COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Review of technological protection measures exceptions

MONDAY, 28 NOVEMBER 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 28 November 2005

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

Members in attendance: Mrs Hull, Mr Melham, Ms Roxon, Mr Slipper, Mr Tollner

Terms of reference for the inquiry:

To inquire into and report on:

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

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

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

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

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

WITNESSES

Committee met at 9.30 am

MEMBREY, Miss Roslynn, Assistant Secretary, Library Resources and Media Services. Parliamentary Library, Department of Parliamentary Services

NEILSEN, Ms Mary Anne, Acting Director, Information and Research Services, Parliamentary Library, Department of Parliamentary Services

PENFOLD, Ms Hilary Ruth, Secretary, Department of Parliamentary Services

CHAIRMAN (Mr Slipper)—I declare open this public hearing of the Legal and Constitutional Affairs Committee's inquiry into exceptions to the technological protection measures scheme under the Australia-USA free trade agreement. The committee will be ensuring that any exemptions recommended meet the criteria set out in the agreement. I would like to stress that the committee is examining access TPMs only. In examining what other exceptions might be appropriate, the committee will also need to consider whether those exceptions already identified in the agreement are sufficient to maintain the balance between protecting the rights of copyright owners and ensuring the valid interests of copyright users.

I welcome everyone here. It is good to see Ms Penfold again in another capacity. I am sure our discussions will be productive. Although the committee does not require you to give evidence under oath, I have to advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The committee has received your submission. It has been authorised for publication. I invite you to make a brief opening statement of, say, five minutes if you wish. Then, if necessary, we will ask some questions.

Ms Penfold—I would like to make a very brief opening statement and then ask my colleagues to give you a bit of information about how these things might affect the library in a practical sense. I should say up-front that we do not claim in any sense to be experts in interpreting the FTA—I am not sure whether anyone does, but certainly not on this side of the table.

CHAIRMAN—If anyone would be, you would be, given your prior life's experience.

Ms Penfold—It was not drafted by professional legislative drafters, as far as I can see.

CHAIRMAN—Maybe it should have been.

Ms Penfold—Maybe it should have been, indeed. I do have some views on some bits of it, but we may get to those later. Equally, we are not terrific experts on the practical details of the sorts of technological protection measures we might be talking about. We do have some ideas about how particular issues may be affecting things that we do in the library already. But we certainly cannot tell you all the things that might turn up and how they might affect different things done in the library.

Our main concern at this stage is to make the argument that parliamentary libraries should be granted whatever exemptions are necessary under the FTA provisions to preserve our current

unique position in relation to copyright. Until now, public policy in Australia has appeared to recognise an interest in ensuring unconstrained access at minimal cost—and that is quite important—to information needed for members of this and other Australian parliaments. This is demonstrated in the various exemptions from provisions of the Copyright Act that are currently available to parliamentary libraries—for instance sections 48A and 104A of the Copyright Act and the provision, which I do not have at my fingertips, that provides us at the moment with an exemption from some of the technological protection measures rules.

The protections provided by those sections of the Copyright Act to parliamentary libraries can be contrasted with those provided more generally for Crown use of copyright material. Those provisions in general provide largely unconstrained access to material, which is again what we would be hoping for, but require appropriate payments to be made to the owners of the intellectual property in due course for that use. So that suggests to us up front that there is a recognition that the position of parliamentary libraries is special even when compared with the position of the rest of the Commonwealth. If exemptions are not provided to parliamentary libraries from the prohibitions required by clause 17.4.7(a) we risk losing access to a range of significant material required by our clients. To some extent, that access—

CHAIRMAN—Could you just outline what material could be not used or accessed?

Ms Penfold—If you would not mind, that is what I would like to do in another couple of paragraphs as it were, at least get Mary Anne and Roslynn to outline that. I am trying to make the very general points. To some extent those problems of losing access to those materials could be sorted out by funding the Parliamentary Library or the Parliamentary Library and others to simply pay what it takes to get permanent—or at whatever point—access to the necessary materials, but I suppose there are two difficulties with that proposition. The first is that you simply have to find the money from somewhere, and the other is that there would be some circumstances in which even being able to afford the access would not be enough to enable us to get hold of material in time for our clients' needs.

It seems to us, looking at the provisions of the FTA, that we need desirably two kinds of exemptions. The first is an exemption covering the use by parliamentary libraries of circumvention devices that enable us to get around the technical protection measures. That is the activity that would otherwise be prohibited or require to be prohibited by 17.4.7(a)(i) and secondly—and this I think is the more difficult one—some sort of exemption from the prohibitions required by 17.4.7(a)(ii) such that the developers of circumvention devices can develop those devices and still provide them to parliamentary libraries. At this point I would like to ask my colleagues to explain to you some of the details of the sorts of material that we are worried about.

Ms Neilsen—As Ms Penfold said, I have to qualify my examples by saying that technology is changing so rapidly we are still unsure how TPMs may affect us and, secondly, we are not sure how the provisions of the free trade agreement would be implemented in Australia. So given those two qualifiers, I can see that the library would be affected by TPMs in a couple ways. Firstly, we could be restricted in providing members and senators with material in different formats. I am sure you are all aware that electorate offices across Australia have different access to digital equipment. In this respect, the library then provides material in a variety of different formats. For example, from our media monitor section you can get formats in digital CD, DVD,

desktop streaming and then you can also get the older formats like analog tapes and videos. So we feel that TPMs could actually prevent that and that is why we would need some sort of ability to circumvent those TPMs.

There is another area that concerns us as well, and that is to do with preservation. The Parliamentary Library has a responsibility for preserving the material which is important to parliament—for example, the radio and television broadcasts and the political party collections. Those sorts of things are vitally important to members and senators. With technology changing so rapidly and hardware and software becoming superseded, it is important that the new legislation does not prevent the library from capturing and copying digital data and preserving unique material. As you all would be well aware, the historical view and the ability to retrieve historical documents is vitally important to the parliament. We feel that that is a clear reason why we need this exemption.

There are other things that affect our day-to-day work as well. The library is noticing that there is an increasing trend for copyright holders and publishers to place tighter technological protection controls on copyright materials. For example, some of the journals that we acquire in electronic format are only available from certain PCs. Presumably the free trade agreement would prevent the library circumventing these restrictions. We now subscribe to many web based databases. That data is actually off-site, and the library has no control over it. So that data can be lost if we stop subscribing to it or if the database provider no longer has the right to publish that material. They are the sorts of concerns we have. We think it is paramount that the provisions of the new legislation do not prevent us from circumventing TPMs.

Miss Membrey—I do not have a lot to add to support my colleagues, other than to say that the Parliamentary Library prides itself on its timely response to queries made to us, and we are able to provide that timely response by the current exemptions under the Copyright Act. We hope to be able to continue that despite the TPMs coming into effect, because we will be letting our clients down if we cannot provide them with the service that they require.

