COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Review of technological protection measures exceptions

MONDAY, 5 DECEMBER 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 5 December 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: Mrs Hull, Mr Melham, Ms Roxon, Mr Slipper, Mr Tollner and Mr Turnbull

Terms of reference for the inquiry:

To inquire into and report on:

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

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

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

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

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

WITNESSES

Committee met at 9.32 am

CHAIRMAN (Mr Slipper)—I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into the review of exceptions to the technological protection measures under the Australia-US Free Trade Agreement. The Attorney-General has asked the committee to determine whether exceptions other than those already identified in the free trade agreement should be included, ensuring that any recommended exceptions meet the criteria set out in the agreement. I stress that we are examining access TPMs only. In examining other exceptions that 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 today; I am sure that discussions will be informative.

[9.33 am]

HANDRECK, Ms Leanne Wendy, Acting Manager, Imaging Services, National Gallery of Australia

VOLKER, Ms Delma Joye, Chief Librarian, National Gallery of Australia

CHAIRMAN—I welcome representatives of the National Gallery of Australia. Although the committee does not require you to give evidence under oath, 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, which has been authorised for publication. I invite you to make a brief opening statement and, if necessary, we will proceed to questions.

Ms Handreck—Thank you, Mr Chairman and members of the committee, for the opportunity for Joye and I to speak before you this morning. We understand that it is the committee's task to consider whether any additional technological protection measure exceptions should be included in the new liability scheme required under the Australia-US Free Trade Agreement. The Gallery's submission sets out in detail the nature of and reasons for our request for exceptions under that scheme. By way of introduction, the National Gallery is the custodian of Australia's largest collection of Australian art. Its founding act charges it with collecting, protecting, preserving and providing access to this collection not only to all Australians but to the rest of the world. Amongst its strategic goals is to enhance visitors' enjoyment and understanding of the arts. The Gallery attempts to explore new and innovative ways in which it can fulfil this goal by giving access to additional support and research material that provides a greater level of understanding and context of the collection, both for the public and the Gallery's staff. An excerpt from the director, Ron Radford's, recent vision for the Gallery reads:

The Collection should be published electronically as well as in books and catalogues. The Gallery should aim to make all works in all collections available online in both images and texts.

… … …

The curators, and others, must be encouraged and given every opportunity to research the collections and related material, and publish the results.

… … …

We must ... fulfil the expectation that we should be the world's principal centre of scholarship in Australian art.

Recent statistics show that last financial year alone 2.6 million people visited the Gallery's web site, and we can only expect these numbers to increase once we provide more rich media on the web site.

Recently the Australian National Audit Office completed a report on safe and accessible national collections. One of the recommendations stated that cultural institutions should formulate long-term digitisation plans. In response to this, the Gallery has been developing a media migration and digitisation plan for the next 10 years. Without these exceptions, currently under review, this plan cannot be implemented successfully.

Ms Volker—I would just add that, although not a deposit library, the research library at the National Gallery holds the largest and most important library and artist archive collections on Australian art and artists as well as a rapidly developing collection on Asian and Pacific art and artists. These collections are in many formats: they are in print, audiovisual and digital. Documentation files hold ephemeral collections of over 37,000 Australian and New Zealand artists. The Gallery also provides research level reference services and interlibrary loans services to the nation. Libraries operate in an increasingly unpredictable environment as a result of rapid technology change and the obsolescence of hardware and software. A current example of hardware obsolescence, which affects our functions, is the demise of the slide projector and DAT players. This loss of access equipment makes the migration to new digital formats an imperative. The research library is concerned to see that the new legislation does not impede its services to users or prevent the preservation of and access to unique cultural materials.

CHAIRMAN—Would it be accurate to say that the Gallery would essentially like to preserve the status quo as much as is possible under the free trade agreement and that you are not asking for more—that you are happy with what you have?

Ms Volker—I think there are some areas that we would also like to address. I would like to discuss the impact of not allowing circumvention in the research library. This might include things such as digital files and regional coding of digital technologies.

Ms Handreck—We have a lot of material that is loaned to us by overseas institutions and private collections. To provide access to free viewing by the public we need to make a copy of that original, and there may be only one. To do that we may have to get access by circumventing a device—we cannot allow the original to be used on a loop all day, every day, for three months for the exhibition—so there are exceptions which I think are unique to galleries and institutions like ours. Libraries, museums and galleries are not the same as other government departments. We are unique in that sense that we perform a totally different function and have different access needs.

CHAIRMAN—Is the Gallery of the view that the balance between copyright owners and copyright users has been shifted a bit by the free trade agreement in favour of copyright owners?

Ms Handreck—The Gallery is here not only to get access to the information for the public but also to protect the artists' rights, so we are happy that the extension covers those people that were previously out of copyright or had limited rights. We support the extended copyright for their purposes.

Ms Volker—Some artists have either not put on any conditions or they would like to have their work accessed. In some ways this may not be possible, and I think it is very important that we have respect for the artist's intentions for access.

Mr MELHAM—I think it is in your submission, but I want you to elaborate. You were giving examples of having to use working copies. Are you saying that that is unique to the National Gallery of Australia?

Ms Handreck—Only in that we come into possession of a lot of private collection materials that are only 'one-offs'. In the interests of the loan agreements, we are under restrictions in that we are told to make working copies of some things. Others come in for example from a private source, an old lady who has no idea of technological issues. So we are dealing with a vast range of lenders and different restrictions. But, to be fair to them, we make a copy just to say that we will not accidentally destroy their original. So there are issues for which we are responsible to those parties.

Mr MELHAM—So that is something that you would like legislated?

Ms Handreck—Yes, if it has not already been given to us by the lender. We sometimes have to go to lengths to find the copyright owners—and, often, multiple copyright owners—of digital material. That can be quite expensive, and we do not have the budget to do that.

Mr MELHAM—I am interested in expanding on stuff, from your point of view, that is not currently covered under the Copyright Act so that we can consider your position fully when coming down with recommendations.

Ms Handreck—I would see the libraries and archives provisions as the logical place for it to be included if it were not seen to be of use outside of our institutions. That would be the place I would see this particular issue addressed.

Ms Volker—We seek copyright agreement on practically everything that we do. I will give you one example of where TPMs could affect our functions: the James Gleeson interviews with other well-known Australian artists. They were carried out in 1979 on the Gallery's behalf. There are 98 interviews on 130 audio tapes. It is unique and important cultural material. They were originally intended for internal use only in order to assist with documenting and cataloguing works in the NGA's collection but in late 1996 we sought copyright permission from James Gleeson to approve access for private study or research, with approval from the chief librarian. In 1997 we began seeking similar permission from individual artists interviewed or their estates. The process is continuing. Some artists wish that no restrictions be placed on access to their interviews. Copyright restricted assets and all other digitised assets should be available within the research library to ensure the creator's intentions for access are complied with.

I would say as well that the tapes are now degrading badly and need to be migrated to archival digital files, with derivatives such as CDs for access. We are working with sound preservation staff at the National Library of Australia to digitise these master tapes so we will have copies for both preservation and access as CDs. This may entail circumvention of protection mechanisms. An inability to circumvent copy protection mechanisms on these materials would mean that these works could not be preserved beyond the life of the original medium or the technology needed to replay it.

Mrs HULL—You say on page 2 of your submission, under (B) in the second paragraph, that there is an increasing interest in and pressure on the Gallery to find access. To what extent do the exceptions in the Copyright Act allow the NGA to provide this information?

Ms Handreck—There are restrictions in the access we allow in the research library, where it is really only staff, and I think we are able to get volunteers included in that kind of category. But it is really the public who want to see this information. If they cannot get here, we need to make it accessible somewhere else. That is what we mean by 'the pressure put on us'. Interlibrary loans is another area where it will become increasingly active, to get access to this material. It is the public access that we want to see available to us; it is more than just the staff and it is more than just our volunteers. We need an extension to that sort of access to be able to get access for them.

Mrs HULL—So is that how the TPMs currently affect your work: in your ability to meet your obligations? Is that basically the way you see the TPMs currently affecting your work?

Ms Volker—I think the complexity of the TPM provisions in the Australian free trade agreement as it relates to things like copy control mechanisms and access mechanisms, use and dealing, make it difficult to predict with any accuracy the effect that the TPMs could have on the Gallery and research library. As well, because of rapid technological changes, the effect of TPMs on the Gallery and the research library is not yet fully known. We can provide other examples of how it may affect the research library, but it is really based on our experience. It is difficult to say with certainty what exceptions are required. I think it is evident that technologies are becoming more capable of locking up works through encryption, passwords and the blocking of making a copy of the work. It is the blocking of making the copy, I think, that is essential.

Mrs HULL—I refer to your submission at page 2 on '(E) The activities of open source software developers'. Your submission outlines the Gallery's requirements in relation to the creation of interoperable products and the security testing of software. Do you consider that the exception in the Australian free trade agreement for interoperable software would not cover the activities you need to undertake in relation to interoperability?

Ms Handreck—I did not bring a copy; I am sorry.

Mrs HULL—That is okay. Basically, you are just discussing—do you want a copy?

Ms Handreck—No, I have a copy of our submission, but not the original. The Gallery's issue is that we may in the future—we are just beginning to delve into looking at ways in which we can create software that we do not have to buy off the shelf and that is not reliant on proprietary software and companies that might go belly up. So we are looking at ways in which we can create this ourselves, using in-house staff with the skills.

CHAIRMAN—Sorry; creating what in house?

Ms Handreck—For example, in our imaging department we have software that enables automatic work flows to process images. It is a sort of data base that is built to manage these work flows internally. We have been previously reliant on external providers for that. We would

like to look at ways in which we could maybe build a digital asset management system ourselves rather than have to spend a fortune on buying proprietary software.

Mr TURNBULL—This is slightly off the topic, but in my experience the most expensive way to develop software of that kind is to do it in house. You are generally much better off buying it off the shelf.

