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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Review of technological protection measures exceptions

MONDAY, 14 NOVEMBER 2005

SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 14 November 2005

Members: Mr Slipper *(Chair)*, Mr Murphy *(Deputy Chair)*, Mrs Hull, Mr Kerr, Mr Melham, Ms Panopoulos, Ms Roxon, Mr Secker, Mr Tollner and Mr Turnbull

Members in attendance: Mr Melham, Mr Murphy, Ms Roxon, Mr Slipper and Mr Turnbull

Terms of reference for the inquiry:

To inquire into and report on:

Chapter 17 of the Australia-United States Free Trade Agreement deals with intellectual property rights. Article 17.4 stipulates the parties' obligations in relation to copyright.

Article 17.4.7 requires the Parties to create a liability scheme for certain activities relating to the circumvention of 'effective technological measures'. The Parties may introduce exceptions in the liability scheme as specified in Article 17.4.7(e)(i) to (vii) or pursuant to Article 17.4.7(e)(viii).

The Committee is to review whether Australia should include in the liability scheme any exceptions based on Article 17.4.7(e)(viii), in addition to the specific exceptions in Article 17.4.7(e)(i) to (vii). The Committee must ensure any proposed exception complies with Article 17.4.7(e)(viii) and 17.4.7(f).

Particular activities which the Committee may examine for this purpose include:

a. the activities of libraries, archives and other cultural institutions
b. the activities of educational and research institutions
c. the use of databases by researchers (in particular those contemplated by recommendation 28.3 of the Australian Law Reform Commission Report on Gene Patenting)
d. activities conducted by, or on behalf of, people with disabilities
e. the activities of open source software developers, and
f. activities conducted in relation to regional coding of digital technologies.

WITNESSES

Committee met at 9.03 am

CHAIRMAN (Mr Slipper)—I declare this public meeting of the House of Representatives Standing Committee on Legal and Constitutional Affairs open. This is the inquiry into exceptions to the technological protection measures scheme under the Australia-USA Free Trade Agreement. The Attorney-General has asked the committee to determine if exceptions other than those already identified in the agreement should be included, ensuring that any exceptions recommended meet the criteria set out in the agreement. I would like to stress that the committee is examining access TPMs only. In examining what other exceptions might be appropriate, the committee will also need to consider whether those exceptions already identified in the agreement are sufficient to maintain the balance between protecting the rights of copyright owners and ensuring the valid interests of copyright users.

[9.04 am]

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

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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 committee has received your submission and it has been authorised for publication. I invite you to make a brief opening statement and then we will ask you some questions.

Ms Baulch—The Australian Copyright Council, as set out in our submission, are a not-for-profit organisation. We receive some funding from the Australia Council for the Arts. Most of what we do is providing information and advice about copyright, but we also have a role in representing the interests of copyright owners, particularly creators, in relation to copyright policy matters.

I want to begin by making some comments about the suggestion in some of the submissions to the committee that the protection for technological protection measures, or TPMs, are somehow icing on the cake for copyright—that they are not centrally connected to the objectives of copyright protection. That is not correct, and I want to make some brief comments as to why that is. In the pre-digital era, copyright owners made their work available by distributing copies of it or by broadcasting, performing or speaking it—by immediate communication. One of the revolutionary aspects of the digital revolution has been that copyright owners can make their work available by putting it on a server so that anybody can get access to it from a place and at a time chosen by them. The need to distribute copies is no longer there. It still often happens. People often download documents or works to their computer or to other devices, but they can get access to material without getting a copy of it. That is one of the truly revolutionary aspects of digital technology.

That, of course, has raised some challenges for copyright law, which has traditionally provided an environment to encourage the production of new works by enabling copyright owners to receive royalties from copies. If the copies are not being distributed then some other basis to remunerate them for the investment and time taken to produce those works needs to evolve. In this environment, rather than receive a royalty on the distribution of each copy, copyright owners are able to charge an access fee each time somebody gets access to a single copy on a server. So, for copyright owners in that situation, if somebody gets unauthorised access to that single copy, the effects on their income can be the same as that of piracy of copies if they were reliant on the distribution of copies for their copyright income. So we have a different business situation now.

The other thing that is important to bear in mind is that there are advantages of online access for both copyright owners and consumers. One of the big ones is the cost savings. If you are making your work available online you cut out the costs of the carrier—the CD, DVD or book—and you cut out the distribution costs. Broadly speaking, those costs are passed on to the consumer. If you look at the cost of getting a song by digital download, for example, it is much

cheaper than if you bought the same song on a CD. So we are in a situation where, from a societal point of view, there are reasons to encourage copyright owners to make their work available online. They are going to do that only if they feel that that is a secure environment. If there is a market for the production of circumvention devices and services then, obviously, they are going to feel much less secure about making their work available online. It is important to see the issue that the committee is looking at in that context.

Another point worth making here is that most copyright owners produce material to be consumed. Most copyright owners are producing material for a certain audience, a certain market, and they want them to see the material and consume it. It is worth bearing that in mind when we are talking about fears of what is sometimes called 'digital lockup'. I think that tensions arise where works may not be truly inaccessible but, rather, the person who wants to get access is unhappy about the terms on which the work has been made available.

They may not want to pay the fee or they may have an expectation that they can get that material on their personal or desktop computer. They do not want to have to go somewhere else to get it. They think that is an unreasonable thing to have to do. That is one of the other issues worth bearing in mind. What are we really talking about when we ask whether something is accessible or not? Is it truly accessible to no-one or is it accessible in a less convenient way than somebody would ideally like, and what should be the policy response to that?

I want to make some brief comments on issues raised in some of the submissions made to the committee. A number of the submissions appear to have misunderstood the scope of the committee's terms of reference, which makes it a little bit difficult to pull out the relevant responses in those submissions. One of the fundamental issues here is that a claimant—somebody who is seeking an exemption—must show that they want access to make a non-infringing use under the current law. A number of the submissions talk about activities that they think should be non-infringing uses but are not currently non-infringing uses. In some of the submissions there is confusion between the two. As you are aware, an inquiry into whether there should be further non-infringing uses is being carried out by the Attorney-General's Department at the moment in connection with its fair use inquiry and the tail end of the digital agenda inquiry. Those issues are properly looked at in that context. All this committee can look at is what is a non-infringing use under the current law.

I think that in a number of the submissions there is also confusion between access control technological protection measures and copy control technological protection measures. Some of the claimants appear to conflate the two, whereas this inquiry is just about the access control TPMs, through which you cannot see or hear the material unless you get past the protection measure. For example, there are concerns raised by some of the libraries about their ability to preserve material in their collections. In most cases, they will be able to perceive that material—it is material that they can see or hear—but they want to overcome a copy control measure in order to be able to make a preservation copy, and that is not what we are talking about here. It is not prohibited under the Copyright Act to circumvent a copy control measure. It will not be, and it is not in the US. There are, of course, sanctions against the manufacturing, distribution and supply of circumvention devices that overcome copy control mechanisms.

Thirdly, a number of submissions—most of them, in fact—do not relevantly address the quite stringent criteria set out in the free trade agreement to meet the ad hoc exemptions that the free

trade agreement allows. Some of the submissions do not even seem to acknowledge that the FTA has effectively shifted the onus onto the person seeking to circumvent the measures, whereas the current exemptions were really based on perceived anxieties about and fears of what might happen in the future. Now we have a test of whether or not there is actually a problem at the moment that can be demonstrated. Some of the submissions do acknowledge the criteria but do not properly address them.

In order to make out a successful case, as I mentioned before, you have to show that the access is needed for non-infringing use, not something that you might want to be non-infringing use in the future. If you are unable to circumvent then that will have an adverse effect on your non-infringing use. It is relevant there to look at whether the person can get access to the material from somewhere else. The mere inconvenience of not being able to get it sitting at your desk at your personal computer is not enough to meet that test.

One of the big issues that came out of the submissions is identifying the class of material for which people were seeking the exemption. Different views are put in the submission about what this is. Our view, which I think is also held by the Attorney-General's Department, is that exemption must deal with a subcategory of one of the class of materials which is protected by copyright. It may relate, for example, to a film that is stored on an obsolete medium. But the class cannot be all material stored on obsolete media; it has to relate to the particular categories of protected material.

Finally, they need to identify the scope of the exemption so that it does not impair the adequacy of legal protection or the effectiveness of legal remedies. The issue there is that once circumvention has been achieved there is a genie out of the bottle issue—it can be difficult to confine the effects of the circumvention to the particular person who has access to it. That is why it is an issue that has to be treated quite seriously in allowing people to circumvent.

One of the things we did expect to see in the submissions but I do not think was in any of them was a description by claimants of what they are currently doing in circumventing access control measures, which they are entitled to do at the moment, and why they think they should be able to continue to engage in those circumvention activities after the new law comes into effect. It was not clear from the submissions we looked at whether any of the claimants are actually involved in any circumvention at the moment.

A couple of other issues were raised. Areas of activities were raised by the terms of reference. Two of those relate to libraries, other cultural institutions and educational institutions. There were some references in some of the submissions to the inquiry and report of the Joint Standing Committee on Treaties and the subsequent Senate committee inquiry into the Australia-US Free Trade Agreement. Those inquiries and their reports were influenced to a certain extent by a lack of adequate public debate about what the implications of the free trade agreement were going to be for the people affected by it. There was a certain inevitability about that in terms of the treaty negotiation process and what the government could say from time to time about where the negotiations were at. A number of issues were raised in those committees that could have been headed off perhaps with some further discussion before those inquiries.

Partly as a result of that, some of the perceived adverse implications were exaggerated, and particularly the implications of the extension of the copyright term. In that context it is important

to remember that the Australian provisions relating to libraries, other collecting institutions and educational institutions are to our knowledge the most advanced in any developed country. They are certainly much more generous and provide a lot more access than do their counterparts in the US. That is particularly because the digital agenda amendments enable the digitisation of non-digital material and the copying and communication of digital material. They are quite revolutionary provisions and put the Australian institutions in a better position than those certainly in the US and I think in any other equivalent country. We have to bear that in mind as well when we are looking at the comparison between Australia and the US. I think if you ask any of the institutions whether they would trade the package of provisions in Australia for those in the US they would say no.

Some of the submissions included some of the confusions that I noted before: the confusion between access control measures and copy control measures and the confusion between what is currently a non-infringing use and what they would like to be a non-infringing use in the future. The other important thing is that this is not the last chance for anybody to make out a case. The free trade agreement requires a process at least every four years for people to make out a case, so it is not an all or nothing situation. The sequence of events is slightly odd here because we do not yet know what the prohibition against circumventing an access control measure is going to look like.

Mr MELHAM—Can I interrupt you there? Is that four-year period specified in the Australia-US Free Trade Agreement?

Ms Baulch—Yes. That is a maximum period, so at least every four years there has to be a process for people to make out a claim. But there is nothing to prevent the government from having a process that allows a claim to be made at any time. In fact, in our submission we propose that you could enable a person to make a claim at any time. I think that is important to remember as well, because this inquiry is being conducted without knowing what the definition of 'access control measure' is going to be, what the definition of 'circumvention' is going to be or what the impacts of those new provisions are going to be on the activities of various organisations.

CHAIRMAN—What impact do you expect the Sony case is going to have?

Ms Baulch—The Sony case was dealing with the current provision regarding the copy control measure. Broadly speaking, the High Court said that what Sony had was an access control measure, not a copy control measure, and so it was not covered by the current law. One point I will make about the Sony case is that it was widely reported as being about regional coding, but in fact the case was about the function of the device in Sony PlayStations to prevent the playing of infringing copies of computer games and the effect of that function on inhibiting or deterring the making of the infringing copies in the first place. So it depends what the definition is going to look like in the legislation, but it may well be that when the new legislation comes into force a device which prevents the playing of infringing copies will constitute an access control measure. But it will depend on what the legislation looks like.

Mr MURPHY—Regarding the need for an exception permitting circumventions of TPM on software, does the council support or oppose such exceptions?

Ms Baulch—I guess we are saying that people need to make out the case. From what we have seen in the submissions, I am not sure that anybody has made out the case.

Mr MURPHY—So at this stage you would oppose it?

Ms Baulch—Yes. We are saying that there are quite stringent requirements in the free trade agreement as to what you have to do to make out a case. If anybody does make out a case, then fair enough, but from the submissions it does not look like anybody has at this stage made out that case.

Mr MELHAM—At paragraph 39 on page 9 of your submission you note that exceptions should be determined by the Attorney-General and announced in the *Government Gazette*. Does the council have any views on the possibility of implementing exceptions by inclusion in regulations?

Ms Baulch—As for regulations, our concern was that the exceptions not be included in the legislation. Once you get exceptions in legislation, it is very hard to get them out. This is an area where the technology is changing so fast that you need to review them periodically. Certainly that has been the practice in the US, as we have pointed out in our submission. In the US the exemptions are granted for a maximum of a three-year period and then you have to go back and make your case again—and that is what happened. As for the two successful claimants, they went the first time around, went back the second time around and were successful the second time around. But they had to show that the circumstances had not changed. So our concern was that if you got exemptions in legislation then the opportunity to review those exemptions in the light of technological change would be hampered. It would be very difficult to change the legislation once it was there, so regulations would certainly be a better option than legislation.

Mr MELHAM—The council's submission indicates that the Australia-US Free Trade Agreement TPM provisions 'relate to measures intended to control access to a copyright work'. That is in paragraph 4 on page 2. However, the committee has heard that access measures might also be used to control access to material in the public domain or non-copyright material. Does the council have a view on this issue?

Ms Baulch—The free trade agreement is pretty clear that the access control must relate to access to copyright protected material—and that is as it should be—so there would be no prohibition on circumventing an access control measure to get access to material which is in the public domain. I think the issue that has been raised in some of the submissions is where the material that you are gaining access to is mixed copyright protected and public domain material. That was an issue that was raised in the US as well, but it was one of the unsuccessful claims.

CHAIRMAN—Thank you very much for attending the hearing today. The secretariat will send you, for correction, a transcript of what you have told us. Please send to the secretariat any additional relevant material that you might think of subsequently and, if you listen to some of the other witnesses, you may also wish to comment on what they are saying. Thank you very much, Ms Baulch.

[9.27 am]

FRASER, Mr Michael Henry, Chief Executive, Copyright Agency Ltd

RODRIGUEZ, Ms Zoe Esther, Lawyer, Copyright Agency Ltd

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, I do advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your submission and it has been authorised for publication. I invite you to make a brief opening statement of about five minutes and then we may proceed to ask you some questions.

Mr Fraser—Thank you for the opportunity to address the committee. We have made a written submission and we would like to begin by explaining who we are. Copyright Agency is the copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members, who are authors, artists, photographers, surveyors and publishers, as to what used to be text and illustrations. We are a not-for-profit company limited by guarantee. We are controlled by our members. We represent the reproduction rights of over 24,000 Australian authors, or creators, and publisher members. Through reciprocal agreements with overseas counterparts, we represent hundreds of thousands of other copyright owners. We have been declared by the Attorney-General to be the collecting society for reproduction and communication in educational institutions and government.

CAL administers the statutory licences through which the educational institutions and Commonwealth, state and territory governments pay copyright owners for the large-scale copying and communication of our members' works. We also offer, under contract licences to corporations, media monitors and others the right to copy our members' published works where our members mandate us to do that. In more recent years we have developed online transactional access models for downloading our members' content from our members' sites, in educational institutions and corporations. For example, universities, TAFEs or, for that matter, corporations can get access to our members' works online, download them and then intranet them through their organisations under licences and with transactional payments. CAL is able to provide copyright clearances and accesses for hundreds of thousands of books, articles and artistic works, both for photocopying and online.

We have worked successfully with a wide range of stakeholders in the book industry to explore opportunities for Australian creativity in the digital age. That leads to our main point that we strongly support the IP chapter of the free trade agreement with the US in respect of the copyright provisions. We believe these provisions will particularly benefit copyright owners, authors, publishers and artists in Australia. Copyright protection is in Australia's long-term economic and cultural interest. Australian content creators have been reluctant to develop online products, electronic products and digital products when you compare our digital publishing industry with US and European counterparts.

According to the research we have done with our members, an important contributor to this has been the concern that Australian content creators have with the circumvention devices generally as well as the general perception by them that the current Australian legislation does not afford them sufficient protection and security to put their content into digital form and online. So we see the copyright provisions of the US-Australia Free Trade Agreement as representing a commitment by the Australian government to address these concerns and give Australian creators the security they need to put their works online and to develop what is a nascent Australian digital publishing industry. Real secure copyright protection is essential to develop Australian digital creative industries.

In the course of the public debate, there often seems to be a fundamental confusion, so I would like to state that there is no copyright in ideas, as is often claimed. Copyright is not patent. Copyright is a mechanism for protecting someone's work—the expression contained in the original work—from someone just making a copy of that expression without permission. So, to take the popular example that you see in the press, for argument's sake, that would be the case if *Romeo and Juliet* were still in copyright. Anyone can do *West Side Story*. There is no copyright on the idea. We are talking about actually photocopying or digitally photocopying the expression. It is not fettering creativity to have strong copyright law. On the contrary, it rewards creativity.

Copyright is an intellectual property right protected in law, in accordance with the Bern Convention and also the Universal Declaration of Human Rights. The terms of these treaties set the benchmark standards for member states, including Australia's copyright protection, and provide the environment for the development of national publishing industries and cultural diversity dependent on copyright protection in each country. As a property right, any exception to the owner's exclusive right must be very carefully drafted within the terms of article 9.2 of the Berne convention, the well-known three-step test.

Fundamentally, we make a philosophical or perhaps an ideological or political point. If you want people to invest in and develop any private property, including intellectual property, they must be provided with adequate security and the opportunity for reward to do so. Those who invest their talent, time, work or capital have to be able to lock the gate to protect their investment or no-one will invest their talent, experience and capital in the creation of these original creative works and services.

This is no different to the protection and security that real property owners are being given by being allowed to secure their property by constructing fences and gates which they can lock, whereby they can control who accesses the property and on what terms. In a market economy such as ours, investment and so prosperity have been based on that security. Technological protection measures and their protection under the law are paramount to the investment by Australian authors and publishers in the development of a local digital publishing industry. Nobody wants their works disseminated and accessed more than our members—the creators themselves—do. However, they will not invest in creating new works if they are not provided with the legal means to control and manage the use of their works. The extent to which others are allowed to spring the locks must be carefully circumscribed. If the concerns and obligations under the free trade agreement and under the Bern convention are not met, the only result will be no development of a local publishing industry in Australia. It will not harm the US or the European publishing industry, to which we are a secondary market—a 'nice to have' market.

Australia will be relegated to the position of a secondary market for the publishing industries of overseas territories which do provide their authors and publishers with appropriate security to invest in and create their online resources.

We have said in our submission that we believe that there are two areas where additional exceptions to the general ban on the use of circumvention measures to bypass TPMs may be appropriate. The first is access control for the print disabled where works have been published in a digital format but not in formats which are accessible to those with a print disability or who are blind. Such an exception should be subject to a commercial availability test, and publishers and authors should first be given the opportunity to meet the demands of this sector of the community on request. The second area where we consider an exception may be desirable is access for the purpose of copying for preservation undertaken by libraries. This would apply where the files in which works were legally stored in digital form by libraries were unstable. But these files would then have to be carefully circumscribed so they could not be repurposed without the permission of the copyright owners.

Another important consideration is which body should be entrusted to carry out the review of the exceptions. In the US, the Copyright Office undertakes that task. We believe there are two viable options in Australia: the Attorney-General's Department or the Copyright Tribunal. Either of these options would be suitable. They are both equipped with legal expertise in copyright. The Copyright Tribunal has the benefit of experience in dealing with a number of parties with varying degrees of legal competence and also the perception of non-political impartiality in its decision making process.

Mr MELHAM—What resources are required for it to be able to do that?

Mr Fraser—I think the tribunal overall is under-resourced in any case. The tribunal and the existing support mechanisms should, in principle, be sufficient; however, the president of the tribunal is a Federal Court judge and he is overstretched with other obligations at the moment. A properly resourced tribunal with its three members plus the secretary should be sufficient if you were to have a review, as I would suggest, every three years.

CHAIRMAN—How much time would the judge spend at the tribunal now?

Mr Fraser—We have made a number of submissions over many years that the government should increase the level of resource for the tribunal. I could not answer that question but I know that, for example, in Singapore, where there is a copyright tribunal, you can get a hearing and a decision within three months. It is, after all, a commercial tribunal. Here, it will take you a year and a half, if not longer.

CHAIRMAN—Is that because of the lack of resources for the tribunal?

Mr Fraser—In large part it is. It is also because the tribunal functions procedurally—although it is not required strictly to do so—in the way that the Federal Court does. So you can have very legalistic proceedings with all the interlocutory steps.

CHAIRMAN—Most people accept that you need copyright regulation. With the free trade agreement, we have noticed that some of the submissions that have come to us have suggested that the balance has shifted somewhat in favour of owners. What is your view on that?

Mr Fraser—I would say that it is quite to the contrary. In our view, the balance has shifted extremely to the consumer. There is in general a move towards the consumer, but in particular in our field. That is because of the technology. The copyright amendment act—the digital agenda changes—carried across the copyright framework that applied in the analog environment, which was the photocopying and printing environment, into the digital environment. It was claimed that this maintained the balance. It has been said that extending the term of copyright puts the balance in favour of the copyright owner—that by creating more stringent technical protection measures and circumvention requirements, it puts the balance in favour of the copyright owner.