CHAIRMAN—I think most members and senators would agree that the library does provide an excellent service. I think we all would hate to see you constrained and unable to continue that service. I imagine, without wanting to pre-empt anything, that the committee might put in our report that we would certainly be wanting to make sure that you are able to continue to provide the service that you do. Your submission notes that the specific Parliamentary Library exceptions in the Copyright Act 1968 are supplemented by exceptions that allow other libraries to copy for and communicate material to the Parliamentary Library—I think it was paragraph 14. How would the library's activities be affected if other libraries were unable to copy or communicate material to the library due to the free trade agreement TPM provisions?

Ms Penfold—That would certainly have an impact on us. In terms of how big an impact, I would have to ask Mary Ann or Roslynn because I am not familiar with exactly what proportion of our material we would acquire from other libraries on a regular basis. Have you got any ideas about that?

Miss Membrey—What we are talking about there—I am just scrabbling to find my copy of the submission—is the interlibrary loans scheme that exists between all libraries in Australia. At present, if we do not hold material in our library we can request it from other libraries. If we can

no longer use that system because there are more constraints in the Copyright Act, again it slows down our services to our clients.

Ms Penfold—Do you have any idea, Roslynn, how much of what we get on interlibrary loan is affected by the whole technological side of it? A lot of it would still be books, I suspect.

Miss Membrey—Yes. Not a lot at this point. But our concern is that you cannot tell what changes are going to happen in technology, as much as I would like to be able to predict. Our concern is that, as changes occur, our activities may be restricted, particularly as technology changes.

CHAIRMAN—This next question is really one for Hilary. It has been suggested to the committee that permitted exceptions should be implemented by either announcement in the government *Gazette* or inclusion in regulations. What is your view on the most appropriate way to implement the permitted exceptions?

Ms Penfold—Instead of through amendments to the Copyright Act?

CHAIRMAN—Yes.

Ms Penfold—Announcement in the government *Gazette* I would have thought was not a particularly appealing approach if only because—and indeed this raises an interesting question about technological protection measures—the government *Gazette* is so hard to get hold of these days. Electronically, the last time I looked, you could find the current government *Gazette*, but it was very hard to find back issues.

CHAIRMAN—Why is that?

Ms Penfold—I do not know. I assume it is because they are using some sort of technological protection measure. It may not be anything that complicated; they may simply take them off. But, for some reason, the view seems to be that they do not want to make the full archive available.

CHAIRMAN—So you would say by regulation.

Ms Penfold—I would be looking for regulations or even amendments of the act. Both of those are obviously more trouble to do but they are also more trouble to get rid of, so they provide better protection.

CHAIRMAN—It is very difficult these days to find the time to legislate to amend an act, so maybe regulations would be the better course.

Ms Penfold—Regulations would be useful, especially if these are going to have to be reconsidered and redone every several years. I think that is part of the requirement.

CHAIRMAN—I have one more question before I ask my colleagues to ask questions they may have. We understand that, as a result of US court cases where access control TPMs were used to prevent competition in the field of non-copyright goods and services, such TPMs not

related to copyright infringement will not be protected by the US anticircumvention provisions. The recent High Court decision in the Sony case could be said to indicate that the court may be prepared to interpret analogous provisions here in a similar fashion. Do you have a view on the likelihood of this?

Ms Penfold—I cannot give you any opinion on that at all; I am sorry.

Mr MELHAM—I suppose on my reading of your submission it really says that what the Parliamentary Library wants is the status quo.

Ms Penfold—That is true: we want the status quo preserved in terms of maintaining the kind of free access to copyright materials—free in both senses of the word.

Mr MELHAM—And there is not anything extra on top of that?

Ms Penfold—I do not think we need anything extra on top of that, subject to the fact that, to maintain the status quo under the FTA arrangements, we will need extra provisions. I do not think there are particular problems—none that I am aware of that have a direct FTA relevance. I do not think there is anything more at this stage.

Mrs HULL—In your submission, under 'Request for exception', in paragraph 10 you talk about the liability for dealing in the TPM circumvention devices and you talk about sections 116A(3) and 116A(7). You go on to say that you understand that it is outside the committee's terms of reference and it should be raised with the AG. I would like to hear more about that. What I mean is that I would like to understand a little bit more about that so that the committee, even though things are outside the terms of reference for us, are still able to raise these issues with the Attorney-General or recommend to the Attorney-General in line with your views. Would you be able to expand upon that statement in paragraph 10 to give us more information and to perhaps give us some direction as to why and how we should be approaching the Attorney-General with that?

Ms Penfold—I think the basic issue here is that, even if the Parliamentary Library maintained our exemption for use of circumvention devices, we need to be able to get them somewhere. I suppose there is a vague chance that we might be able to put someone on staff who could develop them for us themselves but, by and large, given the range of TPMs that will be around and the fact that they are being developed by all sorts of different people, we would expect that the only place we would be able to get hold of the circumvention devices is from out in the market somewhere. If there is no-one who can legally do that for us and supply them then our own exemptions may be useless anyway.

Mrs HULL—What would be the suggestion that you would have to us? Do you have a thought about how we could preserve that?

Ms Penfold—To be quite honest—and noting the chairman's reminder about this earlier—my fairly quick reading of the FTA provisions suggest that that is going to be a very difficult thing to do. It is not at all clear that the provisions are drafted so that the exemptions available for certain sorts of use can somehow be fed into an exemption for developers and suppliers. I am not sure what scope there is for that at all.

Miss Membrey—I guess the point I would add to that is that the parliamentary library community is very small. In terms of copyright owners losing a lot of income because parliamentary libraries have the right to circumvent a TPM for some information, there is not going to be a huge impact on the broader marketplace as well.

Mrs HULL—Mr Chairman, I have to take your advice on this. Would the committee have the right to receive something from the Parliamentary Library on this particular issue to outline it further? Even though this is not basically within its terms of reference, this is a very important issue that I think we need to be addressing.

CHAIRMAN—I am happy for the library to submit anything it wants us to look at. If it is within the terms of reference, we will consider it. If it is not, it is possible for us to also make a comment in relation to it. So feel free: more is better than less.

Mrs HULL—I would be very pleased.

Ms Penfold—We could have more of a look at that.

Mrs HULL—Could you? Even though it is outside the terms of reference, I think it is of significant importance to us in trying to get this right. We can make recommendations—whether or not they are accepted or not is another matter, but we could certainly bring to attention in the report phase that, whilst it was outside the terms of reference, the committee was concerned about this issue. We could certainly put these recommendations up. I would be very keen to have you provide us some more information. I think that inadvertent or unintended consequences are certainly going to impact on what you can and cannot do. Are we happy to have that, Mr Chairman?

CHAIRMAN—Sure. There being no further questions, I would like to thank you for attending the hearing today. I hope it was not too traumatic!

[9.53 am]

DEAN, Professor Roger Thornton, Member, Australian Vice-Chancellors Committee

FLAHVIN, Ms Anne, External Legal Adviser, Australian Vice-Chancellors Committee

KING, Mr Conor, Director, Policy and Analysis, Australian Vice-Chancellors Committee

CHAIRMAN—On behalf of the committee, I welcome you. Do you have any comments about the capacity in which you appear?

Prof. Dean—I am the Vice-Chancellor of the University of Canberra. I am appearing today on behalf of the Australian Vice-Chancellors Committee.

Ms Flahvin—I am a solicitor with Baker and McKenzie solicitors.