Ms Handreck—It does depend on the scale, I think. For the particular example I gave, it is a unique, small hub of staff. We have the skills available in house to do that, and it has already progressed to a point.

Ms Volker—Also, in the research library we do create databases. For example, there is the Australasian Art Obituaries Index. We have found that, if technical support for the database that we have created is no longer available, we probably will have to circumvent TPMs in order to access the material or to migrate it to new software, and indeed this is what has happened.

CHAIRMAN—Does the Gallery have any view on whether the Copyright Tribunal should be the appropriate body to undertake the review process or make recommendations regarding proposed exceptions during the review process? Or do you see the Copyright Tribunal as being too formal and legalistic? Maybe this matter should be considered directly by the Attorney-General's Department itself? Do you have a view on that?

Ms Volker—Having been in the Copyright Tribunal once, it was effective by that particular measure of copying visual artists' images out of books and making slides. That was then covered by licensing agreements with CAL. I think this is very far-ranging, and I would prefer to see it in the Attorney-General's Department.

Ms Handreck—Yes, we have a good working relationship. We have a local copyright and cultural institutions group which meets with and is debriefed by the Attorney-General's Department on issues like this. So we feel comfortable working with them on these sorts of matters. We feel they understand particular cultural institutions' needs a little bit better.

CHAIRMAN—Do you have a view on how the permitted exceptions should be implemented and whether it should be by regulation, through the government *Gazette* or through legislation from the parliament itself?

Ms Volker—This is coming out of legislation. It seems to me that it should be in legislation.

Ms Handreck—Yes, I think so, depending on the issue and the amount of—

Ms Volker—That is the Copyright Act.

Ms Handreck—Yes, I think so.

Ms Volker—And the digital agenda.

CHAIRMAN—Given that it takes an extraordinarily long period of time to amend legislation, would it not reduce flexibility and the ability to respond to a new need if you put it into the act?

Ms Handreck—Do you mean because it takes so long to get it into the legislation that there would be a period where it was a grey area?

CHAIRMAN—Yes, the act could take forever to amend.

Mrs HULL—We were talking about the review. It has been suggested to the committee that permitted exceptions should be implemented either by announcement in the government *Gazette* or by inclusion in regulations. What is your view on the most appropriate way to implement permitted exceptions? How do you currently get information and understanding?

Ms Handreck—Regarding changes?

Mrs HULL—Yes.

Ms Handreck—Through our local copyright and cultural institutions group, through liaison with other institutions and through updates in the *Gazette*.

Ms Volker—As well, there is the Australian Libraries Copyright Committee, the Australian Library and Information Association and the leadership of the National Library, in particular.

Mrs HULL—Do you think that the *Gazette* would the most appropriate way in which to have permitted exceptions announced?

Ms Handreck—Yes. That would acceptable.

Mrs HULL—The reason I ask is that I want to know how you know what you can do. How does everybody know what they are supposed to be doing? How do they know when they are allowed to circumvent, if they are encroaching or if they are doing something illegal? How do you know? Obviously, you have a setup now that determines how you find out what you are allowed to do—

Ms Volker—We refer to the Copyright Act and the digital agenda. We were part of that.

Ms Handreck—Yes. We always err on the side of caution. As it is such a new area for the Gallery and we are acquiring more and more digital art, it is becoming more of an issue for us. We have not done a great deal of work in this area yet but we always err on the side of caution. We seek advice from relevant institutions that have had similar projects and, if we are in doubt, we always get permission. Sometimes that means paying money that we may not need to but, to be on the safe side and to cover the Gallery and the artists, we make sure everyone is involved and we get the permissions.

Mrs HULL—So there is no effective, streamlined way of finding out exactly what you are and are not able to do?

Ms Handreck—The Copyright Act is the ultimate piece of legislation that tells us that, but it is about the interpretation. If the term 'administration' is not clearly defined, we can quite clearly presume that what we are doing is considered administration or preservation, but there may be instances with certain projects where it may not be clear. We always err on the side of caution and clear it anyway.

CHAIRMAN—Thank you very much for appearing before us this morning. If you think of anything else you would like us to take into consideration, feel free to get in touch and send the material to the secretariat.

Ms Handreck—Thank you.

[9.55 am]

CAMERON, Ms Jasmine, Assistant Director General, Executive and Coordination Support, National Library of Australia

LANGLEY, Ms Somaya Zoe, Digital Preservations Officer, National Library of Australia

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, these proceedings are proceedings of the parliament and there are legal sanctions if you do not tell the truth. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Your submission has been received and authorised for publication. Would one of you like to give us a brief opening statement, and we will then proceed to questions.

Ms Cameron—I will make a brief opening statement. The National Library has an interest in this review of technological protection measures, because we believe the outcome will have a direct bearing on our ability to preserve and provide access to Australia's documentary heritage in digital format, so it is quite important for us. Under the National Library Act 1960 we have a mandate to collect, preserve and provide access to a comprehensive collection of Australian documentary resources. For the past 10 years we have actively collected digital resources in both physical and online formats. By physical I mean carriers like CD-ROM and DVD; by online formats I mean things like web sites and electronic databases. We are building quite a significant digital collection. We undertake to preserve these and make them available under the terms of the Copyright Act. We are investing significant resources into research into the preservation of digital formats so that information on digital formats will be available in the future for researchers and, of course, the general public, once their current software or hardware platforms are obsolete.

We made quite an extensive appendix to our submission so that the committee could perhaps better understand the variety and complexity of the digital resources that the Library deals with on a daily basis. We gave some scenarios which show you the way in which we may be affected by use of technological protection measures. Under section 116A of the Copyright Act, the Library is currently able to use circumvention devices to access digital resources to provide access specifically under sections 49 and 50 of the Copyright Act, and in limited circumstances to preserve digital resources for future use under section 51A. Section 51A limits the Library to making preservation copies of works if they are damaged or deteriorated. Of course, this does not serve a purpose in the digital environment, where works are unusable not necessarily through damage or deterioration in a physical sense but through software and hardware obsolescence.

We welcome this review of exceptions, and we urge the committee to consider the benefits of a broad exception for digital works for the purposes of preservation and provision of access in accordance with the Copyright Act. We believe we have a credibly demonstrated need to use circumvention devices for the purposes of preservation and access.

CHAIRMAN—Thank you. Do I understand that what you are really seeking to do is to preserve as much as possible the status quo as existed prior to the free trade agreement being entered into?

Ms Cameron—I made a reference to section 116A of the Copyright Act, which limits our ability to use circumvention devices because it refers to damage and deterioration. I guess our preferred position is that we are able to use circumvention devices to open any digital resources that are locked by technological protection measures in order to preserve them. That would be for the purposes of avoiding software and hardware obsolescence. We are concerned about the idea of nominating classes of works because first of all it is not obvious to us what a class of work actually will be. If it is a very narrow definition then almost on a monthly basis there is a new class of work evolving. It would be very difficult to keep up with naming and having classes of works included in regulations or, as was mentioned earlier, gazettals or anything of that sort. So we are really keen to see a broad class of digital works as an exception.

Mrs HULL—Can you tell me how TPMs currently affect your ability to meet your statutory obligations? You note in your second paragraph of your covering letter that you must meet your statutory obligations. Do you have any problems with currently meeting them because of the TPMs?

Ms Cameron—We do not have a significant issue at the moment because they are not widely used. Therefore, most of the digital resources we require are not locked with technological protection measures at the current time. But I will ask Somaya to talk further on that.

Ms Langley—The Library is in a position at the moment where we are building our infrastructure to be able to preserve all of the files and materials in a backup server environment. So much of the work we are doing is actually assessing the collection and providing an environment where we can actually do it. We have done some tests and we have not come across a lot of items that do have technological protection measures. Some of the things we know we need to do are shifting of email .pst files—email inboxes—into an open format. So there are some email collections that are part of our manuscripts collection that have come in Microsoft Outlook format or a .pst format and they would need to be moved into an open standard—perhaps something like XML or whatever happens in the future. That is where we see, I guess, that a significant amount of our work would need to go. But we are still in the process of building that environment. So we are only halfway there with a lot of what we need to do.

Mrs HULL—You spoke a moment ago about classes of works and that you would want a broad definition—that any confined definition is going to make it difficult due to the amount of times that the class of work actually changes. You have noted that you hope this could be as simple as just digital works. That is in the covering letter in the third last paragraph. You say:

> The library suggests that a much broader definition be used to describe exceptions for libraries. This could be as simple as 'digital works'.

Is that just too broad, though? Does that defeat the purpose of a TPM just to have such a broad definition that perhaps could enable people to circumvent this all of the time?

Ms Cameron—In making the suggestion for the class of digital work, we were thinking that the exception would be used by cultural and collecting institutions. It would be an exception that related to institutions rather than individuals.

Mrs HULL—You have mentioned describing exceptions for a library, so to speak. So you are saying that you could nominate exceptions under libraries, galleries and cultural institutions?

Ms Cameron—Yes, exactly. We were not actually meaning that to apply to exceptions for individual or personal use.

Mr MELHAM—The committee has heard differing views on whether the region coding TPMs are basically a market strategy technology or whether they play a genuine part in copy protection. Does the National Library have a view on this?

Ms Cameron—I do, but I will ask Somaya to answer.

Ms Langley—We do not have particular examples or, if we do, the metadata is not stored in our library catalogue systems to pinpoint individual examples. However, again, if there is a scenario where you have an Australian artist who is living and publishing works overseas on a DVD, and this will be the same for the Gallery as well as for us and NFSA, we would really like that work. If they are producing significant Australian works, we would really like them in our collection. If that is published in an area where we cannot have access to play it or to provide that information to our readers or users, then we are not meeting our mandate of collecting really important works.

