it will be quite the same problem for users as there would have been in the past in a different, postage stamp environment.

Mr WODETZKI—I guess it is a question of whether libraries have to stay in the dark ages and not take advantage of new communications technologies to make requests and share documents. Our view is that they should not have to stay in the dark ages; they too should be able to use new channels to do what they have always done. I also accept that there may need to be some finetuning of the test of commercial availability to make it clearer and to ensure that it does not end up being something that undermines the publishers' market.

There are some points that are also worth bearing in mind. If a library has acquired at great cost huge back collections of expensive journals, it has paid a lot of money on the basis that it can use it and that it can share it with other libraries and with its users. These are related provisions, but let us say they had it for electronic material and they paid a lot of money for electronic material on that basis. If you suddenly change the position and say, 'Now you cannot share it; you have to go and buy it,' it is basically an opportunity to double dip. You have had the pricing set on one regime on the basis of downstream use. Now you are saying, 'We are now going to take away your right to downstream use.'

Mr KERR—I am playing the devil's advocate here, but can't that argument boomerang in the sense that you could say that the library has acquired a subscription and presumably paid a price, and the provider has been too dopey to write into the contract any provision that would address this, so now every library in Australia without further payment can access 10 per cent of that work. Let us say the work is Gibbon's *The History of the Decline and Fall of the Roman Empire*. Ten per cent of the book might be one volume. I am just being absurd.

Mr DONOUGHUE—No, you are not. A multivolume encyclopedia is a good example.

Mr WODETZKI—I can only repeat the point—bearing in mind the earlier warnings on repeating points—that the best example is where there is a single work in electronic form that costs quite a lot and you want the equivalent of a chapter from it. Basically you have to go and buy the whole thing. That is what this current provision says.

Mr KERR—I appreciate that. But I am just saying that the dilemma runs both ways, as I see it. I am not trying to diminish what you are saying; I am saying that if you put a different hat on you can see the dilemma from quite a different perspective.

Mr WODETZKI—I understand the point that the publisher makes. I guess I differ in my opinion. I do not think that someone using 10 per cent is going to undermine the market. If someone only wants 10 per cent and they are told either 'no' or 'buy the whole thing', they just will not use it. You will end up with people not getting access to information, and you are not helping the publishers market.

Mr BORGHINO—I just want to restate the general position on this of the Australian Society of Authors. If there is supply by a library of a copy of a work to a client, whether an individual or another library, for inclusion in its collection, that should be subject to a payment of equitable remuneration to the copyright creator or owner. I would point out also that the ASA submits that new section 57A should be omitted from the bill because, from the advice we have received, it would allow a library to create and supply to another library a digitised version of an entire work which is out of print but which is otherwise available in electronic form within a reasonable time. Furthermore, as in section 49, we think that a library should be required to destroy an electronic reproduction supplied to a client.

Mr KERR—Why? If it is out of print and not available, it is not affecting an economic interest. Why would you wish that?

Mr BORGHINO—Our general position is that, if there is a copy made and that copy is transmitted somewhere else, there should be some form of payment to the copyright creator. It is a position of principle.

Ms MORGAN—In relation to that point, we often have reports of authors who are talking to publishers, trying to get interest in having a book republished. But the reason that the publishers will not proceed is that the educational institutions have already made copies of the whole of those works because they previously were unavailable. That is just to respond to Jose's comment.

CHAIR—Once again I would thank all who have participated in this session this morning—this second session as well as the first session. Again it has been extremely helpful to the members of the committee in terms of addressing the issues and looking at the various proposals put before us. We thank you all for your contribution in this regard. A couple of matters have been taken on notice. If you have any further comments in relation to those matters, please forward them to the secretariat as soon as possible. As you know, we have a reasonably tight timetable on this bill. We are due to report in the first sitting week of December, so we will need to address our consideration of the matters fairly soon. Once again, thank you all for your attendance and participation.

Before closing the meeting, I would ask Mr Cadman to move that the part VB document, supplied by Mr Alexander, and the two documents from the Screenrights Audiovisual Copyright Society be received as evidence to the inquiry and accepted as an exhibit.

Mr CADMAN—So moved.

CHAIR—There being no objection, it is so resolved. I would also ask Mrs Vale to move that submissions Nos 71, 72 and 73 be received as evidence to the inquiry and authorised for publication.

Mrs VALE—So moved.

CHAIR—There being no objection, it is so resolved.

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

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

Committee adjourned at 1.38 p.m.