To the contrary, when you have a law, as in Australia, which allows exceptions for copying by educational institutions, by government and by libraries without the permission of the copyright owner and when you can use those laws by photocopying, it has an effect on the market of the copyright owners. But when you can use that same exception to the copyright owners' exclusive advice by means of the internet—by distributed network digital technology—the impact on the possibility of the rights owner to manage and control their work is severely affected. As soon as you use an exception, you can use that copy through a networked environment to make millions and millions of perfect copies downstream using the digital networks. The effect on our members is severe because the amendments have equated a photocopying machine or a roneo or a gestetner with the internet.

Mr TURNBULL—What is the answer?

Mr Fraser—The answer is to have stronger protection for copyright owners—for creators. Our members are not lawyers. The authors, the artists, the publishers are not lawyers. They have no sense of security.

Mr TURNBULL—Some lawyers are authors.

Mr Fraser—Of course but I am speaking generally.

Mr TURNBULL—'Roxon on Torts' is a very well known text.

Mr Fraser—Yes. I have ventured into print. But in terms of the industry overall—

Mr MELHAM—You represent 24,000 authors and publishers, according to your submission.

Mr Fraser—That is right.

Mr MELHAM—How many of those would be lawyers?

Mr Fraser—I do not know.

Mr MELHAM—A minuscule number.

Mr Fraser—A handful, yes. There would be just a few. We represent both local and international authors and publishers. This year, for copying and communication, we will be distributing $60 million. It is not just cream on the cake as with photocopying; it is starting to be a very big part of the industry. Rather than purchase a book or subscribe to a journal, you just scan it or download it and then you intranet it through your university, your school system or your corporate system. Of all the money that we collect, we only send 10 per cent overseas. Most of the money is for Australian works of education and information. We are not talking so much about fiction at this stage, because people do not read fiction on screen.

Mr TURNBULL—Let us take the example of the Parliamentary Library, which obviously has special privileges. If it provides a PDF file of a journal article to a member, staff member or someone who is entitled to get material from it, what is the technological mechanism that enables the owner of that copyright—that is, the author of the article that has been provided on the PDF—to prevent the recipient from, as you say, sending it to a million other people?

Mr Fraser—There is then nothing.

Mr TURNBULL—When I asked 'what is the answer?' I was really asking 'what is the technological answer?' It seems to me that, once written material—text as opposed to music or video—is in that format, it is very difficult technically to stop its propagation.

Mr Fraser—Once you have opened it and the user or consumer copies it and sends it to their 10 best friends and each them sends it to their 10 best friends, you have immediately flooded the market for that work, and then the incentive to create and produce that work—

Mr MELHAM—Would you have a penalty for the illegal distribution of that work?

Mr Fraser—That kind of copying should be an infringement and there ought to be at least a civil sanction.

Mr TURNBULL—I think it is an infringement now.

Mr Fraser—Yes.

Mr TURNBULL—There is no question that it is an infringement. The problem is: how do you deal with it?

Mr Fraser—As my colleague Libby Baulch, who comes not from the Copyright Agency but from the Copyright Council, was saying earlier—and it is the thrust behind my remarks—we have very broad exceptions in Australia for copying and communication. A library can copy and communicate that content to BHP. They can charge BHP a schedule of fees from $12 to $60 for the online access, but it comes under a copyright exception. So, under our law, everybody is being paid but the author and the publisher. Those kinds of exceptions do not exist overseas. The BHP library can copy for their entire staff and send it to another corporation or another library under our law.

The exceptions are very widely drafted. As I said, they are the same exceptions that applied to photocopying with a certain effect; they now apply in exactly the same way but to the internet

with an infinitely greater effect on our members' protection and incentive to create. The result is that, if you go online now and want digital product for information or educational material, you will find next to no Australian material. You will find US and European material. By having weaker copyright protection, we are cutting off our nose to spite our face. Those industries will flourish with or without us. But our local national cultural and economic development as a knowledge society and as an information economy depends on having sufficient copyright protection for our members to be able to market their work online.

Mr TURNBULL—Just exploring that, I query how real the distinction is. Let us take the United States. If I were to buy an article from an online journal, say the *Wall Street Journal*, and download that onto my computer, clearly I would not be permitted, under my limited licence, to circulate it to my 10 best friends, let alone my 10,000 best friends, but there is no technical way of preventing me from doing that. So, whether or not the initial download is paid for, the fact that it can be propagated is just inherent in the nature of the internet.

Mr Fraser—There are two points to make there. The first is that, once you have downloaded it into our jurisdiction, if you are a library, including a corporate library, you can copy it without permission because our exceptions allow that. The second point—and I agree with you—is that, once you have opened it, there is no technical protection and it is then open slather through the internet. The secondary and tertiary uses are uncontrollable.

In the book and journal print environment, an author or publisher makes a sale or someone gets a subscription to a journal. In this new network digital environment, it is the downstream secondary and tertiary reuse and repurposing, such as putting it into learning materials and packaging it up for training your staff, where the value is, not just in the original sale of a product in specie. So if you cannot manage through digital rights management then that entire balloon of this new online market for superdistribution and reuse is lost. That is where the real value in the knowledge economy is—to encourage that downstream use and repurposing, but with a reward back to the rights owner.

Mr MURPHY—In paragraph 4 of your submission you say:

> CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the Copyright Act 1968 ... CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

Against that background, does CAL support an exception for relevant institutions with a statutory licence to reproduce copyright works?

Mr Fraser—No, we do not. We think that the technical protection measures, where the rights owners—the authors and publishers—have them, should be kept in place. These exceptions for education and government are remunerable exceptions—that is, payable exceptions. They were put in place in 1981, in effect, when there was still a problem of getting access to books and journals. For example, if you were a distance school or in fact any school or university, you might have trouble finding a copy for your students of this or that book or journal in that now distant publishing environment. But now there is no problem in getting access to these works

online. The universities, schools and others have access to them, but they should be accessed on the terms and conditions.

CHAIRMAN—Ms Rodriguez, would you like to make any comments?

Ms Rodriguez—No, I think Michael has put everything very eloquently.

CHAIRMAN—I did find it interesting that you felt that the free trade agreement actually moved the balance away from your membership.

Mr Fraser—Perhaps I did not distinguish clearly enough. I do not think that the free trade agreement by itself has moved the balance away from our members. We in fact did an economic analysis of the impact that it would have on our work and it was a minuscule fraction of less than a 0.1 per cent increase in our revenue for our members due to the extension of term. The impact on our members is due to the effect of the digital technology and the effect of our Copyright Act, which has very broad exceptions for copying by libraries and corporations for research and study which is not limited to private or individual research or study. The Copyright Act, by importing into the digital environment the exceptions that existed in the analog environment, has meant a sea change against the interests of our members. But, to be precise, this particular free trade agreement has had for us a very small improvement but nothing of any substance.

CHAIRMAN—Thank you. The secretariat will send you a draft of your evidence. We would like you to check it and send it back with any corrections. If you wish to make any additional submissions, please feel free to forward that material to the secretariat when you get the opportunity.

Mr Fraser—Thank you.

[9.55 am]

PEACH, Mr Stephen, Chief Executive Officer, Australian Record Industry Association

CHAIRMAN—Thank you very much for appearing before the committee. The committee does not require you to give evidence under oath but the hearings are legal proceedings of the parliament and they warrant the same respect as proceedings of the House. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission and it has been authorised for publication. Would you like to make a brief opening statement of, say, around five minutes and then we will ask some questions?

Mr Peach—Certainly. Thank you very much for seeing me this morning. I will try to keep my opening comments brief. I should give you a quick overview of what ARIA is. As the Australian Record Industry Association, it is the peak industry body for the recorded music industry in Australia. We have approximately 100 members. They range from the local subsidiaries of the major multinational companies, to a range of significant independent record companies, and all the way through to very small artist owned labels that perhaps only have one album that they are releasing at any particular time. In a very real sense, we represent the full spectrum of the recorded music sector in Australia and in that capacity we have a very strong interest in copyright and in the proper protection of copyright.

I had the opportunity to listen to Mr Fraser's opening address and, rather than repeat a lot of that, I would simply say in relation to sound recordings and copyright material that I would also endorse a lot of his opening comments, particularly the importance of technological protection measures to the proper exploitation of copyright for both the benefit of copyright owners and consumers.

I want to recap on some of the key points in ARIA's submission. As I have just mentioned the technological protection measures—I will shorten them to TPMs to make it easier—are vitally important to the ongoing viability of the music industry in Australia in both physical and online distribution of music. The committee is perhaps already aware that the music industry has been very heavily targeted by the illegal online services. Certainly, from our perspective, this has been very much to our detriment over the last few years. In that context we are very concerned about what can be done and what is being done to address those issues. A number of these online services have sought to make music available on the internet illegitimately on a massive scale. From that, there is no recompense to recording artists, songwriters, record labels and others who invest in the creation and distribution of those recordings.

On the positive side, TPMs are also an essential part of the legitimate online services which are now starting to roll out in Australia. Most recently we have had the launch of Apple iTunes Music Store in Australia, which has over one million tracks available for legitimate download and which ensures that songwriters and creators receive fair recompense for the copying of the recordings that goes on there. But iTunes is certainly not the only one. For more than a year now in Australia, we have had services such as Telstra's BigPond Music, ninemsn, Destra and a few others. These services obviously allow consumers to buy recordings legitimately and ensure that

there is a proper revenue stream back to the various creators. If we did not have TPMs these services, by and large, would not be available or would not be as available in the way in which they are at the moment. It probably would not be viable or practical.

One of the observations made in the discussion paper was the perception that TPMs can be used to lock up content and that that is something that has to be guarded against. I can assure you categorically from the record industry's perspective that that is not the intention of TPMs at all. The use of TPMs is directed at making music available in a way which is beneficial to all parties—not just to consumers and those who want to get music anywhere, anyhow—to ensure that there is a proper balance between those who want to access music and those who create it.

In terms of the focus of this particular inquiry, our basic submission at the moment is that there is no need for any additional exceptions. The free trade agreement, as currently worded—as I am sure the committee members are all aware—contains seven listed exceptions which the government may legislate for. The committee's focus is on the eighth broad category, if you like, of non-specific exceptions which may be introduced from time to time. Our submission is that at this time there is no demonstrable need for any additional exceptions and, in that regard, we would look at the terms of the free trade agreement. We do not yet have the legislation in place which creates the breach of copyright in relation to the exceptions that are being considered today. The FTA requires any exceptions to be credibly demonstrated and for adverse consequences to be demonstrated or shown to be quite likely.

CHAIRMAN—In your submission you state that the government will consider 'whether to enact any or all of the seven specific permitted exceptions'. I was wondering whether ARIA has any reason to suppose the government will not enact all seven. Do you have a view on the appropriateness of those exceptions?

Mr Peach—We do not have any reason at all to think that the government will not legislate in any of those seven areas. We do not have any information about that, but our submission proceeds on the basis that the government will decide to legislate for all seven. In relation to that, that is the free trade agreement and we certainly do not express any view one way or the other about the appropriateness of those seven areas. All I would note is that, in large part, they probably do not affect our members terribly much, if at all. In relation to the exceptions, I should say, representing the sound recording industry here, that we are really talking about any further exceptions which would impact our members.

One of our other key submissions, and one that I know I have received some communication from the committee on, is essentially process related. I would like to mention the fact, because it is certainly there in our submission, that we have proposed that a better way to deal with this issue, which is a very important and complex issue, is essentially by a two-stage process. Ultimately, copyright owners have a great deal of difficulty responding to an inquiry such as this where there are no specific exceptions being tabled for consideration and submission.

We suggested that perhaps another way to go around this would be, as is the case in the US, where a similar procedure applies in the Library of Congress, to use a process in which specific exceptions are put up for public comment and submissions made in respect of those specific proposals. That is not something that we are presently in a position to do. I acknowledge that the committee does not presently propose to go down that path and that we have been invited to

make supplementary submissions based on those that have been tabled to date, and we will certainly be taking up that invitation. Beyond that, I think that is an overview of our submission. I would be pleased to take any questions from here.

CHAIRMAN—Do you have a particular view on the Sony case?

Mr Peach—The problems being experienced overseas at the moment?

CHAIRMAN—The Stevens and Sony case that was recently in court.

Mr MELHAM—The recent High Court case.

Mr Peach—No particular view. Our view is that the outcomes of that case have been largely superseded by the requirements of the free trade agreement, which make it clear that access controls in one form or another are important and that the circumvention of access controls, which is essentially one of the main focuses of the Sony and Stevens case, should be legislated, and the circumvention of that should be an infringement.

Ms ROXON—Mr Peach, you were here when evidence was given before in answer to a question that Mr Turnbull asked, which was that, once you have access to an article, any control that might be used has been lost if you distribute it to your 10 best friends—Malcolm asserts that he has 10,000 other friends to send it to. In terms of the technology, in your industry there is an effective way of controlling passing on.

Mr Peach—Yes.

Ms ROXON—It might be useful, it would certainly be useful for me, if you would explain how that is different. We are being invited to consider exemptions that could apply to all sorts of different media, and I think we need to get clear in our heads how there is different technology that can work for your industry but might not work for others.

Mr Peach—A lot of digital technology creates both threats and challenges. The record industry has done its best to rise to the challenge created by digital technology and the sorts of mass copying and mass distribution challenges which exist and which have certainly contributed to the problems in the industry over the last few years. We have seen develop over probably the last three years the introduction of technological measures for both online distribution and, increasingly, physical distribution of CDs. In essence, in the online distribution, such as the Apple iTunes I have just mentioned but certainly a lot of the others, when you download a recording from one of those services it comes with a small software program that will enforce the contractual obligations that you have undertaken. Many of those services, in fact I think all of them, will allow multiple copies to be made but not unlimited copies. So you will pay for the right to make three copies, five copies or whatever it may be and the track will be downloaded to your PC. The PC will be able to monitor this. If you say you are going to make five copies, when it registers the fifth copy it will not allow you to make another copy. None of these systems are foolproof but they are working quite well.

Ms ROXON—And if you were going to forward it on to somebody else—

Mr Peach—Indeed, you would not be able to forward it. There are controls. As I said, none of these are beyond being broken but they are part of the industry's response to the challenges presented by digital technology. In the physical world of CDs, we saw probably two years ago the introduction of copy control technology on CDs, which prevents you making copies of CDs. In order to make a copy of the CD you need to put it into your computer, and then you burn another copy of it or transfer it somewhere, and this technology would essentially stop you doing that. Again, it is not foolproof.

Mr TURNBULL—Could you explain how that works?

Mr Peach—You are testing the bounds of my knowledge now. Essentially what happens is that, at the time the CD is loaded into the computer, a small software program is also loaded that stops the computer from acting on the copy function which would otherwise be available. The next generation of that copy control technology is being rolled out at the moment. It is not a binary thing of yes or no; it allows a number of copies to be made. Again through the process of a program that is loaded off the CD onto the computer, it registers the number of copies made and, once it reaches the contractual limit, it says, 'No more.'

Ms ROXON—So the theory is that a consumer has a legitimate number of copies that they might want to make for their own use, five copies or whatever it is, and that is built into the price?

Mr Peach—That is right. To go the other way and perhaps show some of the consumer benefits of these, it allows the development of a differential pricing system, although no-one seems to have taken it up just yet because it is fairly early days. You could conceivably have different prices. If you want to buy a copy of a recording and do not want to make any copies you might pay one price. If you want to make only two copies you pay another price. If you want 10 copies you pay a different price again. That sort of flexibility is made available to consumers which would not otherwise be available if TPMs were not in place to control the contract you have taken up.

Mr MURPHY—It has been suggested to the committee that an exception allowing circumvention of TPMs on sound recordings for the purpose of making preservation copies, as is currently permitted by section 110 of the Copyright Act, will be necessary for libraries or archive institutions. Do you have any views about that and would ARIA support or oppose such exceptions?

Mr Peach—Our view is that we need to see, as the FTA requires, credibly demonstrated adverse effects. The copy control technology that I have spoken about has been in place for a number of years now in some form or other. At this stage, it does not appear to have created any particular problems for anybody. So we have that issue: we do not see a credibly demonstrated need at the moment. We oppose it only on those grounds. If there is a credibly demonstrated problem that has the adverse consequences that are set out in the FTA, we would have to give consideration to our position on that one. But, at the moment, our view is that there has been no credibly demonstrated problem.

Ms ROXON—I just want to check what you are saying, because obviously you have written to the committee, and we have discussed this preference of yours to be able to respond to the

planned exemptions that we might propose. Do I understand from your opening remarks that you will be monitoring the submissions that other people make and will put in a further submission if there are any sorts of exemptions or exceptions proposed that you have an issue with or that you want us to be aware of?

Mr Peach—Yes, that is right. Certainly there are obviously a lot of submissions to review, and we will do our best to respond to those and to point out why in each case we think the case has not been made out, if any case has been made at all.

Ms ROXON—Thank you. I think that would be useful for us.

Mr TURNBULL—It has been suggested that we should adopt the United States approach regarding the criteria for proposed exceptions—for example, the rejection of exceptions proposed for region coding. Do you have you any comments on that?

Mr Peach—Region coding is actually not an issue for our industry. It is not an issue upon which we express—

Mr TURNBULL—It is a video issue.

Mr Peach—It is a film issue, yes. CDs are released pretty much simultaneously in each territory around the world, and it is usually within days if not at exactly the same time. In relation to music videos, which is the film thing that we look after, they do not tend to be region coded at all and again are released at pretty much around the same time.

Mr TURNBULL—Some other submissions to the committee have suggested that TPMs on digital music media can interfere with the production, editing and transmission equipment and that, where a blanket licence is in place, TPMs of that kind can prevent the exercise of the licence paid for by the licensee. Would you oppose an exception permitting licence holders to circumvent TPMs in order to make use of sound recordings under licence terms?

Mr Peach—We would be because we say that that is a subject for the licence, and we go back to the credibly demonstrated problem. But in that case the answer to the problem—and it is reasonably obvious—is that, if you are negotiating a licence to make copies of recordings, you ensure that you have whatever rights are necessary to be able to exercise that licence. There would be no need at all for a statutory exception in those circumstances.

Mr TURNBULL—We understand that in recent US court cases access control TPMs were used to prevent competition in the field of non-copyright goods and services. I think in the submission of Dr Weatherall, the academic from Melbourne who is giving evidence tomorrow, wrote about this particular. She said, 'Such TPMs not related to copyright infringement will not be protected by the US anti-circumvention provisions.' In the light of the recent High Court case that was mentioned earlier, Sony and Stevens, it could be said that that was an indication that the High Court may be prepared to interpret analogous provisions here in a similar fashion. Would you like to comment on that?

Mr Peach—There is, as I am sure the committee is aware, a constant tension between competition law and copyright in particular, which by its very nature is monopolistic in the sense

that just one person owns the copyright and has the right to exploit it on terms and conditions. We think that the competition law in Australia provides remedies available where any sort of measure is used for anticompetitive purposes as opposed to properly protecting copyright or intellectual property and that there would certainly be no need within the context of TPMs to take account of competition law because the ACCC has demonstrated certainly an ability and a willingness to monitor anticompetitive effects.

CHAIRMAN—Thank you for appearing before us this morning. If you have any additional thoughts or material, please forward them to the secretariat.

Proceedings suspended from 10.16 am to 10.35 am

BUSH, Mr Simon James, Chief Executive Officer, Australian Visual Software Distributors Association Ltd

CHAIRMAN—I declare the meeting resumed and welcome our next witness. Although the committee does not require you to give evidence under oath, the proceedings are proceedings of the parliament and should be treated as such. We have received your submission and it has been authorised for publication. I invite you to make an opening statement, and then we will ask some questions.

Mr Bush—I would like to think the committee for inviting me to appear as a witness. The Australian Visual Software Distributors Association, or AVSDA, represents 14 distributors of DVD and VHS film and television programs in Australia and is the industry's peak body. In 2004 AVSDA members shipped over 62 million units, achieving revenues of $1.125 billion. The home entertainment film industry's revenue now exceeds that of theatrical box office. The industry employs tens of thousands of Australians, involving all areas of the supply chain from manufacturing, distribution and marketing to advertising, rental and retail. Under copyright law, film copyright owners have the legal right to control and enforce their rights, including the unlawful copying, communication, distribution and importation of their films. TPMs are part of the strategies copyright owners use to control piracy and manage their rights, including who can lawfully access film products and in what territories those products can be sold. Without TPMs, copyright owners would lose their rights to control the copying and distribution of their works as soon as they released a single copy to the public. It is important to recognise that private investment in films in Australia has fallen for the past three years and in 2003-04 totalled just $17.2 million. This is a reflection of the risks and returns in the industry and the increasingly uncertain environment of piracy and internet file sharing.

AVSDA's submission to this committee states that it could not give a specific response to a number of the activities outlined in the terms of reference. AVSDA is not aware of any people or organisations that have either sought or have a need for an additional specific TPM exception other than those already proposed under the Australia-US Free Trade Agreement. Should people come forward through this review with a genuine need for an additional specific exception, AVSDA would subsequently be in a position to provide comments and feedback, and would request and welcome an opportunity to do so.