CHAIRMAN—We have seen you before, haven't we? You were wearing a different hat.

Ms Flahvin—Yes. It was a different client.

CHAIRMAN—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of misleading or false evidence is a serious matter and may be regarded as contempt of the parliament. The committee has received a submission and authorised it for publication. Would you like to kick off with a brief opening statement—say, five minutes—summarising your key points? Then if necessary we will proceed to questions.

Prof. Dean—I would like to present the context in which our concerns are addressed and ask our adviser to give you some more detailed specifics during that period if that is possible. Then we will respond to your questions. I think it is important to be aware that the higher education system—universities in particular—are concerned primarily with the social, economic and cultural development of Australia. In that context, the free and efficient access to every possible kind of intellectual property is critical. In relation to the FTA and the technical protection measures, our concerns are primarily about efficiency and secondarily about limitation of access. The other bit of context which I think it is important to be aware of is that the 38 universities in the AVCC are longstanding good users of copyright. We pay more than $20 million per year in levies.

CHAIRMAN—So when you say 'free access' you mean unrestricted access as opposed to chargeless access.

Prof. Dean—Yes, unfettered and efficient, as the case may be. We pay very substantial levies—every year more than $20 million—in copyright fees. We are recognised as a good and honest user of those things. We also pay very large licence fees for other materials which are copyright, such as, for example, Thomson's ISI Web of Knowledge, which is a database. We are

equally concerned with efficiency of access to those kinds of things, as the commercial provider would be.

We are concerned that the background of the DMCA in the US indicates the dangers of restrictions and the difficulties being imposed, which are not intended consequences of the FTA. To give you an example, we are particularly concerned about the decreased efficiency of access to copyright materials and, to a lesser degree, the difficulty of access to non-copyright materials, which can be created by a TPM. We want to rely on, and we want the legislation to take account of, the commitments which were made before the FTA to ensure those kinds of efficiencies, particularly in relation to educational processes. We are referring particularly to parts VB and VA of the Copyright Act. We are referring to format shifting, which, as has been mentioned many times to this committee, is an important recurrent feature for the future. We are also concerned with access to information held by application service providers with whom we have contractual relationships. And we are concerned more broadly with anticompetitive, anticultural and antisocial aspects of the DMCA and its implications.

I would like to point out, in concluding, that the TPMs have not a very good history so far. Even last week, the committee might be aware, Sony BMG CDs were shown to have associated with their TPMs what you could call spyware which was infiltrating computers on which these CDs were played. That caused a drastic and urgent response and is also the subject of upcoming legal action in the US. So it is not only that TPMs need to be able to be circumvented efficiently by us in accord with the exceptions; it is also that they are potentially dangerous and a vehicle for, if you like, a rapacious commercial entity. We would like to be protected against that. If I could ask our expert to give you some more detailed comments, that would be helpful.

Ms Flahvin—What I would like to give the committee is a little bit more of the context, I guess. TPMs, technical protection measures, are a legitimate response to increased concerns about copyright infringement in the digital age. The anticircumvention provisions, however—those provisions contained in the FTA that we are talking about today—were not intended to rewrite the existing copyright balance. Our concern is that, absent appropriate exceptions, particularly the exceptions that we have outlined in our submission, that will be the effect of the anticircumvention provisions that are being proposed for Australia.

I would like to remind the committee that, in its submission to the Senate select committee in the discussions leading up to Australia signing up to the free trade agreement with the US, the Department of Foreign Affairs and Trade made the point that the proposed anticircumvention provisions are ‘designed to assist copyright owners to enforce copyright and target piracy’ and that they are not about stopping ‘people from doing legitimate things with legitimate material’.

I would like to look at some of those questions. It is impossible to talk about the concept of enforcing copyright without thinking about the exceptions and the role they play in the grant of copyright. The grant of copyright to copyright owners cannot be understood absent the copyright exceptions—and, in particular for our purposes, the educational statutory licence and the fair dealing exceptions. Those exceptions contained in the Copyright Act are not defences to copyright. They are carve-outs from the grant. They are a very important part of the legislative balance that is struck between owners and users. So, when you think about enforcing copyright, you do need to think about copyright with those limitations in mind.

When you think about targeting piracy, with respect, I would suggest that it is ludicrous to suggest that educational institutions, universities, create an environment where there is a risk of piracy. If these anticircumvention provisions are all about targeting piracy then it is quite appropriate, I would submit, to be talking about educational sector exceptions. There is absolutely no suggestion that piracy is anything that we need to be concerned about in universities. Universities, as Professor Dean has pointed out, have a long and proud history of complying with copyright obligations. There has been no suggestion made to the committee that I am aware of that they present a piracy risk.

Finally, on DFAT's point about these provisions not being about stopping people doing legitimate things with legitimate material, I hope we have pointed out in our submission that that is absolutely the effect that they will have absent the exceptions—in particular, the exceptions for the educational statutory licences that we are seeking. Sure, it is the case at the moment, when these provisions have not been introduced to the act, that technological protection measures are not being used in the way that we expect to see them being used in the future. But I think we would be daft to think that that is not going to happen. Of course it will happen. The balance that is written into the Copyright Act will be, de facto, written out of the act as a result of these provisions. That is our concern in a nutshell.

CHAIRMAN—So, summing up, I suppose what you would like would be the status quo?

Prof. Dean—Absolutely. That is critical for our continued success as educational advocates.

CHAIRMAN—Whatever has to be done to achieve the status quo, that is what you want to see happen?

Prof. Dean—Yes. A symbol of that, I think, is the fact that we are continually adjusting the balance that our expert just referred to. For example, far more open access publication is being pursued by universities. While that is not directly relevant to these protections, it just symbolises our effort to make sure that this material is efficiently used for the benefit of the community and the economy.

CHAIRMAN—Is there anything that you want beyond the status quo?

Ms Flahvin—Are we asking for anything extra?

CHAIRMAN—Yes.

Ms Flahvin—On one view, you might say that the current status quo—so section 116 of the act, which contains the existing exceptions to the current TPMs—does not extend to part VA of the act. I think this is the point I made on the last occasion. Part VA of the act is the educational statutory licence for copy and communication of broadcasts. When the existing exceptions were introduced, it was thought to be the case that broadcasts were unlikely to be subject to technological protection measures in quite the same way as print and graphic materials might be, and there was not considered to be a need to make part VA a specific exception. I think things have changed. As we point out in our submission, there is quite a lot of movement taking place in the States at the moment with respect to broadcast flags—essentially, TPM provisions that are being used to lock up broadcasts. I think there is every reason to suspect that we will start to see

that technology in Australia. So when you ask me, 'Are you asking for anything extra?' to the extent that there is no exception for part VA of the act at the moment, yes, we are asking for that. That is pretty much it in terms of extra things.

Mr King—In terms of the status quo, it is more a question of maintaining a reasonable long-term balance that caters for whatever new things emerge. At most the present law is very much defined in current things that people have the capacity to do. When something is invented we always face this challenge of: 'What does that mean? What can we do? What should the copyright owner legitimately be able to do?' Broadly, we have been able in a number of areas to try to make that a little bit wider in terms of the principles and the purposes as a way to be able to cater for what will no doubt emerge in coming years. TPMs are just one example of something that has emerged. There is a legitimate purpose for them. They also have an impact upon what we are doing.

