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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Review of technological protection measures exceptions

TUESDAY, 15 NOVEMBER 2005

MELBOURNE

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 15 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, Ms Panopoulos, Ms Roxon and Mr Slipper

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.

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Committee met at 9.57 am

WODETZKI, Mr Jamie, Spokesman, Supporters of Interoperative Systems in Australia

ACTING CHAIR (Ms Panopoulos)—In the absence of the chair of this committee, I declare open this public hearing of the House of Representatives Legal and Constitutional Affairs Committee's inquiry into exceptions to the technological protection measures scheme under the Australia-US Free Trade Agreement. The Attorney-General has asked the committee to determine if exceptions other than those already identified in the USFTA should be included, ensuring that any exceptions recommended meet the criteria set out in the USFTA. 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 USFTA are sufficient to maintain the balance between protecting the rights of copyright owners and ensuring the valid interests of copyright users.

I welcome everyone here today. We have quite a tight program, but I am sure today's discussions will be very informative. I would like to welcome the representative of Supporters of Interoperative Systems in Australia. 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. The committee has received your submission and it has been authorised for publication. I invite you to make a brief opening statement of about five or 10 minutes, if you wish, before we proceed to questions.

Mr Wodetzki—I represent the SISA, an open systems IT industry body. I am also, by coincidence, the chair of the board of the Australian Digital Alliance. They will be giving evidence later on through the executive officer. I started and run an Australian software company, so I guess I speak from a perspective of knowing how this industry works, plus I am an ex-lawyer, so I have a perspective across both sides of these things. Indeed, I attended the WIPO diplomatic conference in Geneva, which resulted in the treaties that caused all of this.

Mr MELHAM—So you are to blame.

Mr Wodetzki—No, I am not to blame. I have been working hard to try and make sure that this does not go bad. I have to say that the Australian government and, in particular, the parliament, have done a good job so far in making sure that this stuff is reasonably balanced. SISA is, if you like, a part of the IT industry that supports open systems. So, when people talk about the IT industry, it is fair to say that they do not speak with one voice. There are those who are usually dominant providers who might favour a more restrictive approach to these sorts of matters. There are those who favour a more competitive approach so that smaller independent vendors can make things that work with other things—that is, software that works with other software.

Our perspective is that copyright is a good thing but over protection is a bad thing. It is usually bad for innovation and competition. This type of committee hearing, and I guess these types of issues, are not really about whether the protection is adequate but whether the protection becomes over protection and does damage to good policy. So technological protection measures,

and the laws that relate to them or try to support them, are another example of trying to place a new layer of protection over the copyright layer. Our view is that, to the extent that these new locks and tools for protecting things are about enforcing copyright, they are good thing. To the extent that they are about extending copyright and, in effect, walking over a lot of the balancing provisions in the copyright law, we think that they are bad thing.

I think this point was stressed by the High Court recently when it was looking at the Sony and Stephens case which no doubt you have all heard about. In looking at these types of laws, which various people have called ‘paracopyright’ and ‘ubercopyright’ and all sorts of other things—it is yet another layer of protection over the top of copyright—the High Court has said that it is important to assume that people are trying to match copyright, that is, to treat this as an enforcement issue but not to extend the copyright monopoly. That is, in effect, what it is. That is our perspective.

The context of this review is one that started back with the WIPO copyright treaty, which was the first thing to bring in a multilateral view that some sort of measures in this area would be good. The WIPO copyright treaty laid down various requirements in article 11 but, importantly, it was quite open and flexible. It recognised that this stuff is a touchy issue and needs to be treated carefully. There is not a lot of prescriptive detail in the WIPO treaty and, indeed, it was well understood at the time of that treaty that it was about enforcement of copyright and not about using new locks to make copyright broader or more extensive than it might be under the basic laws of copyright.

Australia implemented it with the digital agenda laws, and did a good job. It adopted the approach that it should put these new laws in place in a way that is about enforcing copyright but with balancing provisions and exceptions to recognise that these locks and new ways of protecting things could take away the rights of general, ordinary people who have rights under copyright as well.

In a specific situation that I can talk about, if you look at the interoperability debate in the software industry, Australia and, indeed, most parts of the world, have laws that say you cannot use copyright to stop someone from, in effect, understanding the interface components of one piece of software and building other pieces of software that will talk to it. That is because it is good for competition and it is good for innovation. It means that everyone’s software works better. So you cannot use copyright protection to stop someone from making a compatible product. We have those laws; they are enshrined in good provisions of our act and they are reasonably well accepted now. When we put in place our circumvention laws, we created an exception for those things. The good thing about the free trade agreement is that it does at least recognise that piece of the puzzle. So that is not the issue today, but it does highlight that what this treaty is doing is coming in and knocking off things that we had previously, after very careful policy debate, thought should be exceptions.

The example that I am giving is the one that relates to error correction. That is, we also have laws that say it is okay to reverse engineer, if you like, or analyse and look inside a piece of software if you need to do that to correct errors in the software, particularly where the person who supplied the software is not correcting errors themselves. Again, our law recognises that reverse engineering or decompilation to correct errors is a very valid, lawful, self-help measure. Not only that but it makes it impossible for the vendor to try and override that with contracts, so

it is one of the more strongly recognised good policy outcomes that people can engage in self-help to correct errors. And yet, with this treaty it is not one of the automatically protected provisions.

Mr MELHAM—Is there a reason for that?

Mr Wodetzki—There is not a good one that I am aware of. If I can make a comment about this treaty in general, the free trade agreement is what I would call, probably, a good thing, but we are taking it warts and all. This is one of the warts. The provisions around tech protection measures are incredibly detailed and complex. They seem to have been lifted largely from the US—

Mr MELHAM—I notice you say that in your submission. Is this the US approach? Is that why?

Mr Wodetzki—It is an interesting point. The US approach is subtly different. They do not have a specific exception that says it is okay to reverse engineer to correct errors or to create interoperable products. What they have is their general fair use provision. Their history to this is such that their law allows both of those things but because they do not have a specific legislative exception—they have a case law developed exception—they are probably more reluctant in their law to attach a tech measures exception. What they did not want to do was to attach a tech measures exception to fair use which is what they would have had to do, I would imagine, whereas we are not in that situation. We are in a situation where the reverse engineering issues, error correction and interoperability, are not caught up in this nebulous fair use concept. They are the subject of very specific provisions. They might have what you would call a floodgates argument. They are scared, if you were to allow people to get circumvention devices in connection with fair use, that everyone—every consumer, every person on the street—would go out and get those devices and the protection measures would be useless. In our case, the exception on reverse engineering for error correction is not of that nature. It is just a perfectly sensible good thing. That is why it is in our law. It is not in the free trade agreement because the free trade agreement—again I can only repeat this—is sort of a warts and all thing. These provisions were probably done in a hurry, our trade negotiators would have done a good job but they are not copyright experts, they did not have the benefit of input from all sides of the debate, they did not consult very effectively and so we get these very detailed provisions.

ACTING CHAIR—Are you aware of what consultations there were with copyright experts?

Mr Wodetzki—Yes, but they were very sort of opaque—perhaps not opaque—they were, ‘Tell us what you think and we will go off and look.’ Normally in a lot of these processes you get a chance to look at actual, specific language and say, ‘There are problems with that, that and that.’ That was not the case in this process. They would have asked about issues from time to time but not in any way did they ask, ‘If we implement it like this, is it going to be a problem?’

Mr MELHAM—Do you see if the oversight has corrected any problems within the industry or is your view generally accepted?

Mr Wodetzki—My view on which bit?

Mr MELHAM—The correction of errors.

Mr Wodetzki—I would be very surprised if someone seriously opposed it. I think the error correction exception has been in since 1999.

Mr MELHAM—In the Copyright Act?

Mr Wodetzki—Yes and it came through our process, so when we—

Mr MELHAM—Your submission basically says that the Copyright Act has got the delicate balance right, if I have read it correctly.

Mr Wodetzki—It has. If I was being picky, I would say that I did not like certain things, but broadly speaking I think it did a good job of compromising. It was already a compromise, I guess. There are debates around whether you should say that any non-infringing use should still be allowed. You should not be able to use locks to stop someone from engaging in lawful conduct. Our base view would be that you should use tech measures wherever you want to back up your copyright rights, but, as soon as you start using them to stop someone from exercising their rights, you should not complain if they try to unlock them. That is our fundamental, pure view. But, in the spirit of compromise, we can recognise that, in some cases, that type of measure might be prone to abuse and maybe the line needs to be shifted a bit.

I think our approach to section 116A was reasonably good. It recognised exceptions for libraries, universities and open systems scenarios. Those are all good things. But, for example, it does not stop someone from putting public domain materials in behind a locked scenario. People use a lot of silly analogies, I guess, and I might use one of them myself. There has been talk that this is about theft and it is okay to put a fence around something to protect your own property. But, if someone puts a fence around a public park, I would have thought it was okay to go and pull it down. This is not about fencing private property; it is about fencing public property. That is the distinction that we would draw.

We have this history where Australia has implemented these types of laws, and I think it has done a reasonably good job. Then we have seen the US approach the same issue from the same origins—it is all coming out of the WIPO treaty—but the US took a very detailed legislative and prescriptive approach, no doubt thrashed out by many lobbyists in Congress, and they put that into their act. Quite importantly, if you read the US legislation, it sounds incredibly narrow and prescriptive, yet, in the US environment, when their courts have applied these DMCA provisions, they have adopted a very balanced approach at the level of the case law. So you have found that they have reattached the connection to copyright through the judicial process. If you read the DMCA, on its surface it seems to say that we can lock things up, whether it is to protect our copyright or to protect something else. But, when they try to run their cases through the courts using those laws, the courts say, ‘No, we’re not going to let you use those laws unless it’s to protect your copyright.’ So it is at the court level in fact that we see the outcome in the US. It becomes clear that they are not using these provisions to extend copyright. The courts are constraining it and saying: ‘If you try to use the DMCA provisions to protect an after-market in garage door openers, we’re going to stop you. If you try to use these DMCA provisions to stop someone from servicing your hardware, we’re going to refuse it.’ The Americans have adopted

this prescriptive language in the DMCA but their courts, if you like, have softened the blow of that approach.

ACTING CHAIR—Would the US judicial application of fair use make the US law roughly analogous to the situation in Australia?

Mr Wodetzki—On the copyright issues?

ACTING CHAIR—Yes.

Mr Wodetzki—Yes. They are separate from the protection measures. You will get a little more argument around the edges in the US, but the fair use provisions in the US allow more reverse engineering for interoperability purposes than they would allow for certain other purposes. Because they have had fair use, their law has been more flexible and has been able to adapt in that way over time, whereas we had to go through a fairly drawn-out process where our fair dealing laws did not cover any of this stuff for quite a long time. It was only after 1999 that it has been fixed with the specific exceptions. But if you look at the substance of it, what is protected or allowed in the US is generally quite similar. There will be differences, but it is generally quite similar.

In looking to implement the free trade agreement—I will again use my warts and all analogy and treat this as one of the warts—my argument is that the committee should adopt an approach where you are trying to treat the wart, not help it to grow big and ugly and do damage. In this case, you will have people on the copyright owner side, whose interest it is to get stronger and stronger protection, saying: 'This is great. If you read the surface of this stuff, it is really restrictive. It helps us extend our monopoly. What you should do is just implement it, read the words literally and allow these protection measures to be used very broadly.'

We would argue that this is not just an administrative exercise where you literally read the fine print of the FTA but that you look at the whole history, context and purpose of it, the policy objectives of it and the way the US itself has implemented it. You basically say, 'What we should be trying to do is achieve a good outcome as much as this framework allows us.'

Our view is that the exception framework that you have here is capable of being read either broadly or narrowly and that, if you read it broadly, you will achieve a better outcome. You have a choice: you do not have to read it narrowly; you do not have to read it broadly. If you read these tech protection provisions broadly, they are in effect recognising that we are laying a whole new blanket of protection over an already carefully balanced legal regime and that we need to have some sort of balancing force in there. So the provision allowing for legislative or administrative review is specifically recognising that, if you were to apply these laws aggressively, you could do a lot of damage and you would need a policy check. I might pause at that point and ask if there are any specific questions.

Mr MELHAM—I come back to the fact that the only exception that you want us to look at is error correction.

Mr Wodetzki—There was one other, but error correction is the one that we think is absolutely fundamental. The other one is at section 47B(3), which relates to studying the ideas behind a particular program.

Mr MELHAM—That is in your final paragraph.

Mr Wodetzki—It is another example where it is lawful, and there is a risk that tech measures would be used to stop it. There is no legitimate reason to stop it. It is one of those things that are lawful for a good reason. If you have a particular application that you might rely upon—

Mr MELHAM—Would that be a non-contentious view, or are there people in the marketplace who say, 'You shouldn't do that'?

Mr Wodetzki—I cannot speak for the others. I am sure that you would be able to find someone who would try to make it contentious, but I do not think it would be particularly contentious. Again, it is an exception that is already in the act. It is not a piracy issue; it is not something that really threatens anyone. It allows someone to understand how one application works. It is not as though they could then go and rip it off. They would have to build something with similar functionality, which is what goes on all the time.

I did not really want to get into technicalities but there is a lot of discussion around particular language in this provision; namely, that, whatever you do, you must not impair the adequacy of legal protection or the effectiveness of the remedies, or words to that effect, that are used to protect circumvention devices. I wanted to point out that the language that the US provision has adopted is taken from the WIPO treaty but cut short. So they talk about the adequacy of protections and remedies against the circumvention but then they cut off the context of the WIPO treaty. To paraphrase the same provision in the WIPO treaty, it said that contracting parties, namely different countries, should put in place laws that provide adequate legal remedies and effective protection against circumvention of measures used to protect copyright. So the WIPO treaty says that you need to put in place measures to protect these locks where they are used to protect copyright. The US provision effectively chopped off those qualifying words. Our view is that suddenly those words do not make a whole lot of sense. How can you know what is adequate or effective protection when, in fact, the adequacy and effectiveness has no context? The context is all about copyright—it is all about copyright enforcement and copyright protection. In order to look at whether something is adequate or effective, you should be saying, 'How does this relate back to the core law? How does this relate back to protecting copyright?' If you create exceptions that say it is okay to circumvent for purposes of allowing lawful, non-infringing conduct, then you remain true to those words and you are not doing anything to impair the adequacy or effectiveness of the protection of copyright. You are just saying, 'We won't allow those devices to be used in ways unrelated to copyright or in ways that extend copyright.'

I may have not explained myself particularly clearly, but the key point is that all the interpretation of this language, in effect, becomes a very academic exercise and one at which people are probably torturing the meaning of language to arrive at the conclusion that they want to arrive at. Given that scenario, the best way to approach this is to accept that these words could mean anything. They are all quickly cobbled together in many respects and the subject of different levels of debate. The ultimate goal should be to look at what is a good policy outcome

and what the language of these provisions allows for. Our position is that the language of these provisions does allow you quite a degree of latitude to adopt new exceptions and that you should try to do what it is going to result in the best policy outcome.

CHAIRMAN (Mr Slipper)—Thank you very much. As chairman, I would like to apologise for not being here for your start. It took me 1¼ hours to travel from Spencer Street this morning by taxi and on foot.

Mr Wodetzki—You were caught up in the protest against the tech protection measures.

CHAIRMAN—Indeed. A draft of your evidence will be sent to you for correction, if you can get that back to the secretary as soon as possible. If you want to send us any additional material, we will be happy to receive it.

Mr Wodetzki—Thank you.