AVSDA's submission responded in some detail to the issue of exceptions being granted to region coding. This should indicate to the committee the level of concern the home entertainment film industry has about the discussion of exceptions or changes to be made to the region coding system. In summary, region coding protects the windows based release system of a film from theatrical release through its life cycle to DVD, pay TV, internet and free-to-air. This system maximises the return on investment made in a film. In particular, struggling regional and rural cinemas rely on the ability to show major films during Australian school holidays for income, and the windows system, which region coding supports, enables local distributors to time the release of films in this market for when people are more likely and able to see them. This not only ensures that cinemas can maximise income but also means that, during the school holiday periods, the big Australian and Hollywood movies are playing. Region coding is a valuable and critical tool in fighting movie piracy. Police, Customs and industry enforcement

officers use the absence of region coding or incorrect region coding as an easy way of telling a pirated or parallel imported film. AVSDA has estimated that film piracy cost the Australian industry over $400 million in 2004. Film piracy is the largest threat to our industry's future, and we are working with the federal government and law enforcement officers to achieve better enforcement outcomes.

Significantly, police and governments now recognise the organised crime and transnational links of film and DVD piracy. The removal of region coding would also undermine the Australian classification system as an easy detection of pirated and parallel imported films would become more difficult. The vast majority of pirated and parallel imported films confiscated have no Australian classification markings. As the committee would be aware, the federal parliament has made it illegal to parallel import a film into Australia. Region coding supports this intent.

Finally, I would make the point that region coding has little impact on the Australian consumer. Should someone purchase a legitimate DVD from another region, they easily have the ability to play that DVD when back in Australia. In addition, by having parallel importation restrictions for films in Australia, the choice and range of films released into the Australian market is far greater than it would otherwise be by having the full representation of all the major global film distribution companies here in Australia.

CHAIRMAN—Can you explain whether region coding is a technology that controls access to a DVD or a technology that protects copyright?

Mr Bush—On the issue of whether region coding is an access control and a TPM, the answer to that question is that it is considered an access control under the US-Australia Free Trade Agreement and it is a protector of copyrighted works.

CHAIRMAN—Is there any technology apart from region coding that prevents copying the contents of a DVD?

Mr Bush—Yes. There is CSS, the content scrambling system, which is on all DVD software. The region playback is part of CSS and is inextricably linked, so you cannot remove region coding without destroying the whole content scrambling system protection.

CHAIRMAN—Some submissions have suggested that the free trade agreement moved the balance in the area of copyright from consumers to owners. Do you have a view on that?

Mr Bush—Yes, I think that is a flawed argument, with respect, Chairman, simply because the ability for copyright owners to protect their works, which is recognised through the Copyright Act, increases innovation and investment in films. Without ability for an owner to protect its work and derive income from it through those windows that I mentioned earlier, the likely outcome would be that you would not have an investment and people would not spend their creative efforts and time to innovate and put their product onto DVD, simply because, without a protection there, it would get distributed widely without any ability for the copyright owner to derive income.

Ms ROXON—I understand how that applies if you are talking about a pirated copy but, if you actually purchase a legitimate copy of a DVD somewhere else, how do you argue that the region coding protects the copyright owners in that circumstance? If you buy a legitimate copy where the copyright owner is getting some portion of that sale, why is there an argument for the region coding to apply in that situation?

Mr Bush—The region coding is important in Australia because it protects the industry against importation of pirated and parallel imported films. If you buy a region 1 coded disc in the United States, for instance, or you buy it on Amazon and import it through the mail or you physically go there and buy it and bring it back, you have the ability to play that disc on a machine in Australia.

Ms ROXON—If you have the right technology to be able to use a multiregion player.

Mr TURNBULL—But most of them do have that facility, don't they?

Mr Bush—They do and, under the DVD Forum—the people who license the DVD technology to manufacturers—there is the ability and a legal right for a consumer to change the region coding five times as well. So there is the ability for the Australian consumer to watch a DVD from another region on their Australian machine.

Ms ROXON—Yes, but it is not really answering my question. Really what you are saying is that the only argument on behalf of the copyright owners is because it is the only effective way to protect against piracy, not because they do not get any—

Mr Bush—And parallel importation.

Mr MELHAM—Can I just talk to you about your submission and your estimate of $400 million in terms of film piracy? How did you reach that estimate?

Mr Bush—That is an estimate we came up with. Separately the MPA is doing some research to actually quantify this figure. It has not been done. AVSDA had an industry-wide forum for all members of the film and television industry, and we actually attempted to calculate a figure. It is based upon consumer spend, and we believe it is a conservative estimate—

Mr MELHAM—That is what I would have thought it was. I notice that the number of pirated discs seized by Customs and the Australian Federal Police seems to have been doubling in each of the years since 2003.

Mr Bush—Yes, that is correct.

Mr MELHAM—I would have thought that a lot got through undetected.

Mr Bush—That would be a fair thing to say.

Mr MELHAM—In effect what you are saying is that it is costing your industry big bickies.

Mr Bush—It is, and also with the advent of the internet. The film industry in a way is lucky because we can see where the music industry has gone and we can learn from that. The film industry is learning and is providing alternative channels and options for the consumer to buy the legitimate product, but we also see TPMs and region coding as part of that and an important way to protect copyright as well.

Mr MELHAM—Do you see other ways to protect your industry or not?

Mr Bush—The industry is spending a lot of money on enforcement. You will be hearing later from the Australian Federation Against Copyright Theft, an organisation that has been set up in this country with large investment from the industry to work with police, Customs and other law enforcement officials to try to catch as much of the illegal product coming into this country and being sold in this country as possible.

Mr MELHAM—What you are suggesting in your submission is that the criminals tend to be gravitating towards this stuff because it is big bickies and it gives them money to do other things.

Mr Bush—That is right. There have been proven links to organised crime and certainly it is transnational, with syndicated links around the region. The profitability of DVD piracy is huge. The costs are the costs of a blank disc, really. The setup cost—

CHAIRMAN—There is a lot of piracy occurring within Australia, isn't there?

Mr Bush—There is indeed. You can buy a multiple-stack DVD burner and you just buy the blank optical disc. You can rip off quite a few DVDs per hour and sell each DVD at the local markets or on the internet. A new release—often stuff that is not out yet in Australia—will sell for $10 or $15 and it might cost you $1.20 to make.

CHAIRMAN—Do you think that is happening a lot?

Mr Bush—It is happening a lot. The profit margins are huge—more so than some of the drug trade profitability.

Mr TURNBULL—How big is the file of, say, a typical feature film?

Mr Bush—If you wanted to rip it and burn it onto a computer?

Mr TURNBULL—How easy is it to distribute it over the internet as a file?

Mr Bush—It is a very good question because a few years ago it was very cumbersome and difficult to download a feature length Hollywood film on the internet. With the changes in technology there is increased penetration of broadband in Australia. I believe it is now in more than 30 per cent of Australian households. Coupled with compression technology like BitTorrent, this means that you have the ability to download a feature film in under an hour. There are expectations that in the next couple of years that time will reduce to 30 minutes and less to download a full feature film.

Mr TURNBULL—What technological protection measures are there? If someone buys a DVD of a newly released movie in the States, what is to stop them just emailing a copy of it to someone in Australia as an attachment?

Mr Bush—If they bought a hard disc?

Mr TURNBULL—Yes. Obviously they have to copy it.

Mr Bush—They would have to copy it and to do that would be illegal.

Mr TURNBULL—Yes, I understand it is illegal. What stops them from doing that, from a technological point of view?

Mr Bush—There is a piece of technology on the disc called CSS—content scrambling system—which is the technological protection measure on the disc that stops the copying and dissemination of that disc. It can be cracked, I will hasten to add. There is a famous Swedish guy called Johansson, I believe, who back in 1999 released the codes. He reverse-engineered the code and called it de-CSS. I understand he has since been prosecuted. You can, with a bit of effort, crack the CSS code. But that technological protection measure is there. In my submission there is a reference to MovieLabs, which is a new organisation that has been set up in the United States to look at putting a new TPM onto discs.

Mr TURNBULL—If there is a CSS, how do people pirate DVD discs then?

Mr Bush—There are two elements: you have the new release films—which is what people want—films that are in the cinemas and films that are not yet in the cinemas in this country. It has been downloaded from the internet from overseas. Over 90 per cent of that type of piracy involves Handycams—someone physically going into a cinema, recording it with a Handycam, uploading it onto the net to their mates around the world. This is syndicated, so people know where this secret site is. They will download from it. So if something is released in the United States we have evidence that it will be selling in the local Australian markets inside a week.

Mr TURNBULL—But that would be pretty poor quality, would it not?

Mr Bush—It can be pretty poor quality, and a lot of consumers do not want that poor quality.

CHAIRMAN—With people perhaps walking in front of the Handycam!

Mr Bush—If anyone has been to Bali or parts of Asia, they will have seen the range of DVDs en masse in those markets being sold illegally. If it is a new release, you will find the quality is a Handycam type quality. It is pretty poor. If something has been released on DVD, they go from digital to digital so they rip the original DVD straight across—using a computer and a burner—to another DVD, and the quality is not too bad.

Mr MELHAM—How much of a criminal element is in that, as against casual use—the sort of people who are just there for the one-off thrill? Do you have an estimate of that?

Mr Bush—I do not have an estimate of that assessment. The concern for the industry comes down to resources. We want to put our resources into enforcement. It is really going after the people in the commercial trade of this stuff, not so much the consumers these days. I am not suggesting that if someone was distributing to a wide network group for non-profit that the industry would not go after that person. One of the concerns we do have is people bringing into the country 100 and 200 pirated DVDs in their suitcase from holidays and then distributing them to friends and family. I think we all know people who have come back from Asia with DVDs. I certainly do. My family and friends have done it, despite my asking them not to. That is a concern for the industry. We are finding that it has really impacted on local rental and retail stores and they are really struggling. We are talking to the government about finding a solution to that particular problem.

CHAIRMAN—Do you think one of the reasons for video piracy is the high price of DVDs in the Australian market?

Mr Bush—No. I answer no, because I have some information that compares the average DVD price in Australia, the US and the UK in 2004. In Australia in 2004 the average price in US dollars was $US17. In Australian dollars, the price was $23; in the US in 2004, it was $US15; and, in the UK in 2004, it was $US22.49.

Ms ROXON—What about comparisons with countries that will be more relevant in terms of people thinking they are getting a bargain? It is not a case of people going to the US and buying legitimate copies and coming back; it is a case of people going to Indonesia or Thailand or places in our region.

Mr Bush—None of those copies are legitimate. That is why they are so cheap.

Ms ROXON—I understand that. I do not understand why the industry will not consider this option. If you think the cost is the same across all countries where DVDs are legitimate and if you had releases at the same time, you would massively reduce the issue of piracy, wouldn't you? What are the motivators—cost and getting new material before it is in Australia? Are there other motivators for the large scale piracy?

Mr Bush—I am not sure I understand the question.

Ms ROXON—If you think that the reason people want to buy the pirated copies is that they want something that has not yet been released here, isn't the question for industry whether the release time should be more consistent across the world? Obviously, I understand why school holidays increase the market for cinema use and so on, but isn't that also a strategy that could be adopted that would reduce the scale of people buying illegitimate copies?

Mr Bush—Under copyright law in this country, the distributor of a film has a right to decide when it enters this market, so that is the first point I make. In answer to the other issues in your question, the system does have a windows based system that I referred to earlier, so there are different release dates for the product to maximise your revenue stream. Increasingly, those windows are being restricted and reduced, due to piracy. With some of the major blockbusters—*Lord of the Rings* and *Star Wars* are two recent examples in the last couple of years—they have

gone global day and date, which is something that I think you referred to, specifically to respond to piracy.

Ms ROXON—Has that been effective?

Mr Bush—It has been effective, I believe, in those circumstances—but you can only afford to do that for the major blockbusters. To ship 35-millimetre prints all around the world on one release date costs an exorbitant amount of money; that needs to be recognised. To come back to your question about pricing, Australia is, in fact, competitive—if not cheaper than the rest of the comparative markets. To compare us to Asian markets, where there is no legitimate local industry, where intellectual property laws are non-existent, where everything is pirated and linked to organised crime—I do not think that is a fair comparison. The Australian consumer has a massive range of product in this country; the amount of back catalogue DVDs that are now available in your local retail store or video store is huge. More and more are coming on stream all the time and they are being sold in petrol stations, in supermarkets and they are often less than $10 a disc. So I do not accept the argument that because they are $2 and they are pirated in Asia we should remove region coding and allow massive parallel importing of films to this country.

Mr TURNBULL—I am not challenging region coding; I am just being a devil's advocate against it. As the media has become globalised, the minute a movie is released anywhere in the world, if it is of interest, it will become the subject of discussion and debate immediately. Australians will be reading reviews and, if it is controversial, opinion pieces for and against, and so forth. Region coding does disadvantage Australians if the owners of the copyright decide that a film is going to be released here some period after it is released in the United States because it means that there is a movie that is timely and is being debated and is the subject of a lot of controversy globally, and yet Australians cannot participate in that because it has not been released here. Perhaps you could comment on that. Let me contextualise it—was *The Day After Tomorrow* released globally at the same time?

Mr Bush—I could not answer that.

Mr TURNBULL—I do not think it was, but let us take that as an example. That was a film all about global warming. It was obviously a very topical issue and it was the subject of a lot of debate. If a movie like that is released in America and is the subject of discussion, of news commentary and so forth but then it is not released in Australia for some period after that, it does mean that Australians are left out of a very topical, global debate. The global village does not really work from our point of view in that case.

Mr Bush—Yes, I hear what you are saying. Going back to the law, the copyright law allows the owner of the copyright to distribute their product when and where they so choose.

Mr TURNBULL—That is right; I am not challenging that. I am just saying that there are implications of that.

Mr Bush—Yes, and what has happened because of what you are suggesting is that release windows have shrunk around the world. What the windows and region coding do allow, however, is if, say, a kids movie is released now in the United States—or a big blockbuster such

as *King Kong*; I am not sure if that is going global day and date, but I suspect it may be—it might will be held off until December in Australia, for a month, purely so that something is there for parents and children to see during the school holidays, and so that those cinemas around the country have something to show. So having that flexibility maximises returns and gives something for the cinemas to show during those peak periods. As well, there is evidence to suggest—it is new evidence and it is being developed—that the longer the release window is from America on a major picture the less income it will generate in the other markets. So there is a bit of that happening.

Mr TURNBULL—Is that because the American promotion, the American marketing dollar, has an impact in Australia?

Mr Bush—Correct. So the distributor has to make some commercial decisions about the timing of that release, and the window system enables that to happen. If there is a big vibe around a film then you could argue that the distributor will take that on board.

Mr MURPHY—Other submissions to the committee have sought exceptions permitting the circumvention of TPMs in relation to films for the purposes of broadcasting and archival retention of material. Do you have any views about that?

Mr Bush—I would have to take specific exceptions put forward through other submissions—I have not seen that one—and take advice and get back to you.

Mr MURPHY—Okay. Perhaps you might want to make a submission to the committee in relation to that.

Mr Bush—Is that a public submission that you are referring to?

Mr MURPHY—Yes. I will have to dig it out for you.

Mr Bush—That is okay; I am sure I can find it.

CHAIRMAN—The secretariat would be able to provide details.

Mr Bush—I would be happy to respond to that specific issue.

Ms ROXON—I would like to return to region coding. We are all being devil's advocates here, but it helps us test our thinking. Some of the briefing material that the committee has had, in respect of region coding for games as well as for DVDs, was perhaps less frank than you have been in terms of the economic benefits that, legitimately, the copyright owners seek to maximise. Some of the briefing put to us was that region coding was not at all to do with the economic benefit to the copyright owners or the distributors but was actually to do with the technology that material is being played on. Your submissions this morning really seemed to indicate that that briefing material we have had is not accurate. It is not about the technology that material is being played on; it is about a specific decision to want to be able to market your material at a time of your choosing in a particular region and aim to legitimately maximise the benefit of it.

Mr Bush—That is not 100 per cent accurate with respect to what I was trying to say, and I apologise if I have given information to the contrary. Yes, it maximises income. It is a great tool—an essential tool—in fighting piracy and stops parallel importation of film, so it is incredibly valuable for this market. In terms of it being a TPM inextricably linked as a device on a machine, it is that as well. Regional playback control is part of the CSS system. So, if you were going to provide an exception to region coding as a recommendation, that is linked into the CSS system and you would be providing an access control and a backdoor entry into the whole DVD security system.

Ms ROXON—So does that mean that you think the devices that you were mentioning before—multiregion DVD players or whatever the correct terminology is for them—are TPMs? Or are they circumvention devices?

Mr Bush—The DVD Forum, which controls the use of the DVD technology and licenses manufacturers to make the machines, gives the manufacturers, and therefore the user, the ability to change the region coding on their machine up to five times. So on the machine you buy, even if it is a region specific machine—like a region 4 machine for Australia—you will find you have the ability to change that. If you buy a multiregion machine, obviously it is multiregion and you can play any disc on that.

Ms ROXON—So you would not regard that as a circumvention device?

Mr Bush—It is a very good question. I would have to take that on notice, as to whether a multiregion machine is considered a circumvention device. It gets quite technical in a legal sense when you start looking at these issues.

Ms ROXON—Yes. Unfortunately, we are being asked to look at some ridiculously technical material—but we need to. Obviously, the follow-on, if you are going to take that on notice, is whether your association has a view on whether multiregion DVDs are legitimate, and whether the use of them is legitimate or not, because it seems that there are contrary arguments otherwise.

Mr Bush—I would answer that question simply by saying that the resources of the industry to date have been focusing on the pirates themselves—the people who import, manufacture and sell illegal content. The industry has not been putting the resources into going after people who play a pirate or illegitimate product on a region player in Australia. That has not been the focus of the industry.

CHAIRMAN—There being no further questions, I thank you very much for appearing before us, Mr Bush. A draft of your evidence will be sent to you for correction. Could you let us have the additional information you have undertaken to provide and, if there is any other material that you would like us to have, please forward that to us.

Mr Bush—Thank you.

[11.04 am]

GONSALVES, Mr Maurice, Partner, Mallesons Stephen Jaques, Legal Representatives, Business Software Association of Australia

HUTLEY, Ms Vanessa, Senior Corporate Attorney, Microsoft Pty Ltd; Member, Business Software Alliance; and Alternate Director, Business Software Association of Australia

KAISSER, Ms Sarah, Member, Business Software Alliance; and Director, Business Software Association of Australia

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, these proceedings are proceedings of the parliament and should be treated accordingly. We have received your submission and it has been authorised for publication. Would you like to make an opening statement of five or 10 minutes, and then we will ask you some questions?

Mr Gonsalves—I will make a very brief opening statement. The Business Software Association of Australia represents the leading software companies operating in Australia. The Business Software Association was formed about 15 years ago, principally with the object of stamping out software piracy in Australia. The piracy rate back then was in excess of 50 per cent.

CHAIRMAN—Then you have been successful?

Mr Gonsalves—It has been partially successful. The software piracy rate is still 32 per cent, which is unacceptably high. The last study done by IDC estimated that the software piracy rate of 32 per cent in fact caused losses to the software industry of about $545 million, which is a very significant figure for losses. One of the ways of addressing piracy is through technological protection measures. As a result, the BSAA believes that we need strong measures against the circumvention of technological protection measures if they are to be of any effect. We have provisions now in the Copyright Act against the circumvention of technological protection measures, and those provisions are required to be further strengthened as a result of the Australia-US Free Trade Agreement. This committee's task of assessing exceptions to the circumventing of access control measures is a very important one in that context. I say that because any exception has the potential to undermine the prohibition itself, so it needs to be addressed very carefully indeed.

The BSAA's primary submission is that the committee needs to be convinced, with a fairly high degree of proof, that there are circumstances which mandate a particular exception and, further, that any exception needs to be narrowly crafted to address the actual harm which has been identified. The BSAA believes that the US Copyright Office and its numerous inquiries into exceptions are of great value in guiding the committee because those inquiries have gone into great depth in analysing the issues.

Of the specific exceptions which the committee is looking at, the Business Software Association of Australia has a particular interest in relation to the activities of open source

software developers. The BSAA's experience in dealing with this issue suggests that the existing exception in relation to interoperability in the Copyright Act has satisfied the requirements of open source software developers, and no evidence has come before the Business Software Association or its members to suggest that that exception is not adequate to enable open source software developers to produce their interoperable programs.

In summary, I think the BSAA would say that we are not aware of any particular circumstances affecting the software industry which would require additional exceptions in relation to the circumvention of technological protection measures. That concludes the opening statement.

CHAIRMAN—Thank you. There has been some suggestion that the free trade agreement has moved the balance from the consumer to the copyright owner. Do you have a view on that?

Mr Gonsalves—Our perspective on that would be that the free trade agreement has resulted or will result in increased enforcement of intellectual property rights. Most of the provisions with regard to strengthening the copyright law have been in relation to enforcement. I am not sure that that necessarily affects the balance of rights as between users and owners. It is merely intended to assist in enforcement of the existing rights. Obviously, the extension to the copyright term is an exception to that. Clearly, that is a substantive change which benefits copyright owners—but that, to my mind, is an isolated example.