CHAIRMAN—I hope this is not a facile question, but you mentioned that the 38 universities paid $20 million a year by way of copyright fees. Are there often disputes over the amount that has to be paid? I know there must be a formal calculation of what you have to pay. Are there ever differences in the toing-and-froing and haggling?

Ms Flahvin—The act provides for the parties to have discussions. The parties in this case are the universities, on the one hand, and the copyright collecting societies, on the other. So we are dealing with CAL, the Copyright Agency Ltd. The universities pay in the order of $17.5 million a year to CAL and another $4 million to Screenrights, the broadcast collecting society. The parties come together when an agreement is about to expire. Currently the universities are operating under an agreement with CAL that expires at the end of December 2007. In the lead-up to that—and this is historically what has happened in the past—there will be some discussion about what the rate should be, moving forward, for copying and communicating pursuant to part VB.

If the parties are not able to reach agreement on that—sometimes they reach agreement without the assistance of the Copyright Tribunal; sometimes they do not—the act provides for the parties to go before the Copyright Tribunal and for the Copyright Tribunal to hear evidence on what is equitable remuneration. That is the concept under the act: what is equitable, taking into account concerns of copyright owners and concerns of the educational institutions. The Copyright Tribunal will either determine a rate or assist the parties to reach agreement on a rate. That is the process, and that has been the process since those parts of the act were introduced.

Mr King—The discussions usually tend to be fairly robust.

CHAIRMAN—I imagine they would be.

Mrs HULL—Thank you for appearing before us this morning, because it is really important. What we first see—and what we have heard from others in the hearings—is the obvious need to protect. But we see the unintended consequences when they are brought about by submissions such as yours and the Parliamentary Library's et cetera. You have a set of recommendations within your submission. Have you given any thought as to how we would overcome any objections to the way in which these recommendations are framed? Say the committee were to adopt your recommendations to put forward in our report. Is there a counterargument to any of

these recommendations that we should be trying to overcome in order to retain the status quo? I do not know if I am making myself clear enough. When you put up any argument, debate or list of recommendations, obviously there is a perceived need for us to be changing these circumstances under the free trade agreement. So what would be the counterargument to any of these recommendations?

Ms Flahvin—Are you asking us what the language of the free trade agreement permits?

Mrs HULL—Exactly.

Ms Flahvin—The counterargument would be that you could go and consult the Copyright Council submission or the CAL submission. The Copyright Council in particular make the argument that the language of the free trade agreement ought to be construed narrowly. They also make the point that that is pretty much what has happened in the States—they have adopted a narrow construction. The Library of Congress in reviewing the role—it has a role in determining what exceptions are required from time to time—and in construing the language of the DMCA has taken a very narrow construction. You will see that we have made the submission that there is absolutely nothing on the face of the FTA that requires such a narrow construction to be taken. I would also refer the committee to the submissions by the Attorney-General's Department and the Department of Communications, Information Technology and the Arts. The DCITA submission in particular makes that point very articulately. It says that there can be a clear language interpretation of those provisions. There is not the need to take such a narrow approach in construing those provisions.

Mrs HULL—I guess that is what I am trying to put onto *Hansard* for us to be able to consider during the determination of our report, so that we can clearly and articulately prescribe that there is no need for us to be following such a restrictive view or restrictive side of the free trade agreement and that there certainly is opportunity for us to be expansive on this to enable us to keep the status quo on this information side.

Ms Flahvin—I was having a look at the Australian Digital Alliance submission. I think they are coming later today. I noticed that in their submission they make the point that Singapore, in implementing its free trade agreement with the United States, took the view that it was not constrained in that way that is being urged by the Copyright Council and some other copyright owners. It took a much broader approach in interpreting what it was able to do with that language. So there certainly is a precedent there.

CHAIRMAN—Thank you very much for appearing before the committee today and for the evidence you have given. I think what you were saying in particular was that you are principally just asking for an extension of the status quo plus maybe something with respect to part VA. Thank you very much.

Proceedings suspended from 10.10 am to 10.24 am

CORDINA, Mr Simon, General Manager, Creators Rights and Access Branch, Department of Communications, Information Technology and the Arts

CHAIRMAN—Welcome. 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. Would you like to kick off with a brief opening statement of, say, five minutes or thereabouts? Then we will proceed to questions if required.

Mr Cordina—I first of all thank you for providing the Department of Communications, IT and the Arts with an opportunity to speak to the Legal and Constitutional Affairs Committee on the department's submission relating to technological protection measure exceptions. The Communications, IT and the Arts portfolio oversees policy in the areas of the information economy; information and communications technology; the content and carriage industries; the arts, including the national cultural institutions; and the broadcast sector. A number of these areas encounter technological protection measures, I understand, on a regular basis.

The points raised in the department's submission reflect consultations the department has undertaken within the portfolio with its portfolio agencies. In terms of where the department sits within government, it should be noted that the Attorney-General's Department has responsibility for government policy relating to copyright and shares responsibility with the Department of Foreign Affairs and Trade for the implementation of the obligations under the IP chapter of the AUSFTA relating to technological protection measures. That is a shift. Before the last election, responsibility for copyright was actually shared between AG's and DCITA. I thought I should make that clarifying statement. The comments made by DCITA are therefore limited to the views of the Communications, IT and the Arts portfolio.

The department supports an approach to copyright which provides incentives for copyright owners to produce copyright material whilst also allowing reasonable access to copyright material for copyright users. The implementation of the TPM obligations of the AUSFTA will play a key role in ensuring that an appropriate balance is maintained. The use of TPMs and their support through legislation is obviously very important for copyright owners to prevent unauthorised activities relating to their copyright material, particularly in the online environment, where unauthorised copying and dissemination are prevalent. At the same time, it is important that the copyright law not be used to stifle reasonable access and legitimate competition or innovation.

The department has, on the basis of its consultations, identified a number of areas in which further exceptions under article 17.4.7(e)(viii) of the AUSFTA may be necessary to enable portfolio agencies to continue their activities and statutory responsibilities. The submission sets out some general principles on which the department's comments are based relating to the form of the exceptions. It also makes some suggestions as to the form of the exceptions required to facilitate innovation in the information economy and the developing sector of ICT and to allow national cultural institutions and the public broadcasters to undertake some of their government

mandated and funded activities. Further details of the requirements for these exceptions and their practical implications can be found in submissions from portfolio agencies themselves, such as the National Library of Australia, the National Gallery of Australia, the Australian Film Commission and also the public broadcasters, ABC and SBS. Having made that statement, I hope I can assist the committee with any inquiries that you have in relation to the DCITA submission.

CHAIRMAN—Would I be correct in saying that what the department would like would be, as much as possible, a continuation of the status quo?

Mr Cordina—It would seek to maintain a balance between protection and reasonable access. Obviously that needs to be done having regard to the new obligations which we have signed up to under the AUSFTA. In that respect, I do not think we can completely stick to the status quo, because we have this new set of obligations and I think they require a strengthening of copyright owners' rights in the area of TPMs in terms of the way they are currently drafted. Having said that, where possible, using the flexibility which the government has, DCITA would like to introduce exceptions to allow reasonable access to facilitate innovation and also to allow national institutions and public broadcasters to continue their government funded and mandated activities.