Proceedings suspended from 10.24 am to 10.28 am

FANNON, Ms Kate Margaret, Project Manager, Research and Policy Advice, Vocational Education and Training System Support Program, Flexible Learning Advisory Group, Australian Flexible Learning Framework

FLAHVIN, Ms Anne Maree, External Legal Advisor, Flexible Learning Advisory Group, Australian Flexible Learning Framework

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, these proceedings are proceedings of the parliament and there are sanctions in the event of people not treating these proceedings in that way. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Your submission has been received by the committee. It has been authorised for publication. I invite you to give us a brief opening statement of maybe five or 10 minutes and then we may, if necessary, proceed to questions.

Ms Flahvin—I will start by thanking the committee for hearing us today. FLAG, the Flexible Learning Advisory Group, is the lead national body on flexible learning and e-learning in the VET, vocational education and training, sector. FLAG is an advisory group to the Department of Education, Science and Training and other government bodies on issues relating to flexible learning and e-learning. The VET sector comprises approximately 1,900 colleges, TAFEs, centres of community education, industry training bodies, RTOs—registered training organisations—and that kind of thing. There are 1.7 million students. So we are talking about a very large part of the education sector in Australia.

As we point out in our submission, FLAG is not here today to argue against the ability of copyright owners to take appropriate action to prevent infringements of their copyright material. FLAG acknowledges that, in the digital age, technological protection measures are an appropriate response to the risk of infringements taking place. We are here, though, to urge that the committee be cognisant of the fact that the anticircumvention provisions should be about preventing infringements rather than preventing access for the purpose of engaging in uses which, under the existing copyright law, are non-infringing. I note with interest that DCITA stresses that point a few times throughout its submission, and FLAG would very much like to stress that point as well.

Jamie Wodetzki made the point about the High Court's decision in Sony and Stevens. It is interesting, I think, to take account of the fact that the lead judgments made the point that their criticism of the Court of Appeal's decision in Sony and Stevens was that the court was seeking there to extend copyright—to allow the TPM provisions in the act to be used to extend copyright. The High Court was critical of that conduct. Justice Kirby went further and flagged the possibility of a constitutional challenge to a law which had the effect of taking away the right of a person who has legitimately obtained property to use that property in a way which the Copyright Act would otherwise allow.

We would also urge the committee to be cognisant of the experience in the US under the Digital Millennium Copyright Act. We have the benefit now of having seen the DMCA in implementation and some of the problems that have been experienced as a result of that

legislation. Jamie referred to some of them and also to the way in which the US courts have appeared to be willing to rein in some of those excesses—notwithstanding that, on its face, it would appear to allow TPMs to be used to lock up works which would not otherwise be subject to copyright. So the courts have come in to save the day, if you like, in the States. One important point to make is that US courts have a history of judicial activism that Australian courts do not necessarily have, so it might be a mistake to take the view that if the legislators do not get it right we can rely on the courts to fix the problem. I do not think that would be an appropriate approach.

I would like to stress again that copyright law is all about striking a balance between the interests of owners and users. There is some discussion in some of the submissions that are before you, the Copyright Agency Ltd submission in particular, which paint a picture which, in our view, is quite misleading. There is a discussion there about anticircumvention devices and services being akin to bolt cutters and about the TPM provisions being all about the right of property owners to protect their property from thieves armed with bolt cutters.

In our view, that is a highly misleading take on what copyright is all about. Copyright has never been about an exclusive grant to copyright owners. The grant of copyright has always been subject to exceptions and limitations, and those exceptions and limitations are an integrally important part of the copyright balance in Australia. Our concern is that the anticircumvention provisions, as proposed, in the absence of appropriate exceptions have a very real potential—in fact, in every likelihood—that will radically shift that balance, undermine those exceptions and render them totally otiose.

The other thing I would say today is that the education sector is different. That has been recognised by our legislature. The educational statutory licences contained in parts VA and VB of the Copyright Act are very much a recognition of the fact that the education sector serves an important public purpose in this country. Those educational statutory licences were introduced with a view to ensuring that the sector has ready and cost-effective access to copyright material. It is important to keep in mind that that access—the access that educational institutions can currently take advantage of under those educational statutory licences—is paid for. We are not talking about free exceptions here—this is quite a different scenario to fair dealing, for example.

Educational institutions pay vast amounts of money every year to be able to take advantage of these licences, so the legislative intent was to make it easy and to make it cost-effective. Those licences are subject to very strictly enforced obligations, and there is a very long history of educational institutions complying with those obligations. They include, first of all, paying equitable remuneration—the Copyright Tribunal determines what a fair thing is if the parties cannot agree. Copies which are made are subject to the requirement that they include a notice to users reminding the user of the limitations and the rights of the copyright owner. There are limits on how much can be copied under the part VB licence, the print and graphic licence—generally, speaking only 10 per cent of a work can be copied. We are not talking about the whole work unless we are talking about journal articles. The copying is for educational purposes only. The copies cannot be provided to anybody other than a student or a staff member in an educational institution. The institution is obliged to restrict access. So we are talking about checks and balances which are put in place. There is a very long history of those checks and balances working appropriately. There is no history of there being significant breaches of those checks and balances.

We would like to say that educational institutions can be trusted. The idea that they ought not to have an exception to the anticircumvention provisions seems to us to amount to a radical overkill, if you like. The harm that would be caused to the sector is completely out of perspective to the perceived risk or to the actual risk. There is no real evidence that—in extending an exception to educational institutions for the purposes of, in particular, accessing works under parts VA and VB of the act—there is any real risk of those copies falling into the hands of copyright pirates. Nobody has ever suggested that universities, educational institutions, TAFEs et cetera are likely to engage in that kind of activity nor would I say has it been credibly suggested that allowing students and staff members in those institutions to copy pursuant to these licences is likely to lead to copies falling into the hands of pirates.

Finally, I would like to point out that in submissions to the two committees inquiring into the free trade agreement, the Joint Standing Committee on Treaties and the Senate Foreign Affairs, Defence and Trade References Committee, the Department of Foreign Affairs and Trade gave express assurances to both committees that the concerns that had been expressed by the educational sector with respect to the provisions that we are talking about today were misplaced and that the free trade agreement provisions—the TPM provisions, in particular—were flexible enough to allow for provisions that were sensitive to the Australian legislative regime to be formulated. We urge the committee to remind the government of those assurances and to live up to those assurances.

Mr MELHAM—We can chase that up. Have you got original copies?

Ms Flahvin—I can send you copies of the two submissions. We can follow up on that.

Mr MELHAM—I am one who always likes to have the original copy in front of me.

Ms Flahvin—We are happy to do that. The other thing that we point out is that the JSCOT in particular, in its own report, stressed the importance of—

Mr MELHAM—Could you point us to exactly where in the report? I think that is important.

CHAIRMAN—A number of the submissions we got suggested that the free trade agreement somewhat changes the balance in favour of owners as opposed to users. From what you were saying, it would seem that you share that view?

Ms Flahvin—Absolutely, in the sense that we have stated. Under the current TPM regime—I think Jamie pointed out that it was under section 116A of the act—for a start, there is no prohibition on use. The prohibition is limited to commercial supply of circumvention devices and services, so we have a proposed new prohibition on use. Under the existing regime, there are exceptions and, most importantly for our purposes today, an exception for educational institutions exercising their Part VB rights, their right to copy and communicate works for the educational purposes of those institutions without seeking the permission of the copyright owner. As I have said, that is an activity that they pay money for.

CHAIRMAN—I suppose, not unnaturally, when you look at the submissions we have received, you see that those from people broadly representing copyright owners seem to want us to minimise the exceptions and those who represent users want a more generous approach. There

seems to be some suggestion—and I think you made this suggestion yourself—that the free trade agreement restricts what can already be done under the current law.

Ms Flahvin—Yes and no. The provision that is the subject of this review, the provision in the free trade agreement which allows for further exceptions to be crafted, in our view very clearly accommodates the kinds of exceptions that we have set out in our submission.

CHAIRMAN—I think you mentioned in your submission some concern about students with disabilities? Could you elaborate?

Ms Flahvin—Kate, would you like to answer that?

Ms Fannon—Yes. We already have the Disability Discrimination Act 1992 and subsequently, the Disability Discrimination Amendment (Education Standards) Bill 2004 went through parliament last year. They put an obligation on educational institutions to give equitable access to curriculum and support to students, whether they have a disability or not. Anybody who has worked in education will know that the majority of resources and materials that are developed in the world are not accessible to people with a disability, so there is a quandary. What happens is that that material has to be reformatted. The technological protection measures technologies are going to be rapidly increasing, changing and becoming more complex. Because of free trade, people are going to use them more extensively, in ways that we can not even conceive at the present time. Yet the legislation will lock us in to a scenario which we have not grasped yet, because it will be ever-evolving. That will have maximum effect on people with disabilities. If something is formatted so that it is only in audio, someone who is hearing impaired is locked out. If we can have access to that and reformat it then we fulfil our obligations under the law. I can give you lots of scenarios, such as with screen readers and so on for students with disabilities. But there is a quandary: one piece of legislation is working against another piece. We heard before from Jamie about interoperability of technical standards. There needs to be some interoperability between legislation too. That is a problem.

CHAIRMAN—This is not directly relevant, but what proportion of students would you say have a disability of some sort?

Ms Flahvin—Off the top of my head I could not give you a figure, but I am sure we would be able to get access to that information.

CHAIRMAN—It is probably higher than we would think.

Ms Fannon—It is probably higher. They say that, across the board, 18 per cent of Australian students have a disability. That also includes people in wheelchairs et cetera. For FLAG we are talking particularly about flexible learning and e-learning. So we are looking at students who cannot access the current written, audio or video formats, depending on their sight, hearing and maybe intellectual disabilities. We are looking at where the content has to be reformatted to be accessible.

Ms Flahvin—One thing to note is that the existing educational statutory licence regime, part VB, does specifically allow for educational institutions to engage in quite a lot of that kind of copying and communication for people with intellectual and other kinds of disability.

Mr MELHAM—I notice that the free trade agreement 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.

I suppose what you are saying to us is that you just want to see the status quo maintained?

Ms Flahvin—That is absolutely what we are saying. The balance that has been struck as a result of detailed policy discussions and debate is about to be tossed out.

Mr MELHAM—And your view is that the balance can be maintained and that is consistent with the particular sections in the free trade agreement.

Ms Flahvin—Yes, it is. There is nothing on the face of the free trade agreement, in our view, that would prevent the government from implementing the exceptions which we have sought.

CHAIRMAN—Yes, because we cannot vary the free trade agreement.

Ms Flahvin—We absolutely understand that. The other interesting point to note is that some of the copyright owners submissions—I am thinking of the CAL, Copyright Agency Ltd, submission and the Copyright Council's submission—from memory, take a much narrower view, a narrower construction, of the language that the government is required to grapple with in implementing these exceptions than, for example, the submission by the Attorney-General's Department. One thing I would say to the committee is the construction that is preferred by the Attorney-General's Department to some of those questions is the one which we would prefer.

Ms PANOPOULOS—You mentioned in your submission the need for ad hoc exceptions and changing technology and suggested that the four-yearly review is inadequate.

Ms Flahvin—There are two things to say. We think there is nothing on the face of the free trade agreement which limits the review period to being four-yearly. All it says is that there needs to be a review at least every four years. From memory, either the Attorney-General's Department submission or the DCITA submission makes the same point. I think it is Attorney-General's Department's, from memory. We would agree with that interpretation, that construction. But flowing from that, it is perfectly obvious that the rate of technological change is so rapid that, if we were to say that there would not be a review before the end of the four years, we are quite likely to see enormous changes and unforseen consequences in that period and we would have no mechanism for addressing those unforseen consequences.

Ms PANOPOULOS—Do you have any suggestions about what should trigger this process for, I suppose, ad hoc reviews and ad hoc exceptions?

Ms Flahvin—It is something that we could give a little bit more thought to and provide a further submission in respect of. Off the top of my head, one thing that occurs to us is that perhaps the Attorney-General's Department would be an appropriate body for receiving submissions and perhaps forming a view from time to time as to whether or not there was a need for some further consideration or an interim review.

CHAIRMAN—We have had varying evidence with respect to whether the Copyright Tribunal is the right place for this review process. Some people have said that because it is chaired by a Federal Court judge it is too legalistic and it is inadequately resourced. In another country—I think it is the United States—it takes about three months to get a determination, whereas here it is well over 12 months.

Ms Flahvin—Absolutely.

CHAIRMAN—Other people felt that it would be better to go straight to the Attorney-General's Department. What is your view?

Ms Flahvin—FLAG's view is that going straight to the Attorney-General's Department makes more sense than charging the Copyright Tribunal with that task. There are two reasons for that. One, which you have just mentioned, is timeliness. Experience tells us that things take a long time to work their way through the Copyright Tribunal. The very reason that we are suggesting ad hoc reviews is that we expect there to be a need on a regular basis to have a timely review. The other thing to say is that I agree with those submitters who have suggested that the Copyright Tribunal is not the appropriate forum for the reason that the president of the tribunal is a Federal Court judge. Judges are trained to, and do for most part, act judicially. The process that we are discussing here is, in my view, not a judicial process; it is a policy-making process.

CHAIRMAN—We were told yesterday that there is no requirement for the Copyright Tribunal to act like a court—

Ms Flahvin—But of course it does.

CHAIRMAN—but it tends to make use of the practices of the Federal Court.

Ms Flahvin—They are Federal Court judges. I have had considerable experience of appearing before the Copyright Tribunal. Notwithstanding that the rules say that the rules of evidence do not apply and we know that it is not a court but an administrative tribunal, let me tell you that everybody acts as though it is a court. Generally, unless it is a full tribunal, there is a Federal Court judge sitting up there—

CHAIRMAN—Looking like a judge.

Ms Flahvin—Looking and acting like a judge. He might be wearing a different hat but he is a judge nevertheless. Also, there is a potential conflict, isn't there? Is there not a possibility that some of the questions of construction and interpretation might come before the Federal Court, with the real risk of embarrassment? In some respects it is no different from decisions of the Copyright Tribunal being appealed in the Federal Court. But it seems to me that it is so much a policy decision that we are talking about that it really does not seem appropriate to keep asking judges to do it.

CHAIRMAN—Again, this is not directly relevant, but do you think it is appropriate that the president of the tribunal is a judge? Who would be a more appropriate sort of person?

Ms Flahvin—For two reasons, I really think I would need to give that a little more consideration before I answer. Firstly, I am appearing here as an external legal adviser to a body whose views on that question I have not had an opportunity to canvass.

CHAIRMAN—It was an unfair question. I will withdraw the question. Until I read the submissions I had never heard of something called a 'broadcast flag'. I notice that in your submission you discuss TPM controls on digital broadcasts. Yesterday we asked SBS whether they have any plans to have broadcast flags, and I got the impression that they do not at this stage. Do you know of any moves by any broadcasters to incorporate this sort of technology into Australian broadcasting?

Ms Flahvin—In Australia, no. I have not engaged in a detailed investigation of that in Australia. Our understanding, though, is that in the States this is increasingly a big issue, and there is absolutely no reason to think that it will not become the same kind of issue in Australia. The reason that we made that point in the submission was to say that section 116A at present does not include an exception for the purpose of engaging in rights to copy and communicate audiovisual works pursuant to the part VA licence. Part VA is the licence that allows educational institutions to copy and communicate broadcasts. Part VB allows them to copy and communicate print and graphic works. Currently, VA is not an exception to the anticircumvention provisions. Our view is that the reason that VA was not included was that at the time of those amendments to the act it really was not the case that TPMs were being used with respect to broadcasts. The broadcast flag issue in the States suggests that that is no longer the case. Whether or not it is happening here in Australia as we speak I am afraid I really cannot tell you, but I think that in every likelihood it will.