CHAIRMAN—In your submission you state that you do not support many additional exceptions in relation to the activities of open source software developers. Does that opposition also extend to the activities of those who wish to circumvent TPMs on computer programs to make interoperable products such as hardware?

Mr Gonsalves—We are suggesting that the existing exception for interoperability already covers that scenario and enables open source software developers to produce compatible and interoperable programs.

Mr MURPHY—The research conducted by IDC for BSAA found that piracy costs the software industry about $A540 million. How did they arrive at that figure?

Mr Gonsalves—One of my colleagues from BSAA might want to elaborate on this. My understanding is that a very extensive study is carried out every year—because this has been such an important issue for the software industry—on which the figures are calculated. There is quite a thick study which supports the figures. I do not know if we have any further information about the precise manner in which it is conducted.

Ms ROXON—Your submission also uses some figures from 1998. If it is conducted annually, is there more up-to-date material that you might want to talk to us about while you answer that question?

Ms Kaisser—The figures in the submission—such as the 32 per cent—are the latest figures that we have. In relation to how those figures are arrived at, it is basically through interviews that are done in a number of countries and comparing and looking at PC shipments into countries as well as software purchases.

Ms Hutley—It compares the figures between shipments of PCs. It then looks at members' software sold in that country, as well as other software. Business application software is what is actually measured in this study. It compares the gap between the shipments. It also uses a formula to calculate the average number of programs loaded onto a machine, so it is not just a figure showing the gaps. We can make available the methodology for the figure if that would assist the committee.

Ms ROXON—Could you explain to me paragraph 3.4 in your submission where you talk about the survey done in 1998 and a figure of 66 per cent. You have said that 32 per cent is the current figure. Is that comparable material that is current—or was that a particular sectoral survey that you did but have not done more recently?

Ms Hutley—That was a particular study looking at segmented industry. Certain industries have higher piracy rates because of the nature of the type of software they use. Some examples are graphic design and the computer aided design segments. The IDC study is conducted every year and has been conducted every year by the BSAA. A study of that nature has been conducted for the last 10 years globally, looking at software trends. It is done every year around April. So the figure quoted—the 32 per cent—is the most current figure we have for the global IDC study. The one that you refer to in paragraph 3.4 was a particular study that has not been repeated since then.

Ms ROXON—So that I am clear in my head: it was about trying to break down the different types of software and the fact that, obviously, some is more appealing for people to pirate than others.

Ms Hutley—Yes.

Mr MELHAM—In paragraph 3.7 of your submission there is a suggestion that, if you could get a 10 per cent reduction in software piracy, certain things would happen in terms of boosting local industry or whatever. That is the International Data Corporation global research study of April 2003. Could we get a copy of that study or is it a private study? It really talks about a massive increase in the value of the local IT sector—

Ms Hutley—We can make a copy.

Mr Gonsalves—We can obtain a copy for the committee.

Mr MELHAM—which for us obviously is the incentive to try to tighten the systems.

Mr MURPHY—Do you think the penalties for piracy are adequate?

Mr Gonsalves—Our position on that and our experience is that the theoretical penalties in the Copyright Act are adequate. However, the penalties that are handed down in practice are not. This goes across all types of piracy, not just software piracy. The penalties handed down in other courts in other jurisdictions—whether you compare even Asia, or the UK and the US—for comparable cases tend to be a lot tougher.

Mr MELHAM—Are there many prosecutions?

Mr Gonsalves—There are not sufficient prosecutions either. That is the other problem that is encountered.

Mr MELHAM—How many would you have in a year?

Mr Gonsalves—For software piracy issues—five perhaps.

CHAIRMAN—Why are there so few?

Mr Gonsalves—Largely because the Australian Federal Police do not have the resources to prosecute piracy cases.

Mr TURNBULL—A constituent of mine is involved in retail in the clothing business where piracy is also a very big issue with brand names. While travelling we have all seen fake Louis Vuitton bags and fake designer labels material available. That sort of piracy is not technologically complicated compared to what you are talking about. But this constituent has made the suggestion to me that one way of addressing this perceived lack of enforcement or insufficient enforcement would be for the various stakeholders, the copyright owners—in his case, the licensees of these brands or retailers—to contribute to a fighting fund to augment the resources available to the police. It is a rather novel suggestion but, given the amount of money that is at stake, does that sort of idea have any merit?

Mr Gonsalves—If I understand the proposal, it is that there be a fighting fund for the purpose of criminal prosecutions, not a fighting fund for the purpose of civil law suits.

Mr TURNBULL—Yes, for the purpose of enabling there to be more resources put into detection. You are absolutely right—the penalties are pretty significant but the chance of being apprehended is very low. The risk of being caught is so low that potential offenders do not pay attention to the large penalties.

CHAIRMAN—You seem to be saying that, even when the courts do hand down a penalty, they do not hand down an adequate penalty.

Mr Gonsalves—That is correct.

CHAIRMAN—That is not just in your area of law, though; that is a general problem in the community.

Mr Gonsalves—That is a general issue but it is particularly acute in the case of piracy because the courts have traditionally not treated piracy as a serious criminal offence.

Mr MELHAM—What sorts of penalties have been given by the courts in the last 12 months, for instance?

Mr Gonsalves—Typically the penalties are fines. In some cases, the fines are reasonably significant but they are usually proportionate to the amount of the piracy involved and generally regarded by most pirates as merely a cost of doing business.

Mr MELHAM—So what are the figures?

CHAIRMAN—Could you give us some examples.

Mr MELHAM—What are the maximum penalties and what are some of the figures that have been given?

Mr Gonsalves—They range enormously, from a few hundred dollars to $30,000 to $40,000 in fines. But in many other countries there are jail terms handed down by the courts for piracy. To my mind, that is the biggest single distinction, apart from the risk of getting caught being perhaps not as high because of a lack of prosecution as well. If I can make one point in relation to the suggestion of a fighting fund, the various industries, including the software, film and music industries, already commit huge resources to investigating piracy. In fact, usually they will carry out an investigation and put together a very complete brief for the prosecutors, but persuading the prosecutors and the police to actually take the criminal action and conduct a search with a warrant is what is difficult in practice.

Ms ROXON—You were here for some of the discussion on region coding that we had with the previous witness. Do you want to express a view on that? I understand that for some of the industry that you represent it is an issue but for some it probably is not. Do you have a view on or comment about the use of region coding that you would like to make?

Mr Gonsalves—It is not an issue that concerns the Business Software Association directly. The view that we would have, from our understanding of the situation and analysis of the record of similar proceedings in respect of the US Copyright Office, is that the perceived problem is certainly not acute enough to warrant an exception having regard to multiregion DVD players and so on. We do not think that it is such a significant issue in practice.

Ms ROXON—So it is not an issue for your organisation because none of the region coding issues could apply. I see the DVD part does not, but there are no other issues as to games or other things? Does it not apply to the business software industry at all?

Mr Gonsalves—It does not apply to the business software industry at all, as opposed to other segments of the software industry such as the computer games segment.

Ms ROXON—And your members are not involved in both?

Mr Gonsalves—One of our members, Microsoft, is certainly involved in both, yes.

Ms ROXON—Would any other witnesses like to make a comment on it?

Ms Hutley—Representatives of the games association will be making representations on that. As the Business Software Association of Australia, we have stated our position as a member of that.

Mr TURNBULL—So your typical scenario is that somebody buys one copy of Microsoft Office licensed for one user and then allows another 50 people in their office to put it on their machines?

Ms Hutley—Yes, because we do not have the regional coding issue. Ours is a copyright infringement multiple-copying issue.

Mr TURNBULL—And you would normally expect that business user to pay something extra to license it for an additional number of users?

Ms Hutley—Indeed.

Mr TURNBULL—To what extent does the internet enable you to monitor infringement? Most business software communicates with the provider of the software over the internet. There is normally a registration procedure and there is normally a mechanism for updates. To what extent does that enable you to find out whether one of your member's software programs is on a machine in respect of which there has not been a licence fee paid?

Ms Hutley—I cannot comment on other members' software. I am not technologically aware enough of their software to be able to make any sort of statement on that. As for the issue with Microsoft software, I would prefer to have someone who is probably a lot more technological than I am to report on that. My understanding is we do not monitor or collect any data on individuals. There is a registration process which merely recognises a registration as being correct or not correct. We do not capture that data in terms of the nature of the person or the company using that system. But I would prefer that somebody who has a much greater technological understanding answer that question to your satisfaction.

Mr TURNBULL—I would have thought that every Microsoft user—assuming they are connected to the internet, which would be the vast majority of them—is to some extent part of a Microsoft wide area network. All of us who are connected to the internet are members of a whole series of different networks. We are members of multiple networks. Instead of software being sold to a business and then being used within its particular network, most software is now connecting all the time with the provider of the software. The best example is the antivirus programs which are constantly being updated. I am not technical; I am just interested to what extent that new networked reality, which is a function of cheaper bandwidth, higher bandwidth and the internet, is giving you greater capacity to observe unauthorised usage.

Ms Hutley—I would just say that I think whether someone can log on legitimately through a verification process or not is more a statistical piece of information, but the actual knowledge of that person or that company is not information that is captured, it is not part of the way the system works. As a caveat, I would say that this is a technological area that would require a clear explanation from someone who has greater capacity than I do.

Mr TURNBULL—I do not know if the rest of the committee are interested in this, but it may be useful if you could come back to us with something on that. I guess the question is: given the fact that every piece of software is potentially connected via the internet to its provider, to the original licensor, to what extent does that change the rules of the game in terms of monitoring infringement? This is true for business software. It does not apply, for example, to a movie, a sound file or song. It does not necessarily have to apply to those, but it really does with your products.

Mr Gonsalves—We will take that question on notice and come back to you.

CHAIRMAN—Thank you very much for appearing. Please let us have the additional material that we requested. If you want to let us have anything else that you think of between now and when we finish then feel free to do that as well.

Mr Gonsalves—Thank you very much.

[11.28 am]

PECOTIC, Ms Adrianne, Executive Director, Australian Federation Against Copyright Theft

CHAIRMAN—Welcome. We do not require you to give evidence under oath, but these are proceedings of the parliament and there are sanctions if you do not tell the truth. Would you like to give us a brief opening statement, for five or 10 minutes, to summarise the key points in your submission?

Ms Pecotic—Yes, I would, thank you. I refer the committee to our written submission. Thank you for giving me the opportunity to appear today on behalf of the film industry's Australian Federation Against Copyright Theft and also for your consideration of this review into possible exemptions for certain technological protection measures. Film-making is unique in that it represents the combined efforts of many people, often hundreds of people, into a single creative vision that has the power to express popular culture, artistic endeavour, documentary record and commercial entertainment.

The film industry employs Australians at every stage of the life of a film, from production and replication to exhibition in every release window, including country cinemas and local video stores through to free-to-air television. The industry includes big and small businesses, writers, actors, directors, film-makers, studios, post-production facilities, factory workers, graphic designers, printers, advertisers, shop assistants and ticket sellers. Our industry directly employs over 50,000 Australians, let alone many thousands in related industries, who rely on the revenues made possible by the existence of copyright in film and are now affected by the crime known as movie piracy.

Film-making is unique in that many millions of dollars go into the production of a single film or television series—a very high-risk investment into a creative venture that can only return the investment if the program is commercially popular with an audience. A film can also only return the investment through exercising the rights of the film-maker provided in Australian and international copyright law. Those exclusive rights include: to copy the film, to distribute the film, including by broadcast and public performance, to authorise the import and sale of the film, to protect these rights through technological protection measures and to manage these rights through electronic rights management systems.

In 2004, the average cost of making and marketing a Motion Picture Association member company film—and Motion Picture Association members are members of AFACT—was over $US98 million. Only one in 10 US films recoup the investment out of the US domestic market, and only four in 10 US films ever recoup their original investment. Over 80 per cent of Australian films are made at a cost of between $1 million and $6 million, and there is even less chance of recovering this investment from sales of the film in Australia or overseas. The film industry, relying on copyright law, has developed a sophisticated system known as 'windows'. Its purpose is to explore every possible opportunity to bring the film to the audience at different times, places and price points, giving the consumer the choice of how they want to enjoy the film and how much they are willing to pay for it. Many businesses have developed around each

window, and new businesses—for example, television networks and video rental stores—have continually evolved as technology has facilitated new windows from the first invention of film and cinema exhibition to the invention of television, videotape and now digital formats.

The copyright in a film or television program can be legally divided and licensed many times for many different formats to reach consumers in many different ways. It underpins the international system of windows in every different country that respects this copyright law. Like technological protection measures themselves, the windows system is maintained through law, licensing and contract between competing businesses in the industry in Australia and overseas. It allows film-makers the best chance of securing a cinema release for their film at a time when the film is most likely to gain favour with the public. For example, it allows a summer blockbuster to be released as a summer blockbuster for every audience in the world and for 35-millimetre theatrical prints to be shipped to cinemas in each territory to meet the intended release date. In Australia the windows system also allows country and regional cinemas, who generally wait longer for prints to become available in their area, an opportunity to show major films before their release in any other format in Australia.

Infringements of film copyright have existed in many forms since film was first recognised as intellectual property. However, the digital format presents both great opportunities and great threats. The DVD optical disc, for example, has proved incredibly popular as a way for consumers to view and own their favourite films, but without technological protection measures the digital format is the first format to facilitate virtually limitless, instantaneous, perfect copying and distribution of films into the hands of the public.

How do technological protection measures work? They use technology to assist the film-maker to exercise their rights under the Copyright Act and to constrain unauthorised persons from abusing those rights. Film owners use a range of technological protection measures, and all protect one or more copyright rights. Most technological protection measures rely on encryption or scrambling of content and are licensed under multi-industry international licences. For example, the Content Scramble System, or CSS, scrambles content to ensure that only devices built to protect the content can access that content. This is to stop people from making an infringing copy of the DVD and to protect the analog and digital output of a DVD—in other words, protect it from being copied by an additional analog or digital machine. CSS also incorporates region playback control, or RPC, to control the devices on which a film can be viewed. This supports the film owner's legal right to determine the territories in which a film can be imported and viewed.

Without technological protection measures, a film-maker would need to price the film and sales of the film with the idea in mind that one sale could result in numerous, in fact limitless, copies being distributed without authorisation or control. Without technological protection measures, a film-maker would effectively lose their rights to control copying and distribution of their works as soon as they released a single copy to the public. It would be highly impractical, if not impossible, to limit piracy and protect film and television programs in digital formats. Even with existing technological protection measures in place, film and television piracy cost the industry in Australia over $400 million in losses in 2004.

I ask the committee: how many of you or your friends or family have seen or been offered an illegal copy or download of a film? Think about how tempting it is to take up that offer when the

legitimate supplier is spending millions of marketing dollars—it seems to me in just about every bus stop—and that marketing is to invite you to watch that particular film. How realistic is the suggestion that, having opened a Pandora's box by effectively giving exemptions to the law and thus giving access to the ability to circumvent technological protections to some people or for some limited purposes, the use of that device could in fact be limited to that purpose? That is one of the most practical problems that we face with this issue.

Our vibrant and competitive industry abides by and relies on the protection of the law. Left unattended, our experience is that movie piracy becomes a major problem, leaving the public with an insatiable appetite willingly exploited through the theft of the film at the cost of every film-maker, every legitimate business that earns a living from the film and ultimately every consumer of film and television drama. I welcome your questions.

CHAIRMAN—The aims of the Australian Federation Against Copyright Theft seem laudable. How successful have you been over the last 12 months?

Ms Pecotic—It depends, I guess, on how you measure your success. The Australian Federation Against Copyright Theft was established at the beginning of 2004. We came to a situation where the piracy rate as it was measured by the industry in Australia was approximately eight per cent. However, at the same time the penetration of optical discs and DVD players into this market was increasing exponentially. It has become very difficult to assess over the last two years exactly how much impact we have had. There have been things facilitated by the Australian Federation Against Copyright Theft. We are working with police and Customs, and we may have doubled the seizures of pirate discs in this country, which is a plus. We are not sure, in view of the great increase in the penetration of players in the country, whether there has been a corresponding decrease or an increase in piracy. The industry estimates that the piracy rate was approximately 10 per cent at the end of 2004. It calculates from that approximately $400 million worth of losses.

Mr MELHAM—That figure keeps cropping up. Each of the submitters to us says that the figure somewhere in the order of $400 million to $500 million. Is that just taken on the basis of the turnover of the industry?

Ms Pecotic—The AVSDA submission and the AFACT submission both base their estimates on the same exercise. One of the other successes that the industry has had since the establishment of AFACT has been to draw together every different sector of the industry to look at how piracy is impacting their particular sector. For example, at the end of the previous year we were looking at about $200 million. But the market has grown for legitimate product, so the calculation is that you lose a certain percentage of that through piracy. It is a lot of money involved.

Mr MELHAM—Can you give me an indication as to the nature and structure of AFACT? How many employees do you have?

Ms Pecotic—We have seven employees. We subcontract private investigators in states around the country as needed.

Mr MELHAM—I see there is a post office box at Mona Vale.

Ms Pecotic—For security reasons, we do not advertise our actual street address.

Mr MELHAM—What about other states—how do you cover interstate?

Ms Pecotic—We cover other states both through direct representation, in the sense that I travel and the director of operations travels. We liaise with Customs, police, government agencies and industry representatives throughout the country. We also commission private investigators to do direct investigations work in every state as required.

Mr MELHAM—Have you noticed a change as a result of your presence in the marketplace? I am picking up on something that Mr Turnbull said earlier about assisting the authorities.

Ms Pecotic—One of the major problems we had last year was a particular incidence in Victoria, which up until now has appeared to have over 50 per cent of the piracy activity in Australia. We work with government and police to identify particular areas where piracy is most prevalent. We try to tackle, through our investigations, the manufacturing and distribution heads rather than necessarily the traders of this product. Last year in Melbourne there was a particular market that became notorious in that state and in that city and we were working with the police to address that.

Mr MELHAM—In those instances do you allocate your resources to that particular problem?

Ms Pecotic—With piracy you have to allocate your resources as you can because industry resources, like police resources, are limited and you therefore need to recognise the major problems. In Melbourne we had the largest undercover market for pirate optical disc sales in the Asia-Pacific region. That was a significant issue for AFACT and it was a significant issue for state and federal police but it took a long time of liaison between AFACT and the law enforcement authorities before we were able to identify the manufacturers and suppliers to that market and close it down. That is an example of the kind of work that the federation does.

Mr MELHAM—Without your intervention that would still be going?

Ms Pecotic—Yes, I think that is a fair thing to say.

CHAIRMAN—What proportion of piracy is domestic piracy, as compared with things that are imported?

Ms Pecotic—Do you mean Australian films as opposed to foreign films?

CHAIRMAN—No, I mean how much of the piracy takes place onshore?

Ms Pecotic—That seems to have changed dramatically in the last two years through the advent of technology and the price of DVD burning equipment. At the time that AFACT was established the most significant piracy was the import of optical discs manufactured in Asia. That was the source of the majority of discs that were seized through police raids here. In the last 12 months, 80 per cent of the discs being seized in police raids are manufactured in Australia and they are DVD-R copies, in other words, burnt locally. You can buy a nine-stack DVD burner in

Australia for less than $1,500 and every 15 minutes you can replicate a perfect digital copy of nine discs—nine copies of whatever film or disc you put into the top.

Mr MELHAM—Are you picking up a profile of the people who are doing that? Is it the criminal industry or is it backyard operations?

Ms Pecotic—We are seeing a range from serious organised crime through to opportunistic backyard operators. We have seen students who are funding their fees through manufacturing and selling pirate discs and operating pirate optical disc labs; we have seen people who are involved in major other crimes like child pornography, hardcore pornography and drug dealing. There are gangs of various kinds. Bikie gangs who are known to be involved in other types of organised crime are also involved in this type of crime in Australia. It crosses over.

Mr MELHAM—How do you get them reported to you?

Ms Pecotic—We operate a 1800 hotline number and we conduct our own independent investigations.

Mr MELHAM—So that is the way you do it.

Ms Pecotic—Pretty much, yes.

CHAIRMAN—How good is the packaging? I imagine that the packaging of these pirated items would vary enormously.

Ms Pecotic—It does. I should have brought in something to show you. It varies from someone simply writing the name of the film on a blank disc with texta and selling it that way through to a sophisticated attempt to counterfeit the look of the actual film packaging itself. It goes right through that range with no particular consistency as to what you are going to see where. You can have organised crime distributing the texta version of the film packaging and you can have small backyard operators investing in a colour printer and trying to counterfeit with a stamper and a colour printer exact copies as much as they can. That is often the way that Australian films are replicated. Australian films are more often than not pirated direct from DVD so the people who are doing that just photocopy or scan the actual cover and artwork and try to replicate it as accurately as possible. If they are taking it from DVD they are taking a direct digital perfect copy.

CHAIRMAN—What are these pirated copies being sold for compared with the genuine article? I know there would be a range of prices.

Ms Pecotic—The range of prices is interesting. It is like the legitimate market—it depends on competition in some ways. For example, in the marketplace in Melbourne that I was describing to you last year—

CHAIRMAN—Which marketplace was that?

Ms Pecotic—The Caribbean Gardens Market.

CHAIRMAN—Is that all closed down now?