Mr MELHAM—In terms of national institutions such as broadcasters, libraries and educational institutions, you do not see any problem with the status quo?

Mr Cordina—Currently the status quo works for them. There are permitted purpose exceptions, and also the actual protection in relation to TPMs is not quite as broad. So, in terms of innovation and reasonable access, from my understanding I think it is working okay. It is how you then transfer that across into this new scheme.

CHAIRMAN—Are you of the view that the free trade agreement somewhat shifts the balance from users of copyright to owners of copyright?

Mr Cordina—Insofar as the IP chapter as it applies to copyright goes, I think it would be fair to say that there was a focus on strengthening the rights of copyright owners. In terms of whether there is any shifting of the balance, the government is constantly reviewing that, and there are already processes under way in terms of examining the issue of fair use and looking at possible new exceptions, and also there is a digital agenda review. From the portfolio's perspective, we think that it is important that an appropriate balance is maintained. But, having said that, we have also signed up to these new obligations and we need to have regard to them. In terms of where the actual balance should lie, I think it is up to the Attorney-General's Department to provide you with an overall response. I can only provide you one from my portfolio.

CHAIRMAN—The portfolio submission states that, to the greatest extent possible, the exception should be drafted in a way that avoids constraining the way services can be delivered in the evolving online environment. You also note the importance of balancing the consideration of specific rights and exceptions with wide obligations for innovation. Would you like to elaborate on those points?

Mr Cordina—There is obviously a need for TPMs in the online environment to protect copyright material, particularly when new business models are evolving and copyright material is being disseminated online. At the same time, there is a need to ensure that competition and innovation can continue. A good example of that is allowing for interoperability between various new types of products. I understand that in some instances there is a need to circumvent a TPM to decompile, say, computer software to find what its interface specifications are to allow another product to then talk to that original piece of computer software. So there is an interoperability issue.

At the same time, there is a research issue where in the online environment new technologies provide powerful new research tools, such as e-research models, where you now have high bandwidth, increased computing power and large databases. This enables collaborative research projects where you get lots of people sharing information on these systems. Although IP obviously needs to be protected, we would not want to see IP inhibiting the way such projects work. You could still have a fair exchange of information. That in itself helps to create new IP products. One of the comments we would like to make from the portfolio's perspective is that the creation of new IP depends on reasonable access. In a way, it is a circular process. You need to protect new IP but at the same time, for further development to take place, you need to have that IP available to those developers so they can make the next generation of product.

CHAIRMAN—You mentioned that your department does not have responsibility per se for the free trade agreement. Presumably you and other departments would have been consulted about the aspects of the free trade agreement that impact on your portfolio operation.

Mr Cordina—At the time of the free trade agreement we shared copyright responsibility. We were working with AG's jointly in the whole negotiation and implementation process.

Mr TOLLNER—You talk about the importance of implementing exemptions in a way that is technologically neutral. That reflects a balance between the rights of creators and the interests of users. Can you elaborate on what you mean by 'technologically neutral' and what factors you think should be taken into account in creating a technologically neutral exemption?

Mr Cordina—I think the main thing we are referring to here when we talk about technology neutrality is that, because technology moves so quickly, if you have the exceptions crafted in very specific terms they become obsolete quickly. To the extent possible, obviously, if there is a broader approach in terms of how that exception is drafted, it runs less of a risk. Having said that, technology is always going to move very quickly and new uses will arise. So the exception probably will end up needing amendment but not to the same degree as if you had a very technology specific exception.

Mrs HULL—Thank you for appearing before us this morning. In your submission, you talk about the general principles. Under 'General principles', at item 5(b), you say:

> ... the anti-circumvention framework should be directed at preventing copyright infringement, rather than controlling access to copyright material.

Can I get from you your understanding and definition of the TPM and a circumvention device? I think there has been some concern about the lack of understanding of the definition—that is, the

broader issue and the lack of definition of what counts as a TPM and a circumvention device. Do you have a view on that?

Mr Cordina—Firstly, in relation to the statement in the principles, DCITA understands that the aim of the TPM framework is in the context of providing adequate legal protection and effective legal remedies against the circumvention of TPMs that owners use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their copyright material. From a portfolio perspective, a better regulatory environment is created for innovation and reasonable access if the focus of the legislation is on preventing copyright infringement rather than simply on controlling access. This of course has to be done having regard to the IP chapter of the AUSFTA. We are obliged to follow the wording of that, including the definition of 'effective technological protection measure'. In terms of how that definition operates and how it should be implemented, that really is probably more for Attorney-General's and perhaps the Department of Foreign Affairs and Trade to provide comment.

Mrs HULL—I do understand that and I understand it is not within that term of reference, but I wondered whether you had any views on that. We can take that definition in the narrowest terms, in the most restrictive terms, or we can look at the definition in expansive terms. Do you have a view on how defining that might be or how restrictive in enhancing that restrictive capacity in order that we can deliver to, say, libraries, universities and other places the unfettered use of communications and information resources? These places are paying their fees and are really not looking at abusing the copyright potential. How do we actually achieve this? Do you have a view on how we achieve the ability to have unfettered use for those principal institutions who really do provide an enormous information resource?

Mr Cordina—Sure. From a portfolio perspective, we would think that innovation and reasonable access is better facilitated if the focus of the protection is against copyright infringement, rather than simply controlling access. Again, that has to be done by looking at the actual definition. You would have to see whether that is possible after examining the way effective technological protection measures are defined. To supplement that, obviously we would be looking for a range of exceptions to the TPM provisions so that national institutions, libraries, archives and public broadcasters could continue their legislatively mandated activities and so that libraries and archives could continue to preserve material to develop a national collection and have that accessible to users where copyright obviously is not infringed. The public broadcasters would also need to be able to do that. For instance, SBS have noted that in some instances they need to get around regional coding when they get DVDs from overseas, in order to undertake their mandated role of delivering a multicultural broadcasting service.

Mrs HULL—That leads me to the second question, which is on the regional coding that you just mentioned. We have heard from many organisations and people—some with games and some from other areas, such as Austar and others—that basically regional coding is essential to enable them to protect their material. In your view, is regional coding the technology that controls access to a DVD for market purposes or a technology necessary for the protection of copyright? How do you see that process? The question is: is regional coding a technology that would control access to a DVD for market purposes or a technology necessary for the protection of copyright?

Mr Cordina—From a portfolio perspective, we would say that you would have to carefully look at the definition of 'technological protection measure' to see whether or not that would cover regional coding. It does make a reference to controlling access, which seems to be quite a broad reference. Again, how that is implemented and interpreted is a matter for the Attorney-General's Department. From the DCITA perspective, if it is interpreted as being a technological protection measure, obviously we would think that it would be necessary to have exceptions to regional coding as a technological protection measure in certain instances to allow public broadcasters to undertake their activities. I am not trying in any way to not answer your question.

Mrs HULL—I know. It is very hard from department to department. If in a perfect world you could recommend to this committee how we might approach this with the AG's office, what would you be saying?