CHAIRMAN—Thank you very much for appearing before us this morning. We will send a draft of your evidence. Please check it, correct it if necessary and send it back. If you want to let us have more information in relation to our discussion this morning, feel free to send that information to the secretariat.

Ms Flahvin—Thank you.

CHAIRMAN—Thank you very much.

Proceedings suspended from 10.55 am to 11.08 am

D'APRANO, Mr Steven, Operations Manager, Cybersource Pty Ltd

FINNEY, Mr Ben, Senior System Administrator and Developer, Cybersource Pty Ltd

CHAIRMAN—I welcome representatives from Cybersource. We do not require you to give evidence under oath but these are proceedings of the parliament and must be treated accordingly. There are sanctions for giving false evidence. We have received your submission. We have authorised it for publication. Would you like to make a brief opening statement?

Mr D'Aprano—We have a number of concerns about the technological protection mechanism legislation. In particular, there are three major issues that are of concern to those in our industry, and particularly so for the open source software industry.

One of those is the issue of security. This is something which we have been aware of for a while. Having software on systems that we are prohibited from effectively investigating or touching to find out what the software does and how it operates potentially allows the introduction of great big gaping security holes.

Mr MELHAM—Can you explain how that comes about?

Mr D'Aprano—A very topical example of this has come up in the last couple of weeks from a music CD released by Sony BMG. The CD installs some software on your PC, which is basically a TPM. The way Sony does that is by using what we call a rootkit. A rootkit is basically the same sort of technology that is used by viruses. It installs itself deep inside the operating system and hides from view. They are very difficult to even detect and very difficult to remove.

Mr Finney—The reason it is called a rootkit is that once the software is installed, generally unknowingly, onto the computer system it allows an outside party privileged access to that computer without the owner's knowledge.

Ms ROXON—How does it do that?

CHAIRMAN—How does it get onto the system?

Mr MELHAM—You are dealing with people who are not computer experts or literate.

CHAIRMAN—We may be literate; we are certainly not experts.

Mr D'Aprano—When you insert the music CD into your computer because you want to listen to it, Windows detects that you have inserted the CD. It pops up a program that detects the software on the CD and installs it on your hard disk.

Mr MELHAM—What is the purpose of the software? Why has Sony put it on the CD?

Mr D'Aprano—It is effectively a technological protection mechanism. It is to prevent people taking the music CD and duplicating as many copies of the music as they want.

Mr MELHAM—But you are saying there is an unintended consequence?

Mr D'Aprano—The unintended consequence is that the TPM they are using basically opens up a security hole in your PC. That is probably not what Sony intended.

Mr MELHAM—Have you brought it to Sony's attention?

Mr D'Aprano—A lot of people have.

Mr Finney—It has been brought to Sony's attention.

Mr D'Aprano—They are now being sued in Italy and the US by a large number of people.

Ms ROXON—I am not clear about the part where you were saying that once it is installed it gives an outside user access. How does that work? I understand how it can automatically download and you might not realise. But how does it then give access to someone external?

Mr Finney—The stated purpose of it is to have on your computer a means of preventing you from breaching the copyright of the music that is on the CD. However, for Sony's convenience, they set it up such that they could monitor breaches in copyright. That means, of course, that it needs to communicate across the network without your knowledge. So, for their own purposes, they needed to have software on your computer that you were not aware of—

Ms ROXON—Presumably, theoretically it could be installed via a CD and you might not be on the web. I guess they assume that most people will be on the web and they will then get access.

Mr Finney—Precisely. That is the security hole that it opens because they want to have access to information about what you are doing with their music. They get information about what you are doing with their music on your computer, and thus they need to have something on your computer that tells Sony about what you are doing.

Ms ROXON—Does that mean they get access to what you are doing with anything else?

Mr Finney—That is the practical effect of what has happened. Because a way has been put into your computer for someone else—Sony—to get in, people have piggybacked onto that and managed to get access to your computer for completely unrelated purposes. Thus it is a security hole.

Mr D'Aprano—I point out that it is not Sony's intention for viruses to get onto your computer via this mechanism. It took less than a week from the knowledge being put out that Sony's software was doing this for the first virus to come out that was specifically taking advantage of that. That was a particular virus that was sent via email. You receive the email, you look at it, you think, 'This looks like something that's of interest to me,' you click on it and it goes behind your back and uses that Sony TPM to install hostile software. The Department of Homeland Security in the US weighed in on this just a couple of days ago. The assistant secretary for policy, Mr Stewart Baker, basically pointed out that they were very concerned about this. In particular, he talked about the potential avian flu outbreak and said that they would

need reliable communications. They were concerned about anything which could potentially knock out communications, perhaps preventing people, for instance, from working from home. It does not take a lot of imagination to imagine hostile nations or terrorists creating viruses that spread via these TPMs or taking advantage of them, which could knock out communications.

Mr MELHAM—What has Sony done since it has been brought to its attention?

Mr D'Aprano—Sony has given instructions for how to remove their TPM and replace it with another variety, which to date has not been analysed enough to know exactly how it works and what it does.

Mr Finney—Germane to this discussion, it is important to note that the only reason that the world knows the ramifications of this software is that one particular person who bought one of these CDs was curious that some software was installed on their system and examined what it did. They reverse engineered exactly what it did and discovered what the security ramifications were. This obviously was not an action which would have been covered by the licence on that software.

Mr MELHAM—But your submission goes on to query the ramifications of the Australia-US Free Trade Agreement in terms of investigating copyright infringement and interoperability.

Mr Finney—That is a separate point.

Mr MELHAM—It seems to be the reverse of what you are saying—that you are not able to get in and examine infringement.

Mr D'Aprano—Legally we are not. It is unlikely that a company like Sony would sue the gentleman in the US who analysed this program in the first place under the American DMCA to prevent him doing so, although companies like Adobe, which is a major computer company, have actually done that. Adobe have sued professional researchers and academics to prevent them from investigating how their programs work.

Mr MELHAM—One minute ago you were giving us the example about others being able to come into your computer, but the complaint you have in your submission is that it is going to hide certain types of copyright infringement, putting companies at a serious competitive disadvantage. Is that the status quo or is it more than the status quo?

Mr Finney—What is the question—is what the status quo?

Mr MELHAM—Protecting certain types of copyright infringement by putting companies such as yourselves at a serious competitive disadvantage.

Mr D'Aprano—The issue of copyright infringement is separate from the issue of computer security.

Mr MELHAM—I understand that.

Mr D'Aprano—Would you like me to move on to the copyright infringement?

Mr MELHAM—Yes, I am interested in that. What is the current situation, without the free trade agreement?

Mr D'Aprano—The current situation is that, if a company takes open source software, which we make available in source code, and uses that in its own product, if it abides by the terms of the open source licence we have no problem with that. That is perfectly legitimate. That is what we encourage people to do. We disagree with people taking our software, which we have written, and using it in their own products without abiding by the terms of the licence. If they do that, there are technical means of detecting the presence of our code in other people's products. However, under the TPM regulations, we are forbidden to do that.

Mr MELHAM—You were not before?

Mr D'Aprano—No.

Mr Finney—What that means is that if the software, which is in breach of our licence by using our code in a way that is not permitted by the licence, is protected by a TPM then the very act of investigating that software to try to determine whether it is breaching our licence is itself a criminal offence, because we are circumventing a TPM to do so.

Ms ROXON—So it is the opposite of the submissions that many other people are giving us about why they want to be able to use TPMs to protect their copyright material?

Mr Finney—Yes. It allows copyright infringement without being discovered.

Ms ROXON—You actually want to be able to get around somebody else's TPM.

Mr Finney—Precisely.

Mr D'Aprano—We do not believe that it was the government's intention to give copyright thieves a mechanism for hiding the fact that they have stolen somebody else's copyrighted source code.

Ms ROXON—But, as someone who would be trying to then make recommendations about the legislation or whatever, it is actually pretty hard to design, isn't it—something that allows people to use a mechanism that should be able to protect their material but does not allow them to use it to protect something that is not their material?

Mr Finney—That is where it has to come down to an examination of purpose. If the purpose of circumventing the TPM is merely to investigate whether the software is infringing a copyright, that should be a valid purpose.

CHAIRMAN—How often do you consider that people misuse your software?

Mr D'Aprano—In my submission, I included a link to a site—I believe it is called 'GPL infringements'—which has quite a number of alleged infringements. Most of these are settled out of court, so it is difficult to put a number down and say, 'X numbers of people have deliberately tried to steal open source software.' Again, just to jump back to the Sony case: in the

last couple of days, what appears to be some open source software has been discovered being included in the Sony software, in their TPM. Sony themselves subcontracted the layer of software out to a third party, and that third party, which I think is a small, English software development firm, appears—it is not yet proven—to have taken open source software and just wrapped it up in its own program without abiding by the terms of the licence agreement, which is a copyright infringement.

CHAIRMAN—Without wanting you to breach commercial confidentiality: you talk about a lot of these matters being 'settled'. In what sort of general dollar terms—not in any specific case—or why would they be settled?

Mr Finney—In the specific case of open source software, they are generally not settled by a monetary compensation; they are generally settled by agreeing to abide by the terms of the licence in future. So it is generally not an exchange of money.

CHAIRMAN—Just a sort of rap on the knuckles?

Mr Finney—But this is an issue for companies that do not deal in open source software as well. Cybersource does generally deal in open source software, but this is not exclusive to that. There are many software companies that will distribute their source code under licence to companies, not under an open source licence, and yet there are still many things that are outside the terms of that licence. Those companies are not able to investigate what is going on inside the software if it is protected by a TPM without breaching the terms of this act.

Mr D'Aprano—In the open source industry, because we as a matter of general practice make our source code available, it is a lot easier for people, either maliciously or through ignorance, to take our copyrighted material, our source code, and incorporate it into their work without abiding by the licence.

So we are at particular risk. But the risk is also shared by closed source software companies. Even though they do not make it a matter of common practice to release their source code, they do under certain circumstances. Under those circumstances, they then have that risk. For example, a company may want to do an audit of the closed source software that we supply them, so we come to an agreement and show them the source code for the purposes of an audit. If they are unscrupulous, they can take that source code and insert it in their own work. Even if we suspect that they have done so, if they hide that behind a TPM, we are breaking the law to try to investigate—to try to disassemble their executable code or their application to try to find out how it was built.

Mr Finney—There is also the commercial interest of simply selling your software under licence to companies so that they can incorporate it into their products. However, they generally do so under specific licence terms.

Mr MELHAM—How do you propose we do this? It is untenable to give you an unlimited ability to access these things or to go on fishing expeditions in some instances.

Mr Finney—If you want to put it that way, it is always technically possible to do so. The question is whether it breaches the act under discussion.

Mr MELHAM—Exactly. What is the threshold? What is the bar? What is the way to put down a regime?

Mr Finney—I would propose an examination of purpose: what was the purpose of circumventing the TPM?

Mr MELHAM—How you get to that threshold question is what worries me. People can claim that they have not breached it.

Mr D'Aprano—Well, people can claim that their TPM is for the purpose of preventing copyright infringement and wrap all sorts of things up in there.

Mr MELHAM—I understand that, but what I am saying is that there has to be a threshold question before you are allowed to investigate or go behind that, surely. You cannot have an unlimited right to go and invade someone's space, if I can put it that way. Reverse the onus: you would have to have a reasonable suspicion. You would have to have something.

Mr D'Aprano—I understand your point. No legislation is going to prevent programmers and hackers, whether good guys or bad guys, from disassembling a piece of code to find out how it operates. If they are, for example, a virus writer—some kid sitting somewhere wants to know how the Sony TPM works so he can write a virus to piggyback off it—they are going to do that no matter what the legislation says.

Mr MELHAM—Exactly.

Mr D'Aprano—And he is not going to publicise that. He is not going to go out in public and say, 'Look at me—I broke the law.'

Mr MELHAM—I understand that. But what is the threshold question before you can go after them?

Mr D'Aprano—From our perspective, the question has to be: if somebody wants to take the risk to technically break the law by investigating how a TPM operates, what do they find? If they find that everything is all above board and perfectly fine and acceptable then they have no reason to go public with that information. If they find that the software protected by the TPM is itself infringing copyright or is malicious software then we do not believe that it should be a crime to have detected the fact that that crime has taken place.

Mr MELHAM—But surely it has to be a crime if without proper basis you are out there invading people's space. It is similar to the issue that you raised earlier about what has happened as a result of Sony's TPM. If people are going to pop in and out, surely there has to be—

Mr Finney—What is the purpose of the TPM in place? Is it to stop anyone examining the code? Or is it to protect the copyright interest in that code? If the purpose is to protect the copyright interest then, surely, the question to ask is: were any actions committed that were against the copyright licence on that code? And an investigation to determine whether our own code is inside that, is not going to lead to further distribution. It is not going to lead to—

Mr MELHAM—I am not saying this is the committee's view. My view is that there has to be a threshold before you—

Mr Finney—I am trying to present a threshold question to you. The threshold question would be: did the act of circumventing the TPM then lead to a breach of the licence on that code?

Ms ROXON—I will put the question another way. Do you have to have any suspicion that the material that you are trying to access, to see if your code is there, is using your code—contrary to your licence—or do you really want to be able to go and play in any area to say, 'Our job is to make sure that anyone who is using our code is going to pay for it.'

Mr Finney—The only thing that we would ask to do is to be able to examine the software that we legally obtain—not further distribute it, which would be a breach of the licence; and not do other actions.

Mr MELHAM—Why shouldn't it be a condition of your software agreement—

Mr Finney—It is.

Mr MELHAM—that if people purchase your software, you have the capacity, at any stage, to come in and examine whether it has been improperly—

Mr Finney—Perhaps so, but would that then provide protection under the act forbidding us from circumventing the TPM?

Mr MELHAM—I am saying that it gives you a right to go in. In other words, there is a condition on the sale of your software—

Mr Finney—Well, that is the question, isn't it? How do we know whether the supposed agreement on our software licence—that has perhaps been agreed to by one party, or has perhaps not been agreed to because they have not used our software—is going to protect us from circumventing the TPM? We need to be able to know that circumventing that TPM, for the purpose of determining infringement on our licence, is not going to fall foul of this act.

Mr MELHAM—I would argue that if it is on your licence, it gives you a legal right.

Mr Finney—Only to those who have accepted that agreement. Those who have not accepted that agreement—and we do not know who those people are until we have investigated the software—

Ms ROXON—That is what my question is going to. It is a slightly different point to Mr Melham's. Do you want to be able to go and check any material at any time and to use your—

Mr Finney—That we legally obtain, yes.

Ms ROXON—Well, sure—but if you 'legally obtain' it, it means that you go into a shop and buy it.

Mr Finney—Sure.

Ms ROXON—Surely you would not be suggesting that you should not legally obtain it either? Do you believe, for the exemption that you would require, that you should have some suspicion that your material is being used? Or would you like to be able to go and purchase every program that is operating in some area, and be able to circumvent their TPM and check whether it is there? So you essentially want to be able to do that policing role entirely randomly—

Mr Finney—Not policing at all, no. Mere investigation—investigating what is already installed on our computers, or what we already have a right to look at and to use.

Mr MELHAM—Have you had that right previously, before the FTA? I can't believe so. So why should you get it now?

Mr Finney—I believe that we do.

Mr D'Aprano—Excuse me, I believe that we have. Any piece of software that you have had on your computer, we have had the legal right to reverse engineer for the purposes of interoperability. You can—

Mr MELHAM—And that was the status quo before the FTA?

Mr D'Aprano—That was the status quo.

Mr MELHAM—So what you are asking for is the status quo with the FTA?

Mr Finney—For that to be preserved, yes.