Mr TURNBULL—I would like you to turn your mind, if you could, to the possible exceptions under article 17.4.7(e)(v), (vii) and (viii). With regard to them, there is no corresponding exception to the prohibition in dealing in devices and provision of services for the circumvention of TPMs. I put it to you that this could lead to the situation where a party with an exception could not make use of it due to an inability to obtain a circumvention device or service. One solution that has been put to us is to allow third parties to circumvent TPMs on behalf of the party with the exception. Do you have any views on this situation and the proposed solution? When you answer that you might consider this additional question: when the National Library currently circumvents TPMs, is it had done by the Library directly or by somebody else, for example, a consultant, on behalf of the Library?

Ms Cameron—At the moment, the Library has had little experience of using circumvention devices to unlock TPMs, but we undertake the work ourselves and do not use third parties. We would not normally use a third party or want to.

Mr TURNBULL—Would it not make sense for a party that has the benefit of an exception to be able to engage a third party to affect the circumvention on its behalf?

Ms Cameron—I do not really have a strong opinion on it. In terms of our collection, we do not normally engage third parties to provide services which we would consider preservational or related services on the national collection. We do not let material out of the physical building, if it is a physical carrier like a CD-ROM or a DVD. But the Library does not have a lot of

experience in using circumvention devices, so perhaps if TPMs became very widespread in use it might make sense.

CHAIRMAN—Does your organisation believe that the free trade agreement has shifted the balance from the rights of copyright users in the direction of copyright owners?

Ms Cameron—The extension of the copyright period from 50 to 70 years has done that. We believe, as I think we mentioned in our submission, that it is really important that legislation does not further encroach on that balance. I think if institutions like the Library, the Gallery and the National Film and Sound Archive of Australia were not able to preserve, and provide access as well, to digital resources under the terms of the copyright act because of issues like TPMs, then I think the balance would be further altered.

CHAIRMAN—Can you outline how your obligations would be affected if you were unable to communicate material to other institutions, or copy it, as a result of the provisions of the agreement.

Ms Cameron—Yes. At the moment the Library is a net lender of Australian resources to other libraries, particularly to the university library sector but also very strongly to the public library sector. If we are not able to communicate material that is locked by TPMs, I think that will have an adverse effect on the supply of materials to libraries and, consequently, their use by researchers and the public.

CHAIRMAN—As there are no further questions, I thank you very much for calling in to see us this morning to give evidence. If you think of anything else that you would like us to consider, feel free to communicate that material as well.

We have a couple of formal elements of business. Is it the wish of the committee that we accept as a supplementary submission to the inquiry and authorise publication of the material provided by the Copyright Advisory Group (Ministerial Council on Education, Employment, Training and Youth Affairs)? There being no objection, it is so ordered.

Is it the wish of the committee that we accept as a supplementary submission to the inquiry and authorise publication of the material provided by the Business Software Association of Australia? There being no objection, it is so ordered.

Is it the wish of the committee that the South Australian government submission be accepted as a confidential submission? There being no objection, it is so ordered.

Is it the wish of the committee that we accept the following as exhibits: Copyright Advisory Group (Ministerial Council on Education, Employment, Training and Youth Affairs) document 40.1 supplementary to submission No. 40 and Business Software Association of Australia document 41.1 supplementary to submission No. 41? There being no objection, it is so ordered.

[10.15 am]

ARTHUR, Dr Evan, Group Manager, Innovation and Research Systems Group, Department of Education, Science and Training

BELL, Ms Margot, Director, Innovation and Research Systems Group, Department of Education, Science and Training

CRISP, Mr Philip, Special Counsel, Australian Government Solicitor

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, 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 the department's submission, which has been authorised for publication. I invite you to make a brief opening statement and then we will proceed to questions.

Dr Arthur—We hope that the submission is self-explanatory but it may be useful to highlight a few points. The key argument in the submission is twofold: first, it is in a policy sense desirable that certain exceptions to the prohibition on interference with technological protection measures be permitted; and, second, it is, within the terms of reference provided to the committee, possible for the committee to make recommendations for those exceptions. The two key arguments are set out in the submission. In my opening statement I will deal mainly with the first of them. Mr Crisp is available to provide technical commentary on the terms of reference and our contention that it is within those terms of reference permitted for the committee to recommend as we would seek to argue that it should recommend.

In broad terms, it is our contention that it would be desirable from an education perspective that certain exceptions be recommended by this committee and that it is in accordance with government policy, particularly government policy as announced when the legislation giving effect to the free trade agreement with the United States was debated in the parliament. On both those grounds it is desirable that certain exceptions be granted.

From an education perspective the key background is that educational systems around Australia at the moment are making major investments in the use of information and communications technology to facilitate the delivery of education and educational services around Australia. In order that those investments be well utilised it is important that there be certainty about their use and particularly certainty about the ability of educators within the Australian system to make the appropriate use of technology to disseminate intellectual products around schools, vocational education and training institutions and universities within Australia. It is our contention that if there is not that degree of certainty, and particularly if there is a degree of uncertainty amounting to the potential for criminal action against individuals in the system, then that will have, to use an American term, a major chilling effect on the use of technology appropriately to deliver education and improve education within Australia.

The key basis on which those actions currently occur is as provided for by the parliament. The parliament has recognised within the exercise of the legitimate rights of intellectual property owners that there are certain areas, particularly in education, where those rights need to be balanced against the rights of educators. Those are well known and set out in legislation but particularly and most important for our purposes within the statutory licences—part VA and VB—provided for in the current Copyright Act. The key element of the DEST submission and submissions from a number of other educational bodies made to the committee is that nothing should be done under the aegis of introducing appropriate technological protections which imperils those existing rights as provided for under legislation.

It is also our central contention that we need to understand the nature of the relationship between copyright owners and the education sector. This is a highly regulated relationship between, in large part, copyright collecting societies, such as the Copyright Agency Ltd, and education authorities. It is something which has a long history. There are a large number of individual elements to that, but it is a highly regulated relationship between institutional players. It is not a relationship which is in any way analogous to that which provokes much of the interest in technological protection measures where there is unregulated use of intellectual property by a very wide number of individual players where individual piracy, to use the term which is very much the concern of the intellectual property owners, is a widespread phenomenon. This is not the case in the education sector. There has never been evidence brought forward to the various agencies, particularly the Copyright Tribunal, that are interested in this area suggesting that there is any particular problem within the institutional use of intellectual property of wide-scale piracy. Therefore, the protection that is provided by legislation for intellectual property should, in our contention, take account of that basic factual situation.

In its submission to this inquiry, the Copyright Agency Ltd uses a particular analogy to justify its argument in favour of the quite restrictive interpretation of the potential for exemptions to the technological protection measures. It uses the analogy of a property with a boundary fence and a person seeking illegitimately to enter that boundary fence, in that case by cutting a wire. Analogies are always perilous if they do not take account of the full circumstances which you are trying to draw attention to. Perhaps it can be useful to produce a more accurate analogy to describe the real situation in the education sector. If you are in the United Kingdom and seeking to exercise property rights over a property that you have a full private title over but across which there is a traditional pathway known as a footpath, if you were to place an impenetrable barrier across that footpath denying the right of entry of all United Kingdom residents to transgress, you would be required to remove that barrier because you had inappropriately allowed your rights to interfere with someone else's rights. This is exactly the case we are dealing with at the moment only it is a much stronger case in that we are not dealing here, as we would be in that case, with a conflict between statutory rights of property and traditional rights of access; we are instead dealing with statutory rights throughout. The parliament has passed certain rights for users within the educational sector, particularly the statutory licences, and all that is being argued by DEST and by a range of other stakeholders is that the parliament should not arbitrarily infringe by a measure in one part of the statute rights which are granted in another part of the statute.

The argument with regard to the fact that this is understood by government and that there should be no such trammelling of existing rights in the execution of the free trade agreement was made clear by a number of players, but I will quote from the Deputy Prime Minister, the Hon.

Mark Vaile, in his second reading speech on the introduction of the US Free Trade Agreement Implementation Bill 2004 on 23 June 2004, in which he said:

> ... it is important to be clear that these amendments do not represent the wholesale adoption of the US intellectual property regime. We have not stepped back from best practice elements of Australia's copyright regime ...

We suggest that those remarks are entirely apposite to the current issues and that the educational provisions of the current Copyright Act, particularly the statutory licences, which have no parallel in the US, are in fact very good examples of best practice elements of the Australian copyright regime. Therefore, we submit that ensuring that those elements can continue to exist in an untrammelled way is entirely consistent with government policy, as articulated by the Deputy Prime Minister in his second reading contribution.

CHAIRMAN—Is there anything more in your opening statement?

Dr Arthur—I will briefly conclude that, in addition to arguing that on a policy basis there should be appropriate exemptions to the antiprotection measures, the technological protection measures, within the act, that in terms of the detailed reading of the terms of reference as set out in our submission it is entirely within the remit of the committee to make recommendations in accordance with our submission and the submissions of other educational players, which we submit will indeed preserve the best practice elements of the Australian copyright regime as it applies to education.

CHAIRMAN—Was your department consulted in the framing of the agreement? Did you have input?

Dr Arthur—We certainly did. We were engaged in conversation on a number of occasions with the negotiating team, mostly at the early stage. Certainly we set out our views on copyright elements and potential copyright elements of the free trade agreement.

CHAIRMAN—Broadly, I imagine you would like the exemptions that currently exist to continue to be available as much as possible.

Dr Arthur—Certainly we would like to see the exemptions which currently exist in relation to dealing in technological protection measures, with appropriate alterations for the case, mirrored in terms of the new prohibitions on use of such measures.

CHAIRMAN—Some people have expressed the view that the free trade agreement somewhat shifted the balance in favour of copyright owners and away from copyright users. Is that the view of the department, or your own personal view?

Dr Arthur—It is certainly our view that it has the potential to do that. If the enabling legislation is not carefully drafted, we would certainly agree it has the potential to do that.

CHAIRMAN—And that is why it is important for this committee to get its report right.

Dr Arthur—That is exactly our view.

CHAIRMAN—How would the implementation of the agreement, the TPM scheme, impact on the government's achievement of outcomes outlined on page 6, paragraph 11 of your submission?