Mr Cordina—From a portfolio perspective, we would see more of a focus on TPMs which are used directly to prevent copyright infringement rather than as access controls. But there is, obviously, the definition which you need to implement.

CHAIRMAN—Is that your personal view as well as the departmental perspective?

Mr Cordina—It is the departmental perspective in that it is presented in the submission. I point to paragraph 5(b), where we talk about the general principle. We say:

... the anti-circumvention framework should be directed at preventing copyright infringement, rather than controlling access to copyright material.

Mrs HULL—It might appear that it is not within our terms of reference to go there, but we can always make recommendations outside of the terms of reference. It is important to be able to ensure that people or organisations can continue with the access that is vitally important to us and to the general population of Australia. My concern with this whole thing is that there is a narrow interpretation of what the act means, rather than a more broad and expansive interpretation. I guess I am trying to draw from you how we might approach this as a committee.

Mr Cordina—I suppose the most I can say is that, if regional coding is protected as a technological protection measure, from the portfolio perspective it would be important that there be appropriate exceptions to allow circumvention of that regional coding to allow various legislatively mandated activities to continue.

Mrs HULL—You do not have to have this now, but would you be able to provide us with a list of those area in which you think we should have exemptions?

Mr Cordina—I can certainly point you to the SBS and ABC submissions. They provide quite a detailed description of the types of activities they undertake which involve regional coding, and they actually propose a set of possible exceptions to allow that to continue. It is probably better if the portfolio agencies themselves directly provide you with that information. They have the working practical background.

Mrs HULL—So you have obviously looked at their submissions?

Mr Cordina—Yes.

Mrs HULL—And you would agree with the exceptions that they are proposing, in a broad sense?

Mr Cordina—Yes, in a broad sense and as far as can be done consistently with the obligations of the AUSFTA. But we certainly support their wish to continue to have access for the government funded and mandated activities which they undertake, and we support exceptions to allow those to continue.

Mrs HULL—Thank you.

CHAIRMAN—Thank you very much for appearing before the committee today. A draft of your evidence will be sent to you. Could you check it and get it back to the secretariat. If you do think of something else you would like us to know, feel free to communicate with us. We would be happy to receive it.

[10.49 am]

WALADAN, Miss Sarah Davina, Executive Officer, Australian Digital Alliance; and Copyright Adviser, Australian Libraries Copyright Committee

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, I wish to advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Your submission has been received and authorised for publication. I was wondering if you could give us a brief opening statement of five minutes or thereabouts. Then we will proceed to questions.

Miss Waladan—Thank you for inviting the ADA and ALCC to participate in this public hearing. Both the ADA and ALCC, as you know, have provided detailed written submissions, so I will just provide a short statement, basically to support those written submissions. It is the view of both the Australian Digital Alliance and the Australian Libraries Copyright Committee that in relation to both the legislation banning circumvention of technological protection measures and the exceptions to that legislation a position should be adopted which facilitates a good policy outcome—in other words, a position which protects copyright by protecting both owner and user rights.

A narrow technical approach to interpretation of the free trade agreement in this instance risks a bad policy outcome. A very specific, narrow and technical set of exceptions in place of the current broad based exceptions for libraries and educational and cultural institutions would fail to meet the needs of such institutions. It would lead to a situation where new technologies will increasingly be used to lock up works, whether or not in pursuance of copyright rights, and where exceptions will not be able to effectively balance the interests of owners and users to copyright material.

Inadequate exceptions would also fail creators of works in many instances. One example that I would like to provide the committee with is where creators have chosen to license their works—for example, pursuant to creative commons licence, where the intention is—

CHAIRMAN—Sorry, creative what?

Miss Waladan—Creative commons licence—so, for example, where the intention of the creator is to share that work and not to lock it up. Depending on the particular licence which a work is subjected to, a technological protection measure might actually be in contrast with the actual intention of the creator. That is, I think, an important issue to consider also.

Essentially, for these reasons and for the reasons described in more detail in the written submissions that we have provided to the committee, the ADA and ALCC would support retention of the current broad set of exceptions in their entirety. The ADA and ALCC would also support consideration of what additional exceptions are required, given the more stringent laws that Australia is now required to adopt under the free trade agreement, to ensure that technological protection measures are not misused to facilitate, for example, anticompetitive

conduct and also to ensure that enjoyment of personal property is not encroached upon. Furthermore, the ADA and ALCC would submit that it is important to also consider how such exceptions and the broader technological protection measure provisions would work alongside the fair dealing provisions of the Copyright Act. The ADA and ALCC basically would support an approach that would not render those exceptions completely ineffective.

CHAIRMAN—Are you of the view, generally speaking, that the free trade agreement shifts the balance of copyright regulation in the direction of copyright owners and away from copyright users?

Miss Waladan—Yes, generally speaking that is correct.

CHAIRMAN—While you said that you have a wish list of a couple of extra items, largely the organisations that you represent would be happy with the status quo.

Miss Waladan—Yes. The current exceptions serve libraries and educational and cultural institutions very well at the moment.

Ms ROXON—I am particularly interested in your evidence because we do not have a large range of submissions from user groups. I know you have slightly different hats on. The institutions are obviously confident that, if the existing exceptions remain, their institutional protection will be adequate for what they want to do. In terms of an ordinary consumer who is not one of those institutions, could you just talk me through what the position of particularly the Digital Alliance would be? I am trying to understand whether you think that consumers get the protection via these public institutions having an exception or whether you think we need to pay some extra attention to the circumstances of consumers and individual users.

Miss Waladan—I think that, while the current exceptions serve institutions well, additional need does have to be paid to exceptions for consumers. There are two main reasons that I can think of. Firstly, there is enjoyment of personal property, as was touched upon in the Sony and Stevens case recently in the decision that was handed down by the High Court. I think there is a risk, if there is no exception or if the law does not provide for it, that if a technological protection measure is placed on personal property and it is illegal to circumvent that protection measure then that necessarily restricts what someone can do with that property that they have legitimately purchased.

Ms ROXON—Do you have some suggestion in that area at all?

Miss Waladan—Do you mean what sort of exception?

Ms ROXON—Yes.

Miss Waladan—I would probably need to think about that in a bit more detail. Broadly speaking, it would be an exception to deal with legitimately acquired personal property. I would be happy to answer more questions, if you have any, about how to draft that type of exception.

Ms ROXON—I am not trying to put you on the spot. If it is something that you want to provide to us afterwards, that is fine.

Miss Waladan—I would be happy to.

Ms ROXON—I am interested because we have had submissions and evidence from a lot of industry groups, institutions and people who are major stakeholders, and it is important for us to hear from them, but we have not had a lot of groups that might speak on behalf of individual consumers. It would be helpful for us if you could give some more thought to those areas. I was conscious that your submission is very clear on the institutions that are represented. I understand that they provide a critical access point for a lot of consumers. But is there a separate issue that we should be thinking about? If you would not mind taking that on notice, that would be good.

Miss Waladan—Yes, sure. So, more specifically, how such an exception would be introduced?