Mr D'Aprano—And also to reverse engineer, for the following purpose: if there is a problem with the software such that it is introducing security holes, you can't fix those holes without some level of reverse engineering to find out what is causing them.

CHAIRMAN—Mr D'Aprano, can I ask you to take on notice the questions from Ms Roxon and Mr Melham and reflect on them. Then, if you would like to put something in writing and pass it on to the secretariat, we would be interested to get it. I realise you have endeavoured to answer the questions truthfully but, because it is a reasonably complicated area, you might wish to think about it. Are you happy with that?

Mr MELHAM—Yes.

Ms ROXON—Yes.

CHAIRMAN—There being no further questions, on behalf of the committee I would like to thank you for appearing. A draft of your evidence will be sent to you for checking. Please make any corrections and get that draft back to us. If you wish to provide any additional material, we would appreciate receiving it.

Mr D'Aprano—Thank you. I have some material here which I will pass to the secretariat.

CHAIRMAN—Thank you gentlemen.

[11.35 am]

WEATHERALL, Kimberlee Gai, Private capacity

CHAIRMAN—On behalf of the committee I would like to welcome you. Do you have any comments to make on the capacity in which you appear?

Ms Weatherall—I appear in my personal capacity as a lecturer in intellectual property law at the University of Melbourne.

CHAIRMAN—Thank you for leaving where you were a little earlier to get here on time. We appreciate that very much. Although the committee does not require you to give evidence under oath, these proceedings are proceedings of the parliament and there are sanctions in the event of people not respecting that. We have received your submission and authorised it for publication. Would you like to give a us a brief opening statement of five or 10 minutes to summarise and highlight some of the key points?

Ms Weatherall—Thank you for the opportunity to appear here and to talk to you about the drafting of these laws. You have been hearing from people for some time now, so you are probably aware of the background generally to these laws—that we have to rewrite laws that we wrote in 2000. The particular laws we are concerned with here are complex and difficult but will be of increasing importance. Do not let anyone tell you the issues are simple. They are not. Anticircumvention law is hard.

While there are good reasons why copyright owners use TPMs and those TPMs should be upheld by the law, such laws do have costs. TPMs are binary. You can copy or you cannot. A computer does not ask you if you are making a fair dealing or whether you are making a copy for a research project or to distribute to 1,000 people for cash. TPMs cannot make the distinctions that our copyright exceptions make. As the High Court recently recognised, TPMs extend a copyright owner's rights. That is why this committee is important. This committee needs to weigh up when people in Australia should be allowed to avoid TPMs. This committee is the only public forum so far announced in which these laws are going to be discussed and reviewed, which makes it all the more important.

In this opening statement I want to comment briefly on three matters on which this committee has choices to make. The first is: what are the criteria for the exceptions? The second is: what approach should the committee take in adopting additional exceptions or recommending such exceptions? The third is: what should be the future process for determining exceptions? I am not appearing before you as someone who is arguing for specific exceptions in general. I am not able to give particular examples of where I need to circumvent. I am not appearing in that capacity. I am appearing in the capacity of someone who writes and researches on this area of the law.

The first issue is: what do the criteria mean? The lurking question there is: how important are the US model and the US interpretations? In my submission I have made the general point that I do not believe that Australia is obliged to or should adopt the interpretations adopted by the US Copyright Office. We are not obliged to because under international law we are obliged to

interpret the terms of the treaty in good faith, according to their ordinary meaning and in accordance with the purposes of the treaty.

CHAIRMAN—I think that is one of the reasons for this committee hearing.

Ms Weatherall—Indeed, so your job is to interpret it, in many respects.

CHAIRMAN—The government has referred the matter to us.

Ms Weatherall—Indeed. The point I wish to make is simply that you do not have to adopt the US interpretations. Under international law you are not obliged to, and you should not. The reason you should not is that the US Copyright Office is a very different body from you. It is an administrative agency. It exercises delegated power to make limited exceptions from an overall balance of copyright law established by the US congress after extensive discussions in congressional committees. You are more like the congressional committees than you are like the copyright office.

CHAIRMAN—We only make recommendations to the government. The government then has three months to respond. We are not actually making policy, we are just recommending.

Ms Weatherall—No, but in that role of making recommendations it is your role to review the policy and to make recommendations as to what is the appropriate policy, which the government can then take into account.

CHAIRMAN—I agree with that.

Ms Weatherall—The US approach, which is narrow, has two key drawbacks: it is not technologically neutral and it leads to very complex and specific exceptions. Also, it means that a lot of time is spent in discussion about definitions, scope and things like that, leading to serious disadvantage to people who do not have good expert legal representation. Far too often in the US process exceptions have not been considered on their merits, because people were unable to fit themselves within the narrow terms of what the US Copyright Office would allow. The text is short, the words are general and the committee has flexibility in interpreting those words. Particular classes of works could be defined however you choose as long as the boundaries of the exception are clear.

If you want to grant exceptions or recommend exceptions defined by the kind of user or the reasons for use, if you want to give exceptions, for example, or recommend them to academics and administrators at a university for the purposes of classroom performance under section 28, you could do that; the terms are so broad. A credible showing needs to be just that: credible, believable and reasonably anticipated. One further comment is that the criteria should be read as interrelated. The more important the public policy supporting the non-infringing use and the lower the risk of widespread piracy resulting from an exception, the less strong or specific the evidence needs to be. I think you can take into account the importance of the public policy.

The second issue I want to comment on is the nature of the exceptions. First I want to comment on the attitude the committee should take. No doubt this committee has been urged to

be cautious in adopting exceptions and to limit the exceptions until we see how the law works in practice.

CHAIRMAN—No, we have not been urged to do anything. We have been given the terms of reference by the government.

Ms Weatherall—I was talking about the submissions, Mr Slipper. I believe there are urgings to be cautious in them.

CHAIRMAN—Urgings everywhere.

Ms Weatherall—No doubt. In response to the urge to be cautious, the argument tends to lose sight of the fact that we actually know how these laws operate; we have had them for five years. The evidence in the digital agenda review is that the exceptions created back then have been operating okay.

Mr MELHAM—Are you urging us to consider the status quo as the starting point?

Ms Weatherall—Yes. I believe the status quo is a good starting point for this committee. Thirdly, I would like to argue that if the committee is too cautious and restrictive it will have negative effects on the real world by changing the incentives of copyright owners. In an ideal world, people would not need to circumvent, because TPMs would be designed to allow the necessary extent of non-infringing use—one back-up copy or allowing universities to make the copies they need for classroom purposes. If the committee adopts a very narrow, specific and cautious approach, that decreases the incentives for copyright owners to design their TPMs that way. If owners know that being too mean will lead to the creation of new exceptions or that the government will be ready to create new exceptions if necessary, they will have more incentives to design their TPMs appropriately in the first place.

Another thing on exceptions is that the committee does not have to take a one-size-fits-all approach. What you could do is to have three different kinds of exceptions. For example, you could put longer term, more stable exceptions into statute; you could have other exceptions where it is less clear that circumstances will be stable in regulations for adjustment after the four-year review; and you could recommend the creation of a power to create ad hoc exceptions, which I think would be appropriate. It is important to note that the exceptions are not required to expire after four years. That is not the text of our FTA. It is actually the text of every other FTA the US has negotiated but it was not negotiated into ours.

Mr MELHAM—Was that deliberate or was it just something that they missed?

Ms Weatherall—That is something you would have to ask the negotiators, I am afraid. You could speculate that it was deliberate. I have done a comparison, broadly, of the IP provisions of the FTAs that the US has negotiated. There is generally very little difference between the various texts, particularly in the copyright area. This is one area where it is different, and that is very unusual.

Mr MELHAM—What does that mean for practical purposes?

Ms Weatherall—It means, basically, that the exceptions do not have to expire after four years. They need to be reviewed, just like the digital agenda laws were reviewed after three years and considered as to whether they were working or not.

Mr MELHAM—Which enables us to have our home-grown product.

Ms Weatherall—Indeed. And it means that in the context of that review we do not have to go through the whole process of re-proving the need for the exceptions. It should be considered and discussed, but the presumption does not have to be that it will end. I think there are circumstances in which an exception should not be presumed to end.

Mr MELHAM—If it were the case that it was not going to end after four years, shouldn't we then be more cautious in our recommendations? I am playing devil's advocate here.

Ms Weatherall—Sure. Given that your role is recommending, as I said, you may take the view that there are different kinds of exceptions, some of which are more stable and some of which are less. For example, you might recommend that some are status quo type exceptions, such as the permitted purposes to circumvent under the statutory licence in part VB for educational institutions. The part VB statutory licence has been around for some time. The permitted purposes to circumvent have been around since 2000 to make that licence scheme real. You could take the view that that is a stable exception and should be included in legislation. About others, you might take the view that it is not quite so obvious that they are stable. Institutions like educational institutions or libraries or the like do probably need to know, for planning and budgetary purposes, what they are going to be able to do in four years, such as when they are planning new digitisation projects. So there are arguments for creating an Australian stable regime.

Mr MELHAM—Did you hear the evidence from Cybersource Pty Ltd?

Ms Weatherall—Were they the people who immediately preceded me?

Mr MELHAM—Yes.

Ms Weatherall—I heard the last half.

Mr MELHAM—If we were to try to address the situation, how would you recommend we do it?

Ms Weatherall—Are you asking me to propose wording for that exception?

Mr MELHAM—Not the full the wording but how you would deal with it.

Ms ROXON—I might ask a question that assists here. I want to say that I found your submission extremely helpful and very easy to read. Thank you for that. It is a difficult area, so it is helpful to have some detailed submissions that are useful like that. One of the things I was thinking when the previous witnesses were giving evidence was that clearly the exemption that they would like to be able to use has to be purpose based. Could you give us a view on whether you think those sorts of exemptions work properly? Is it realistic to assess purpose when you are

going to circumvent a TPM? Or will that mean that whenever anybody is asked they will always claim their purpose is provided for under an exemption?

Ms Weatherall—I was investigating an infringement, so I am okay.

Ms ROXON—Yes. Obviously, you have commented in your submission about different types of institutional exemptions and other things. Do you think purpose based tests work? Is it possible to design them in a way that—

Ms Weatherall—I think it would be possible to design a purpose based exception. A very general purpose based exception that referred only to purpose and not to the kind of work, when you could do it, what the criteria were and the like might go beyond what the treaty allows. But having a purpose is one of the factors. There is no problem with that at all. For example, in the particular case of Cybersource they were talking about computer programs. The kind of work would be a computer program. The circumvention would be for the purpose of investigating infringement. There is no reason why that sort of exception should not work. In fact, as I understand it, in the US, purpose is one the things they talk about as a potential limiting factor for an exception. To me, to not have exceptions defined to some extent by their purpose, firstly, is not consistent with the way our law works. Exceptions are defined by purpose, mostly. You do not give people an exception generally to make copies for any purposes whatsoever. Usually we say, ‘You can make copies for these purposes.’ So it sort of fits with our statutory scheme. Secondly, the exception has to be for non-infringing purposes. Not to define it in terms of the non-infringing purposes is just a nonsense. Does that assist?

Ms ROXON—Yes, it does; thank you.

Mr MELHAM—Yes. Sorry; keep going.

Ms Weatherall—That is quite all right. There is just one other thing I wanted to cover. We can talk, ask questions and things like that. I have already outlined the fact that I think you can have different kinds of exceptions—stable ones, more ad hoc ones. I have referred to the fact that I think it would be a good idea to create a power to create new, ad hoc exceptions, because it is a fast-moving area—four years can be a long time—and there is a precedent for that approach, by the way. The United Kingdom has a similar system to that.

The final matter I want to comment on in my opening statement is the process for future reviews and exceptions. I want to qualify—or rather retract somewhat—the comment I made in the submission. On page 17, I commented that future reviews could be given to a body like the Copyright Law Review Committee or the Copyright Tribunal. That is part of the table there. I remain attached to the CLRC as an appropriate body, but, the more I think about it, the less attached I am to the idea of giving it to the Copyright Tribunal.

Mr MELHAM—Why is that?

Ms Weatherall—I was getting to that. Firstly, the tribunal is set up, in essence, as a dispute settlement body headed by a judge. That is the way it works. It is not a policy-making body. It is not equipped, as this committee is or the CLRC is, to take submissions from a wide range of stakeholders and weigh up those submissions. It is equipped to hear disputes between two

parties, effectively. The question of what exceptions should exist in copyright law is essentially a matter of policy, not something we should be giving to a dispute settlement body.

The second thing about the tribunal is something I did refer to in my submission, which is that proceedings before the tribunal are run, in effect, like court cases. They run as adversarial processes with pleadings of a kind, affidavits and the ordinary processes of a court, practically speaking. As such, they are expensive, they are long and they do tend to give advantage to experienced litigants, which copyright owners are and most user groups are not. That is not to say that they do not deal with unrepresented litigants; of course they do. They have had a number of cases of unrepresented litigants. But there is an undoubted advantage to people who are involved in these processes frequently. And, of course, the other point is that the creation of exceptions is not an adversarial thing. It is not one party against another; it is: what do Australian interests require? It would require the weighing up of a whole lot of different submissions from different people. That is not what the tribunal should be doing.

CHAIRMAN—Because the president is a Federal Court judge, do you think that is why the tribunal has adopted almost Federal Court practices?

Ms Weatherall—I think it runs like a number of these tribunals, even the AAT and the like. They are more informal than courts, obviously, but they are often run in a courtroom setting and they are adversarial. It is one side against another, largely. I am sure the fact that it is a Federal Court judge has an impact. I am sure the Federal Court judges concerned are aware that they are not sitting in a courtroom, but the reality, the way it works, is that you have QCs and solicitors on each side, fighting it out like they would fight out a court case.

Ms PANOPOULOS—In discussing ad hoc exceptions, you said that in the UK there is precedent for it and that it works. I am not familiar with the UK system. Can you just briefly explain?

Ms Weatherall—Yes. What I said—and, to be perfectly accurate, what they have—is a precedent for such a system. Under the UK laws which adopted the information society directive, they created a power in their secretary of state to create ad hoc exceptions. Essentially, the way the European directive works is that the idea is that copyright owners should be encouraged to provide access where necessary for non-infringing uses. Where that is not happening, then exceptions might be created. That is the way they have drafted it.

In the UK they said, ‘The secretary of state has the power to make ad hoc exceptions.’ I can refer you in writing to the particular provision if that would be helpful. I did get in contact with the secretary of state when I was writing the submission to see whether there had been any ad hoc exceptions created under that. There have not been. The view of the secretary of state was that no situations had come up yet where an exception should be created. Applications had been made, but I could not give you the number of applications.

CHAIRMAN—But the flexibility is there.

Ms Weatherall—The possibility is there.

Ms ROXON—Is that also part of the incentive to copyright owners to be a bit more flexible—because they know that this power is there and is a risk to them if they are not reasonable in granting it?

Ms Weatherall—I think so. They have incentives, obviously, to make stuff available and to give access. The ordinary market works that way.

CHAIRMAN—Like a carrot and stick, almost.

Ms Weatherall—Yes.

Ms PANOPOULOS—Are those ad hoc exceptions in the UK for a limited time? Or are they permanent?

Ms Weatherall—I cannot precisely recall whether the act states that they are for a limited time. I have the act with me, so maybe when I step down I can find that out for you.

Ms PANOPOULOS—Would you not see that sort of process as being a problem? Where the secretary of state has the power to create an ad hoc exception, that is really a backdoor way of expanding the exceptions permanently. Giving one minister the power to do that, without any review—

Ms Weatherall—But there would have to be review, wouldn't there?

Ms PANOPOULOS—Why?

Ms Weatherall—Any exceptions which are created under the FTA must be reviewed after four years.