Ms Pecotic—No, the market continues, but, as to the illegal DVD activity, there is no overt sale of pirate DVD movies in that market anymore, fortunately. In that market pirate discs started off at between $15 and $20 at the beginning of 2004. By the time that market had 135 pirate traders, the discs were being sold at $5 and below.

CHAIRMAN—What would the official price of a non-pirated item have been?

Ms Pecotic—The average consumer retail price of a DVD in 2004 was $23. That was the genuine price in Australia.

CHAIRMAN—It was about $23 and they were selling these pirated discs for $15?

Ms Pecotic—For $15 and less than $5. If you buy them in places like Bali or China, they can be as little as $1. The main reason for that is that the people who are stealing the film are not paying for the film—they are simply paying for the disc.

CHAIRMAN—In those Asian countries it is quite legal to buy them? I gather that the authorities have no concerns about these being sold openly?

Ms Pecotic—I am sorry, it is legal to buy which?

CHAIRMAN—You mentioned that in Asia some of these pirated films are as cheap as $1, but they can be quite legitimately sold in those countries?

Ms Pecotic—No, it is against the law in most Asian jurisdictions to sell them—it is just that there is no policing of it. In Indonesia, for example, there is a piracy rate of approximately 90 per cent. In China there is now, I think, a piracy rate of approximately 95 per cent. In those markets there is virtually no legitimate film industry. There are little or no legitimate video stores or people who are genuinely selling the film as part of all of the industries that I have mentioned that are part of our windows system. All of those are bypassed by theft. In places like Indonesia, Malaysia and China, it is definitely controlled by organised crime, which controls in most instances replication in a manufacturing plant.

In the same way, all of the films and television DVDs that are sold in Australia are manufactured in Australia in legitimate factories. It is a very large investment to set up one of these factories. You would have an optical disc replication plant. In Asia you have similar plants that are actually owned and operated by organised crime, so they are hidden and also protected by corruption in some instances. A replication plant is a major, significant investment for a criminal.

What has happened with the advent of DVD burning technology, as I have mentioned, is that, in Australia, for $1,500 you can buy a nine-stack burner and set up in your backyard. In September police raided a lab with 65 burners in Melbourne, and one with 47 burners in Western Australia two weeks ago. Criminals are establishing small factories in their homes or in warehouses or wherever. All they need is access to a power supply. But to operate a replication plant you actually need much more sophisticated investment. You need to have a huge factory

with enormous airconditioning vents, power and access to chemicals and equipment. That all involves a much higher level of subterfuge. But to the consumer of these stolen products it does not technically make much difference to them whether they get a replicated disc or a burned disc. What they want is a copy of film X and it is being sold to them. It is supplied to them by the criminals who are manufacturing these.

Mr MURPHY—I would be interested to know what Customs has unearthed in relation to the importation to Australia of these pirated movies from South-East Asia. I have seen them in China myself. I am wondering what happens with the normal tourist who might go there and say, 'Gee, there are a lot of movies there that I would like to buy.' They might buy 100 movies and bring them back. What does Customs do about that or about the organised criminal networks that actually bring them in in containers or elsewhere? Do you have any feedback on how successful Customs is?

Ms Pecotic—Customs is very successful at identifying pirate discs and at finding them when they cross the border. There are difficulties when it comes to the law that Customs is operating within in terms of what happens to those discs when they cross the border. Firstly, it is commercial import of infringing discs that is prohibited by, for example, the Trademarks Act. So if a passenger has just brought in 200 discs that they bought for $1 in Bali and they are all stolen, while this will have a devastating effect on their local video store, the law at the present time does not prohibit that unless you can prove that that person is bringing them in for a commercial purpose.

There are some other issues with the law that we are currently discussing with the federal Attorney-General's Department and Senator Ellison to try and address problems like that, because Customs are able to identify them at the border. They use mechanisms. In part we work with them to train them and help them identify a pirate disc. Things like region coding and parallel import restrictions assist, insofar as all legitimate discs, with very few overflow exceptions, are produced in Australia and it is not difficult then to track the import of infringing discs into the country. Customs can find them. It is then a question of what they do with the discs when they seize them.

Mr MURPHY—Ms Pecotic, you seemed concerned that there is something like $400 million being lost in the industry. That seems an enormous amount of money. In your submission, at 4.2, you give great credit to the police and the Customs authorities because you obviously think they are doing a good job. That might be in relation to the experience in Victoria, but obviously more needs to be done. What do you think can be done, ideally, to capture the loss of that $400 million?

Ms Pecotic—There are two strategic things that need to be done: one is more enforcement and the other is more education. The industry through AFACT is currently working on the education side to try to bring together all sectors of the industry to educate everybody right through from the courts to the consumer. To step back for a second: unfortunately, film piracy is seen as a victimless crime. A lot of people—and police and government, in prioritising in the work they are doing, are no different to any other consumer—think automatically of big business and big Hollywood stars that make a lot of money and go: 'Ah, what does that matter?' That is a very significant problem. They do not think about their local video store whose whole business and mortgage rely on the sale of those films. They do not think about Australian film-makers

who may, similarly, have mortgaged their house to make their film and are protected by these same copyright rights.

One of the issues for the film and television industry, and given that we are an industry about communication, is to get together the whole range of people who are involved in the industry to develop educational messages to try and counter that perception, because that perception does not recognise, obviously, the criminal nature of the work or the value inherent in intellectual property works. You could only steal them for the last 10 years.

Ms ROXON—I understand those—and it is actually fascinating to hear the evidence that you are giving—but I am struggling a little bit to understand how those measures that need to be taken, which I do not dispute, actually are going to relate to the inquiry that we are currently doing, which is quite a restricted area. I am not left yet with an impression of what it is that you think would assist the work you are doing in terms of the recommendations that this committee might make. It would be helpful for me at least to hear from you if you think there are any steps that should or should not be taken as part of this inquiry that would have a direct impact on what you are doing. Given that I have asked all the other people who have given evidence, I would not mind also if you made some comment about this region coding issue, because obviously it is one that we are going to be looking at as well.

Ms Pecotic—I think the first thing is to recognise that technological protection measures are in place directly because of the threat of piracy. If we are talking about what the industry is doing, what it is investing in and the elements that it is contributing to this fight, the design and implementation of technological protection measures could be described as an arms race—but it is the single most important thing that the industry is doing in trying to facilitate the development and bringing to the public of new consumer products based on digital technology.

As I think I mentioned, you cannot release a digital copy of a film without a technological protection measure of some kind on it, because of what the person you have given it to could do with it on an investment of under $2,000—or not even of that. At the moment, with a PC you can rip a DVD into your computer and upload it to the internet to an unlimited number of people all over the world—in other words, steal and distribute the film—with no more investment than simply your computer, a connection to the internet to download the ripping software—the illegal ripping software, I might add—and a broadband connection. That is it. So, in terms of the future development of this industry, technological protection measures are of critical importance in relation to piracy. They are also of critical importance to provide consumers with products that they clearly love. There is no question that consumers love accessing copyright product over the internet. One of the most difficult things that the industry is grappling with is how to design a way of providing a film or a television program to a consumer over the internet in a way that is safe, protected and commercially viable. All those sorts of issues are challenges for the industry, and technological protection measures are part of that.

With a technological protection measure, as I understand it, once that key is out there then there is a concern about what exemptions should be created. It is for the committee to consider whether that might be a Pandora's box. I know that is quite emotive but I use those words in the sense that, in opening up the issues of what exemptions should be created and what people could legally exempt a TPM, you have to consider what, practically speaking, you then put in the

hands of those people and why. If you have questions for me about specific exemptions you might be thinking about I can try and address them.

Mr TURNBULL—Are you aware of any specific exemptions that have been put to the committee that you have a special concern about?

Ms Pecotic—I am not aware of the specific exemptions that have been requested up until now, but if you would like to put them to me I would look to respond.

CHAIRMAN—All the submissions we have received have been published and you are welcome to go through those.

Ms Pecotic—I will indeed and I will get back to you with our response to those.

Mr TURNBULL—But your contention is that there is no need for any additional exceptions?

Ms Pecotic—In the scope of the committee's review, as it has been published, it quite clearly states certain exemptions that have been mooted to date within, for example, the US-Australia Free Trade Agreement and the legislation. It has made suggestions as to what it should further investigate—for example, region coding. Because of the critical nature of TPMs and the fact that by breaking a code you can virtually deal in an unlimited way with the film once you have unencrypted it, I would invite the committee to look at the benefits versus the harm of something like region coding for the industry and for whoever it is who would seek an exemption from region coding. I am not sure who is seeking an exemption from region coding and why, but that is what you would need to look at.

At the moment, as I have explained, with the system of windows, virtually all product that is released in the US market is also released to the Australian market. In a similar way, an Australian film producer hopes to be able to release their product internationally. One of the ways that that is facilitated is through the windows system and one of the ways that the film-maker facilitates the windows system is through region playback coding. This is the way that a film-maker, whether they are an Australian or a US film-maker or any film-maker, can ensure that there is a theatrical release of a film—well, they cannot ensure a theatrical release but they can ensure an opportunity for a theatrical release. Whether the film gets released theatrically or not depends on the popularity of the film, on whether there is an exhibitor who wants to show it. It is a commercial relationship. You out there in the marketplace trying to get your film seen.

Mr TURNBULL—The windows have been collapsing in terms of time, haven't they?

Ms Pecotic—They have. The windows are negotiated by contract. They rely on copyright law. Every different copyright owner of every different film could put them in different ways.

Mr TURNBULL—Yes, but the point I am making is that the time for each window, each period of exclusive exhibition—be it cinema, pay per view, DVD, pay TV, movie channels and then, finally, free to air—is now much shorter than it used to be. And, because there are so many of them, some of them are almost evaporating. That is one of the reasons that on two of the three commercial networks in Australia there is no longer a Sunday night movie, because big movies have been thoroughly viewed beforehand either on pay or on DVD.

Ms Pecotic—In terms of opportunities and threats that is true for a US blockbuster film. If you look at it from the perspective of an Australian film-maker, there is an opportunity now in the free-to-air television market for Australian film that, generally speaking, does not get a theatrical release. It could be shown to the public at free-to-air level, or a designed film that is made for TV. You are seeing the resurgence of miniseries and of Australian drama. What is limiting that is the cost of investment in that Australian drama and where else it could recoup the investment for that film.

Let us stick with film. If it is a two-hour made for television drama, it is going to cost on average $3 million. The film-maker will need to invest that to supply the film to the network. No Australian network for some time, over 10 years now, has paid the full cost of the making of that film even though it is primary free-to-air—in other words, everybody has the opportunity of seeing it when it goes out to free-to-air television—but the film-maker who made that film and any investor who invested in that Australian film have not recovered their money. They have usually not recovered even half of their money. What do they then do? If it was a particularly popular film—and you have seen this in international markets—they might try and get a cinema release for that film overseas. If it had been really successful on free-to-air television in Australia, the film-maker would go overseas and say: 'Look at this. It rated its head off in Australian television. It's a beautiful film. Have a look at it. We've produced it in a way that is suitable for a theatrical release. Can we show it theatrically in America? Can we show it theatrically in Germany? Can we show it theatrically in the UK?'

Ms ROXON—But none of the measures that we are talking about at the moment have an impact on any of that, do they?

Ms Pecotic—Yes, they do.

Ms ROXON—They are all driven by the market. I understand the threat from piracy. I accept your basic point, which is that TPMs are obviously one way of making sure that the owners are able to control their negotiations in these other markets. But is there really anything that we can take beyond that from the submission that you are making for the purposes of this inquiry?

Ms Pecotic—An exemption to region playback coding, for example, or another kind of exemption for the technological protection that might be on that Australian film, US film, UK film, or whosever it is, will have an impact on whether that film gets out of the hands of the film-maker and whether it is able to be dealt with. The view in other markets where there is the question of exemptions for technological protection controls, including that of the Australian government in the digital agenda review, is that there should be very limited or no exemptions for technological protection measures because of the harm versus the benefits issue. Similarly, to take the region playback coding to that next step is what I was saying before in terms of what it is enabling. Yes, it is later, in the sense that the Australian consumer may receive a US film, for example, later; but, similarly, the Australian consumer may receive a direct-to-DVD feature film in Australia and the American consumer may have to wait for the Australian film to be released in America, or a UK film to be released in Germany.

Mr TURNBULL—I am not sure whether you were here when we discussed this with an earlier witness. What is the normal window in the states between theatrical release and DVD availability?

Ms Pecotic—It depends on the film.

Mr TURNBULL—Typically?

Ms Pecotic—Typically, there are two issues happening: one is the theatrical release of the film and, as I think was mentioned earlier by Simon Bush, a small number of what we would describe as US blockbusters are being released on the same day and date theatrically in America and in Australia. It is rare for the DVD to be released—

Mr TURNBULL—I do not want to be rude, but could you answer the question I asked: what is the normal window between theatrical release—

Ms Pecotic—It would range between three months and six months between theatrical and DVD release in Australia.

Mr TURNBULL—No, between theatrical release and DVD release in the United States. I was asking about the United States.

Ms Pecotic—I should take that question on notice to check, but I anticipate that it would be a similar period of time. I do not know what the window is in the US.

Mr TURNBULL—Just looking at the practicalities of it, if a film is released in America on, say, 1 January and it goes to DVD on 1 April—that sounds a bit short to me, but let us say that was the period—if region coding was not applicable your copyright owner members would be at risk if the theatrical release had not occurred in Australia prior to 1 April and people were able to buy DVDs from the United States and view them in Australia prior to the theatrical release. That is the concern, isn't it?

Ms Pecotic—That is one of the concerns, yes. The first concern is if they are commercially sold in Australia. There is no restriction on any of us as individuals buying a film from anywhere in the world and playing it. That is the first thing.

Mr TURNBULL—Including via Amazon.

Ms Pecotic—Exactly. But there is a restriction on people in Australia commercially selling a non-Australian release DVD. So the window system is there to ensure that the local legitimate distributor of the film, whether it is a theatrical distribution or not, and all of the retail exhibitors that rely on whatever contract they took from the distributor, the local home entertainment distributor of the film, the DVD distributor of the film and all of the businesses that rely on licensing the film and comply with the window system, all have an opportunity to sell the film at the price that those retailers choose to sell it to the consumer in Australia at the appropriate time.

I can give you a television example. You may have a television series that is released in the US. A lot of this debate is about consumers wanting to see a film and wanting to see it now. It is about: 'Why should we have to wait?' I spent 18 years of my life working in the television business and that has informed part of this. If you have released a television series in the US, you need to create an opportunity for an Australian broadcaster to pay for the rights to broadcast that television series in Australia, whether it is by pay subscription television or by free television.

You are creating an opportunity as a television film-maker for that to happen. If there were no region playback controls, no windows and no coding then there would be nothing commercially to stop someone who was not authorised to do so from releasing that television series in Australia. It would cut out income.

Ms Roxon, you asked earlier about whether it mattered that if someone in, say, the UK produced a television program and you bought a UK DVD of that television program then they get their money. They get some money. But that person in the UK who sold that television program would have an expectation to license the sale of that television program in Germany, France, Australia, New Zealand, everywhere, and they would be hoping that its commercial success in the UK was so good that it would attract distributors in those other countries to outbid each other for the right to sell that program there and, ultimately, provide consumers there with the ability to purchase that film. If it was a made for TV feature, for example, it is potentially missing out on the ability to have a cinema exhibition in Australia. If it was direct to DVD or even if it was direct to free TV in the UK, invariably you produce it again on DVD and you provide the opportunity for a consumer to buy it, take it home and own it. I do not know if any of you have been to your video store lately and seen things like *Gilligan's Island* and ancient episodes of *Prisoner* that are now being provided to the consumer, facilitated by digital. You could never really package these things for the consumer before, but they can be packaged now and provided to the consumer as a product to own. That is an enormously important and valuable commodity that the copyright owner is providing.

I guess what I am saying is that by providing the film once to one person in one place—for example, if it was released free to air to the internet globally and that was it—then every consumer would have accessed it everywhere and there would be no real ability, practically speaking, to recover the enormous investments that are currently being made in film and television. What would have to happen is that those investments would be reduced over time.

Mr TURNBULL—That sort of thing could easily happen as the distinction between television and the internet starts to evaporate. It is evaporating now.

Ms Pecotic—It is. They are crossing over. The industry—including not just the film and television industry but communications carriers, for example, that want to be able to show audiovisual content as part of their business model—is grappling with ways of being able to provide it to the consumer in a protected way so that we avoid this problem. Let me use a satellite television example. I used to be involved in licensing Australian television programs internationally. You would license it to a French company. In fact, usually what happened with Australian programs is that you would need an investment from a French television company in your film to get it off the ground in Australia, especially with children's films, which I was involved in making in my previous life. So to get that children's television series you would have to have a sale in France. You would have to have that sale before the film was even made. One of the problems that you had to deal with at that time—because there were not so many technological protections available but there were some—was that you had to enter into a contract with the French investor such that their licence was for France only and that they would, if they were putting it out on a television signal, encrypt their signal so that Belgium, for example, could not simply pick up that channel and get it for free, which otherwise was what would happen.

So the industry has been dealing with this—that is going back 20 years—for a long time. You are dealing with how you get enough investment in your film to make it in the first place and, once you have made the investment, how you recoup those moneys. Region coding is one example of that. It is only one example. Encryption of satellite television signals is another example. You had to have encryption so that your television signal did not spill over into other territories without payment.

CHAIRMAN—Do you think part of the problem about piracy is the community attitude? The community does not really see piracy as being a bad thing. A lot of what you are seeking to achieve would not have a lot of public sympathy.

Ms Pecotic—Definitely. There is a lot of public complacency in the sense that, as I earlier described, when people think of films they think of big money.

CHAIRMAN—They see it as being victimless.

Ms Pecotic—Yes, they do not see the victims. A lot of the work that AFACT has done through the release of trailers, through PR events, through interviews and with video stores is to try to get information out to the public to help them understand, if you steal the film, what the potential repercussions are for employment in your suburb, for example, which people just do not think about. Also, to put the other side to that, at the same time as they are not thinking about those things, the industry is bombarding the consumer naturally with advertising messages such as: 'You must go and see this film, it is at a cinema near you.' So on the one hand they have this desperate desire to see the film, which the industry legitimately wants to create in them, as in any marketing exercise, and on the other hand there is this new capacity for the consumer to copy a film that they have not previously had.

CHAIRMAN—It is very hard to tell someone that he should pay $40 or $50 for something when he can get it for $3 or $5.

Ms Pecotic—That is the same as if I went down to the supermarket and I decided that I wanted to buy something at the supermarket that I could take out of the supermarket for free. It is a question of it being stolen.

Ms ROXON—The only thing that it is not the same as—which is what I am coming back to—is if you buy a legitimate copy in another region which you are unable to play here. Otherwise, your comparison is that you go to the supermarket when you are in Bali and you buy yoghurt for whatever it costs in the supermarket in Bali. If you are buying a legitimate copy—leave aside the pirated ones—Joe Blow consumer thinks that they should be able to come back and play it here. I think Mr Bush addressed my concern with this. He was quite frank that it is actually about trying to protect your economic interests there too, not just technological, which is fine, but I do not see how that logic actually works for that example.

Ms Pecotic—Can I help?

Ms ROXON—Possibly.

Ms Pecotic—I will try. At the moment there is no restriction on a consumer going to America or Japan and buying a genuine DVD there and bringing it home and playing it. They can play it. They can play it on a DVD player that they purchase under the CSS licence, which is a licence that is an international protocol that all DVD manufacturers are meant to comply with if they are going to provide the capacity for their DVD player to play the encrypted DVD. Each player can be changed five times on a region. If someone cannot wait the additional three months that it is going to take for the film they saw in the US to be available in Australia or if they are a foreign film buff and are interested in a Japanese film that is never likely to surface in Australia, they can simply purchase a DVD player coded to the code that applies in Japan and play every DVD that they want to buy. They do not need to—

Ms ROXON—As long as they do not want to do it more than five times.

Ms Pecotic—No, you can have a DVD player that you keep for your Japanese films. DVD players are now cheaper than DVDs in a lot of instances.

Ms ROXON—That is not right, is it?

Ms Pecotic—It is. There is a major retail store that is giving away DVD players for free when you buy your DVD. There is no financial disincentive. But I would argue, even if there was a financial disincentive, that what we are talking about is the capacity to buy a DVD player that will play it—and you can buy it in Australia and in Japan and in America; it is possible—versus the harm against providing the consumer the right to decrypt the playback card.

Ms ROXON—I understand that, and I understand the weighing up of those, but I just wanted to be sure that I was understanding your argument. I just find it difficult to be convinced if you are buying a legitimate copy—which I know is the minority and we are not dealing with that as the major issue—but any change or decision not to change has to weigh up the quantities that we are talking about. I think there is probably a good argument that the legitimate use is really minor compared to the illegitimate use and therefore you might not want to make any exemption, in trying to deal with the legitimate users' problems, that creates a bigger problem in terms of illegitimate use. But I understand what you are saying, so thank you.

CHAIRMAN—There are no further questions. If you have undertaken to give the committee any additional information could you let the secretary have that.

Ms Pecotic—I will.