Ms ROXON—Yes, or what you would argue for when you say 'something that protects people if they have legitimately acquired it'. Of course the one example so far that we have had a lot of debate about is the DVD region coding. There might be others, of course. Would that be the main area that you would be thinking of?

Miss Waladan—Yes, definitely. Another one I can think of is if a consumer has purchased the right to enter a particular database but has lost a password. I suppose that applies to institutions as well. Should they be required to pay for that password again or should they be able to circumvent the technological prevention measure because they have already purchased that right?

Ms ROXON—Those sorts of things are not covered in the licensing arrangements when they first buy it?

Miss Waladan—They may be, but they may not be. It probably depends on the particular licence.

Ms ROXON—I am not sure about other committee members, but from my perspective it would be very helpful to have a bit of thought on that from you. At the end of the day we are trying to balance what impact this quite technical area has on individual people as well as institutions. I think that would be useful. Others might not. I do not want to send you off on a project that takes a lot of time if it is not of direct interest to the others.

CHAIRMAN—I think that would be of interest.

Miss Waladan—Sure. There was just one more point that I would make on consumers, and that is in relation to the fair dealing rights, which are particularly important for users and consumers in accessing a limited amount of copyright material—for example, being able to copy 10 per cent of a chapter of a book. That is another example. The Phillips Fox report in relation to the digital agenda actually recommended that fair dealing be included as an exception to the ban on circumvention of technological protection measures. The ADA and ALCC would submit that that is a matter for consideration also in terms of consumers and individuals.

Mrs HULL—In the third paragraph on page 9 of your submission you state that the FTA TPM scheme:

... should be construed as intending to protect access to copyrighted works which have been intentionally access protected by the rights holders of those works .... **and** to which the—

public interest—

exceptions do not apply.

Can you elaborate on why it is important that the scheme should only apply to materials that have been intentionally access protected? In your view, would it be within the terms of the FTA to restrict the operation of the scheme in this way? I can give you the second question in a moment. No. 1 was: why is it important that the scheme only apply to the materials that have been intentionally access protected?

Miss Waladan—That partly relates to the example I was providing earlier where an author of a work perhaps intends that their work be provided according to, for example, a creative commons licence or another type of licence where they do not want their work to be access protected in that manner. It would seem to raise other issues that would be inconsistent with the intention of the creator and perhaps raise issues in contract law as well. If it is against the intention of the creator then it really raises other contract law issues. I am not sure if that answers your question.

Mrs HULL—Would it be within the terms of the FTA to restrict the operation of the scheme in this way?

Miss Waladan—It would be our submission that it would be within the terms of the free trade agreement. The free trade agreement—I do not have the exact wording in front of me at the moment—specifically refers to the protection of copyright. Also, the free trade agreement stems back to the inception of the WIPO Copyright Treaty and various other treaties before that to protect copyright. That seems to be the inherent intention of the free trade agreement wording and also the intention behind the US introducing that legislation to their system in the first place. To broaden that would seem to be introducing requirements in Australian legislation that are over and above those that are required by the free trade agreement and also over and above those that the US legal system has interpreted those requirements to mean in their own case law.

Mrs HULL—Moving on, in your submission on page 12 at paragraph 2.8, 'Effects of harsher penalties', you state that under the FTA provisions harsher penalties will apply to dealings in circumvention devices as well as to the use of circumvention devices. In what way do you consider that the harsher penalties will apply to dealings in circumvention devices? I found it most interesting, actually, that you see that harsher penalties will actually come into play.

Miss Waladan—Yes. First of all, there will be penalties in place for the use of circumvention devices. At the moment, use is not actually prohibited by the act. In that way it will be a major shift in the law, because use itself will be prohibited, whereas previously it was only dealings. Penalties will be attached to use as well as to dealings with circumvention devices. In addition to that, I think the free trade agreement provides for the particular types of penalties required. Again, I have not got the specific wording in front of me.

Mrs HULL—Could you come back to me on that? You say in the joint submission—although perhaps not you, specifically; I am not sure whether or not you wrote the submission—

Miss Waladan—Yes, I did.

Mrs HULL—It is interesting that you say:

Whilst the AUSFTA makes clear that exceptions for certain entities (including libraries and educational institutions) may be made, for the average consumer, this will be a major shift in the law putting them at greater risk, not only of breach of the Copyright Act, for acts quite unrelated to the bundle of rights provided by copyright itself, but also of the harsher penalties that the AUSFTA agreement requires.

Miss Waladan—Yes. For example, if the definition of TPM prohibits not only the circumvention of TPMs that protect copyright but also circumvention of TPMs that protect access to a copyrighted work, that is a broader set of circumstances in which it is illegal to circumvent a technological protection measure. Say, in those circumstances, consumers use particular software to get around a particular computer program. There could be myriad circumstances, and it might be of use to the committee if I were to provide examples of those kinds of circumstances on notice.

Mrs HULL—Yes, that would be really good. That is the sort of thing. I am just trying to work out: what would be the circumstances?

Miss Waladan—Where consumers would find themselves accidentally breaching?

Mrs HULL—Yes, so that I have a better understanding. We have heard from various companies how their particular software is pirated—the whole process of that—and it would be interesting to understand under what circumstances general consumers would find themselves in breach of this and open to significant penalties and fines.

CHAIRMAN—If you could let us have that, that would be good.

Miss Waladan—That would be no problem. I envisage there would be many circumstances, so I will provide those on notice.

Mrs HULL—Thank you.

Mr MELHAM—On page 15 of your submission you note the importance of implementing exceptions in a way that is technologically neutral and that reflects a balance between the rights of creators and the interests of users. I think I am paraphrasing that correctly. Can you elaborate on what you mean by 'technologically neutral' provisions and what factors should be taken into account in creating a technologically neutral exception?

Miss Waladan—The exceptions that are in the Copyright Act at the moment were drafted at a time when technologies were quite different to what they are today. The technology at the moment means that it is quite easy, via technological protection measures, to get around the exceptions to copyright infringement. At the same time, I understand that it is easier to engage in piracy and that sort of thing as well. But copyright owners are quite easily able to put

technological protection measures on works so that the fair dealing provisions of the Copyright Act are not able to be accessed. By the term 'technologically neutral', I envisage an exception that allows consumers to effectively access exceptions in the digital environment in circumstances where technological protection measures will increasingly be used.

Ms ROXON—So if you are allowed to photocopy five pages of a book you should be able to use any device to obtain those five pages of the online version?

Miss Waladan—Potentially. I recognise that there are certain risks, depending on how an exception is drafted, but, essentially, yes. It begs the question: what is the purpose of having those fair dealing exceptions in the act if we move to a stage where technological protection measures are widely used and information is just not accessible according to the fair dealing provisions? A related issue is public domain works and, if public domain works are protected by technological protection measures, whether users should be able to circumvent technological protection measures to access those. My understanding is, and again I could try to find practical examples if that is useful, that publishers often group together different types of work to sell as bundles. Some of those works might be public domain works and other works might be copyright protected works. The question becomes: if that public domain work is not easily accessible via other means then should the user be able to circumvent any TPM that is provided on the bundle to actually access that public domain work?

Ms ROXON—What does a user currently do, taking away the technological changes, for a public domain work that is out of print and only held in one library? What is the real-life access that people have to public domain material if it is very rare, unusual or not in high demand?