Ms PANOPOULOS—But does that include ad hoc exceptions? Or do the ad hoc exceptions fall into a different category?

Ms Weatherall—I think they would have to be reviewed. I do not think you could create a back door. My off-the-cuff belief is that you could not create a back door that did not have to be reviewed. In any event, if you are going to have a review after four years, I would assume that any exceptions that were applying at the time would be looked at. I can see the issue.

Ms PANOPOULOS—That is a bit of an assumption though.

Ms Weatherall—Yes, it is an assumption. But I think careful drafting could ensure that that was the case. There is a certain sort of weighing up of all the costs here. The problem is that, if you have a four-yearly process, four years is a long time. If you have people who in a very specific situation are needing to circumvent this—and, remember, this is to make non-infringing uses—I would anticipate that any such ad hoc exception would have to be fairly limited. To make them wait four years is—

Ms PANOPOULOS—Even though the committee are not technological gurus, I think we do appreciate the changing nature of technology and the need to be flexible. I think some of us are a bit concerned about the actual process and how some of these ad hoc processes would work.

Ms Weatherall—The initial response to that is simply that this has been done in other countries. They have set up processes which could be looked to as a potential precedent for that sort of thing. Obviously the UK is not subject to the four-year requirement but, again, I think careful drafting could overcome any particular issues there. The downside, obviously, of the ad hoc style exception right is the question of how it interacts with four-yearly processes.

Ms PANOPOULOS—That is right.

Ms Weatherall—Could you have exceptions being created at the third year and then being reviewed—

Ms PANOPOULOS—Does the minister have to advertise to give other interested parties an opportunity to object? There are lots of questions that we may have to turn our minds to.

Ms Weatherall—Of course. I am thinking about it as being likely to arise in situations where you do have specific parties. I cannot imagine that universities would be seeking large, ad hoc exceptions through such a process. They are in a position, very frequently I would say, to deal with a four-year review process. They are much more aware, too. Obviously you have AVCC submissions and the like. There are a lot of people out there in the real world who do not really understand what TPM law is about. Most people in the real world, thankfully, do not have to understand what TPM law is about.

Ms ROXON—Let us back into that real world!

Ms Weatherall—It is hard to get to for a copyright lawyer, I can assure you.

CHAIRMAN—I will not ask how you became a copyright lawyer—what made you choose that area of expertise.

Ms Weatherall—It was a charismatic lecturer. I blame her for everything!

CHAIRMAN—She must have been charismatic.

Ms ROXON—This question is a bit more related to the real world, I suppose. I am very keen to have your view on it, although it is different to the discussions we have been having. A number of the submissions that have been made and the witnesses who we have heard already have shown a particular view on an issue that probably gets raised in our constituencies more often than others—that is, the DVD region-coding issue. I am interested in, and have not really been able to get an adequate answer on it from people who have—and this is not meant to sound pejorative—a vested interest in the view that we take, whether there really is any legitimate argument that the region coding is there for a technology reason.

Some of the presentations we have had have really focused on the idea that we have to have this region coding because the TVs in a particular place will only work if you match it up with

this. I have to say that I find that a little hard to believe. Others have not been comfortable in saying it, but it seems to me that the major argument is entirely economic—wanting to make sure that you can release your material in one region at one time or another. That is a perfectly legitimate reason, but no-one seems to have been prepared to say that that is why they want to do it.

Ms Weatherall—The AVSDA submission talks about the Windows sort of model.

Ms ROXON—That is true; it did. They were still a little bit cautious about that yesterday, but they were a bit more up front. In your view, as a person who obviously observes what happens, is there really any technological reason? Is it entirely market driven? Is there any argument in terms of the other laws that apply? I am interested in your view, because it is something that I think there is a bit more popular understanding of, but there is a lot of misinformation about it as well. Do you have any comments that might be useful for us on this one specific issue—one that is going to keep coming up in this inquiry?

Ms Weatherall—Sure. I should preface any comments I make on this with the following. This is one of those fast-moving areas where full information is difficult for anyone to obtain, because a lot of it is commercial-in-confidence and is what happens in standard-setting committees and the like. My understanding is that, for example, in the television area, there are two competing television standards which must be adjusted to. But there are more than two regions, which means that some of the region coding that is occurring is market based. Some of it might be technology based, as in there might need to be two different regions. If there are two different television standards, there should be two regions. There are three, I think, in the particular space I am talking about. In the Sony PlayStation consoles, they have three regions. There are two television standards that they are matching to. So some of that is market based; it must be market based.

In the DVD area, there are five regions. That is more significantly and more obviously market based. The argument is made, and I could point you to a number of sources where the argument is essentially one of Windows, release times being different in different countries and matching to holiday seasons and the like. That was probably more significant some time ago, and it is perhaps getting less significant as release times move closer and we have global marketing campaigns.

I do not think it is sustainable to argue that DVD region coding in particular is purely technological. There are just too many different regions where there are really only a couple of standards. That does not mean that general market reasons are not a legitimate interest to want to protect. It is a question of whether we want to back it up with law. That is what we are talking about here: do we want to give that sort of regioning the force of law, which cannot be circumvented? That is the issue that this committee faces.

Ms ROXON—I have one more question. I am jumping around a bit again. In your submission you talk about the case law that has developed in the US with the print manufacturers trying to control these other ones. This might not be your area—it is not mine either—but, if you were currently doing that sort of thing in Australia, wouldn't you be breaching our trade practices acts? Wouldn't those sorts of examples actually be third line forcing or some other type of offence that would not permit you to do that anyway?

Ms Weatherall—Again, I preface this with: I am not a competition lawyer. I made comments in the process where the FTA was investigated where I expressed some scepticism about the ability of competition law to in fact control activities in relation to IP. There has always been a real difficulty with how competition law interacts with intellectual property. Intellectual property creates, in some cases, monopolies and, in some cases, market power. That is the purpose of the laws, so in general we have not applied competition law with quite the same force in IP. There has always been the exception of section 51(3) of the Trade Practices Act. That has been reviewed a number of times recently. As I understand it, the ACCC is looking into this interaction between intellectual property and competition law. There has been talk of creating guidelines for the relationship between intellectual property law and competition law, as exists in some countries like the US. But it is a very uncertain area. Competition law cases are difficult to prove and difficult to bring. My view is that falling back on competition law or relying on competition law to solve the problem is not necessarily the best approach. You have to have parties prepared to get into a long battle over issues like that.

Ms ROXON—Just so I am clear, you are saying that the existing law would possibly have some impact, but the reality of whether you could use that as a tool to enforce rights—

Ms Weatherall—The existing law would have some impact. The scope of that impact is not clear. And the reality of using competition law is questionable.

Ms ROXON—I am sorry to have jumped around so much.

Ms Weatherall—That is all right. I think it is worth paying attention to the way that, in case law, in the United States, the courts have managed to avoid enforcing those kinds of restrictions through copyright law. It is not clear if the Australian courts would take quite the same approach. It would depend on how our law was drafted. The US courts tend to pay a bit more attention to policy and to consider themselves a bit freer to discuss economic issues and policy issues in their judgments. They tend to take a slightly less deferential approach perhaps towards the drafting of statutes than has historically been the case in Australian courts.

CHAIRMAN—Thank you very much for giving evidence today. Your submission was very comprehensive. I can see that you do not have any axe to grind. We appreciate that high level of professionalism. With the submissions we receive, a lot of people come from one perspective or the other, and we have found what you had to say particularly valuable.

Proceedings suspended from 12.09 pm to 1.27 pm

WRIGHT, Ms Robin, Private capacity

CHAIRMAN—The committee welcomes Ms Robin Wright. Thank you very much for appearing before the committee today. 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. The committee has received your submission. We have authorised it for publication. I now invite you to present a summary of your submission and an opening statement, and then we may ask you some questions.

Ms Wright—I welcome the opportunity to make a submission to the committee. My concern is that an increase in the scope of provisions prohibiting the circumvention of technological protection measures has the potential to remove or restrict some of the existing rights and freedoms available to users of copyright material. Copyright legislation has traditionally provided a balance between rights granted to creators to encourage further creativity, and rights granted to, or lack of restrictions on, users to further the social, cultural and intellectual development of society. The legislation is not simply a mechanism for the protection of property rights. It also plays an important role in Australia's cultural and intellectual development. The rights of citizens to access and make certain uses of copyright material put in place by government for public policy reasons may be threatened in the digital environment unless appropriate exceptions to the prohibition on the circumvention of technological protection measures are put in place.

My submission covers four main areas: the potential for TPMs to restrict access to material in the public domain, the use of TPMs for purposes other than for restricting copyright infringement, the effect of TPMs on proposed changes to Australia's fair-dealing exceptions, and protecting the activities of cultural and educational institutions. The public domain has been referred to as a great, invaluable bounty of knowledge, art and culture, whose value lies in the paradoxical fact that it is openly accessible to all. It is therefore important that concerns about piracy in the digital age are not used as an excuse to lock away human intellectual capital from this moment in time onwards.

We need to ensure that TPMs are not used to encroach upon the public domain, either by prohibiting the placement or retention of TPMs on material which is in, or comes into, the public domain, or by the provision of an exception to the prohibition on the circumvention of TPMs for works in the public domain. In this age of content aggregation, copyright owners could apply the same TPMs to public domain works as they apply to their own material. There are already examples where usage restrictions have been placed on public domain works published in e-book format. It is important that TPMs cannot be used to begin to lock away from Australia's future creators and innovators access to the broad range of intellectual and creative material in the public domain.

The recent High Court decision in Sony and Stevens has highlighted that copyright owners may use TPMs in an attempt to restrict the freedoms of users beyond those restricted by copyright law. The increasing granularity of uses which copyright owners can control through

the use of TPMs can provide the ability for the control of both infringing and non-infringing uses of copyright material through the one mechanism. This is currently most obvious in relation to the regional coding of DVDs and other media products. I do not believe it is appropriate for TPMs to be used by copyright owners to restrict existing freedoms of copyright users which are not related to copyright infringement without explicit government review. Either Australians should adopt a narrow definition of TPMs in the revised legislation, or exceptions should be provided for the circumvention of a TPM which has a purpose other than the prevention of copyright infringement.

The Attorney-General's Department has recently undertaken an inquiry into fair-use and other copyright exceptions, to ensure that Australian users are able to undertake appropriate, private, non-commercial use of copyright material. If the government decides to amend the current fair-dealing exceptions in the Australian legislation, it would be unfortunate if stronger anticircumvention provisions were to render the public benefit of any such exception effectively unusable in the digital environment.

Despite the concerns of copyright owners about potentially infringing use, it should be possible to harness the technology itself and implement TPMs which allow users to exercise appropriate fair-use rights while still restricting infringement. One Australian commentator has noted that:

> ... there are more effective ways of restoring the copyright balance than creating exceptions to the anti-circumvention provisions. These include imposing limits on the situation in which copyright owners can use technological protection measures, and on the amount of works they can protect ...

The activities of cultural and educational institutions are an important part of Australian society. A number of specific exceptions are provided in copyright legislation which support the efficient and effective delivery of appropriate services by these organisations. Exceptions to the anticircumvention provisions should be provided to allow these organisations to continue to take advantage of all existing exceptions and statutory licences in the digital environment.

One example of a TPM which could potentially restrict the legitimate activities of Australian educational institutions is the inclusion of copy control technologies in free-to-air digital television broadcasts. A technology called 'the broadcast flag' was recently proposed for introduction in the USA, and I understand that similar technologies are being investigated for the DVB digital broadcasting system used in Australia. These technologies provide copyright owners with the ability to control certain forms of reuse and therefore have the potential to restrict the exercise of the part VA statutory licence which currently allows educational institutions in Australia to copy and reuse material contained in television broadcasts. This could potentially limit the ability of institutions to undertake their educational activities and to engage in broader public debate, unless an exception to the anticircumvention provisions was provided.

On one further matter, I am concerned that any process put in place for the future evaluation of whether exceptions should be provided where it is claimed that TPMs are restricting non-infringing uses of material should be conducted regularly and through an easily accessible administrative process.

CHAIRMAN—Thank you very much. To address that last point, various people have suggested the review should be conducted by the Copyright Tribunal; others have suggested it should be conducted by the Attorney-General's Department. From what you have said, it seems as though you would not be in favour of the Copyright Tribunal doing that?

Ms Wright—I have concerns about the process being available to users. User groups are generally perhaps not well funded to take action in those sorts of forums. So I feel that an administrative process would be more accessible to user groups and therefore more appropriate for this type of evaluation.

CHAIRMAN—You are not the first person to have said that. There seems to be a thread of thought with some people taking that same view. Partly that is because the Copyright Tribunal has as its president a Federal Court judge and tends to be fairly legalistic, even though apparently it is not compelled to be. Some people have said that the free trade agreement moves the balance as far as copyright regulation is concerned from the user to the owner. From what you have said it seems you are of that view.

Ms Wright—Yes, I would be of that view.

CHAIRMAN—The committee has heard that many TPMs have a dual function, both controlling access and preventing direct infringement of copyright, and that separation of the two functions within the one TPM is rare. Do you believe that it is inappropriate that they be used for controlling access?

Ms Wright—Yes. I am concerned that TPMs allow copyright owners to extend the control that they have available under copyright legislation into areas that perhaps are not covered by copyright legislation or are covered by exceptions, and that this extension is inappropriate, particularly without appropriate government review of it occurring.

CHAIRMAN—My last question relates to your remark about broadcast flags. Until we started doing this inquiry and I read the submissions, I must confess I had never heard of a broadcast flag. Yesterday we asked SBS if they were proposing to use this technology and I got the distinct impression that they were not; they did not commit themselves not to. I understand that it is being looked at in America. The evidence we have had so far seems to indicate that no broadcaster is seriously looking at it in Australia, but from what you said a moment ago it appears you might think the situation is otherwise.

Ms Wright—I have no evidence that any broadcaster would be looking at using the technology. I have just done some research into the broadcasting flag and the process it that went through in USA. Also, I have been looking at the development of a DVB copyright protection system called CPCM and looking at the types of user controls that are proposed. These technologies have been proposed, particularly by copyright owner groups in the United States. The FCC in the USA put regulations in place to implement the broadcast flag but there was a court challenge and that did not go ahead. My understanding is that it still may go ahead if the Congress decides to change the laws governing the FCC in the USA. I simply wanted to bring the issue up because I have identified this as a potential TPM, depending on how it is structured, which could influence a particular statutory exemption in Australia, which is the part VA statutory licence provided to educational institutions.

CHAIRMAN—Do you not like this technology? Do you think it is a bad thing?

Ms Wright—No. I am not claiming one way or the other. I am just looking at the types of restrictions that it might place on users. I am concerned that it might impact on users' freedoms.

CHAIRMAN—Sure.

Ms ROXON—I will ask a basic question before I ask you in more detail about the proposal that you have for accessing public domain material. I do not properly understand—and forgive my ignorance—what material it is in the public domain that is likely to have a TPM on it. Is it the copyright owner saying: 'This material is in the public domain. I did not want it in the public domain therefore I am going to try to project it in some other form'? Or is it people gathering information that is in the public domain, repackaging it and then wanting to protect it in that repackaged format? Can you give me some examples so I can understand how the public domain material might be used by people in a way that they would then want to protect it with a TPM? I do not understand the practicalities of it, and I want to understand how the exception that you are urging us to consider would have an impact on day-to-day life. Does that question make sense? I do not really understand what it is that might be covered by the proposal you have made to us.