CHAIRMAN—Thank you very much. We have received a further submission from Professor Fitzgerald, who is appearing this afternoon. Is it the wish of the committee that it be accepted as a supplementary submission to the TPM inquiry and authorised for publication? There being no objection, that is so ordered.

Proceedings suspended from 12.16 pm to 1.15 pm

SCOTT, Mr Brendan Adrian Scott, Director, Open Source Industry Australia Ltd

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, I have to advise you that the proceedings are the proceedings of the parliament and there are sanctions if you do not tell the truth. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt. We have received your submission. It has been authorised for publication. Would you like to make a brief opening statement before we proceed to some questions?

Mr Scott—I am here on behalf of Open Industry Australia Ltd. We are a company limited by guarantee. We operate not for profit. Our purpose is to promote open source businesses within Australia. Open source is a new model for the commercialisation of software, basically, but it can be applied to other things. All of our members are owners of copyright who exploit that copyright through the granting of licences which have specific characteristics. Open source has been a quite successful mode of commercialisation in some specific niches. If you go onto the internet and click a link, there is roughly a two-thirds chance that the link that you are clicking is provided to you through open source software. Equally, when you send an email to someone, there is roughly a two-thirds chance that the person who is receiving it is receiving it through the use of an open source product.

Open source is also very prevalent in high-performance computing. There is a list of the top 500 fastest computers in the world. Of those, roughly 50 per cent are open source. The places in which open source has been successful tend to be those where someone needs to get something done and is not tied to existing data or alternatively is able to work with that data in any way that they choose. We have found that moving from the successes in the server, email and high-performance computing areas to the desktop has been quite difficult. That is because it does not matter how effective or good your software is or whether it has all the functionality that competitors have, because, unless your customer can access the old data that they have been storing for five or 10 years or whatever—all of their old documents—they are not going to want to acquire your competing product.

One of the things that we are concerned about is that these provisions can be used to lock down our customers' data in a way that we cannot access it. So, if we have a competitor who writes their software to save the data in a specific format in a specific way, they can make use of these provisions such that access to that data would be illegal. That would happen through one of the main heads of the technological protection measures. That is just an example of the broader concern that we have about the manner in which these provisions can be used to prohibit, basically, aftermarket goods and services or markets which arise after the initial sale of a product. We would be concerned if the technological protection measures prevented us from, for example, maintaining an existing piece of software.

Looking at the provisions, we think they are very complex. It is very difficult to read through them and then understand what it is that you are able to do, let alone exactly what you cannot do. The other thing is that the prohibition provisions are in a structure of a prohibition coupled with a maze of exceptions. Unless we know what the prohibition is, it is difficult to know whether the exceptions are sufficient or insufficient. In that respect, the prohibitions which refer to

circumventing a measure to gain access or selling things which will allow someone to circumvent a measure are worded in a very broad way, a way which is not dissimilar to the wording that is used in the equivalent US legislation.

Our concern is that the wording would be taken at face value. If it were taken at face value, the breadth of the provisions would be extremely wide and there would be a very broad scope, whereas what we think is a better reading of the provisions is that they ought to be read in light of the broader act that they are becoming a part of, which is the Copyright Act, and that the definition of 'technological protection measure' should be tied to having some effect in relation to copyright. I have mentioned some cases in the US where at an appellate level it has been said that it is very difficult to read the provisions as they are at face value because the effect would be far too broad and that they ought to be read down. We are saying that we think those decisions ought to be given good consideration and endorsed when you are passing the legislation in relation to these provisions.

There is a provision in the FTA that talks about interoperability between independently created computer programs, and that is of some comfort to us. But our main concern is as to interoperability between a data set and our programs, because we do not necessarily want to interact with someone else's word-processing system. What we want to do is interact with data which has been saved by that word-processing system.

CHAIRMAN—I notice in your submission you indicate the importance, as you have just said, of an exemption permitting circumvention of interoperability between programs and data. Article 17.3.7(e)(i) of the agreement will permit a circumvention exception for the purpose of achieving interoperability between computer programs. In your view, will circumventions for this purpose generally suffice to enable one program to access data held or protected by another program? From what you said a moment ago, I gather you have a concern about that.

Mr Scott—Yes, because it is expressed in terms of interoperability between independently created computer programs. The provisions in the Copyright Act use similar wording but then they have an additional definition which says, 'By the way, if there's information which is related to the computer program then that's treated as part of the computer program'—and then the exception is quite broad.

CHAIRMAN—Can you elaborate, then, on what the scenario might be if no exception to enable program data interoperability existed? In other words, with the absence of such an exception, what are the ramifications for the users of computer programs and their access to their own data?

Mr Scott—Would it have implications for users having access to their own data? That is a good question. It would depend on how the protection measures are structured.

Mr TURNBULL—Perhaps I can help. When you talk about the customer owning the data and the software proprietor owning the program and licensing the program and the data becoming embedded in the program, are you thinking of situations such as a big bank might have, where it has a whole series of databases which are recorded in different programs and using different software? There is a need there to be able to access and work with data across all of those platforms and software systems, some of which may be quite old—they are often

referred to as legacy systems. The TPMs you are concerned about would be ones that would prevent a new vendor producing a program which enables you to access, search and use all of this data.

Mr Scott—That would be an example, yes. The idea is that we do not want to be locked out of competing using our customers' data. We want to make sure that we are able to access our customers' data. We also want to be able to assure our customers that they are able to access their own data. For example, when someone presses 'save' on the program, what is saved is the data that they have entered. But there is also a component that is what the vendor of the program created and that structures it in a certain way. There is no reason I can see why a technological protection measure could not be applied by that vendor to their component of the data. There is nothing in these provisions which say that if the protection is only for a small part then the anticircumvention measures only apply to that small part. They just apply to the act of circumvention, rather than to the outcome of the circumvention.

CHAIRMAN—A copy of your evidence will be sent to you for checking. We will look very closely at your submission. If you want to make any corrections to your evidence, that is fine. If you want to make any further comment in relation to any other submissions or give us any additional material, that will also be appreciated.

[1.28 pm]

BROWNE, Ms Delia Maria, National Copyright Director, Copyright Advisory Group

CHAIRMAN—I welcome you to this public hearing. Do you have anything to add about the capacity in which you appear?

Ms Browne—The Copyright Advisory Group, CAG, reports to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs. Essentially, CAG is responsible for copyright policy and administration for the majority of Australian schools and TAFEs. Its members include almost all the departments of training and education in the states and territories, all the Catholic Education offices, the Independent Schools Council of Australia and the majority of TAFEs.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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 parliament. Would you like to give us a brief opening statement of about five to 10 minutes duration, and then we may have some questions for you.

Ms Browne—I thank the committee for giving me an opportunity to point out some of the concerns of the education sector, primarily the schools and TAFEs. CAG wishes to ensure that Australian students and schools and TAFEs can continue to enjoy appropriate access to copyright material for educational purposes. We are concerned that the FTA will remove the ability of education institutions to use copyright works that are protected by TPMs, stopping them from making copies for student use in the classroom. This has been a long-recognised public access right in Australian law and, indeed, in most copyright law around the world. I will firstly outline our major concern about the consequences of the FTA and then, if I have time, I will try to outline four additional areas about which we also have concerns. I thought it would be best if I give you a practical example, work it through and show how it works under the current law, how it would work with the TPM put on the work for protection and, then, the consequences of the FTA.

We will take the example of a class that is going to do an assignment on Australian history and the teacher wishes to access and copy extracts of material on a CD-ROM, which is a very common occurrence now. Under the current law, under part VB of the Copyright Act, that teacher is permitted to access the CD-ROM, copy whatever extracts they want, print it out from the CD-ROM on the computer and photocopy 20 copies to give to the 20 students in the class. Currently under part VB the copyright owner gets paid under the statutory licence. I am happy to talk in a bit more detail about the special statutory licensing in the Copyright Act if it will help you during questions.

Let us imagine that same scenario, but this time the CD-ROM has a technical protection measure on it. Under current law, the teacher is allowed to access and break that TPM in order to access the material so that they can provide a copy to the class. This is called a ‘permitted

purpose' under section 116A of the Copyright Act, so we are currently permitted to do that under the Copyright Act. Let us move on to the FTA impact on this scenario. First of all, the FTA takes away that permitted purpose from teachers, so it will no longer apply. That means that teachers will no longer be able to circumvent TPMs to access or copy material for classroom use, unless of course the committee says that they recommend that. Secondly, the FTA does permit a teacher to break a TPM, but only if it is done to help decide whether the school wants to buy that CD-ROM. In other words, you can do it only to make an acquisition decision. The teacher is not permitted to access the TPM to get into the CD-ROM to make copies for the students in the classroom.

Another practical problem of the provisions in the FTA is that, even though the teacher is allowed to break this TPM to make an acquisition decision, which I referred to before, no-one is allowed to make or sell the school a circumvention device to do that. So what we would like the committee to do is to ensure that any exception the committee deems it wants to recommend to the government also allows someone like a technical expert to use a circumvention device on behalf of a school. There is often a problem where the teachers of a school may not have the ability to access or break that TPM, so they might need to have an agent do it on their behalf.

I would like to remind the committee that this issue about what circumvention devices should be allowed to access TPMs is not new and that it was a concern to parliament when it was making the changes to the Copyright Act with the digital agenda amendments in 2000. At that time, parliament deliberately and specifically protected the rights of teachers to use copyright material for Australian students. What we are really concerned about is that what is now a permitted purpose under the act will become a criminal activity under the FTA if teachers continue to do that. We want you to make sure that does not happen. We do not believe that is the intended effect of the free trade agreement for two reasons.

The first reason is the evidence put forward by the Department of Foreign Affairs and Trade to the Senate hearing which said that the provisions were not designed 'to stop people from doing legitimate things with copyright material'. In its report to government, the Joint Standing Committee on Treaties said that 'the government needs to enshrine the rights of educational institutions to readily and cost effectively access material for academic purposes'. So we really want to make sure that at least the current exceptions in the act are restored and maintained for the continuation of non-infringing use by the education sector.

The other four areas which are of concern to schools and TAFEs that I want to briefly highlight to the committee are the following. The first is breaking TPMs to access copyright expired works. The committee will no doubt remember the huge public outcry from certain quarters about the extension of copyright for a further 20 years in Australia. We are more concerned that the FTA will have the practical effect of extending copyright even further than lifetime plus 70 years. I will give two practical examples. First is where there is a copyright expired work combined with a new work in a format that is protected by a TPM. I will go back to the example of a CD-ROM which contains old sound recordings for which copyright has expired. The second example is where a new work has been created and put into a new digital format with a TPM, but long after the copyright has expired on that work the TPM continues to protect it. The list of exceptions in the FTA does not allow teachers to unlock out of copyright work that is protected by a TPM. So we would like to ask the committee to recommend that

education institutions should also be able to access copyright expired works that are protected by TPMs.

The other more practical concern we have is about obsolete formats or works that are protected by obsolete TPMs. That is where material is protected by copyright but the format that is protected or the TPM that it is protecting it becomes obsolete. We need an exception that allows teachers to access the obsolete format or the obsolete TPM in order to make the material available for classroom use under the current statutory licences and educational exceptions in the Copyright Act.

The third one is something that we did not actually think about back in 2000 when we were looking at the permitted purposes exception. That is, teachers accessing off-air broadcast programs under the other statutory special licence, which is part VA of the Copyright Act. Currently, under that statutory licence, teachers are able to copy or tape, for instance, the ABC news when it is broadcast on TV, or some other program from either free-to-air or pay television. They are allowed to play that copy of that program in the classroom. At the time of the digital amendments, I do not think there were TPMs around that could prevent access to or copying of broadcasts. But I understand that at the moment there are things like broadcast flags being developed, which will lock up free-to-air as well as pay television broadcasts. We need to think about whether the permitted purposes exception, if it is retained, should also extend to the other statutory educational licence.

The last concern that I would like to put to the committee on behalf of the sector is about accessing copyright material for section 28 purposes. Section 28 in the Copyright Act allows teachers to perform works—to read and recite literary and dramatic works, plays, sound recordings, films and DVDs—in the classroom for classroom use. We may need an exception that also allows a teacher to circumvent a TPM on a DVD, for instance, that may be locked up by television access coding et cetera so that they can play that DVD in the classroom, which is currently permitted under the Copyright Act.

Those are our main concerns. I thought it was best to go straight to the core issues of our submission and try to put them into a practical context for the committee. I would be happy to take any questions.

Mr MELHAM—Where would the resistance to you come from? What you are saying sounds fair enough.

Ms Browne—I think what we are saying is reasonable. I do not know that the view of copyright owners would be that no-one should be allowed to access TPMs, but I think our submission and requests are reasonable. Firstly, we have not gone as far as suggesting that you should be able to circumvent a technology protection measure for fair-dealing purposes, even though that was a recommendation made in the Phillips Fox report on the review of the Copyright Amendment (Digital Agenda) Act 2000. We have not gone that far. We understand that there are probably good policy reasons that the government decided not to go that far. I think that what we are proposing, which includes very limited circumstances—education institutions being able to access TPMs for very limited educational purposes—will not adversely impact on a copyright owner or prevent them from protecting their work via a technological protection measure.

I would also like to remind the committee that, if we do extend the permitted purposes regime to maintain part VB, permitted purposes use, and part VA, permitted purposes use, copyright owners will get paid under those statutory licence schemes, so they are not missing out on any revenue. They are actually getting paid under those licence schemes. In areas where the educational use is what we call a free exception—like section 28, or another bizarre section, section 200, which allows us to put extracts into examinations and use it for other types of educational purposes—I would like to remind the committee that those uses are not commercial uses. If, in any instance, we are circumventing devices that are outside the permitted purposes exception, that is a criminal activity. If we do not use it for purposes that the act specifies, the school or the teacher will be in breach of the act, and there are some very serious penalties contained in the act as well.

Lastly, in the current permitted purposes exception, there are quite a lot of safeguards to prevent potential abuse by teachers and schools. There is a regime in place. You must give a statutory declaration to the person supplying you with the circumvention device to say that you are doing it for particular purposes. For instance, part VB refers to educational copying of printed and artistic works. There is a whole system in place before you can acquire or purchase that circumvention device for that limited purpose. I think that our requests are quite reasonable. I am not aware of any copyright owner—I have not been here this morning—having a problem with the continuation of it. I think their main concern is individual access, and that is not at all what we are recommending—the 'free for all'.

Mr TURNBULL—Firstly, how does the system work in American schools and universities?

Ms Browne—America have a very different copyright regime in dealing with educational use. Most of the time it is actually done under what they call their 'fair use' regime whereby educational institutions can access works. That is what they mainly rely on. Australia is very different from America. We are unique in the sense that we have a statutory licence regime—which has been in place for well over 20 years—which allows us to copy extracts of works and whole parts of works in certain circumstances for educational use. The fair use regime for educational institutions in the US may be a little bit more limited in some ways. It is free, so copyright owners do not get paid. But it does not necessarily allow you to copy whole works, for instance, if the work is not commercially available within a reasonable time.

Mr TURNBULL—What is in this article that would require Australia to change or abrogate its statutory use regime for educational institutions?

Ms Browne—The list of exceptions in the FTA at the moment allows us to circumvent only technological protection measures for acquisition decisions. In other words, unless we actually have—

Mr TURNBULL—Let me interrupt you. But, clearly, if you are licensed to access the material then you can circumvent the TPM?

Ms Browne—No, that is not what is said there, as far as I understand it. As far as I understand it, the permitted purposes exception, which allows us to circumvent TPMs for educational purposes—

Mr TURNBULL—Just go back to article 17.4.7(a). You know much more about this matter than I or the rest of the committee do.

Ms Browne—I will have to look at my submission to look at the actual words.

Mr TURNBULL—Just help us—or me—out here. It states: 'In order to provide adequate legal protection' et cetera and it refers to restricting unauthorised acts. Wouldn't the argument be that the statutory licence makes those acts authorised?

Ms Browne—The copying of the material is authorised, but, if you want to access a TPM in order to do that, it will not be covered unless you have a specific exception in the legislation. That is just for accessing the TPM in order to do those things that are authorised under that licence. A lot of investment has been made by the Commonwealth and by state and territory governments in trying to implement a 21st century education strategy. Of course, works are moving from a hard copy environment into a digital format environment, and considerable money is being spent in making sure schools have up-to-date broadband and other information and communications technology. If we do not have an exception that allows us in limited circumstances to circumvent a TPM so we can use a statutory licence, it renders the whole statutory licence ineffective.

Mr TURNBULL—Earlier you mentioned the exception at paragraph (vii) of (e).

Ms Browne—Yes, the non-infringing uses of a work et cetera.

Mr TURNBULL—But aren't the key words there 'not otherwise available to it'? Wouldn't the proposition be that the statutory licence makes the works available to it?

Ms Browne—Not if they are locked up by a TPM.

Mr TURNBULL—If I am licensed to use a work, then I must be licensed to use the work regardless of whether there is a TPM, surely.

Ms Browne—That would not be a reading I would like to rely on in court.

Mr TURNBULL—I am just asking the question.

Ms Browne—I just think we are meant to be looking at additional exceptions for the activities of educational and research institutions. Our legal advice suggests that, unless we have a specific exception that maintains the current position plus a few additional ones, schools would not be able to access a circumvention device to break a technological protection measure that is protecting a work that, without that TPM, could be accessed and copied under a statutory licence. That is our legal advice.

Mr TURNBULL—So you are saying that, by putting a TPM on a work in respect of which an educational institution has access via the statutory licence, a copyright owner can in effect frustrate parliament's intention in providing for the statutory licence?

Ms Browne—That is correct.

Mr TURNBULL—Do you regard the statutory licence as contrary to the spirit of the FTA? Are you suggesting that the statutory licence is somehow at odds with this? I would not have thought it was.

Ms Browne—I do not think it is at odds with it at all. We just have a different way of dealing with educational use in Australia compared to America.

Mr TURNBULL—You are saying that, because of a different approach to fair use in the United States, the outcome is the same for American schools. American teachers can make copies and distribute them to their students in the same way our teachers can.

Ms Browne—They can. They have slightly different rules, which may limit the amounts they can access, and in a lot of instances that may be for free. In Australia we are slightly different: we have a statutory licence that guarantees payment to the copyright owner.

Mr TURNBULL—A small sum, yes.

Ms Browne—It is a lot of money, in fact.

Mr TURNBULL—But for a small sum per use.

Ms Browne—Yes.

Mr TURNBULL—It adds up to a lot.

Ms Browne—It adds up to more than $45 million a year paid by schools.

Mr TURNBULL—I appreciate that. At the end of article 17.4.7(a) it says:

Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

Do you regard that as only applying to criminal procedures and penalties and therefore that clause is endeavouring to provide that the ability of the copyright owner to make a civil claim continues but criminal procedures and penalties do not apply?

Ms Browne—From that reading I would say—

Mr TURNBULL—Why doesn't that solve the problem itself?

Ms Browne—If we retain the permitted exemption and do not use it properly, it is a criminal activity currently under the act. We are not advocating that that should be any different. The reason there is such a push towards TPMs is that copyright owners wish to protect their works from unauthorised access and piracy. We have no problem with that. What we have a problem with is the copyright work being locked up for a period of time regardless of what parliament's intention is. I am not sure whether that would be saying that it is a civil liability only, but the TPM, as I understand it, is limited to criminal activity; it can provide for that. I also suggest that we should be released from civil liability by having appropriate exceptions for educational use

by educational institutions in very limited circumstances. We are looking at only very specific and current uses that are in the act and adding a few little suggestions for practical operational purposes.

Mr TURNBULL—Mr Chairman, has the Attorney-General's Department had anything to say to the committee on this point?

CHAIRMAN—I do not think so.

Ms Browne—Looking at it, I agree with your interpretation of it.

Mr TURNBULL—Okay.

Mr MURPHY—How do schools and TAFEs currently approach the issue of encoding on subscription television broadcasts?

Ms Browne—How are they getting around them?

Mr MURPHY—Yes.

Ms Browne—I have not got any practical examples of how they currently get around encoding TV subscription broadcasts because of the limited time we had to prepare the submissions. I draw your attention to the current regime and what you have to do to take advantage of the permitted purposes regime under section 116A(3). Basically, you have to be a qualified person and provide the supplier with a declaration on which you state your name and address, the basis on which you are a qualified person—for example: 'I am a teacher employed at X government school—the name and address of the supplier, that the work is going to be used for a permitted purpose—in this case, that would be under part VA of the Copyright Act, which is the statutory licence administered by Screenrights—identify what it is, that you use it and that it is not readily available in another format that is not protected by a TPM. So, if the work is available in a format that is readily available and not protected by a TPM, you have to obtain that one as opposed to blithely riding on the permitted purposes section. I also draw your attention to section 203G of the act which states that, if you do not do this properly, there are penalties of 12 months and six months imprisonment. These are certainly adequate safeguards.

I am not aware of how they are doing it at the moment, but what I can say is that an enormous amount of investment and work has been made in the last two or three years by the Australian Commonwealth, state and territory governments to introduce quite amazing ICT applications in schools, TAFEs and universities. My sense is that we are going to see a major change from the hard copy to the digital environment. It is happening as we speak. What I was hoping to do—and I will probably do it next week—was to provide the committee with the latest strategy of MCEETYA entitled *Contemporary learning: learning in an online world*. It is not yet released. I have the PDF version, but I will pass it to you once I finish dotting all the i's and crossing all the t's. I think it is being checked for spelling mistakes. That also highlights what we are trying to do for the 21st century. My feeling is that the change from hard copy to digital education is happening as we speak and that, without these exemptions, it is going to be very difficult for governments around Australia to implement the brave vision for education in Australia in the 21st century.