Dr Arthur—It would impact in that a number of activities which are envisaged in the current education provisions of the Copyright Act—most particularly, the statutory licences—would potentially be directly impacted by technological protection measures. Specifically, as we understand it, copyright owners and their representatives propose to implement technological protection measures in much the same way as they have currently implemented them—that is, in an undiscriminating sense. Measures are put in place that prevent the doing of certain things, and it does not matter who you are as a person who is trying to access a product, the measures do not in any way take cognisance of who you are or the purposes for which you are trying to use the material. Therefore, all uses of material, if they are caught by the protection measure, will be undoable. So an act of a school, for example, to attempt to copy a piece of electronic material or to make that piece of electronic material available, in execution of the statutory licence, which act would be remunerable under the normal provisions of the statutory licence, will simply be undoable. You will not be able to do it, because it will be subject to a blanket protection in the software.

CHAIRMAN—Do you have a view about the need for a circumvention exception for interoperability between computer programs and data?

Dr Arthur—I am not sure that I fully understand the question.

CHAIRMAN—In your submission, you list agencies such as CSIRO and—I hate acronyms—ANSTO and the researchers in the higher education sector as being amongst the stakeholders. Presumably these stakeholders will have an interest in TPMs that could prevent access to databases by researchers?

Dr Arthur—Yes, that certainly is true. If there are protection measures which go to preventing access to raw data and, for example, some of that data has been developed by public funds and because it happens to have gone through a particular publication mechanism and that publisher then places a blanket technological protection measure on it, then potentially it could be a problem. There could be a conflict between a public policy objective, which is entirely legitimate while protecting the rights of copyright owners, but also, in this case, a policy interest in the public availability of data funded by public funds.

Mrs HULL—I would like to congratulate you on your most comprehensive submission. It is absolutely fabulous. If we did not understand what it was all about prior to reading your submission we can certainly understand it now. Thank you for that and for the time and effort you have put into this.

Dr Arthur—With your indulgence, can I say that Mr Crisp should have the credit for the intellectual clarity.

Mrs HULL—Thank you, Mr Crisp. It is absolutely fabulous.

Mr Crisp—Thank you.

Mrs HULL—The previous witnesses spoke specifically about the need to have a generous form of class of works or a non-prescriptive form of class of works. On page 27 of your submission at paragraph 112, under the heading 'Particular class criterion', you go into that area as well, saying:

The relevant class of works will vary according to the particular provision involved ...

How would you prefer to have 'class of works' described to enable access to be as expansive as you require, as you have indicated throughout your submission. Would you thinks that their particular form of wording, being just 'digital works', would cover it, or should there be a specific mention of the class of works?

Dr Arthur—I will let Mr Crisp answer in detail. My comment would be that we think it would need to be expansive but not so expansive as to be challengeable as being beyond the wording of the treaty. We have actually recommended to the committee, particularly in the executive summary, some wording. I will turn to Mr Crisp to speak to that wording.

Mr Crisp—The paragraph reference that you gave was 112. In fact, the comprehensive discussion is earlier, beginning at paragraph 86, and it is briefly reprised at paragraph 112. So I refer you to paragraphs 86 to 92. We have not sought to make the proposition that the term 'class of works' should be so broad as to extend to every class of subject matter that is covered under the Copyright Act. But, short of that, any formulation or predication of classes of subject matter by reference to the category they fit into in the Copyright Act in terms of literary, dramatic, musical, artistic and so on, or by reference to other attributes of the way that the work is formatted, the medium on which it is stored, the way in which it is delivered to the consumer or, indeed, the fact that it is subject to a particular category of a technological protection measure is itself a characteristic that might serve to delineate the class of works. Anything that is referable to the work or its attributes might count as part of the predication. We have not sought to go so far as to say that the attributes of the user would form part of the delineation, although some submissions have.

Dr Arthur—If it would be of assistance to the committee we would happy to make a supplementary submission setting out briefly our submission as to what would be a recommendation on this particular matter.

Mrs HULL—I would be very keen to have that. The previous witnesses said that they change so regularly, they might change every month, that to have a prescriptive form of wording for class of works would be significantly difficult for them. They were seeking to have something as simple as 'digital works'. When I look at your paragraph 86, under the heading 'The "particular class" criterion', I can see you are being relatively specific. I am just asking if you might look at that and look at the issue raised by the Library. That was a considerable concern of the witnesses from the Library about the class of works. If you could look at that and come back to us on it that would be tremendous. In addition, we have heard that without a suitable TPM exception educational institutions will run the risk of not complying with disability standards for educational institutions. Do you have a view on that issue?

Dr Arthur—I would agree with that comment. In all cases at the moment, technological protection measures are deployed which do not discriminate at all about the user. Therefore, by

definition, if you are a disabled reader who requires, for example, the format to be changed or the protections around the software to be removed so that a device which at the moment only allows the thing to be printed can be transferred to a device which will read that aloud, then at the moment, without the appropriate exceptions, that would be potentially an infringing act. To go back to a comment I made at the beginning, this has potentially a very chilling effect in that education institutions will simply not deploy software which could be of benefit for fear that they will not be able to use it or, if they do use it, they will run the risk of sanctions.

Mrs HULL—In addition, the committee has heard that the review process specified under article 17.4.7(e)(viii) will not necessitate review of permitted exceptions, but it has also been stated that each review will indeed require review of exceptions. Does DEST have a view on this and on what the precise nature of the review process required under article 17.4.7(e)(viii) should be?

Mr Crisp—What is required is that an exception that is put into the legislation will be reviewed at least within a period of four years, but not that it have a built-in expiry date. Does that clarify it?

Mrs HULL—Yes.

Mr Crisp—That is our view on what is required.

Mr TURNBULL—Other submitters have identified the Copyright Tribunal as being the appropriate body to either undertake the review process or make recommendations to the Attorney-General regarding proposed exceptions during that review process. What are the views of your department on that?

Dr Arthur—Our view, as set out in the submission, is that we would not regard that as being an appropriate vehicle, certainly not for the kinds of exceptions that we are looking at. What we are addressing in the submission and in discussion today is very much broad policy issues, that the parliament has enacted certain rights and privileges for education and we think that it is appropriate for the parliament to make sure the way that the full suite of legislation is enacted preserves those rights. We think that is a matter which is appropriately the parliament's matter. When you come down to the way in which those exceptions as provided in legislation were being executed, where you have cases where there is an argument as to whether a particular act does or does not fall within the definition of an exception, then that is obviously the kind of matter which is appropriate for bodies such as a tribunal to rule on. But we do not see it as being appropriate that a body which is a tribunal is appropriate to be dealing with policy matters such as whether or not a particular part of legislation is consistent with another part of legislation.

Mr TURNBULL—Okay; thank you. It has also been suggested to us that permitted exceptions should be implemented either by announcement in the government *Gazette* or inclusion in regulations. What is your department's view on the most appropriate way to implement these permitted exceptions?

Dr Arthur—Our overriding concern is that there should be clarity. Users within the education sector, which in this case will include a very large number of classroom teachers, need clarity as to what is or is not permitted. That is essential. Our preference would be that that clarity is

provided in the primary legislation. I will defer to Mr Crisp on that. But, as a policy comment, if it can be provided with sufficient assurances by subsidiary mechanisms within legislation then I guess we need to examine the particular proposition to satisfy ourselves that there is the necessary clarity for the actual practitioner in education to be certain. Mr Crisp may make some additional comments.

Mr Crisp—I did actually want to supplement that and make a point that I think goes to the nature of this committee's role in the current inquiry.

Mr TURNBULL—This committee being this committee today?

Mr Crisp—Yes, indeed. We note that a number of the copyright owner interests have made submissions arguing that the committee should follow the example of the US Copyright Office in its rule making under the DMCA. We think that is quite wrong. We think the nature of this inquiry is different to the rule making under the US DMCA, which is essentially a regulatory process. Indeed, the US Copyright Office on a number of occasions rejected claims for certain exemptions on the basis that the arguments for them were more appropriately directed to the legislator rather than the regulator. But we do not think this is what the current committee is about. Associated with that, we say that the appropriate form to implement or give effect to recommended exemptions would be in legislation. That seems to be the view of the Attorney-General's Department in its submission, incidentally, that it should be implemented in the Copyright Act. I think we would say it should probably be implemented in either the Copyright Act or in regulations.

Mrs HULL—On page 19 of your submission under the heading 'Primary (non infringing) activities' 71(f) reads 'activities conducted in relation to regional coding of digital technologies'. Further down at 73 it says:

> It should be noted that the exemptions are *current* exemptions. They may be affected by the outcomes of the Digital Agenda Review and the current AGD Review of Fair Dealing Exceptions.

Could you expand on that review and who is undertaking that review?

Dr Arthur—Yes. The review is being undertaken by the Attorney-General's Department, if I am not mistaken. It is looking particularly at issues such as time shifting and format shifting and dealing with private uses in relation to that. I will leave others to answer in more detail. The point we make in our submission is that, were it to be the case that, for example, following the introduction of legislation it was agreed that an exemption should be provided hypothetically for a classroom teacher to format-shift a piece of software from one medium to another medium for educational purposes but that was restricted just for educational purposes, if a manufacturer had placed a blanket technological protection measure on that piece of software it would in fact be impossible to execute that hypothetical right without infringing on the anti-tampering measures. That is the burden of that argument. We do not make a principle of it because obviously it is hypothetical at this stage. Our principal concern is obviously what is currently in existence and wishing to preserve what is currently in existence.

Mrs HULL—Of course, we have had providers of games and a whole host of activities who have looked for regional coding and have presented to us about regional coding. On page 25 you

talk about exceptions under article 17.4.7(e)(viii) of the Australia-US Free Trade Agreement. You recommend a number of exceptions under the catchall provision, and you talk about circumvention for permitted purposes et cetera. You talk about circumvention of region coding ACM. How do you put in place something that can be of protection value against lost revenue of, say, the digital industry with respect to music, CDs, games and a whole host of things where you have piracy that is taking place in other countries and yet enable the circumvention of that coding to achieve the outcomes for educational purposes?