Ms Wright—What I am referring to is material in which copyright no longer subsists, so there is no owner of copyright. It is possible that publishers or content aggregators may sweep up some of that material and publish it alongside other material they are publishing. This has occurred with the publication of e-books. Professor Lawrence Lessig gives an example of the publication of George Elliot's *Middlemarch* and work by Aristotle—I cannot remember the name. They are obviously both in the public domain—copyright does not exist—and they have been published by a publisher of e-books, where they had applied particular usage controls onto that content.

Ms ROXON—In the non-technological world, wouldn't the publisher of *Middlemarch* have control over the hard copy version that you can buy? Obviously you can access it through the library and all those sorts of things, but why should a publisher not be able to package and repackage and sell their product in that way? I just do not fully understand the situation in that circumstance. Are you worried that they will then take it out of the public domain altogether and you will not be able to access it in some other format?

Ms Wright—I believe everyone should be able to access and use material in the public domain. I just feel it is inappropriate for people who are doing that to place restrictions on it, which does not allow other people the access that they would normally have the right to under copyright law.

Ms ROXON—But if there is no copyright remaining in *Middlemarch*, what would stop somebody else putting the whole text of *Middlemarch* up on the internet or—

Ms Wright—That is true—anyone can do that, but I am looking forward to a time when material may not be available. We may not be able to get a work from a public library. It may only be available in digital form. In that situation, I think it would be inappropriate for it to be locked up, because it then may not be available to the wider user of the public domain.

Ms ROXON—So how would you shape the exemption that you think should apply for the use of public domain material to ensure the availability of information but not remove the disincentive for people who want to package and repackage and market in ways that may include their own work—the work that is required for putting together particular materials, maybe not so much in the novel example, but perhaps other works that might be compiled together for some reason? How would you actually frame an exemption so that it would be effective?

Ms Wright—Obviously if people are adding value to the work then they should be able to charge for that value. I think they should be required to structure an access mechanism which allows them to add value and allows them to use it without restricting access to the work itself. I do not have any practical solution. It may be difficult to frame that form of exception. I was just pointing out the concern about the loss of public access to material in the future.

Ms ROXON—Which I think is really important, and in previous inquires the exemptions that apply for libraries and the importance of making sure that the public have access is something that I, and I am sure others, have been very concerned about. I just do not really know how that translates quite so easily into this new environment. I guess that is the challenge.

Ms Wright—I believe it is difficult, but I also feel that it should be discussed, because it is easy for these things to just slowly slip away. I am concerned that we are making changes at this point in history that could have a significant impact many years down the track, and people should be at least aware of that.

Ms PANOPOULOS—Other than your hypothetical scenario that some information may only be available electronically—which may or may not happen—can you think of any other situation where information already in the public domain cannot be accessed in another format?

Ms Wright—There could be material that is held in fragile conditions, for example, that is only accessible through one access point and that could also be made available digitally. I think there are many other possibilities.

Ms ROXON—Doesn't that happen currently? If you have material that goes out of print or a piece of music that is no longer under copyright, but no-one has played it or published it for such a long time, the reality now is that the only way you can find that information is to search through various holders of those records to find a copy that you can use. I guess the great hope with the new computer world is that you would not have to do that and the information would be there for the benefit of everybody. If you are starting from the status quo, it seems that you would actually be expanding what the status quo is, with an exemption that you are urging us to consider, rather than keeping it comparable and non-technology specific.

Ms Wright—I feel it is more than just a case of moving the existing access rights into the digital environment and making sure they are not more restricted in the digital environment than they are in the current environment.

Ms ROXON—Do you think you should go beyond that?

Ms Wright—That would be a matter for further review.

CHAIR—Thank you very much both for your submission and for appearing today. We will be sending you a draft of your evidence for you to check. Please feel free to send us any additional information if you have perhaps overlooked something or if you have been inspired to send us something more.

[1.48 pm]

BRENNAN, Dr David John, Member, Intellectual Property Committee, Law Council of Australia

ROTHNIE, Dr Warwick, Member, Intellectual Property Committee, Law Council of Australia

CHAIRMAN—I welcome Dr Brennan and Dr Rothnie, representing the Intellectual Property Committee of the business law section of the Law Council of Australia. Do you have any comments to make on the capacity in which you appear?

Dr Rothnie—You may know that the Law Council is an association of the law societies and bar associations of Australia. The Intellectual Property Committee is primarily made up of practitioners and academics who specialise in practising in the intellectual property area. I am currently a barrister, having previously been a solicitor, and I do some teaching at the University of Melbourne in the postgraduate intellectual property program.

Dr Brennan—I am a full-time academic at the University of Melbourne law school and I also have a consultancy with a copyright collecting society in Sydney called Screenrights, the Audio Visual Copyright Society.

CHAIRMAN—We do not require you to give evidence under oath, but I do have to point out to you that these are proceedings of the parliament and have to be respected as such. There are sanctions if that does not occur. Would one of you like to give us a brief opening statement summarising your general position and perhaps highlighting the points you would like us in particular as a committee to take note of?

Dr Brennan—I suppose the committee takes the view that the scope of this review is quite limited insofar as it is targeted to a very specific type of liability under the regime proposed in the free trade agreement. As such, our submission has been written in that light but also mindful of the fact that the liability regime has not yet been announced, even in draft form. We appreciate that this standing committee is operating at somewhat of a disadvantage in considering what exceptions there should be in relation to liability, which so far does not exist.

I will go through the key points of our submission. We wanted to point out to the standing committee that the idea of a credible demonstration probably requires something more in its contemplation than simply a rhetorical proposition. It requires something which is more in the nature of concrete evidence that the committee would accept on a balance of probabilities type standard. The relevance of US law is considered by the IP committee to be useful guidance, but the IP committee is not in a position to be able to provide any evidence of credible grounds. It can simply point to materials such as the US position to say, ‘Here are some exceptions that have been created in’—obviously—’background circumstances fairly relevant to the FTA regime.’

I suppose the primary aspect of our submission is twofold. One element relates to the ability of a person who is the beneficiary of one of these ad hoc exceptions that allow them to access liability circumvention to be able to engage someone to circumvent an access control on their behalf. Obviously the FTA regime draws three distinctions: liability for access circumvention,

liability for the supply of access circumvention services and devices, and liability for the supply of copy control circumvention devices and services. That three-way breakdown and Australian copyright law at present—which seems to suggest that where one party has the benefit of a particular exception, such as fair dealing for research and study, another party, such as a copy shop, cannot exercise that exception on their behalf—could create a strange outcome in public law if, as a result of this review, an exception is created whereby a person has a lawful entitlement to circumvent an access control but has no lawful entitlement to receive the supply of such a circumvention service from a third party.

There seems to be sufficient scope, or wiggle room, within the FTA regime, bearing in mind that the US exceptions include an exception for blind people to circumvent an access control. Presumably there is no expectation that a blind person is to do the actual circumvention themselves. There seems to be sufficient scope within the regime for someone who has the benefit of an exception to avail themselves of services from someone else to actually circumvent access control. I suspect that those services should be supplied consistent with the requirements of the FTA regime, pursuant to some sort of rigorous controls such as the existing declaration system that is in place already for the permitted purposes supply under our existing law.

The other major point of our submission—and I suspect this might be something that we both speak on at a little bit more length—is the connection with what might be thought of as traditional or conventional copyright. There has been some litigation in the US where automatic garage door openers, laser printer cartridges and computer repair services have all sought to be protected as items of commerce through the coincidence that they are related to some computer software. The computer software itself is copyright subject matter. If you can imagine a situation where you have some computer circuitry on your automatic roller door or garage door, the maker of the garage door has sought in some US cases to rely upon the fact that there is copyright embedded in the circuitry to exercise a monopoly right in relation to spare parts and servicing of the roller door under the access control regime.

It seems that where you have such an extension of circumvention liability it is liable to bring the Copyright Act into some disrepute. This, of course, is moving on to the area of primary liability, but the line between primary liability and exceptions here is a little murky, particularly when you are dealing with topics like regional coding of media. It seems that, where you have circumvention liability being created in relation to material which really is being enforced for no reason related primarily to the exclusive rights attached to the copyright as such but in relation to some collateral commercial objective relating to some non-copyright subject matter, there is a need to think very carefully about how liability is primarily created to avoid those sorts of outcomes.

Dr Rothnie—If I could add two points to that. The first one—and presumably the committee is aware of it, but I will just mention it for the sake of completeness—is that, since we prepared our submission and submitted it, the US copyright register has embarked on a third round of rule making. That was not information that we had at the time. So there is currently new rule making taking place in the US to see if there are further ad hoc exceptions that should be introduced. They have quite an interesting process there, where the submissions are due by early December, and then I think it is in February that there are submissions in reply. So there are two rounds of submissions, as it were, where parties put in submissions about what they think the exceptions should be or what they think exceptions should not be.

CHAIRMAN—Is that an effective way of handling it?

Dr Rothnie—Not having been involved in the US process but from this distance, I think that is something we could certainly learn from, in that the inquiry process here tends to have everybody putting in lots of submissions and then reports coming out, so it is a bit ad hoc as to whether anybody addresses things that somebody else has raised. Let us say that somebody puts in a submission in parallel and a first submitter thinks that there is a factual inaccuracy or some additional information that needs to be disclosed. You often do not know whether or not that kind of thing is being taken into account.

Ms PANOPOULOS—That point has been made by at least one other significant submission. It is a fair enough point.

CHAIRMAN—Ms Panopoulos is right. People have raised this general issue, but all of our evidence and the transcripts go up on the web site, so anyone who is following this area closely—and I imagine that people who put submissions in and particularly the people who appear and who are expert would be doing this—will always have the opportunity to respond. If you see someone saying something that you think is outrageous or something you want to support, we are more than happy to receive any additional material from you and the committee is happy to consider that. But the onus has to be on you to follow the proceedings. This particular inquiry is not too hard, though, because we only have three or four days, so it is not as though it is one of these inquiries that has a life of its own. The Attorney is very keen for us to report expeditiously.

Dr Rothnie—I will make two very short comments in response to that. The first one is that my comment was not particularly directed to this specific committee and its proceedings; it is fairly common with all sorts of inquiries into copyright and intellectual property in general. The second one, perhaps on a bit more of a practical level, is that I am sure you do get submissions from people who are following the submissions, as do some of the other inquiries, but I suspect a lot of Australians are quite passive and often think: ‘We’ve been told we’ve got to put our submissions in by a certain date. Well, that’s really the end of it.’ That is perhaps something to look at for future inquiries rather than for this particular one.

CHAIRMAN—We are pretty flexible. We had a number of people ask that, given the imminent handing down of the Sony case, they have additional time to reflect on the outcome of that case prior to submitting to us. I think we were quite accommodating in every single case.

Dr Rothnie—I certainly welcome the chairman’s thoughts. The only other comment I want to make, as a general remark, is to pick up on David’s point on the case law in the US. We wanted to draw the attention of the committee to the point that this is a whole new branch of the law, in many respects, and it is still quite uncertain in many ways as to how it works out. It is interesting to see them, with some of these cases in the US, trying to grapple with whether it is worth stepping around what might be thought to be quite draconian provisions having unintended consequences. Australia’s ability to do things seems to be quite constrained in terms of the treaty requirements. I think it is important to follow the US developments. That is all I really wanted to add.

Ms ROXON—I want to go to this section in your submission where you deal with regional coding. I am determined to get my head around this. You say that the coding really has a different impact depending on whether you are dealing with films or other material that is now not subject to parallel importation laws. Do you have a view about how you think the regional coding operates for films? Do you think it is being used as a protection of copyright tool or do you think it is being used for maximising marketing opportunities? Do you see that, inevitably, film is going to go the way of other media and that regional coding will die a natural death because there will be pressures to change either parallel importation laws or other laws that will mean that it is not effective anymore?

Dr Rothnie—That is a point we have not discussed at the Law Council committee so our comments here would be our personal comments rather than the committee's comments on that.

Ms ROXON—Sure.

Dr Rothnie—Perhaps the first point to take up is that it is not really correct to say that protection of copyright and region coding is being used to protect the marketing rights, outside of copyright. Copyright has always been about protecting distribution and marketing rights. In terms of the Sony case and the region coding issue there, I think the judge in the first instance did accept that Sony's purpose was more than just trying to block parallel imports. The coding was also being used to try and restrict unauthorised copying, albeit indirectly. As we say in our submission, it becomes particularly significant in the film context because films have not been subject to that relaxation of the control over parallel imports that all the other types of subject matter have. I guess we are not really sure what the policy difference is.

Ms ROXON—Just so I am clear, you think it is inconsistent, really, to have made a distinction between the interactive games and films?

Dr Rothnie—Once again, speaking personally, we probably have the worst of all worlds in Australia. We do not have clear rules one way or the other; we have some quite complicated regimes, which allow parallel imports, and we have some exclusions, such as the film industry. It is not really clear what the basis of the different treatment is, whereas in other countries you either have one law or another. There is an interesting article, which I can probably forward to the committee in draft form, by some New Zealand economists that looks at the impact of the repeal of parallel import laws in New Zealand and the impact that had on the film and video industry.

Apparently the main outcomes were initially a very heavy influx of parallel importing of rental DVDs, the consequent dropping off of cinema attendance and revenues through film distribution and then a reintroduction of controls. But, at the same time, New Zealand, I think, had quite a longer window between first launch of films in the US and the first public exhibition in New Zealand. I think it was something like 12 months. That period got truncated quite drastically to less than three months. If that would be of interest to the committee, I can certainly forward that article.

Ms ROXON—It would be to me, thank you.

Dr Brennan—Just one point to add to Warwick's comments is that, when you consider an access control which has some form of region coding aspect to it in relation to copyright material for which there are no parallel importation controls—let us say an interactive video game where there is some sort of region code access control—perhaps it is possible to think of that sort of an access control as being somewhat like an access control on the computer software controlling the garage door, because the connection there to any recognised exclusive right in copyrights is fairly slim, given the public policy preference has been for essentially a unitary copyright territory in relation to such material.

Ms ROXON—Have they developed differently because they are historically such different industries? Obviously the film industry had a history well before the interactive games industry and has had a more regional focus. I guess we have our own industry, which people have always had an interest in protecting as well.

Dr Brennan—Originally the norm was complete parallel importation control in relation to all copyright subject matter. The modern history of this has been progressive removal of those controls through a series of exceptions, starting with printed books and then moving on to sound recordings and other material. So ultimately we have a situation where the last man standing, so to speak, is film copyright. This is a reflection, I guess, of the economic significance of the film industry to Australia and our trading partners, particularly America. Completely outside the scope of the Law Council IP committee is a view of what will become of the historical mode of distributing films by what was called the windowing system of distribution of film but, to the extent the recent history is a predictor of the future, my personal view is that there is some great likelihood that sooner rather than later Australia will be in a similar position to America whereby any item which has been lawfully sold anywhere in the world is able to be lawfully imported or used.

Dr Rothnie—We may have a difference of opinion amongst our members here because I am not sure that that is an accurate reflection of the US.

Ms ROXON—It would not be a proper copyright inquiry if you all agreed, would it?

Dr Rothnie—I think there are different views in the US about whether or not the first sale doctrine applies to things marketed outside the US. There is a US Supreme Court decision which applies the first sale doctrine to things which were first sold in the US itself although reimported from abroad. They are not clear yet how far that will carry to things marketed outside the US, although the judgment itself seemed to clearly exclude them from being subject to parallel imports.

Mr MELHAM—You say in your submission at page 4:

> It seems preferable that any exception created for access control circumvention liability should permit the undertaking of activities within the exception by third parties acting for another person, so long as there is compliance with a type of signed declaration' system similar to that which currently applies under section 11 6A(3) of the Copyright Act 1968.

Can you tell the committee what the level of use is of the existing signed declaration system under the Copyright Act?