It will render the statutory licensing schemes basically ineffective. It will increase the copyright compliance costs for the education sector, because we will have to enter into direct licences with those copyright owners who have TPMs that are locking up that material that would otherwise be available if we had an exception. It will really hinder the significant investment in work that has been done thus far to try to actually integrate technology into student online learning and basically training kids so that they will be able to have a very sophisticated knowledge of ICT when they leave school to integrate into the work force. Really, this will put a serious hindrance in the way that we are looking forward to introducing and making sure that we are the best nation in the world when it comes to training our kids in ICT.

CHAIRMAN—What level of concern do you think there is out there in the educational community about these changes?

Ms Browne—I represent quite a large proportion of the educational community, being the schools and TAFEs of Australia. You will notice—

CHAIRMAN—So you are responsible for the numeracy and literacy as well.

Ms Browne—Not quite. I am only responsible for the copyright aspects of the compliance and negotiation for the collecting societies, but I am also fortunate in my position to also take part in a lot of task force discussions—for instance, the information communications task force—

Mr MELHAM—This has been raised, then, as an issue?

Ms Browne—This has been raised as an issue. Our submission has been endorsed by AESOC and supported by the information communications technology task force to MCEETYA. We have worked very closely with the Australian Vice-Chancellors Committee, the Department of Education, Science and Training, as well as FLAG and a number of other education sector groups. We all have a very similar position and all endorse each other's submissions, so you will find that we will all be raising the same issues and making the same recommendations from that sector. I do not think you will find much difference.

Mr MELHAM—Didn't you also state that the first evidence to the Senate inquiry into the Australian free trade agreement indicated it was not the government's intention—

Ms Browne—That is right.

Mr MELHAM—to undermine the rights of educational institutions and other public interest rights? At that stage, they just offered that as an opinion.

Ms Browne—And that was taken up by JSCOT in its recommendations to government.

Mr MELHAM—So they did not offer a way through. Did they recognise at that time that what has happened would happen?

Ms Browne—I think everyone at that time knew that there was going to be a further public inquiry where people could make their views known—as this inquiry is. I think they were

leaving it up to the respective interest groups to have the open debate with the House inquiry or whoever would be given that inquiry at that time.

Mr MURPHY—Is the Copyright Tribunal an appropriate body to either undertake the review process or make recommendations to the Attorney-General regarding the proposed exceptions?

Ms Browne—We used to have the Copyright Law Review Committee that would undertake such reviews, but that has, I understand, been discontinued by the Attorney-General. The Copyright Tribunal's function really is in relation to making determinations over the statutory licence schemes under part VA and part VB and the voluntary licence schemes that are administered by the other collections societies, so it has a very limited jurisdiction under those licence schemes. I do not think it, as a judicial arm, would be an appropriate body to be making any recommendations to the committee in this regard.

Mr MURPHY—Who do you think should make recommendations?

Ms Browne—I think that the process we have now is a good process. I was very supportive of the Copyright Law Reform Committee when it was in existence. I thought that was a uniquely Australian way of actually focusing on a very important issue, not just domestically but also for the investment and export industries in Australia. I was very fond of that whole process of the committee, and the committee has also changed over time—they brought in experts. But I am also quite happy with the current inquiries that have been carried on this year: the Attorney-General's review of fair use and other copyright exceptions, and the current review on the carriage service liability provisions in the act. This committee is another opportunity that has been put forward to us through the House of Representatives to make an inquiry into a very important part of copyright law and how it is going to impact on us in the future.

Mr MURPHY—Thank you, Ms Browne.

CHAIRMAN—Can you tell the committee whether the issue of TPMs for the use of digital material has been raised in your discussions with owners and copyright collecting societies?

Ms Browne—I have not raised it directly with them, because what we are advocating is in relation to statutory licence schemes, one of which is the part VB one which is administered by the Copyright Agency Ltd, which is the declared collecting society of the Attorney-General, and the second is the part VA one which is administered by Screenrights. What we are putting forward is not in contravention of those licensing schemes and we are not suggesting we would not be paying for material that is accessed and copied for educational purposes. I cannot see why they would oppose our very reasonable request when in fact all we are trying to do is use the statutory licence that is permitted and provided for under the act and for which the copyright owners will be remunerated.

CHAIRMAN—As there are no further questions, I thank you very much for appearing. We will send you a draft of your evidence for correction, and if you have any other thoughts on the inquiry or any other ideas you would like to convey, please feel free to do so.

Ms Browne—Thank you very much, and I will try and send you this strategy policy document within the week, once it has been released. Thank you for your time.

Proceedings suspended from 2.02 pm to 2.11 pm

EISENBERG, Ms Julie Lorraine, Head of Policy, Special Broadcasting Service

McCAUSLAND, Ms Sally Peata, Senior Lawyer, Special Broadcasting Service

CHAIRMAN—I welcome the representatives of the SBS Corporation to this public hearing. Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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 parliament. Would one of you like to make a brief opening statement of, say, five or 10 minutes and then we will proceed to questions?

Ms Eisenberg—Thank you for giving SBS the opportunity to make an oral submission to this inquiry. As you are aware, SBS is Australia's national multicultural broadcaster. We have just celebrated 30 years of SBS radio, which broadcasts in 68 languages, and 25 years of television.

CHAIRMAN—Sixty-eight languages?

Ms Eisenberg—Yes, 68 languages. Importantly and relevantly to this inquiry, in recent years SBS has been at the forefront of moving into new platforms such as online new digital television services and experiments with handheld televisions, and all of these are regarded by SBS as a critical way in which we fulfil our charter to reach all Australians with our multicultural and multilingual services. SBS's strategy is to ensure that our services are offered as widely as possible and reach all the new platforms from which Australians are now consuming their media. As a public broadcaster, one of our key policy drivers is to ensure maximising free public access to SBS services for all Australians. For example, SBS has recently started podcasting some of our radio services, and one of the key considerations in providing those has been to make them available in the universally accessible MP3 unencrypted format.

For these reasons and those set out in our submission, which we would be happy to talk on further, we support the new fair use exceptions being considered by the Attorney-General for personal time shifting and format shifting of our broadcasts to give the public greater and more convenient access to SBS's broadcasts. I would like to hand over to Sally McCausland who has been involved in undertaking the internal consultations within SBS to identify the practical consequences of this proposed legislation, including the potential adverse effects on SBS's future business activities. As one of the in-house lawyers at SBS, Sally advises on a daily basis on copyright issues of this kind.

Ms McCausland—I want to make some brief opening statements before we go to questions that you may want to ask. SBS is both a copyright owner and a user. As a copyright owner, we do support antipiracy measures provided that they are not a heavy-handed means to an end. We believe that the existing copyright regime adequately protects against piracy concerns while respecting the activities of legitimate users. Our submission to this review is primarily as a copyright user. We are concerned to protect our legitimate uses of copyright where these are being interfered with by technological protection measures—TPMs. Our position is generally reflected in the ABC submission, which you may have seen. It is more general than ours and it urges that exceptions to TPMs should match all existing copyright exceptions. However, we are

aware of the narrow parameters of the current review, therefore we have focused on a small list of key exceptions which we believe meet the tests being set by the review. We believe that they are vital to ensure that SBS does not suffer adverse effects under this new legislation.

As you know, the key exceptions we are seeking are, firstly, an exception to allow access to DVDs of film and television programs for the purpose of making acquisition decisions where the format provided by the distributor cannot be accessed on our playback equipment and, perhaps most vitally, an exception for fair dealing as to DVDs of film and television programs or other copyright material where we cannot obtain a broadcast-quality copy within a reasonable time and cost without breaking a TPM. Why do we need these exceptions? Like all broadcasters, we rely on copyright user exceptions as a vital part of our program making. Broadcasting is typically about compilation of different copyright sources on a very short turnaround. In SBS's case, we also work with relatively tight budgets and small teams. As we have stated in our submission, TPMs which hinder access to copyright material are already causing adverse effects in our day-to-day programming activities and acquisition decisions. Rather than spending their time trying to work out how to access TPM protected material, our program makers would like to spend their time doing what they are supposed to be doing, which is making broadcasts. It is not merely a matter of inconvenience for us to be able to circumvent TPMs. TPMs represent a potentially substantial interference with our broadcasting practices in the digital age and therefore with our business activities and productivity.

I want to comment quickly on the requirement of adverse effects for these exceptions. It is a principle of good governance that regulation should not interfere with private activities unless there is a clear reason why this is necessary and there is no other way to achieve the end. This is particularly so where the activities in question are already well established and have never before been proven to have anything to do with illegal activity. Some submissions made to this inquiry adopt the US approach and suggest that the threshold for proving adverse effect be set very high, that any exception must be supported by evidence of adverse effects going beyond mere inconvenience. However, let us remember that this new regime is effectively criminalising the existing and legal activities of Australians in their daily business and private lives. Adverse effects should be provable whenever the prohibition is shown to interfere with these existing and legal activities, particularly where the interference may result in higher business costs to small and medium enterprises or the restriction of free speech or other private rights of individuals. As we have stated in our submission, this committee is not bound by the US approach, and you can form your own view of what is appropriate in local conditions.

There is a further requirement that an exception not impair the adequacy of legal protection of TPMs. In our submission, users should not have some sort of negative onus to prove that an exception to preserve their existing rights will not impair the legal protection of TPMs. To do so would be to presume that users are pirates. As we know, the majority are not—particularly broadcasters. Once an adverse effect justifying an exception is shown, those who oppose the exception should, in our view, demonstrate why they cannot prevent piracy of their copyright products through other means. We support the submission of the Law Council of Australia that a TPM which is purely or primarily designed to control regional coding of DVDs and not to prevent any infringement of copyright should be outside the scope of protection of the Copyright Act. Regional coding is a competition issue, not a copyright issue.

Finally, a word about process: some people will tell you that this review or future reviews should be conducted through the Copyright Tribunal. As you know, the Copyright Tribunal is headed by a judge and, in the words of one commentator, is an arena for lawyers. SBS strongly supports the current committee process, which allows submissions to be made by letter by any member of the public anywhere in Australia and for them to state their point at hearings without the fear of legal costs or adversarial process. It would be disastrous in our view if this important public inquiry process were to become subject to overly legalistic proceedings in the Copyright Tribunal. It is already an extremely technical and legal inquiry. The committee should avoid any process which results in user groups and small businesses feeling disempowered.

As this committee has said in the past, there are few laws that have such a wide effect but are so little understood as copyright law. I am a copyright lawyer and I can tell you that having to get to grips with the terms of this inquiry has not been easy even for me. In our submission it is vital to keep the process for determining exceptions open, democratic and accessible and to frame the exceptions themselves as widely and clearly as possible to ensure that users can understand their legal rights.

CHAIRMAN—You mentioned regional coding before. In your submission you outlined some examples where TPMs have had an adverse effect on what you do. I think the ones you mentioned were regional coding, DVD access, copying for fair dealing and copying of digital music for broadcast. Is this a reflection of your high usage of audiovisual material or is there less of a problem with TPMs on other types of works?

Ms McCausland—I think it is a reflection of our high use of audiovisual material. Essentially, we have radio, television and internet. I guess there are underlying works like literary works such as scripts which are protected as part of a DVD. Certainly, in the exceptions that we are seeking, we would like to have the exception cover those underlying works as well. But the overwhelming response that I have got back in doing these consultations has been about the DVD format and accessing the DVD format.

CHAIRMAN—SBS has had some discussions, I think, with copyright owners and collecting societies for the use of digital or overseas material and for blanket licences. Have you raised the question of TPMs in these discussions? If not, why not?

Ms McCausland—We have had some discussions recently about podcasting, which, as Julie mentioned, is one of our new platforms. One of the things that has come up in the discussions with music copyright owners is that they are concerned that any use of music in our radio broadcasts needs to be restricted because they are not happy with us using a podcasting format that is in MP3 format. As you know, that format is not protected and can be reproduced. We have been very strong in our negotiations so far, saying that we do not want podcasting to have to be in a format which you can only play on certain types of digital devices or portable devices. We want to make sure that anybody can receive a podcast on their computer or on any device that they have, and MP3 is the best format for that.

Mr TURNBULL—Can you explain how podcasting works?

Ms McCausland—I was really hoping that you would not ask me that! Essentially, as I understand it, it is very like what we already do. Already, for our radio broadcasts, say, the same

day or a few hours after they have been broadcast on our radio we will put them on our web site. That means that people can come along and listen to them on their computer. Essentially, what podcasting does is expand the formats and devices that you can use. So, if you want to, you can program your computer to find out when our podcast goes up. It is just a file that has our radio broadcast in it. You can program your computer to download it whenever it happens. You do not have to go back and keep doing it; you can just program it. You may want to hear the SBS Arabic program and you want that to be put onto your computer. You can also have it put on your portable device, which might be something like an iPod, as well. Essentially, it is just a way of these devices or computers receiving the file in a more accessible format.

Mr TURNBULL—Does it receive the file in a compressed format and then just play it like a normal recording? The word 'podcast' suggests that you have a broadcast to an iPod type of device, but that is actually not what is happening—is that right?

Ms McCausland—It is not a broadcast in real time at all. It is just essentially a saved file. It just allows somebody to hear it in different formats at different times.

Ms Eisenberg—It happens through the computer. It is another way of accessing our material online. It is not through a transmission. It is delivered digitally online.

Mr TURNBULL—So it is not really a broadcast in the strict sense of the word?

Ms McCausland—Not at all. It is an expansion of our activities so that people can time-shift and format-shift, essentially.

Ms Eisenberg—I think the key point in all of this is this issue of accessibility of a public broadcaster. It is quite important for us not to be encrypting or restricting access to material that really is owned by all Australians. It is paid for by all Australians, so they should be able to access it.

CHAIRMAN—Do you know what broadcast flag technology is and can you explain it to us?

Ms McCausland—Broadcast flag technology, as you would know, originated in the US. It is being considered in the US. It is a combination of technology and regulation. Essentially it is a way for broadcasters to control the end use of their broadcasts by having some sort of signal in the broadcast which is picked up by the receiving apparatus at the end. The controversial part of it is that, in order to make it effective, US copyright owners would like to regulate the types of set-top boxes or digital boxes which can be bought and to say that anything sold in the US has to have this particular type of flag recognition device in it so that it actually restricts the types of end-user devices that can be used for receiving TV.

There are various exceptions that they propose, such as if you have got an old box you do not have to go and buy something new but anything new sold in the States, if they get this through, would require the user to sign up to whatever regime the broadcaster wants them to have in terms of access.

CHAIRMAN—Is there any move by broadcasters in this country to use this particular technology?

Ms McCausland—Anecdotally I have had a couple of informal discussions with commercial broadcasters who are interested in it. But my understanding is that at this stage there is no concrete proposal. Certainly the public broadcasters are not interested in it because we want to encourage public access and we do not want to impinge in any way on the existing copyright balance of fair use and things like that which might come in.

Mr MURPHY—Apart from podcasting, how do you maximise access for everyone?

Ms Eisenberg—It is really by as far as possible making it available on all platforms. For example, SBS radio is a case in point. There are 68 language programs broadcast every week and with some languages there is only an hour an week available so if you want to listen to one of those languages you would have to tune in on your radio at a particular time on a particular day of the week. So we take those files and stream them online so people can access them through their computers, we make them available through podcasts so they can time shift their usage and we also make SBS radio available on digital television. So if you have a digital set-top box you can receive SBS radio. This is fantastic because its terrestrial signal only goes to the major capital cities and some of the smaller regional centres, but we have digital television across 90 per cent of Australia so if you have got a digital set-top box you can receive SBS radio. That is just an example of how we try to make our programming available as widely as possible and on different platforms and in formats that people are accessing.

Mr MURPHY—So people would not necessarily have to stay up in the middle of the night to watch the broadcast of the test cricket, which you got a lot of credit for recently.

Ms Eisenberg—With television the issues are slightly more complicated because of the copyright issues in the various programs. But yes: there is the capacity, using digital services, to time shift some of your programming.

Ms McCausland—We made a submission to the Attorney-General that we support personal time shifting and format shifting for that reason of access.

Mr MURPHY—That is very good.

CHAIRMAN—Thank you very much for appearing before us today. We will send a draft of your evidence for you to check and correct. If you want to give us any other material feel free to do so.

[2.28 pm]

FITZGERALD, Dr Anne, Private capacity

FITZGERALD, Professor Brian, Private capacity

CHAIRMAN—Welcome and thank you for agreeing to bring forward the time that you are appearing before us, I know you have come down from Brisbane. Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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 parliament. We have received Professor Fitzgerald's submission and a supplementary submission and they have been authorised for publication. I gather that you have brought another tome with you.

Dr Fitzgerald—Two actually.

Prof. Fitzgerald—I do have something that I would like to hand up in a few minutes. Maybe I could give a bit of an opening statement. I have drafted a provision, which is just to focus my attention. I thought it might be helpful for the committee to look at that.

CHAIRMAN—Thank you very much. Feel free to give us an opening statement.

Prof. Fitzgerald—I have made two submissions to the committee already. In my first submission I outlined concerns particularly in relation to the role of technology as a form of regulation, as it is largely unaccountable to the Australian public in the sense that it is quite often generated through private industry. The public values that we may see informing the Copyright Act are not always present in technological regulation. The exceptions that are to be introduced are very important in restoring a balance between the notion of private industry regulation through technology and informing the law with public values of openness and access.

I would like to make four opening points and then I will focus on a draft provision that I have brought along with me today to highlight some of the issues that I will raise. A couple of themes seem to underpin this inquiry, and they certainly took my attention as I tried to prepare a submission to the committee. The four things that I would like to mention are: (1) competitive advantage; (2) interoperability and access; (3) competition and diversity; and (4) consumer rights. We are very much in an age where information is very important to creativity, innovation and knowledge. It is an important economic driver, not only socially but economically. Access to and utilisation of information, particularly copyright content, is very important to Australia as a player in the global marketplace. It is a given that we will have copyright law, but it is also important that we reconcile the competing interest to information and copyright content that exists within our community. It is very important for the future generation—in particular, perhaps, for people under 18 and those who are not born yet—to be considered in the debate of this committee in this inquiry, to understand the importance of access to and utilisation of copyright content in an emerging and ever-expanding knowledge economy.

The first point that I would like to make is that I believe that competitive advantage is an incredibly important issue that is implicated in this inquiry, in the sense of how we can utilise information and use it to Australia's advantage. The second point that I would like to make is that interoperability has become a critical theme across scholarship concerning the digital environment. 'Interoperability' is a very broad and generic term and, sometimes, I suppose, it is assimilated with the notion of access, but the idea is that we should be able to interoperate content, platforms and content, and platforms and platforms, in a variety of mechanisms. Interoperability has become almost enshrined as one of the core or constitutional-like principles of the digital environment. It is something that we see in our everyday lives and we get frustrated if something is not interoperable. We get signs saying 'error' or something will not connect and we feel very useless. So the idea of interoperability and seamless access is an important point.

Thirdly, there is competition and diversity. It is important that we have choice in this digital environment. The point that I made in my supplementary submission was that it would be a shame to see the High Court decision in Stevens and Sony, in relation to regional access coding, reintroduced or facilitated, if you like, through these amendments to the Copyright Act. That is something that I would like to highlight as I go through. The fourth point is that the recent case of Stevens and Sony showed very much that the consumer, particularly the person who has lawfully acquired a digital entertainment product, has a legitimate right and a legitimate role in this whole debate. It is no longer just about the copyright owners' and perhaps the copyright users' interests; a new interest also seems to have emerged, which is very much the issue of the consumer of the digital entertainment product. With that, I would like to hand a document over to the committee.

I would like to take the committee through this document. It is something that I tried to draft in preparation for appearing today and in terms of focusing my attention. It is very much a draft, one that would take a much different shape in the long run. There are issues that I would like to point out to you as I go through. At the beginning there is a definition for 'effective technological measure', which is taken from the free trade agreement. There are two points put under that. The meaning of 'controls access' is something that seems to be very important, and is something that I raise in my supplementary submission. I would suggest that any amendments to the act deal with the definition of 'controls access'. I would also suggest that it should not mean control over the use of a work or other subject matter once access has lawfully been obtained. The other point I have put there is that the definition should not include technology, devices and components that have the effect of reducing consumer welfare in contravention of the Trade Practices Act. The other great concern with technical protection measures is that they will lead to a reduction in consumer welfare and have an anticompetitive effect, and putting something into legislation would act as a defence for the consumer if they were sued in litigation.

Moving on to the actual exceptions, there are four headed exceptions. One is for people who have lawfully obtained copyright material, non-communicated copyright material, open access licence material, public domain material and statutory licensed material, and then there is a provision relating to agreements excluding the operation of certain provisions. I would like to go through those provisions just in outline. The first provision deals with people who have lawfully obtained copyright material, and (1)(a) really relates to backup copies of computer programs. It is provided for in section 47C of the Copyright Act that you can make a backup copy of a computer program in certain circumstances, yet that is not replicated as a permitted purpose in section 116A. So (1)(a) says that we should be able to circumvent a TPM for the purpose of

creating a lawful reproduction of a work or other subject matter for the purposes of 47C or (1)(a)(ii) for the purposes of using that once it has been made.