Dr Arthur—That question has essentially already been answered by the parliament. The parliament has enacted an ability for the education sector to engage in certain forms of non-remunerable or remunerable action under licence arrangements and has enacted quite elaborate mechanisms to ensure that that occurs appropriately—in certain cases a statutory licence. There are reporting requirements and there are revenue generation activities, all of which are overseen by the Copyright Tribunal. No evidence has been brought forward at all, to our knowledge, that those measures do not work well and—to turn it around—that there is a problem of widespread unauthorised copying or piracy within educational institutions. There is not a problem there.

So we are submitting that the problem which technological protection measures are introduced to deal with is not a problem which particularly exists within the education sector of institutional copying and therefore their legitimate rights in terms of the use of that material as provided for by the parliament should not be infringed by measures tending to solve someone else's problem. They are directed to solving the problem of the use by a large number of individuals simply as a result of a simple retail transaction in the private sector and to prevent unauthorised copying in that area. That is a real problem which they are quite appropriately directed to solving. We are simply asking that the solution of that problem not in an unintended way impact on an area where there is not a problem.

Mrs HULL—So you are basically saying that they, in resolving their issue, should not come in and impact on you guys?

Dr Arthur—Yes, and that they do not take away rights which the parliament has already enacted.

Mrs HULL—Given that you are so knowledgeable in this area, do you have—and I am quite happy for you to take this on notice—suggested ways to approach this? Obviously, there is a financial drain in these areas, particularly in the digital music area and the games area where there is a lot of money being lost. Is that right?

Dr Arthur—Yes.

Mrs HULL—So do you have a view or a thought as to how this committee could try to answer the call from these companies? It is obviously an issue. It is not something that they are not entitled to receive under these measures. Also, it is about being able to maintain the integrity of what you have now and not have an impact. What would be your suggestion as to how we could achieve such an outcome? I am happy for you to come back to me. If you can answer that now that would be fine.

Dr Arthur—There are broadly two ways that it can be achieved, one of which is at the moment technically quite difficult to do but would certainly meet our needs. The other is what we have already recommended in terms of the exceptions we are asking this committee to recommend. If it were possible for the industry to develop measures which were discriminating in terms of the nature of the user and which allowed people who were in an authorised institution to identify themselves as being in such an authorised situation and allow certain actions to follow, then the problem would be resolved on the supply side. That is in fact a quite difficult technical thing to do, and I do not imagine that such measures would be deployed immediately. However, that does go to a broader point—since you have invited me to give gratuitous advice to the producers.

Mrs HULL—I am very happy for you to do so.

Dr Arthur—I would certainly recommend that they engage in appropriate market segmentation analysis. In the education sector in fact deploying wide-scale non-discriminating technological protection measures will inhibit the growth of that market. That is a market that works off the current educational licences, where if education institutions are allowed to use the products appropriately, revenue will flow to the producers via the educational licences and the revenues associated with that. Therefore, there is a market interest which is common between educators who want to use this technology to get educational benefits and producers who want to find a growing market. Certainly the education sector and players in that whom I know quite well would be delighted to have a conversation about how to grow that market, not to stifle it on the basis of a perception that there was a problem there of unauthorised copying, which certainly exists elsewhere.

Mr Crisp—I will add something to that. I wonder whether it would help to stress that we are not saying that copyright owners cannot use technological protection measures, nor are we insisting that, if they put them on devices, they should construct them in such a way that they will instantly know that this is an educational user and that the TPM is not to operate. That would be nice, but we did not ask for that. All we said was that we would like to be able to circumvent a technological protection measure in certain limited situations and, further, that any circumvention device or solution would not be able to be marketed outside the educational user.

Dr Arthur—The detailed arguments in the submission concerning the no disadvantage criterion, which the committee is required to have regard to, are our presentation as to why we believe there would not in fact be adverse consequences for the industry in general from the measures we are seeking.

CHAIRMAN—Thank you very much for appearing before the committee this morning. Would you also let us have the supplementary submission you volunteered to let us have and, if you have any further thoughts you would like us to consider, feel free to pass those on to the secretariat as well.

[10.52 am]

DANIELS, Ms Helen Elizabeth, Assistant Secretary, Copyright Law Branch, Attorney-General's Department

FOO, Ms Pam, Senior Legal Officer, Copyright Law Branch, Information Law and Human Rights Division, Attorney-General's Department

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department

TREYDE, Mr Peter Richard, Principal Legal Officer, Copyright Law Branch, Attorney-General's Department

CHAIRMAN—Welcome. The committee does not require you to give evidence under oath but I have to advise you that the proceedings of the committee are proceedings of the parliament and should be treated as such. 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 now invite you to make a brief opening statement, at the conclusion of which we have a number of questions. If we do not get the opportunity to ask them, we might submit other questions so that you can consider the matters raised and come back to us.

Ms Daniels—Thank you, Mr Chairman. We are happy to proceed on that basis. We do have an opening statement to make. Both the Copyright Law Branch and the Office of International Law of the department have a role in providing legal and policy advice to the Attorney on the implementation of the copyright obligations of the Australia-US Free Trade Agreement. Having regard to the respective roles of both areas, namely copyright policy advice and treaty interpretation, it is proposed that my colleague Mr Mark Jennings, from the Office of International Law, and I will each make a brief statement.

The Copyright Act currently contains a liability scheme for the manufacture, sale and dealing of circumvention devices and for the provision of circumvention services as outlined in our submission to the committee. The scheme imposes liability on those making the devices for circumventions possible, rather than imposing liability for each individual act of circumvention.

The scheme also allows certain limited exceptions to technological protection measures. The main institutions that can take advantage of these exceptions are libraries, archives, educational institutions, government agencies and those entities maintaining computer systems and networks. The relevant case law on the current technological protection measure regime is the recent High Court decision of Stevens v Kabushiki Kaisha Sony Computer Entertainment. Generally speaking, the reasoning of the High Court in that case suggests that the TPM provisions in the Copyright Act should be interpreted in a way that would not readily extend copyright owners' rights.

I would like to make a few comments to provide the department's views on the obligations imposed under article 17.4.7 of the agreement. Firstly, the current scheme regarding

technological protection measures in the Copyright Act will need to undergo changes to comply with Australia's obligations under the agreement. Secondly, the provisions regarding circumvention of effective technological measures differ from the existing Copyright Act provisions in three main ways. First, the definition of an effective technological measure under the agreement covers devices that control access or protect copyright. Second, the agreement provides liability for the act of circumventing effective technological measures that control access, in addition to the sale and dealing of devices and services that circumvent effective technological measures. Third, the exceptions to both the sale and dealing of circumvention devices and services and acts of circumvention are more narrowly confined than those currently existing in the Copyright Act.

In relation to exceptions permitted under the agreement, the department is considering the implementation of the specific exceptions in article 17.4.7(e)(i) to (e)(vii). Of these exceptions, only the activities outlined in (e)(i), (e)(ii) and partly (e)(vi) relating to interoperability, security testing and law enforcement, overlap with the current permitted purpose exceptions in the Copyright Act. When this inquiry was announced, the department anticipated that interests relying on the other permitted purpose exceptions would be making submissions to your review. I note submissions from those institutions in effect urge the preservation of the status quo under our law. The continuation of the permitted purpose exceptions under the future technological protection measures is an issue the department is closely considering in the context of what is possible under our treaty obligations. We are also aware that some of the specific exceptions we are considering may overlap with exceptions being sought in submissions to your inquiry. Should any particular issues arise about the scope of the exceptions for the committee's consideration, we would be happy to provide what assistance we can to the committee.

In closing, the department recognises the technical nature of this inquiry and that the committee does not have the benefit of knowing what actual changes may be needed to our law to implement our obligations. We also appreciate that the committee needs to interpret treaty language that is complex. While it would not be appropriate for the department to provide the committee with legal advice about the meaning of various provisions, we can outline in some detail the approach that should be taken in interpreting the agreement. This may assist the committee in its role of recommending whether certain activities ought to be exceptions or whether they actually fall outside the liability imposed by the agreement. I would now like to hand over to Mark Jennings and, following his comments, would be happy to answer any questions the committee may have.

Mr Jennings—Mr Chairman and members of the committee, I would like to offer some observations on the analysis of USFTA article 17.4.7 to assist the committee in its interpretive task. The key threshold point I would make is that article 17.4.7 is treaty text, not domestic legislative text. Accordingly, it is to be interpreted in accordance with article 31 of the Vienna Convention on the Law of Treaties, not principles of interpretation applied to domestic legislation. Article 31.1 of the Vienna convention states as a general rule of interpretation:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This rule contains the following elements: the treaty is to be interpreted in good faith; the treaty's terms are to be given their ordinary meaning; the meaning is not to be established in isolation

from the context of those terms; and account is to be taken of the object and purpose of the treaty.

Mr TURNBULL—How do those principles and that interpretation differ from the normal domestic principles of statutory interpretation?

Mr Jennings—I think in the Acts Interpretation Act around section 15AA or section 15AB you will see a range of provisions that deal with the interpretation of statutory provisions. One of the principal differences you will find between these two provisions—I have not mentioned all relevant aspects of the provisions in the Vienna convention—is the recourse to extrinsic material. Under the statutory interpretation provisions there are documents that can be referred to, such as second reading speeches, explanatory memoranda and so on, to try to get to the purpose of particular provisions. Under the Vienna convention, in terms of recourse to what in the treaty context is called preparatory work, or travaux preparatoires, you do not have recourse to that in the first instance to assist you.

The recourse to preparatory work in the context of the Vienna convention is dealt with in article 32 of the Vienna convention. There are two circumstances in which you can have recourse to that material. Negotiating records of diplomatic conferences and the like is what we are principally talking about. One of those circumstances is to confirm your interpretation arrived at by applying article 31(1)—in other words, confirmatory of that interpretation. The other circumstance is where your application of article 31(1) has led to an ambiguity or an absurdity and you need to have recourse to the interpretive benefits that you may, although not always, find in the preparatory material.