Dr Rothnie—Neither of us have any personal familiarity with that being used, which therefore means if it is not being used people cannot rely on the defence. I think the main thrust of what we are trying to say there is that it seems very difficult or hard to give people a right to do this. I do not want to speak for anybody on the committee, but certainly in my case I would not be able to avail myself of any of these rights to do these types of exceptions, if they were granted, without somebody coming along and providing me with technical assistance.

Dr Brennan—The primary reason for the suggestion is related to the requirement of non-impairment under the FTA. And so this would be a means by which Australia could demonstrate minimal impairment.

Ms PANOPOULOS—Going back to the process in the US for consideration of ad hoc exceptions, are you familiar at all with the process and time frames in the US?

Dr Rothnie—In a fairly general sense, yes. They hold an inquiry—I cannot remember whether it is every three or four years. The Copyright Register holds the inquiry. It calls for submissions. Officers from the Copyright Register, I believe, hold various public forums around the US. After the submissions are all in and the forums have been conducted there is a deadline. In the current round, as I said, I think that is in February next year. I could be slightly wrong with the date, but it is certainly early next year. People have an opportunity to put submissions in reply to address things that have been raised in other submissions and have come up.

That kind of process strikes us as making the debate a lot more transparent about who is saying and dealing with what. As I said in the opening session, we would see that as being something to be particularly looked at if a mechanism is being proposed for how these sorts of things should be dealt with in the future, and also for that matter in other copyright reform initiatives that are undertaken, which usually seem to follow the approach of a welter of submissions being filed in parallel. Some of the positions of the policy makers—not just the committee—come out without people knowing quite what has been influencing decision makers and what should be addressed and what should not be addressed. It strikes us as being certainly a much more transparent approach.

In further answer to that, although slightly at a tangent, we are aware that some suggestions have been made that perhaps it would be more appropriate for this kind of inquiry to be undertaken by a body like the Copyright Tribunal. I do not know whether you want to hear our views on that.

CHAIRMAN—We have asked about that, and there seems to be a strong division of opinion. Some people say the Copyright Tribunal is too legalistic, being chaired by a judge, and that maybe it could be better handled by submissions to the Attorney-General's Department. Do you gentlemen feel that it would be better if it were to go to the Copyright Tribunal?

Dr Rothnie—This is not something we have discussed on the committee as a whole so, once again, it would be our views rather than the committee's views as a whole. I am not sure, depending on what sort of time frame you are operating under, whether we would be in a position to get concluded views from the committee. However, I think our initial view is that we do not think the Copyright Tribunal would be the right place for it to go. There might well be quite serious considerations of separation of powers. The Copyright Tribunal's powers and

functions at the moment under the Constitution seem to derive very much from the real or presumed consent of the parties to what is in effect an arbitration. That would not really be applicable here. The tribunal proceedings are, in many respects, very much like court hearings. They are legalistic, with discovery and submissions, and they tend to take more than a year, if not much longer, to carry through. It would seem that that would be a very awkward type of arrangement.

As we understand it, the US copyright register's approach usually involves the promulgation of regulations. The nearest thing we could see to that would be the minister promulgating regulations to implement ad hoc exceptions. The Law Council generally is not too keen on regulations being used to create and regulate substantive rights, although I suppose there are plenty of precedents for ministers having power to promulgate regulations.

CHAIRMAN—Regulations can give some flexibility.

Dr Rothnie—Yes, certainly we consider it being much more flexible than requiring statutory amendments.

Ms ROXON—I wondered if you had a comment on that as practitioners. We had some evidence before us, and in some of the other submissions, putting a view that the technology is changing so quickly in this area, unlike in others, that the ability to be able to respond quickly and have ad hoc exemptions might be more important than in some other areas. I was wondering, from the point of view of practitioners who clearly have to advise people on what they can do to comply with the law, whether you have a view about whether that is workable, whether you have a view on the time frame for exemptions. One of the earlier witnesses giving evidence said that she did not believe that it was necessary to have a four-year life for all of the exemptions, that there are probably more stable ones in Australian law that we can expect to continue on forever. Do you have a general view about the lifespan that should exist for exemptions and the practical issues that might arise from having ad hoc exemptions, if they were to be introduced?

Dr Brennan—Again, these are personal views because we have not discussed this within the IP committee. I do not think that the Copyright Tribunal procedures would be pointed to as a more nimble and flexible way of going about this task than the procedures of this committee.

Ms ROXON—My question is: irrespective of the procedure that establishes them, once established, is there a view that there needs to be a quick response time for new exemptions to be introduced as technology changes? Do you have a view about the lifespan of them, rather than the process that might establish those exceptions?

Dr Brennan—Again, without having had these things discussed as to whether or not you could have a set-and-forget exception permitted under the FTA processes, my personal view would be that that would be counter to the text of the agreement, which seems to suggest that any exception needs to be reviewed and resuscitated every four years. The idea that a review could set up a perpetual or ongoing exception seems to be a little strange, based on my reading of it and my understanding of the comparable US processes, which is its genesis. As to the need for a quick response, I suppose ultimately—and again it is my personal view—if there was a pressing need for there to be urgent law reform as a result of the imposition of circumvention

liability, then ultimately the Australian parliament is able to enact such a reform on its own motion.

Ms ROXON—And you think that is preferable?

Dr Brennan—If the suggestion is for there to be a standing body that is created with the sui generis purpose of receiving submissions whenever there arises some sort of a concern as to the imposition of circumvention liability, I suspect so.

Dr Rothnie—I suppose the intervention of parliament would be a safety valve, as it were, to reform the act. Usually, legislation takes quite a long time to formulate and pass through parliament, whereas the regulation-making power for this sort of thing would be much more flexible. Presumably it is to deal with relatively small sorts of circumstances. Once things get enacted in legislation as exceptions, they tend to take on a life of their own. You do not tend to pass laws with four-year sunsets.

CHAIRMAN—You are right.

Ms ROXON—Ten seems to be the going rate.

Dr Rothnie—I was trying not to get into that. Once something gets embodied in legislation, it would be much more difficult to get it out or to modify it, I would have thought.

Dr Brennan—I think this is related, but it goes a little bit back to the process point. My personal view is that, whatever ultimate review mechanism is instituted moving forward, it would be desirable to have an integration between the review and the law making. As Warwick pointed out, in the US the actual body that makes the copyright regulations, pursuant to the Copyright Office determination, is the Library of Congress. That is the actual law-making body that promulgates the regulations, but it acts essentially implementing the recommendations of the registrar of copyright. Here, I have some reservations about there being a parliamentary committee making recommendations to government that are then subject to a separate parliamentary process for the purpose of law making rather than a review which has the ability itself. I suppose this is why our lunchtime conversation led us to think about the delegated legislation model, a review which is integrated and connected with the actual crafting of the exception. It seems a more elegant solution.

Ms PANOPOULOS—I am just trying to work out whether I understood correctly. You think it is unnecessarily burdensome and does not achieve the optimal solution to actually have parliament decide?

Dr Brennan—Ultimately parliament decides, but I think the optimal solution, whatever it is, is one where the review is integrated with the law making. For example—not that it is possible—if this committee itself were able to promulgate the delegated legislation or the regulations, that would be, perhaps, preferable to a process whereby this committee makes recommendations to another body which then considers and debates, and then ultimately there might be a subsequent review of the recommendations of this committee. A more elegant and straightforward approach, which mimics to some extent the genesis of this regime being the US model, would be one where there was that degree of integration so that the parties who are

turning up making submissions and answering the submissions of other parties know that ultimately the body that they are making those submissions to is the body that will be responsible—

Ms PANOPOULOS—That actually matters.

Dr Brennan—Sorry, I do not mean any disrespect at all.

Ms PANOPOULOS—Not at all, no. Please feel free to be disrespectful.

Ms ROXON—We are acutely aware of our lack of expertise in some of it.

Dr Brennan—It is not so much a question of expertise, though; it is more just a question of integration of the review with the law making.

Ms ROXON—Can I just test you a little bit on the expertise. I would have thought that, in an area like this, having the decision-making bodies actually being the ones that have both some expertise in copyright as well as some technological expertise might be a serious advantage rather than disadvantage. And parliament is certainly a clumsy forum to try to ensure that that will be achieved.

Dr Rothnie—I do not think we have any disagreement on the need for both the copyright and the technological expertise. I think Dr Brennan's point probably comes back to the fact that we anticipate that the committee will make some sort of recommendations which will then go off somewhere else for somebody to decide whether or not to do something about them.

Ms PANOPOULOS—And not being left in limbo about what is going on and, as everyone else who has put in a submission, not knowing what weight is given to—

Dr Rothnie—Yes, that is certainly a concern. Presumably somebody has to then draft whatever decisions get made. So in between this committee's recommendations and things getting drafted there will be a whole further round of reviews and submissions, whether formal or informal. Certainly in this area of the law we have had quite a lot of experience with recommendations being made for reforms and then being sent off, and what comes out of the parliament draftsmen not really reflecting what anybody thought was going to happen.

Ms ROXON—I am not sure the poor parliamentary draftsmen should always be blamed.

Dr Rothnie—No, that is true.

Ms ROXON—As we have been tasked with this, we are reporting to the Attorney, not to anyone else, and the decisions will then be made by government.

CHAIRMAN—The Attorney has given us a tight time frame for reporting. However, the Attorney has also had quite a few other matters on his plate, which we have been reading about recently. The Attorney-General's Department has to juggle priorities and resources, and that is a constant challenge. Thank you very much for appearing before us. If you are inspired to send us

any additional information, please feel free to do so, particularly after you have seen some of the evidence on the web site.

[2.27 pm]

EVANS, Mr Tim, General Manager, Business Enterprises, Vision Australia Information and Library Service

SIMPSON, Mr Michael, General Manager, Policy and Advocacy, Vision Australia Information and Library Service

CHAIRMAN—Welcome. On behalf of the committee I would like to thank each of you for appearing. Although the committee does not require you to give evidence under oath, these are proceedings of the parliament and must be treated as such. There are sanctions when that does not occur. We have your submission and it has been authorised for publication. Thank you very much for that. I was wondering whether we might kick the proceedings off with one or other of you giving a brief opening statement of five to 10 minutes.

Mr Simpson—If you do not mind I will make a few comments and then hand over to Tim. It will not take that long, because we do want to leave sufficient time for the committee to ask questions. Firstly, Tim and I would like to thank the committee for inviting us to appear before you today. While we have already made a submission on behalf of Vision Australia to the earlier call for comment on the technological protection measures exceptions, we are pleased to have the opportunity today to expand on it.

Worldwide, people who are blind have struggled to have even partial access to the world's rich pool of creative content. Here in Australia, it is no different. It has been estimated that, even with the efforts of alternative format producers, those of us who have to access material in alternative format to print have access to less than three per cent of the information available to others in the community—that is less than three per cent of the information that is available to people with sight. The overwhelming bulk of creative material is produced in a manner which requires vision to access it. For those of us who are blind or have a severe vision impairment, we usually have to rely on intermediaries, such as the Vision Australia Information and Library Service, to put that visually accessible information into a format we can access without sight. This is the case for the full range of creative material, including for education, employment, recreation and leisure—the whole gamut of information.

Publishers rarely put material into any accessible formats. It is even rarer to find a publisher who is prepared to provide material in a range of formats, given that there is a multiplicity of formats which people who are blind or vision impaired use. This is why people who are blind or have severe vision impairment rely on adaptive technology and alternative format producers, such as the Vision Australia Information and Library Service, to meet their information access needs. There are a number of other alternative format producers in Australia and they are mostly linked to blindness agency service providers, such as Vision Australia, and educational institutions, such as state departments of education. Traditionally people like me have relied on these producers to take the inaccessible piece of work and to put it into an accessible piece of work depending on the needs of people who are blind or vision impaired.

The needs may vary depending on the level of sight loss, the skill level of the person and the situation in which they want to access the particular material. For example, someone who is recently blind will not be able to readily use braille. Someone who can read braille proficiently, on the other hand, would choose braille over something like audiotape if they need to access a document during a meeting or a hearing such as this. Someone with some remaining vision may be able to read print if the print size is large enough and the font size is clean enough. There is no one-fix solution, and there never will be, because of the range of sight loss and the skill level of those who lose sight. That is one of the reasons we do not see publishers rushing to meet our access needs. The needs are too complex and the economies of scale just do not exist.

Vision Australia Information and Library Service has around 18,000 registered users. It is Australia's largest producer and distributor of alternative format materials. The digital era has opened up a world of opportunity for people who are blind and vision impaired. We need to ensure that, through an exception under technological protection measures, we can use adaptive devices, such as this one I am using now. We also need to ensure that alternative format producers which legitimately take an inaccessible piece of work and put it into an accessible piece of work for a person with print disability have an exception.

We do not have any issue with copyright holders and publishers building technological protection measures into digital content. However, if they are not going to make that content accessible in all formats, we must be able to use devices and intermediaries, such as alternative format producers, to make it accessible for us. If we do not, people like me will fall further behind at a time when, because of the world of opportunity afforded us by the digital era, we can start to catch up. Tim understands only too well the issues faced by alternative format producers. He is now going to talk to you about technological protection measures and circumvention devices from that perspective. Then we will be happy to answer any questions you have as a committee.

Mr Evans—I think it is true to say that we stand at a point in time when technology offers so much to people who are blind and vision impaired. But this opportunity can very quickly become a threat. People who are blind and vision impaired say that the biggest barrier to them more fully participating in society is the lack of access to information. I think it is important to understand that when we talk about information in the context of people who are blind and vision impaired we talk about access to the whole breadth of information—which includes information for education, training and development; information for employment; information for day-to-day living, which includes access to things like bus and train timetables; basic information for voting; and information that would involve our clients exercising their rights to participate in society as citizens of Australia.

To address this issue, Vision Australia has commenced to introduce a new information and library service for its clients. We will invest over $20 million in that over the next five years to develop an information access service based on opening up the world of content and information to our clients. We will use the latest technology to do this. This technology includes technology that allows us to access, produce in alternative formats and distribute for playback information that offers the opportunity to open up the world of information for our clients.

There have been developments in the fields of text-to-speech synthetic voice systems. The device Michael mentioned to you earlier, which he is currently using, is such a device; it has a

text-to-speech synthesiser capability built into it. This enables Michael to access a wider range of information than has ever been possible. We have seen the integration of things like audio into braille transcription devices, so the devices become multifunctional and multipurpose. This means that a blind or vision impaired person using a braille device can access files through audio or other styles of information access. Global cooperation across all major national blindness agencies around the world has enabled the development of information access standards for people who are blind and vision impaired, so we can start a global exchange program of information and spread our scarce resources and dollars even further than we can today. The use of the internet facilitates our clients' access to information and significantly opens up the world of information to them.

We see that technology offers a huge opportunity to improve access to information. The irony is that the technology that offers so much opportunity can become a major threat to people who are blind and vision impaired if they are unable to use that technology to access information. We think this issue is generally understood by the community. I think it is fair to say that the publishing community assists and supports us with issues that we need to address for our clients. These issues are also recognised through the funding we receive from various state and federal government funding bodies to assist us with the task of converting printed information into accessible format information and through enshrining in the current copyright law the need to grant us special exemptions in terms of the ability to use statutory licences and the education licence to make information accessible for our clients. Just to reinforce what my colleague Michael Simpson said, we are asking for an exemption from the liability scheme, which might limit access by blind and vision impaired people to information through the use of technological devices that could be seen to be using circumvention.

CHAIRMAN—Thank you very much. I must say, I was disturbed to hear that blind and vision impaired people only have three per cent of the resources available to the general community available to them. Do you feel that the free trade agreement has shifted the balance in copyright regulation away from users towards the owners of copyright?