A broader backup right is contained in (1)(b)(i). This is contingent upon what happens with the Attorney-General's fair use review. There has been a suggestion that there may be a broad backup copy legislated into the Copyright Act. The idea here is that I buy a music CD; it is arguable that I am not allowed to make a backup copy of that. The fair use review is looking at that. If that comes in, my suggestion would be that it should be permissible to circumvent a TPM to make a backup copy of that CD, or (b)(ii) to actually use it on a platform that will recognise it. In (1)(c) the technological protection measure is circumvented to facilitate a lawful fair dealing of a work or other subject matter. Remember, this is by a person who has lawfully obtained the material.

So (1)(d) is where the technological protection measure is circumvented to facilitate the lawful changing of format or medium of the work or other subject matter. Once again that is subject to the Attorney-General's fair use issues paper but if format shifting is allowable, it would seem logical that you should be able to circumvent a technological protection measure to engage in format shifting. Item (1)(e) is where the technological protection measure is circumvented to facilitate the use of the work or other subject matter on a technological platform of the person's choice. The idea here is that there should be diversity of platforms upon which people can play and use their copyright material. The Sony Playstation scenario could be one example here. I go to New York, I purchase a computer game, I come back to Australia and I want to play it on a platform that I have purchased in Australia. If I cannot do that that certainly takes away the value of not only the platform on which I want to play it but also the game that I have purchased. In (1)(f) is where the work or other subject matter is not communicated to any person and (1)(g) is where the work or other subject matter is not dealt with in a way that would be an infringement of copyright in the work or other subject matter. Those two are probably options in the sense that if I have lawfully obtained something, I should be able to access it for a variety of reasons as long as I do not infringe copyright in the work or other subject matter.

The next provision, 'non-communicated copyright material', is very broad based but it is an attempt to try to bring to the fore the issue of the right to read or the right to fair deal with material. It is a very difficult issue to deal with but this suggests that you should be allowed to circumvent where you can access material as long as there is no further communication of that to any other person of a substantial part or whole of the work or other subject matter. It is very broad and it is one that I am sure would encourage significant debate. Item (3) relates to open access licensed copyright material. There are a number of projects going throughout the world at the moment, particularly one that I am involved with called the Creative Commons, which is a model of giving permission in advance in a generic way to utilise copyright material. It can be expected that in the future significant amounts of government material in Australia would be accessed under open content or open access type licenses. The argument here would be that if there is no other source for material that has been licensed under an open access licence, you should be able to circumvent for that purpose.

Item (4) relates to material in which copyright does not subsist or is in the public domain or has otherwise been waived, rejected or discarded and the work or other subject matter is not readily available in a form that is not protected by a technological protection measure. The argument here would be that material that is an important resource in the sense that it is the

public domain, if there is only one place that it is readily available, there should be a right to access it through circumvention of an access control for the purposes of improving knowledge and research and so on.

Item (5) is an attempt to encapsulate what I have seen in the submissions, the notion that, if a statutory licence is given under the Copyright Act and if there is no right to circumvent a technological protection measure then a number of those statutory licences will be made redundant or very difficult to utilise. There are probably things outside of those provisions that I have listed such as the Disability Discrimination Act relating to people with disabilities and access.

Item (6) is a provision that talks about agreements excluding the operation of certain provisions. My submission would be that there should be a provision in the exceptions that does not allow contracting out of the exceptions to the protection of the technological protection measures. This would occur probably through mass market licences, known as end-user licence agreements, where people might not be fully aware that they are signing up to exclude their rights to circumvent. So item (6) is an attempt to put into words that a contract or agreement that excludes the operation of these exceptions should not be allowed. I conclude there.

ACTING CHAIR (Mr Murphy)—Thank you, Professor Fitzgerald. Dr Fitzgerald, do you have any comments for the committee?

Dr Fitzgerald—I have a submission I have just prepared which has not actually been given to the committee yet. I have a copy on disc, and copies will be made available.

ACTING CHAIR—You can submit that in hard copy or in electronic form, if you want to do that.

Dr Fitzgerald—My submissions really carry on from what Brian has been talking about but perhaps exemplify moving towards an attempt to define the concept of a particular class of materials. My overall submission would be that this committee should support the enactment of provisions in the Copyright Act which would enable definable categories of copyright material to be exempted from the prohibition on circumvention of TPMs that control access to copyright material as envisaged by article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement, and that such provisions should set out (a) the criteria to be applied in determining which classes of copyright material are to be exempted and (b) the process by which exempted classes of copyright material are to be determined from time to time. I realise that the committee has probably really gone straight through to the process which in the United States has been referred to as the rule-making process under the Digital Millennium Copyright Act, but I guess my essential submission is that it would be beneficial for a process to be included within the Copyright Act and for some description of the categories or the characteristics of the materials that would be included in the exemption to be set out in the act.

I do not really want to hold up the members of the committee. Much of the material that is in my submission will have already been covered in other submissions, but I would like to just draw attention to the particular points that I am making. I think it is particularly relevant to look at the United States experience with the Digital Millennium Copyright Act. Article (e)(viii) of 17.4.7 does broadly replicate section 1201(a)(1)(B) of the United States Copyright Act, which

was introduced by the Digital Millennium Copyright Act. While that article does broadly approximate 1201(a)(1)(B) of the DMCA, it is important to note that the Australia-US Free Trade Agreement does not contain any equivalent to 1201(a)(1)(C), which goes on to describe the rule-making process to be applied to determine which classes of copyright material are to be exempted from the prohibition against circumvention.

Further, in this process it is important to bear in mind that although, as I am submitting, it is actually beneficial to look at the United States experience with rule-making under section 1201, there are in fact some substantial differences between Australian and US copyright law. For example, protection is not available in the United States for factual compilations, whereas in Australia, because of the low level of originality that was established by the full court of the Federal Court in Desktop Marketing Systems v. Telstra in 2002, it does actually mean that we have copyright protection for that category of materials. When you are looking at the classes that have actually being exempted in the US process, please bear in mind that there are differences between Australian and US copyright law which mean that the classes of exemptions will not necessarily be the same. I think that you can see things being left out of the US process—for example, there being no copyright in federal materials. A lot of governmental materials are not protected by copyright in the United States, so you have to bear in mind those kinds of differences when you are looking at the appropriate scope of the exceptions in Australia.

Nevertheless, I think because of the similarities between article 17.4.7(e)(viii) and 1201(a)(1)(B) it is in fact instructive to consider in detail the reviews that have been conducted by the United States Register of Copyrights, Marybeth Peters, in 2000 and 2003. I would draw the committee's attention to the fact that a new round of rule making has just commenced. On 27 September 2005 the Register of Copyrights issued notice of a third round of anticircumvention rule making, and written comments from interested parties are to be submitted by 1 December 2005 with reply comments due by 2 February 2006.

In particular, I think it is relevant for the committee to understand the way in which the US Copyright Office has dealt with the concept of the particular class of works. Essentially the same terminology is used in the Australia-US Free Trade Agreement. Again, there is no definition in the DMCA of 'class of works', so the US Copyright Office, through the two rounds of rule making so far, has spent quite a lot of time looking at what that means in practice. Both the 2000 and 2003 rule makings considered this concept in a degree of detail.

Looking at the Australian context, I would submit that there is in fact an identifiable class of materials for which an exemption from the prohibition on circumvention of TPMs is warranted. This relates to copyright material that is received by governments. Governments receive and deal with a vast amount of copyright material, including material in which copyright is owned by non-government entities. Copyright materials may be obtained by government by means of contractual arrangements under which the government obtains an assignment of or licence to the rights. Governments also obtain copyright materials which are produced by non-government entities and lodged with government in compliance with legislative requirements contained in a range of statutes.

Such provisions are commonplace in statutes dealing with the allocation of rights in land and the management of state natural resources—for example, in Queensland we have the Land Title Act, the Mineral Resources Act and the Environmental Protection Act. These require parties to

provide information which is essential to government functioning. That information is contained in documents which attract copyright. It may or may not be the case that governments own copyright in these documents that are produced and lodged by external parties, depending on whether the Copyright Law Review Committee's recommendations are to be implemented and the outcome of a case that is presently before the Copyright Tribunal and the Federal Court—Copyright Agency Ltd and the State of New South Wales. If the CLRC's recommendations were to be implemented, or if the case that is currently before the Copyright Tribunal and the Federal Court were to find that the provisions of sections 176 and 177 of the Copyright Act do not operate to vest copyright in the state, you will find that copyright in quite a significant category of materials—those currently produced by external entities—will not be owned by the state but by the party which has produced and lodged the material. In the light of this—

Mr TURNBULL—What would the implications of that be?

Dr Fitzgerald—Essentially, in this particular context it means that increasingly those kinds of materials are lodged in digital form. For example, materials are going into land title registers in digital form; all of the state governments are well advanced with that kind of lodgement. Australia wide, there is a major e-conveyancing project beginning. The national e-conveyancing system has just been—

Mr TURNBULL—If I fill in a land transfer form of some kind—I am thinking back to that case about classified advertisements, which I think was the *Daily Telegraph* and John Fairfax—am I really creating a literary work?

Dr Fitzgerald—I am talking about cases where it is really not in doubt that you are creating a literary work. For example, it could be quite a substantial report that has been required. In the case that Copyright Agency Ltd brought first of all in the Copyright Tribunal, and New South Wales has established parallel proceedings in the Federal Court, the key focus of debate is not so much that copyright does not subsist in surveyors' plans that accompany land title applications but as to who owns them—what the effect is of sections 176 to 179 of the Copyright Act. And those are the exact provisions that the Copyright Law Review Committee, in its report on Crown copyright, has recommended be repealed in their entirety. So you may have a situation where the category of materials in which the Crown, in the right of the states, territories and Commonwealth, owns copyright is significantly reduced by virtue of the exclusion of this category of materials. At the current time, governments have tended to view those materials as ones for which copyright is automatically vested in them, either by virtue of the fact that they are produced by or under the direction or control of the Crown or by virtue of the fact that they are all first published by the Crown when they are included, say, in a public register, which is made available.

You have a situation where, if the CLRC recommendations are implemented, the category of materials in which the Crown would own copyright is where the material is produced by government employees in the course of their employment or where the material is produced under contract and the contract expressly addresses the issue of ownership and vests it in the Crown. So we have materials coming in from outside of government and they are copyright materials, let us not argue. We are not worried about the category of materials which are so insubstantial that there is no copyright in them. Increasingly, these documents are actually sent to governments in a digital form. A TPM, as we know, covers a myriad of forms of measures that

are applied to something—it could be a password or a form of encryption. Increasingly, encryption is used as part of digital signatures to ensure the security and authenticity of these materials, and in many cases these are exactly the kinds of materials which need to be provided in a secure form.

So I would argue that there is a need for an exception to apply to these kinds of documents. There are many reasons, too many to go into—and I do not have a technology background. But from the point of view of governments receiving materials it could, to say the least, hinder the performance of significant functions if they could not use documents that have been provided to them. We are talking about there being an exception, applying the statutory licence under section 183, which means that once you get through the access control measure the documents can be used in the current form. The category that I am talking about is materials which are used for governmental functions. I am not talking about educational or entertainment products; I am talking about documents which essentially would normally be protected by copyright as literary or artistic works in the form of text or plans and drawings.

As there has been a lot of difficulty in coming to grips with how we would define a particular class of materials to be exempted from infringement, I have had a stab at doing that for this category of documents and I think that this is actually starting to work. I would submit that there is a justification for creating an exemption to permit circumvention of TPMs on a particular class of materials which is defined in the following terms: literary works—I would include computer programs, compilations and artistic works—produced and lodged pursuant to a requirement imposed by statute, regulation or administrative instrument which are in the lawful possession of a government department or agency, which are required for the performance of government functions and—perhaps if we wanted to really restrict it down a bit further—which are protected by access control mechanisms that fail to permit access because of malfunction, damage, obsolescence or incompatibility with the platform or platforms used by the government entity which received the literary or artistic work. That is a pretty watertight kind of thing.

Essentially what we are worried about is if you get something in and the copyright belongs to the party who has lodged it. That category of materials could expand, depending on what happens with the implementation of the CLRC recommendations and the Copyright Tribunal-Federal Court case between the Copyright Agency Ltd and New South Wales. What we are wanting to do is to avoid a situation where you have got a document that you need and you do not want to worry about chasing up the copyright owner to be able to circumvent the TPM that is attached to it. It is needed for a government function, you understand the context in which it has been lodged and you want to be able to circumvent that access control so that you can carry on, plug it into the system and use it in the way in which it was obviously intended to be used.

I would draw your attention also to the United Kingdom Copyright, Designs and Patents Act 1988. In that act, they did away with Crown copyright as we know it. In fact, essentially the same step that is now being recommended by the CLRC was made in relation to the UK act under the Copyright, Designs and Patents Act 1988. So copyright in documents may well belong to an external entity, but the act counterbalanced that change in ownership by introducing a number of specific exceptions. These are royalty free, total exemptions from copyright infringement. One of these relates to this category of materials that have been provided to the Crown.

I just want to run through these. This provision is in section 48 of the Copyright, Designs and Patents Act. It is addressing the category of materials and the uses that can be made of them. It deals with materials which are protected by copyright as literary, dramatic, musical or artistic works—that is the equivalent of the whole of our category of part III works—where 'a document or other material thing recording or embodying the work is owned by or in the custody or control of the Crown'. The work has been communicated to the Crown 'in the course of public business', and 'public business' is defined as 'any activity carried on by the Crown'. The work has been 'communicated to the Crown for any purpose, by or with the licence of the copyright owner' and the work has not been previously published. That essentially defines the kinds of materials that this exception applies to.

Mr TURNBULL—You would have to define 'the Crown'—you would have to define that to include a lot of government agencies that may not necessarily come within the definition of the Crown. I am thinking of something like Sydney Water, for example, which is a statutory corporation.

Dr Fitzgerald—This is one of the issues that the CLRC went through in its Crown copyright inquiry. Essentially, they proposed a listing of the bodies that come within 'the Crown' so that it is not overly extensive, because it was felt that the benefit of the Crown ownership provisions was being claimed by too broad a group of entities. That was something that was addressed by the CLRC.

So, for works with these features, the Crown could make copies and issue copies to the public for the purpose for which the work was communicated to it or any related purpose which could reasonably have been anticipated by the copyright owner, without infringing copyright. I do not actually know—I have not been able to ascertain—how the UK has implemented the European directive which gives effect to the WIPO Copyright Treaty. But as far as I can see in the most up-to-date version of the act it has not interfered with the operation of that kind of provision. So what we have there is essentially an open licence for the Crown to use materials that have been provided to it for government business.

Essentially, I am advocating here that there be an exception to the prohibition on the circumvention of TPMs for government activities in dealing with documents that are submitted to them for public purposes but in which someone else may own copyright—so that that exception could be carved out.

Mr MURPHY—In relation to the implementation of article 17.4.7, which you referred to earlier, I would be interested in your views and Professor Fitzgerald's views about the fact that we have received a number of submissions that argue that the balance being struck by copyright regulation is now tipped in favour of the copyright owners. Do you have any views about that?

Prof. Fitzgerald—The theme of my submissions is certainly that we have to be very careful to ensure that we get the correct balance. There is a perception that the copyright owners certainly have the upper hand in this area of the law, the way the amendments have gone. I think we have a real opportunity here to ensure that we allow people in Australia who need and want to have it—and who will require it for their educational development—the means to access information. There cannot be any doubt that copyright law will exist, but there also needs to be real effort put into the balance of reconciling these interests. The tenor of my submissions is that

if these amendments go through and the exceptions are very narrow we will then have a great variety of Australians—consumers, children, schoolchildren, university students and all kinds of people who now access information products—who will be at a significant disadvantage.

Mr MELHAM—In your supplementary submission, you summarise as follows:

The critical issue for Australia and our enterprise class is to ensure that the implementation of the Australia-US Free Trade Agreement obligations does not result in the reinforcing of TPMs that deny Australian consumers their legitimate rights to participate in the global market for digital entertainment products.

That is basically what you are submitting, isn't it?

Prof. Fitzgerald—That is correct, yes.

Mr MELHAM—It is not a question of balance; it is that you do not want to see consumers deprived of their legitimate rights to participate in the global market?

Prof. Fitzgerald—Yes.

Mr MELHAM—Would it be fair to say that you think the balance at the moment is tipped against consumers?

Prof. Fitzgerald—I think there are a variety of interests that we are looking at. We traditionally talk, in copyright terms, about copyright creators, copyright owners and users. But, as I said, through the recent decision of the High Court in Stevens and Sony the court has very much opened our eyes to the idea that there is also a consumer interest involved here, in the sense that if someone has lawfully acquired something we really need to be honest in telling them at the point of purchase what they have actually acquired. If you bought a game in New York, brought it home, tried to modify your Playstation to play it and someone said, 'You cannot do that,' you would ask, 'Why didn't you tell me that when I bought the Playstation or when I bought the game in New York?'

Mr MELHAM—What about when someone buys a DVD and then seeks to on-sell it through multiple copies that they have made? Is that a legitimate use on their part? We are talking about different things here.

Prof. Fitzgerald—Yes. The copyright law clearly says that it is unlawful to engage in reproduction and communication of material. I am certainly not advocating that we set up a pirate industry in Australia. What I am very concerned with is that increasingly, as we try and access things, we are finding that there are these interoperability barriers that are put up. One of the things I think we need to be very careful about here is that we do not legislate more difficulties into the law.

Mr MELHAM—Is that in relation to educational purposes?

Prof. Fitzgerald—I think it is across the board, but in education it is certainly an issue. There are also issues, as I have listed in this draft provision, about backup material and format shifting. Currently the Attorney-General is looking at whether those issues should be legislated into the

Copyright Act. It seems ludicrous that we buy a CD of music and we cannot make a backup copy of it, when the medium is not really what is so valuable. What is valuable is the IP in that CD. So it really seems silly that we can go out and buy something that could be scratched, take it back to the store and have the store say, 'We are not going to replace that.' That seems to be something that we should not be doing. If we are going to take that step—that is another part of the law reform—I think that this part of the law reform should follow suit. So there are lots of different interests that are involved. As a consumer, when you purchase something you want to be sure that you can use it to its fullest extent. You want to make back-up copies. There are the statutory licence provisions that Anne has touched on. But there is a whole host of provisions that allow you, without the permission of the copyright owner, to go and take material as long as you compensate them for that. We do not want to create barriers to doing those things. We want to have a sense of seamless access, I suppose.

Mr MURPHY—In relation to the proposed exceptions, is the Copyright Tribunal an appropriate body to undertake that review process?

Prof. Fitzgerald—I am not sure whether the committee has received a submission from the ACCC, but I believe that Stevens and Sony really does show us—and I do not want to keep making this point again and again but I will—that we are now also talking about the legitimate interests of Australian consumers. I do not want to throw a curly one here but I just wonder what role the ACCC could play in this process as well. A large part of this is about consumer products and their useability. I fear that the Copyright Tribunal will lock us into a copyright landscape, if you like. I think this is much broader than just an issue of copyright and that Stevens and Sony highlights that issue for us. So while I do not really have a confirmed view on that I do think that the ACCC is one government agency that should also be considered in that rule-making and review process.

Mr TURNBULL—For clarification: your proposition is that if a person has lawfully acquired a right to view, read or otherwise use a copyrighted work then no TPM should be permitted to prevent such use.

Mr MELHAM—Legitimate use—you do not into piracy.

Mr TURNBULL—You are saying that if I buy a DVD in New York and there is no restriction on where I can view that movie then why should I be prevented from viewing it in Australia?

Prof. Fitzgerald—Yes.

Mr TURNBULL—You agree with that. You would say that the copyright owner could have said, 'I sell you this DVD and it has a licence that permits you to view it only within the United States of America.' They could do that legally, could they?

Prof. Fitzgerald—The difficulty we have with that is that parliament changed the law over the last 10 years to allow parallel importation, so the copyright owner's ability to restrict importation of that into Australia is certainly restricted. You raise the question of whether they could impose through a licence the restriction that it could only be used in the United States. Hypothetically, that could run into competition law issues or anti-trust issues within the United States. That would be one possibility. What they would more likely do and what has been done is

that they would in effect implement those licence terms that you are suggesting through regional coding—through the technology. In essence what would happen would be that you would not have the capacity to utilise it elsewhere.

Mr TURNBULL—Is this your point: in the absence of an express provision that the DVD purchased in the United States cannot be viewed, for example, in Australia—putting aside the question of whether this is enforceable, legal or whatever—your argument is that there should not be any technical barrier to a person being able to view it in Australia if they have, at the time they purchased the DVD, the right to view it anywhere in the world.

Prof. Fitzgerald—That is the argument, yes.

CHAIRMAN—Thank you for what you have done and for your evidence. If there is any further information that you would like to send us, please do so.

Dr Fitzgerald—I have my submission here on disc, so I can hand it to the secretary.

CHAIRMAN—Thank you very much.

Resolved (on motion by **Mr Turnbull**, seconded by **Mr Melham**):

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

Committee adjourned at 3.13 pm