So I guess the point I would make is that really what we are talking about here is the text of the treaty, the ordinary meaning of the terms, the context and so on. We are very much dealing with the text that we have in front of us. It would only be in the circumstances that I have referred to that we would then seek to have recourse to that preparatory material. In terms of the general rule itself, I am sure you will find echoes of that in the statutory interpretation principles—that is, the ordinary meaning and taking full account of context and so on. That would be my answer to that question.

CHAIRMAN—Thank you. Please return to your outline now.

Mr Jennings—The broad context for article 17.4.7 is provided by chapter 17 of AUSFTA, which establishes a regime of rights and obligations in relation to intellectual property rights. More immediate context is provided by article 17.4, which deals with copyright. Article 17.4.7 itself creates a regime relating to what are termed ‘effective technological protection measures’, or ETMs. An ETM is defined in article 17.4.7(b) as:

... any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

The use of the disjunctive ‘or’ before ‘protects any copyright’ suggests a reading of the definition that encompasses two types of ETM—one type which controls access to copyrighted material and another type which protects any copyright. That article 17.4.7 deals with two types of ETM is borne out by the elements of the regime it creates. Article 17.4.7(a)(i) establishes

liability for circumventing an ETM that controls access. No liability is established for circumventing an ETM which protects any copyright. The definition of an access ETM requires that 'in the normal course of its operation' the ETM 'controls access to a protected work, performance, phonogram, or other protected subject matter'. The use of the word 'protected' may be taken to refer to subject matter which enjoys copyright protection. Articles 17.1.9 and 17.1.10 provide context for this interpretation, making reference to the protection of subject matter under the chapter.

Article 17.4.7(e) permits specified exceptions to the liability regime created by 7(a). The application of 7(e) is governed by 7(f). The effect of 7(f) is to limit the exception provided for in (e)(viii), which is the one before the committee, to measures implementing (a)(i), which is the individual act of circumvention of an access control. As I have observed, (a)(i) establishes liability for circumventing access controls. Accordingly, the committee is being asked to consider the access ETMs.

I have addressed provisions dealing with the definition of ETMs and liability for circumventing access ETMs. However, the analysis cannot be confined to those provisions. In particular, the chapeau, or the introductory words, to article 17.4.7 provide essential context for the interpretation of these provisions. It reads:

In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms, use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide—

and so on. The chapeau provides that the purpose of article 17.4.7 is to establish a legal regime to deal with the circumvention of ETMs. In this regard, however, the chapeau does not make a bare reference to ETMs. It does not read: 'in order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures each party shall provide'. It does not rely solely on the definition of an ETM contained in 7(b). The definition should be read together with the words that follow the reference to 'effective technological measures' in the chapeau. Those words are the:

... authors, performers, and producers of phonograms, use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances—

et cetera. These words qualify the reference to ETMs.

There are two elements in this text from the chapeau which are joined by the conjunctive 'and'. The first is that an ETM is to be used in connection with the exercise of a copyright holder's rights. The second is that an ETM is to restrict unauthorised acts in respect of the copyright holder's works, performances or phonograms. I would just like to make some observations about that first element. The use of the words 'in connection' suggests that there is to be a relationship between the use of an ETM and the exercise of rights by a copyright holder. The word 'rights' is not elaborated upon. The broader context of the chapeau may support a reading that restricts rights to those comprising copyright. Article 17.4 deals only with rights comprising copyright, as I have mentioned. In addition, the definition of an ETM refers to technology that protects any copyright, not that protects any right.

In relation to the second element, the question arises as to the meaning of 'unauthorised acts'. Are they acts which are not authorised by the copyright holder or do they extend to acts which are not authorised by law? If it had been intended that 'unauthorised acts' refers only to acts not authorised by copyright holders then the drafters may have made this clear in the text as follows: 'that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict acts in respect of their works, performances and phonograms not authorised by them'. The reference to 'the exercise of their rights' is immediate context for 'unauthorised acts'. If, as I have suggested, the term 'rights' reflects the rights comprising copyright then unauthorised acts may be taken to mean acts in relation to copyright which are not authorised by the copyright holder or by law.

Before closing I will just make a few brief observations on (e)(viii) itself. The first relates to the term 'non-infringing uses'. The terms 'infringing' and 'non-infringing' are terms of art in the copyright field. They are applied to denote whether the use of material or material itself infringes copyright. For example, article 16(1) of the Berne copyright convention provides that 'Infringing copies of a work shall be liable to seizure'. Accordingly, the term 'non-infringing uses' in (e)(viii) may be seen in the Australian context as covering uses of copyright material that are authorised by the copyright owner or covered by existing exceptions or licences. Such non-infringing uses are to be 'of a work, performance or phonogram in a particular class of works, performances or phonograms'.

As the committee has heard previously, a key interpretative issue here concerns the words 'particular class'. These words are to be given their ordinary meaning in their context. Their ordinary meaning reflects something less than the whole and their context provides guidance on the issue of how much less than the whole. By way of context, the preceding reference to 'work, performance or phonogram' provides important guidance. That work, performance or phonogram will be part of a class that can be identified, be it broad or narrow. I hope these observations have been of some assistance to the committee.

CHAIRMAN—Thank you very much. This has been a very intense inquiry with a very short time frame. It is interesting that when you look at the submissions you can put them broadly into two categories: those from copyright owners and those from copyright users. Most of our witnesses have been very reasonable, not asking for things that seem to be outrageous, and I have to say we do appreciate the assistance that we have been given by the Attorney-General's Department. Given the fact that there will be quite a number of technical questions for the department, as I said at the outset, I want to foreshadow that we will forward any other questions to you. If you do not feel able to give us now the technical response that you feel we would want, feel free to send it to us subsequently.

Like other members of the committee, I was quite astounded when one witness gave us evidence that TPMs employed by Sony on certain CDs have the effect of installing software that cannot be removed without damaging the computer. That raises security vulnerabilities in users' computers, and I understand that there is some legal action that has some way to play out. In the light of the potential seriousness of this kind of TPM use, is it intended in the legislation to place any limits on the types of TPMs that will be subject to legal protection? In the drafting of the legislation, do you have any plans to limit the protection accorded to TPMs that are found to cause damage to the media on which they are contained or the devices that play the work or to collect information about the user? It seemed to me when I heard about this to be quite serious

and I was surprised that a reputable company would do that. Could you give me a response to those questions?

Ms Daniels—First of all, as we understand that particular issue, it occurred in the United States. From a briefing from Sony BMG in Australia, we understand that the same TPM does not occur on CDs made available in Australia and we have not heard if there is any problem. We know people travel and they may have brought back a CD that does contain that particular problem TPM, but the government has not heard anything at this stage about whether that is a problem in Australia. The approach I think the department would take in advising the government on implementing the new TPM provisions under the act is to accord with our treaty obligations and no more. I do not think the problem that occurred in the United States in relation to Sony BMG related to how the law operates in the United States. I think it was just about the characteristics of that particular TPM.

CHAIRMAN—Yes. Most of the copyright users seem to want as many as possible of the existing exceptions to remain. Just for the purpose of the *Hansard*, how does the department see that attitude conforming with the technical terms of the free trade agreement?

Ms Daniels—I think we could say to the committee—and we could follow this up in writing, in terms of specific exceptions—that our starting point would be what is presently under the Copyright Act. We would have to compare the terms of the agreement to determine whether exceptions can be straightaway transferred to the new regime in totality. That might not be possible but we might need to alter the way the exceptions are framed. A lot of the exceptions are framed in terms of what users can do as opposed to what the non-infringing uses are.

Ms ROXON—I would like to ask you a question on that issue because I am particularly interested in the exceptions that institutions have. Is there any suggestion that there has to be a prohibition on defining an exception by the nature of the user rather than just for the particular purpose? I am not sure whether that was what you were referring to in your opening statement when you talked about examining the permitted purposes and how that will line up. Is there any realistic suggestion that after making that examination you will come back and say, 'Look, the free trade agreement doesn't allow us to have a particular exemption for libraries,' or something? It seems to me that that would be fairly extraordinary.

Mr Jennings—I return to the concluding comments that I made about the reference to a particular class and the fact that they are linked to types of works within the classes of copyright. So I think there is an indication, through the language of the provision itself, what the focus of a particular class is. Really there is a linkage established to classes within the broader categories of copyright material.

Ms ROXON—Does that mean yes or no?

Mr Jennings—It is a difficult position to be in because it is not an issue that we have had cause to deal with expressly, as yet. In looking at that particular question and assessing it in the context of (e)(viii) we are considering the linkages to the types of copyright material of which non-infringing uses are being made. It is there on the page that that is the guidance that we are being provided with.

Ms ROXON—I want to ask you about suggestions that the text was taking away Australia's ability to be able to have exceptions for institutions which currently have protection under our law. Forgive me, I cannot recall all of the detail of the evidence that the departments gave to the Senate inquiry about this, but in my recollection they did not suggest that there was anything that was going to stop Australia being able to continue in some form with those sorts of exemptions. Were any of you involved in that? Can you clarify that for me?

Ms Daniels—The department was part of the negotiation leading up to the free trade agreement. Officers from other departments gave evidence before the committee that you are referring to—officers from the Department of Foreign Affairs and Trade, and the Department of Communications, Information Technology and the Arts. Our starting point would be our present exceptions: how do they need to be adapted, if at all, to fit within what is required under the wording of the agreement? As I said, that might require turning some of them around.

Ms ROXON—I did not mean to go off into too much detail, but the suggestions that I think you touch on in your submission are about whether you can set up exemptions for institutions just by whether they are subject to criminal penalties and those sorts of things. Would that be seen as the alternative to having a statement saying, 'X institution for X purposes is permitted to do these things'? The question is: is there any proposal that you only look at the sorts of penalties that would apply as the adequate way of dealing with exceptions, or would you still be looking at more general exceptions per se?