Mr Simpson—Three per cent is actually a very generous estimate. Many people put it well below three per cent, but we felt we should go to the upper end of the estimation. We believe that there are in fact a number of opportunities arising from the free trade agreement. In the United States of America there are a number of schemes that require digital material to be put into repositories, particularly for educational purposes. That means that further down the track students who are blind and vision impaired will automatically have access to a digital file of information which, by then using adaptive technology devices such as the one I use, they will be able to access. At this stage we cannot get a feel for whether the free trade agreement will either inhibit or enhance things. It will enhance things if we can access some of that material.

CHAIRMAN—Could you tell us what the particular device is you are using and what it does?

Mr Simpson—This device is called a Book Port. It is specifically made for people who are blind and vision impaired, so it does not have a menu screen that sighted people can read. It is fully driven by the function keys. This device will allow me to take any piece of material that I produce myself or have access to in a particular format—for example, Microsoft Word files, MP3 files, audio files such as .wav files, straight text files, which you often see with the

extension .txt, and rich text format files; there are a number of different formats—and put them on the device. I think there are nine formats. Is that right Tim?

Mr Evans—I think there are 12, actually.

Mr Simpson—You can put a file on here that has been formatted into Braille. It has a synthetic speech device in it so that it turns what it reads as print or text into speech. One of the problems with the way that the technologies are going, particularly with things like image files, portable document files, PDFs, for example, is that the assistive technology generally cannot access those. Depending on how the author has developed the material in the first place, they can be locked, even from those devices that might be able to read an image file.

Ms ROXON—I understood from your evidence, Mr Evans, that the publishing community is quite supportive and, with respect to any sorts of TPMs that they might have on their material, I presume you have established relationships for ensuring that you can access their material. Is there greater concern in the areas that perhaps we do not think of as being the most obvious ones—like the examples you used of bus timetables and other things—where you might want to reproduce material in a different form and there might be some sort of protection measure that prevents you from being able to transform that material? I want to get a feel for where the biggest problem is in terms of your fears about what TPMs might do to restrict your access to material.

Mr Evans—I think that is right. As I indicated, we are trying to develop a system whereby a very broad range of information is available to our clients. The device that Michael just spoke of—and some of the other devices I have here, which fall into roughly the same category—rely on receiving a file, de-encrypting that file and then re-encrypting that file to play on the device. Our concern is that we are not limited—that people who are what we call or classify as print disabled are able to access those files. I think it is reasonable to say that the support that we get from the publishing community comes about because we have always been responsible citizens as far as copyright goes. We have probably gone to extreme lengths to ensure that we comply with the law. We are concerned about the possibility that there might be some constraint in the application of the use of these devices—when they are using published information and also when they are using information that might be available from other sources. That could include information from university syllabuses and things like, as I mentioned earlier, bus and train timetables. We are concerned that there could be some limitation to us accessing that information.

Ms ROXON—Would the most desirable outcome be, from your perspective, an exemption that is based on organisations such as yours that do this particular work—an entity based exemption or a purpose based exemption?

Mr Evans—I am not sure what you mean by purpose based.

Ms ROXON—Being able to use an anti-circumvention device because you are trying to translate material from one format to another for the purpose of assisting a print disabled user: that would be an example of the purpose test. So anybody who was doing that, rather than just your organisation, would be allowed to do it and potentially market that material with the sale of an e-book or something else.

Mr Evans—I think we are talking then more generally about a purpose based exemption that would apply, for example, to people who have a print disability, in a more general sense.

Ms ROXON—Or to people who are assisting them.

Mr Evans—Yes, that is right. Organisations that may assist in the conversion of materials into alternative accessible formats, or the individuals who are actually accessing that information.

Ms ROXON—So you feel that that is adequately protected in the current circumstance but you want to make sure that that status quo is protected—or do you feel that with the new technology you need a more explicit protection for what you do?

Mr Evans—We think that there are developments in technology that are not fully understood by the community—the publishing community and the broader community. We want to make sure that the group of clients that we are talking about here is able to use that technology to its fullest degree. The thing with this technology is that it exists in a continually developing and emerging scene. There are already new prototype models of the devices that we have in front of you today that we are testing, and they will take things even further. So it is a general technology issue. Technology is something that is continually under development. Each generation of technology offers more and more opportunities for people who are blind and vision impaired to more fully access information. So it is pretty hard to draw a line in the sand and say, ‘Here we rest.’ It really is an evolving thing.

Mr Simpson—Our general concern was that if at some point the development, import or sale of adaptive technology devices—such as the Book Port or other ones that people who are blind or vision impaired or alternative format producers use—became illegal, it would mean that people like me—and alternative format producers like Vision Australia’s library—would in fact be performing an illegal act. So it is not just around the intermediaries like alternative format producers; it is also the devices that individuals use to play back material. They may be considered, in this context, circumvention devices. That is why we would be looking for that purpose specific exemption.

Mr Evans—I think that would apply to the manufacturers and developers of these devices as well, just as an extension of that.

ACTING CHAIR—Everybody is nodding that there are no further questions, so thank you very much for coming and giving us your evidence and making sure we are aware of these issues. I think the chairman normally indicates that we provide a copy of the draft transcript for the hearing so that you can check whether there are any corrections that you would like to make. You might just mention to the secretariat if you want that in any particular format, given the discussion we have had. You can give us any corrections that need to be made. If there is any further evidence you would like to give—after looking at other submissions or that you think about, having given your evidence today—please feel free to let us know—or if there are additional comments that you would like us to be aware of. Thank you for coming in.

Mr Simpson—Thank you very much for the opportunity.

[3.04 pm]

CLAPPERTON, Mr Dale, Board Member and Convenor, Intellectual Property Committee, Electronic Frontiers Australia Inc.

PAM, Mr Andrew David, Board Member, Electronic Frontiers Australia Inc.

CHAIRMAN—Welcome. We do not require you to give evidence under oath, but these are proceedings of the parliament and must be respected as such. There are sanctions in the unlikely event that it is necessary to access them. We have received your submission. It has been authorised for publication. I wonder whether one or other of you would like to give us a brief opening statement. I think Dale has been here for most of the day, so he is well aware of the process.

Mr Clapperton—Electronic Frontiers Australia is a non-profit national organisation concerned with the protection and promotion of the civil liberties of users of online communication systems. In this day and age, primarily our focus is on the internet, but we also cover basically all modern forms of technology. The type of technology now known as technical protection measures is not new. It has been in use in various forms and under different names since the 1980s. However, in recent times two important things have happened. Firstly, TPMs have received protection of law by legislation such as the digital agenda amendments to the Copyright Act and the Digital Millennium Copyright Act in the United States and under the changes we were required to make as part of the free trade agreement. Secondly, TPMs have evolved from devices and measures which were designed to prevent the infringing copying of protected material to measures which control and restrict access to protected material.

CHAIRMAN—Is that a good thing?

Mr Clapperton—No, not at all, because the combined effect of these changes is to eliminate and prohibit the exercise of the exceptions to copyright, which are granted under the current act and which provide the vital balance between the interests of copyright holders and the users of copyright material. It is with this balance in mind that we are urging the committee to recommend the creation of exceptions or a policy for the creation of such exceptions which will protect the exercise of the existing exceptions to copyright under Australian law.

CHAIRMAN—In your view, just for the record, to what extent do you consider the free trade agreement limits what you can now do?

Mr Clapperton—Under the changes which will be required as part of the free trade agreement, Australia will have to extend the definition of what is a TPM to encompass devices which control access to copyrighted material. The distinction between TPMs which prevent or inhibit copying and TPMs which control access was the key issue in the recent High Court decision in Sony v Stevens.

CHAIRMAN—You would be of the view, as some other witnesses are, that the free trade agreement has somewhat moved the balance of copyright regulation away from users to owners?

Mr Clapperton—Yes, we are of that view.

CHAIRMAN—Sorry, I should not have interrupted you.

Mr Clapperton—That is quite okay. That concludes my opening statement.

Mr Pam—Another issue which is perhaps relevant is that in a realm of digital media and computer mediated media it is essentially not technologically possible to distinguish between copyright control over copy and copyright control over use. Copyright now has power over the use of media because inherently in making use of media you are copying it. There has been some judicial discussion over fixing a form that is controlled by copyright, but there is no firm basis at this point for assuring the safety of knowledge; making use of a media work does not legally consist of exercising the copyrighter rights. That allows copyright owners to now have control over all uses of their digital works, whereas previously the copyright law was intended only to restrict the distribution and the making of copies in a physical sense.

Ms ROXON—Just for my background information, what sorts of membership numbers do you represent? Do you represent mostly users—that is, individuals who are members of the organisation—or do you have more networks, groups or something else that are part of your organisation?

Mr Clapperton—EFA have both individual memberships and group memberships for representative organisations. It is a policy that we do not discuss specifics of who our members are, for obvious privacy reasons.

Ms ROXON—What sorts of numbers are you talking about?

Mr Clapperton—It is also policy that we do not discuss that.

Ms PANOPOULOS—Are there more than 50?

Mr Clapperton—Yes, I can confidently say that.

CHAIRMAN—Are they mainly younger people or is there a cross-section of people?

Mr Clapperton—Again, for privacy reasons we do not really collect information on such demographics.

Mr MELHAM—How does one become a member? Are you advertised on the net or something and people just pay a membership fee?

Mr Pam—Essentially, although not only on the net; we have also been mentioned in the media quite frequently, so we do gain members that way. We are open to any Australians of good character who wish to join the organisation.

Ms PANOPOULOS—Do you have a constitution?

Mr Clapperton—Yes, we are an incorporated association in South Australia. We have rules of incorporation and so forth that go with that.

Mr MELHAM—I see you were established in 1994, so you have been around for a little while.

Mr Clapperton—We have been around for quite a while. EFA was established in the era of bulletin board systems, a predecessor to the internet which the committee members may not be familiar with.

Ms ROXON—Do not take us to the older technology; we are struggling with the current and new technology that is coming! One of the things you say in your submission you are concerned with—I am just trying to understand the perspectives that people bring to the evidence they give us—is the protection and promotion of the civil liberties of users. What exactly are you talking about there? Are you talking about the protection of a user's privacy, or are you talking about the protection of a user's ability to access a broad range of information?

Mr Clapperton—You probably would not characterise the right of access to copyrighted material that a user has legally obtained as a civil liberty per se, but the debate over TPMs does bring in civil liberties issues such as privacy, as you have just highlighted. The committee members may or may not be aware of recent media coverage of a type of TPM which has been deployed by Sony in the United States.

Ms ROXON—One of the other witnesses today gave us some evidence about that.

Mr Clapperton—The rootkit issue?

Ms ROXON—Yes.

Mr Clapperton—I am not sure to what extent the previous witness went through it, but essentially Sony has released audio CDs with a TPM contained on them. When the CD is inserted into a computer running the Microsoft Windows operating system, it automatically, without the user needing to prompt it, installs a type of what I charitably call 'malicious software' on the system. In technical speak it is known as a rootkit, which basically embeds itself into the operating system at a quite low level. You could also characterise it as spyware.

Mr MELHAM—How many people would have been affected by the release of that Sony product?

Mr Pam—There is a list of CDs which are known to have it, and it is well over a dozen CDs. I do not know how many people purchased those CDs, but I would certainly guess it would have to be in the tens or hundreds of thousands. There are several class-action lawsuits now under way.

Ms ROXON—Is your primary focus on those sorts of issues—the invasion of privacy or unknowing provision of information that people might be involved with—or are you more of a consumer organisation? They are two different things.

Mr Clapperton—Yes. With the TPM issue, the majority of our focus is on the user rights issue, access to copyrighted material generally—intellectual property is one of the key areas that we focus on—and the civil liberties issue. Not to diminish the importance of users' privacy, it is probably of secondary importance.

Ms ROXON—You make some fairly broad comments about wanting to propose exceptions if there is anticompetitive impact. I would not mind if you expand a little bit on how you think that could work. It probably is not necessarily going to be achievable; I would have thought you could frame every TPM in a way that it has got an anticompetitive impact. What are you trying to particularly get out with that proposal?

Mr Clapperton—The one that comes first to mind would be region coding on DVDs, but there are other TPMs which have similarly anticompetitive aspects to them. As the committee is probably also aware, Sony PlayStation games have a similar region-coding system to DVDs. There are also issues with TPMs designed for home computers. The majority of the ones on the market require the use of the Microsoft Windows operating system. So if you want to access content released in those formats you have to use Windows or you cannot access it. There is little or no support for alternative operating systems such as Apple, Linux or FreeBSD.

Ms ROXON—The committee had some briefing information indicating that those PlayStation issues were only affected by region coding if you were going to use your TV to play the games rather than if you used a console version. One of the other committee members will help me if I am using the wrong terminology. Is that your understanding, or is it a bit of industry sleight of hand to pretend that the problems are so limited?

Mr Clapperton—I do not own a PlayStation myself, but in the previous testimony this afternoon I have heard discussion on this issue, especially as it pertains more to DVDs than PlayStation games. In the case of video DVDs for motion pictures there are essentially two competing TV standards: NTSC, which is used in the United States; and PAL, which is used in Australia and a lot of the rest of the world. DVDs are typically one standard or the other. However, these days there is less of a distinction between the two because many modern devices are capable of supporting both formats. Apart from the region coding and parallel importation issue, if I were to import a DVD from the United States, yes, it would be formatted in NTSC, which is not the format used in Australia, but because I have a relatively modern DVD player and television I could still play it.

Mr Pam—I should add that that is the case for games as well, not just movies. For example, Japan also uses NTSC. Japanese PlayStation games will also tend to output their video in that NTSC format and the modern television should be able to deal with that. You may need an NTSC capable PlayStation to play a game designed for an NTSC PlayStation. So there are other issues beyond just the region-coding one, but certainly one of the issues that has come up before with these games has been, for example, modifying consoles to output different TV standards, which may or may not be permitted under the law. So if you have a console which you need to play Japanese games on which supports the Japanese format, and you modify it to output to an Australian standard television, that may be an issue. But it is less of an issue now because you can just buy a television that supports the format inherently.

Mr Clapperton—Getting back to the root of your question about whether there is a necessary or desirable link between the region coding and potentially incompatible standards, our position is that there really is no such link. If a person wants to import a DVD from overseas, or a PlayStation game for that matter, it is up to them to ensure that they have the required equipment to play it. There is no technical reason why DVDs in America should be made region 1 and DVDs in Australia should be made region 4. I am not sure what reasons are being put forward for it by the motion picture groups. There is no reason why the region coding should be an extra layer of incompatibility on top of the television standards.

As a previous witnesses has noted, there are at least five different region codings in the DVD coding system. Australia is grouped in with South America and Mexico. There are at least five region codings and two potentially incompatible TV standards, which on modern equipment is not a lot of difference anyhow, so it does not seem to add up. It does seem to be more for market segregation and the convenience of the motion picture companies.

Mr Pam—It is of course possible to make DVDs that have multiple regions or indeed are playable in all regions. That is sometimes the case for a global release—a disk is intentionally created with a region coding of zero, which permits it to be played anywhere.

Mr MELHAM—Is it your view that circumvention should be allowed for the purpose of doing any act allowed by the Copyright Act?

Mr Clapperton—That is our position, yes. As I indicated before, the existing exceptions to copyright protection are a necessary part of the balancing of rights. Essentially, they are the payback to the public for granting the copyright monopoly to the creators of copyrighted material. If we diminish the applicability of those exceptions it really does throw things out of balance.

CHAIR—Thank you for appearing before the committee today. We will send you a draft of your evidence for you to check, correct and send back. If there is anything else you would like to communicate to us, please feel free to do so.

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

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 3.21 pm