Miss Waladan—I guess it differs. It is sort of changing as well. At the moment probably largely they would be hard copy works, as opposed to digital works, but increasingly they will be digital works. At the moment there are broad based library exceptions. In terms of digital works, there is no problem for libraries to circumvent TPMs. Depending on what the exceptions will look like in the future, there may be an issue there. Something I indirectly raised in the submissions was that, if very technical US style exceptions are introduced, I get the impression that libraries and other institutions—and also consumers—will struggle to understand what these exceptions are actually allowing them to do. The way they have been drafted in the US is quite technical and confusing. That is another issue that, in interpreting those exceptions, might put people off accessing or trying to circumvent anything in fear of being subject to penalties that apply.

Mr MELHAM—In your summary you say at page 3:

... Australia **is not required** to follow the US example of crafting narrow exceptions which are limited in functionality and which risk becoming redundant in a short space of time.

You then go on, in the body of report at page 7, to indicate how Singapore has implemented the provisions of its TPMs as a result of its free trade agreement with the US but has basically taken a more domestic approach than the US approach. I just wanted to elaborate. Do you think if we take a US approach, in terms of your summary, that it is going to be limited in functionality?

Miss Waladan—I do. If we take a US approach, there are myriad issues that are covered in more detail in the submissions. For example, what is the definition of a dongle? What if a new type of technology that is called something else is introduced tomorrow? What use is that exception going to be then? Will we have to go and amend it? Additionally, I think I mentioned the example of an exception applying to a class of work called 'new media'. I showed that to someone in the new media field. I had a discussion with them whilst writing the submission. They said that there was an issue about what new media is. Is it time based? Is it something else? A lot of issues arise out of this very technical, specific approach. I think that will have two results. It will put people off using the exceptions when appropriate and, at the same time, people will probably also use it when it is inappropriate. It has both of those effects. They will not be able to be easily understood or easily implemented. Probably, if technology keeps developing the way it currently is, they will outdate quite quickly.

Mrs HULL—We have had two points of view put to this committee. Particularly, under article 17.4.7(e)(viii), which you do not have in front of you, we are basically being told that the review process specified under 17.4.7(e)(viii) will not necessitate review of permitted exceptions—and it has also been put to us that each review will require review of the exceptions. Do you have a view on what would be the precise nature of review process required under this article? Would it require a review or would it not require a review?

Miss Waladan—It was my understanding that a review would be required every four years under the terms of the agreement.

Mrs HULL—And what do you think it should be? Do you have any particular view contrary to this?

Miss Waladan—What should be reviewed on each occasion?

Mrs HULL—Yes.

Miss Waladan—I guess it depends on how specific or how narrow the exceptions will be as well. If they are very specific then probably everything should be reviewed, because some of them might have no further use. It probably does depend on how the exceptions are drafted, I think.

Mrs HULL—Do you think it should have a time frame for review? Is the proposed four years an adequate time frame or should it be done earlier?

Miss Waladan—If we end up with a set of exceptions as the US has, I think much more frequent review is probably required. But again I think it depends how technologically neutral and how specific or narrow the exceptions end up being as to how frequently they will need to be reviewed. On the US approach, I think four years would not be frequently enough.

Ms ROXON—But presumably—without wanting to put words in your mouth—if you are an institution that has had a longstanding exception, you do not want to have to argue for that every four years.

Miss Waladan—No. From an institutional perspective, it would be much better to have a broad exception that applies to that institution so an institution knows what they can and cannot do for the limited set of purposes for which they are set up and not outside of those purposes—which they would not do anyway—and then not have to go back and argue for them. I provided the example of the National Library of Australia. I appended that to my submission. That really indicates the large set of circumstances where institutions might need to circumvent technological protection measures. To go through that process every couple of years or so would be quite an administrative burden.

Mrs HULL—Would you be adverse to putting to us what your considerations for review would be and how you would see reviews working, particularly for putting in place an exception for libraries and other information-providing services, and how that could work and be an ongoing exception without having to go, as Ms Roxon put, to review every four years?

Miss Waladan—I could provide a more detailed view of that. I think I touched on it briefly in the submission.

Mrs HULL—Yes, just briefly. It would be interesting to get a bit of an understanding as to how you think a review period could work in the best interests of those people who have the exceptions and who would require that as a longstanding provision.

CHAIRMAN—If you could let us have that, that would be appreciated.

Miss Waladan—Yes, sure.

CHAIRMAN—On a procedural matter, it takes some time to get legislation amended through the parliament. What would be your preferred vehicle for announcing or registering exceptions? There would be a number of options. One would be amendment of the Copyright Act—but that could take forever, given the legislative program. There was a suggestion that it could be announced in the *Gazette*, but Ms Penfold from the parliament said that that is now not as accessible as it once was. She was of the view that, because of flexibility, it might be better to put them in regulations which could be amended more quickly than the act. Would that be your preferred way of dealing with them?

Miss Waladan—I think our favoured position would be broad based exceptions in the legislation. But if the committee favours narrow, specific exceptions then probably legislation would not be such a good idea given that, as you say, it takes quite a period of time to amend that.

Ms ROXON—I think one of the other witnesses made submissions that, especially if there were exceptions that were not technologically neutral, you might want to be able to quickly, in quite narrow circumstances, provide an exemption or not. There is the possibility that you could have parts of it in the act and another mechanism for those more restricted areas that might need a quick response via regulation or the *Gazette* or something else.

Miss Waladan—If there were a combination of broad and narrow exceptions, that might be a good approach. The question then might be how the review process would work.

Ms ROXON—My concern would be how the consumers that you represent, with one of your hats on, would know when the exemptions or exceptions were introduced. Maybe we kid ourselves that they know when we pass legislation as well. But this is about making sure people are aware if you change the law or change what attracts some sort of penalty.

CHAIRMAN—I imagine the various interest groups and representative bodies would disseminate that information.

Ms ROXON—Does ADA have a network that disseminates those sorts of things?

Miss Waladan—Yes, we have a monthly, sometimes bimonthly, publication that we send out to a wide network of members and others. There is no cost in joining up to that. It informs them about those sorts of things. I think the perception is that most users have an inkling about what is right and what is wrong. If they have bought something legitimately, they will have no qualms about accessing that in different ways—copying that to their iPod or whatever. But just ask consumers: 'Would you have the same approach if you didn't legitimately purchase that?' I think there was a survey done at some point; I will try to find that for the committee. I guess the logic behind that is that, where the law makes sense, consumers tend to just follow it. The ADA will certainly try to disseminate as much information as possible, but I guess it is where the law starts diverging from consumer activity that it starts to become an issue of how you are going to get that message across.

CHAIRMAN—Thank you very much. If you could let us have the additional information you have undertaken to give us as soon as possible, we would appreciate that.

Ms ROXON—I think we have given you more work than you have given us, unfortunately. I am sorry about that.

CHAIRMAN—You have some homework! Thank you for appearing before the committee. A draft of your evidence will be sent to you for checking. If you could correct it as required and send it back to the secretary, that would be appreciated. Thank you very much.

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

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

Committee adjourned at 11.25 am