Ms Daniels—We would be looking at both.

Ms ROXON—Okay, so it is not an either-or situation; as long as they are not subject to criminal sanctions then we do not have to have a statement about how the exception applies?

Ms Daniels—We are not looking at it in those terms, no.

ACTING CHAIR (Mrs Hull)—We have been advised during this process that there is an increasing trend for copyright owners to attempt to prevent users from exercising TPM exceptions by means of a contract. Does the department have any plans to address this issue of contracting-out of TPM exceptions before the implementation of the free trade TPM provisions?

Ms Daniels—In implementing the obligations, we will again be looking to the words of the agreement, and the agreement itself does not refer to the issue of contracts. So we are not—

ACTING CHAIR—So are you going to look at contracting out? The issue that is currently being used to prevent users from exercising the exemptions is contracting it out, so are you going to look at that?

Ms Daniels—Following the process of the committee—that, when the committee releases its report to the government, the department then will likely consult further with stakeholders—owners, users and everybody else in between—on what are likely to be the options for the new scheme. In that context, contracting out will no doubt be raised again and we will need to consider it; yes.

ACTING CHAIR—Also, as the chairman indicated, we need some answers to some of the questions that have been raised along the way. If we are not able to cover them all we might like to give them to you on notice so that you might respond to those.

At page 14, paragraph 54 of your submission, the department discusses the meaning of a particular class of works, performances and phonograms. If you had been here for the evidence given by some of the other people appearing before the inquiry, you would have heard that 'class of works' was a particular issue, but it appears that there is a possible inconsistency in article 17.4.7, as the first paragraph of that article refers to measures used in respect of 'works, performances, and phonograms', while the definition of 'effective technological measures' extends to measures that control 'access to a protected work, performance, or phonogram, or other subject matter'. So it is this other protected subject matter that we would like to understand. What is your view of what is meant by that term, 'other protected subject matter'?

Ms Daniels—It would probably be more useful for us if we could take that as a question on notice; I do not want to mislead you.

Mrs HULL—I am happy for you to take it on notice. We will provide you with these questions in writing so that you do not have to take down notes. Could you include in your response what categories of works and subject matter other than work will be protected under the new TPM scheme? Could you also tell us whether the provisions apply to TPMs on broadcasts and published editions? Do you have a view, at the moment, on broadcasts and published editions or not? Or would you still rather take that on notice?

Ms Daniels—It would probably be more useful for the committee if we took that on notice so that we could give you a thorough outline.

Mrs HULL—In addition, it has been suggested in a number of submissions that Australia should adopt the narrow approach taken by the USA regarding the criteria for proposed exceptions. Of course, there are other submissions which have stated that there is no compulsion on Australia to adopt the same approach, particularly given Australia's different copyright framework, history and position in the world market regarding the generation of copyright material and its consumption. Please feel free to take this question on notice as well, but would the department have any comments on this issue? Varied views have come to us in evidence. Would you rather take that question on notice too?

Ms Daniels—We might follow up and give the committee more detail, but the general response is that we would look at the words of the agreement and how the words of the agreement can be implemented in the Australian context. The agreement is not the US legislation; it is the words of the agreement, and we have our own copyright law, so it is to do with how we would adapt and comply with our treaty obligations in accordance with Australian copyright law.

ACTING CHAIR—There has been a genuine feeling that there should be a far more liberal use of the term. Article 17.4.7(e)(vii) provides an exception for:

… lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes.

I am quite happy, if you prefer to, for you to take this on notice as well: what is the department's interpretation of this exception in terms of its coverage of the broad range of government activity? In the department's opinion, will this exception cover the activities of government agencies such as the ATO circumventing TPMs for the purpose of taking civil actions, and the Office of Film and Literature Classification circumventing TPMs for classification purposes?

CHAIRMAN—Do you want to take that on notice also?

Mr Treyde—Yes, particularly in relation to the issues raised at the end of that question we would be very grateful if we could take that on notice.

Mrs HULL—We will provide you with a written form of this question as well.

Ms Daniels—That would be helpful, thank you. We have written to all departments and agencies about this reference and to get their views on how they think their current operations, whether regulatory, enforcement or otherwise, should be dealt with under the law.

Ms ROXON—Can I ask a question which relates to that. It is an issue for the departments, obviously, in terms of their use. But does the department have a view generally about whether an exception should apply for any legally or lawfully obtained material? A number of witnesses suggested to us that there should be an exception: if you have purchased material legally, you should be able to use a TPM device to access it. Do you have a view as a department on that generally?

Ms Daniels—In section 183 of the current Copyright Act, the government has a very broad statutory licence to do the acts to which you are referring.

Ms ROXON—Sure, the government does. But the proposal put to us was that any individual consumer—the DVD example is the one that is always used—who lawfully purchases a DVD should be able to use a device to make sure that they can play it here in Australia. It is an example, but a couple of academics suggested to us—I think it was in Melbourne—that as long as you have purchased the material lawfully you should be able to use any device to be able to use it. Do you have a view on that?

Ms Daniels—Under the present law, the High Court decision in the Sony case—the Sony decision—sets out the interpretation of the present provisions, and they would accord with the view that you have just expressed.

Ms ROXON—I am asking you whether the department has any view on it in terms of the policy appropriateness of it or not. If you do not, that is fine. But telling me what the current law is does not answer my question.

Ms Daniels—Sure. We think the High Court's interpretation in that decision is correct on the present law. But we know that the present law has to change under the agreement. What we cannot answer, I suppose, to your satisfaction, is how that issue raised will be dealt with under the new regime.

Ms ROXON—What you cannot answer is that people put a proposal—and I think one of your officers was there at that time—that we should consider an exception which explicitly says: 'If you have lawfully purchased material you should be able to use it. If that means you need to use some TPM device to access it, then so be it.' It goes to the core question of whether it is about access or about copyright control. I am just trying to find out whether the department has any view on it or not.

Mr Treyde—I guess the difficulty with answering that is that, whereas before we would be able to formulate a policy position, now we have to be certain that it complies or is consistent with Australia's obligations under the agreement. Until we have had an opportunity to consider how that proposal would fit within the framework it is a bit difficult to say whether the department would support that as a policy option or not.

Ms ROXON—It is a bit chicken and egg. We are being asked to have a view generally on whether they are good or bad ideas. Of course an assessment will have to be undertaken of whether or not it is consistent with the obligations that we are committed to. We are going round in circles on quite a lot of these issues because of that very problem.

Mrs HULL—It also includes a definition of what you mean by 'lawfully acquired'. Obviously, you could acquire something with good intent lawfully that could be quite unlawful.

Ms Daniels—Exactly.

Mrs HULL—I am concerned about that as well in that question. What do you term 'lawfully acquired'?

Ms Daniels—Yes, it has to be non-infringing and lawfully acquired.

Mrs HULL—That is right. That is my problem. I have one quick question that almost follows up on that. SBS informed the committee that the USA Copyright Act provides an exception for broadcasters to circumvent TPMs on sound recordings for the purpose of making broadcast copies in certain cases. Are you aware of this exception and, in your view, would such an exception comply with the free trade agreement TPM provisions?

Ms Daniels—We will have to take that one on notice.

Mrs HULL—Thank you.

Mr TURNBULL—With regard to article 7(e)(viii), we have noted that there is no corresponding exception for dealing in devices and service provision to circumvent access-controlled TPMs. The same is true for the circumvention exceptions available under 7(e)(v), which deals with the collection of personal information, and 7(e)(vii), which relates to acquisition decisions. The question is: how does the department envisage that a party with an exception under these provisions will be able to utilise their exception rights if the manufacture and provision of circumvention devices and services is prohibited? Do you think this is an error in the free trade agreement?

Mr Jennings—In terms of the reading of the provisions, I dealt in my opening statement with (a)(i). But certainly (a)(ii) is the other part of the liability regime and it deals with the manufacture, distribution and sale of goods and services that are intended to meet the criteria as set out in (ii)(A), (B) and (C). They apply to both access controls and copyright controls, even though there is no individual liability for circumvention of the copyright controls. That is the text of the agreement as negotiated. The approach was to provide exceptions for individual acts of circumvention of control access ETMs as provided for in (e) as governed by (f) and that in relation to exceptions under (a)(ii) only certain of the exceptions listed in (e) were to be permitted. So some exceptions are to be permitted but, as you note, (e)(viii) is not listed amongst those exceptions.

I was not personally involved with the negotiations and I do not think anybody at the table was, so we are not really in a position to indicate what was involved with the particular negotiations. We are dealing with the text, as the committee is, and that is our reading of the text and the exceptions. I do not think we are placed to comment on what the results were in a negotiating context.

Mr TURNBULL—That is fine. Would allowing third parties to perform circumvention on behalf of those with exceptions be permitted under these TPM provisions? That would be consistent with the wording of the chapeau, wouldn't it?

Mr Jennings—Yes. Without going particularly to the substance of the question of the involvement of third parties, which I think we would have to take on notice, clearly there are issues related to bodies and institutions who may seek to have the benefit of exceptions under (e)(viii), how they go about taking advantage of those exceptions and whether they have the capacity within their own resources to do so.

Mr TURNBULL—This is an issue we raised with the National Library. Surely somebody that is entitled to an exception and to effect a circumvention should be able to engage another person to do it on their behalf.

Ms Daniels—In principle, I agree with you. The act, in a number of provisions, already says 'the user or an agent of', so it is not an unusual concept in the Copyright Act to work through a third person, as long as the liability is still tied up.

Mr TURNBULL—Do you agree that an agent in those circumstances would be able to be engaged?

Ms Daniels—It would probably be most useful if we took that on notice and gave you a written answer.

Mr TURNBULL—Okay. Following on from that—and you can probably take this on notice also—how will people undertake circumvention of copy control TPMs, which does not appear to be an infringing activity under the agreement, if they cannot access devices to circumvent such TPMs? We have given them the right to do something; we are denying them the tools to do it.

A number of organisations have indicated that an inability to circumvent access TPMs for legitimate purposes under the provisions of the free trade agreement could prevent them from

using copyright material that they are currently entitled to use by virtue of statutory licences held under the Copyright Act 1968 or blanket or broadcast licences agreed with copyright owners. Accordingly, it has been put to the committee that there should be circumvention exceptions to preserve the effectiveness of these statutory blanket and broadcast licences. What is your view on that?

Mr Treyde—From a policy position, I think Helen has already said that as far as possible the department supports the existing scope of the exceptions that are available under the legislation. Of course, the issue for us will be to see what changes need to be made to those exceptions, having regard to our obligations under the treaty. As Mark has pointed out, the issue there is how the exceptions fit in with the classes of materials to which they can apply. As far as possible, we would seek to ensure that the existing exceptions are maintained.

Mr TURNBULL—It is sort of a circular argument, isn't it, because the introductory words—the chapeau, as Mr Jennings correctly referred to it—in the article talk about the objective being to restrict unauthorised acts. Anything that is subject to a statutory licence is, by definition, authorised. Prima facie, this should not be interpreted as rendering unauthorised acts that are currently authorised. Do you agree with that?

Mr Treyde—Yes.

Mr TURNBULL—Very good. The committee has heard evidence that in some cases copyright owners choose to bundle copy protection TPMs with TPMs related to market control or competition prevention when such bundling is not really necessary. What is your view on this? Do you intend to address this issue in your implementing legislation?

CHAIRMAN—Or would you like to take it on notice?

Mr Jennings—I think we would take that on notice. But I will say briefly that clearly the bundling of TPMs raises issues in relation to the treatment of a TPM under the AUSFTA regime. As I said, it contemplates two types of TPMs—one is an access control, one is a copy control. In relation to some TPMs that distinction is easy to make, but you are referring to circumstances where it is a much more difficult exercise to try to disentangle access and copy control. Let us make that as a general statement, but we will certainly take it on notice. It is an important issue.

Mr TURNBULL—Finally, the committee has heard differing views on whether region coding TPMs are basically a market strategy technology or whether they play a genuine part in copy protection. What is your view on this; and, in your opinion, would region coding technology come within the definition of an ETM in article 17.4.7?

Ms Daniels—I refer the committee back to Mr Jennings's opening statement in stepping through the interpretative approach to be taken. It is not the definition alone that the committee might look at in coming to a view on that issue; it is the whole liability regime, and the definition is just one aspect of that.

CHAIRMAN—Maybe you could take that on notice.

Ms Daniels—I think that would be helpful.

CHAIRMAN—I understand Ms Roxon may have had an interest in that particular area.

Ms ROXON—I am not sure. After most of the evidence this morning, I suspect that you should have done your process before we got this referral, but I am sure no-one in this room can affect that. It does seem that we might be doing it the wrong way around. I am just concerned with the DVD region coding that has been raised with us absolutely everywhere. No-one seems to really want to talk about the actual technology protection. We had completely different views from industry people, although most of the industry has made clear that it thinks it is about tackling piracy rather than about accessing markets at a time of their choosing. Of course that is a legitimate business thing to want to do but not necessarily what we should try to deal with in copyright matters.

I have a question that arose from some of the later evidence we got. One of the industry people—and I cannot remember who it was—said, 'Really, we have multiregion DVD players here now so as long as people have lawfully purchased something they can play it.' It just seems to me that if that is the actual practical way around it why would you give any protection in those circumstances? Why would you prevent someone who does not have a multiregion DVD player from using a TPM to be able to access their lawfully obtained material for a permitted purpose? Do you have a view on this?

This seems to me to be one of the few areas that the general public has an interest in rather than the important but very technical other areas that are being dealt with. It must be something that you have had an opportunity to consider and work on. Do you want to make any comments about the general issues in the submissions that were being made to us? We got submissions from very interested parties, and, as a disinterested party, your advice would be helpful in terms of not being an actual industry player or having a particular market share to protect. Do you have a view that you want to share with us?

Mr Treyde—Perhaps I can make a number of comments which, hopefully, will be helpful. I will start with the issue that Mr Turnbull raised in relation to whether or not this was a market control measure. At the testimony before the Library of Congress Copyright Office hearings in May, I believe Mr Fritz Adaway, a representative of the motion picture industry in the United States, expressed quite clearly his view that this was entirely to do with marketing. So, from the US motion picture industry's perspective at least, if not ours, that is what region coding is about. I would like to give you some helpful comments, so maybe you could steer me in a direction so that I can add to that.

Ms ROXON—Of course my suspicion was that it is used for increasing market opportunities and other things. Is it appropriate that you use this sort of regime to try to ascertain whether or not that is a lawful mechanism? It just seems to me that it is not directed towards copyright protection; it is directed towards maximising the value of your copyrighted material. I am not sure that it falls into the same categories as the other sorts of things we are being asked to consider. I am anxious to ensure that I have not missed some critical factor that means we should express a view that it is a completely legitimate mechanism for protecting your market share. Of course, the poor old consumer who buys a legitimate copy in America should have to buy a legitimate copy here as well.

Mr TURNBULL—If I may add to that, you can take the analogy of a book. If you buy a book in New York, you can read it anywhere. The region-controlling TPMs are really quite extraordinary restrictions on people's freedom to access legitimately acquired material which they have paid full value for. I do not see what it has got to do with protecting copyright.

Mr Treyde—I guess we are in a position now, though, where we are a party to the agreement which talks about access and the task before the committee is to determine whether or not an exception can be made under the agreement or, having regard to the way the agreement can be interpreted, whether or not those provisions might perhaps fall outside the liability that is provided for under the agreement. But those are matters for the committee.

Ms ROXON—But within the committee's remit the department cannot see any reason why we can't do that?

Mr Treyde—I think that is consistent with the interpretation.

Mr TURNBULL—Let us go back to the introductory paragraph. It talks about restricting unauthorised acts. The reality is that a regional access control TPM is really not regional access control at all; it is device access control. If I buy my DVD in New York and I come back to Australia with an American DVD player that is capable of playing that DVD, I can play it in Australia or anywhere I like in the world. This comes back to the Sony case. It is really related to a type of device. I would put to you that has got nothing to do with copyright. The restriction relates to the device rather than the region.

Ms Daniels—And it is whether the device is an ETM, which our obligations under the agreement require us to bring into the liability regime.

Mr TURNBULL—Do we say it is illegal for someone who is moving from America to live in Australia to bring their DVD player with them? Is that the case?

Ms Daniels—No.

Mr TURNBULL—If that is not the case, then if it is legal to have a US DVD player here then it is perfectly possible to play a US DVD here. I just do not see what this has got to do with protecting the copyright.

Ms Daniels—I think that is right. Most ETMs are directed to antipiracy measures, which is what copyright owners are most concerned about, but the region-coding issue gets merged with the access issue and it is hard to disentangle them.

Mr TURNBULL—Yes, but I think we have got to disentangle them. It has gone from the world of theatrical distribution where, for a whole variety of reasons—not the least because of the scarcity of prints—films were released in certain regions one after the other. But that is a very different thing from saying to somebody, 'I will sell you the DVD—I will sell you this work—and I will take your money from you but, while I am not saying you can't play it in Australia, I am saying you can't play it on a device as is commonly purchased in Australia.'

Ms Daniels—Yes.

Mr TURNBULL—I think I have made my point, but I would be very interested to hear why you believe that it is covered. Mr Jennings very usefully got us focused on the introductory paragraph, which is the chapeaux, and Nicola Roxon asked about that very well.

Ms ROXON—I am disappointed you cannot think of the Latin word as well, Malcolm.

CHAIRMAN—He probably can!

Ms ROXON—I do not want to encourage him!

Mr TURNBULL—Mr Jennings has educated us about the interpretation of treaties very valuably.

Ms ROXON—I have got a couple of other questions if we have finished with this area.

Mr TURNBULL—I have finished, but I really would like some reflection on that.

Mr TOLLNER—On page 13 of your submission you discuss the review process. You indicate that it is your view that exceptions identified between the main reviews would need to be reviewed subsequently at least once every four years.

Ms Daniels—That is right.

Mr TOLLNER—Given the lack of any explicit statement in article 17.4.7(e)(viii) to the effect that permitted exemptions will have to be reviewed every four years, wouldn't the interpretation be equally valid that permitted exemptions would not require review unless challenged? Also, where did the four years come from? Why wasn't it three or five or 10?

Ms Daniels—I have no idea where the four years came from. The government has not yet made any decision on how future reviews are to be conducted. Hopefully, whatever is decided, though, it will be a suitable forum that allows for open and frank consultation with the range of stakeholders that are in copyright and to appropriately examine all of the technology and other issues. We have noted one suggestion made to the committee that the Copyright Tribunal be the body that does these reviews. I would just inform the committee, because you may not be aware, that the Copyright Tribunal is a statutory body and it is basically an arbitral body that determines rates of remuneration between collecting societies and licensees. It is not really a policy-making body. If there was a view that they would have this role in four years time, they would have to be given specific jurisdiction under the legislation. To answer your other question about whether every exception has to be reviewed, I guess that whatever body does this process they would seek views on the present exceptions. I guess that, if there are no adverse comments received then, by default, they would be maintained.

Mr TOLLNER—Do I understand what you just said to mean that you believe that the Copyright Tribunal would be the appropriate body to run these reviews? Is that the department's view?

Ms Daniels—No, it is not the department's view. We do not have a view at the moment. I was just drawing the committee's attention to the fact that the tribunal's role is fairly exact under the

legislation. It is really an arbitral body; it is not a policy-making body. So I guess I would query whether it would be the right avenue to take.

Mr TOLLNER—In regard to the creation of ad hoc exemptions, would you envisage that this could be on an 'apply for exception at any time' basis or would there still need to be a structured process—applications every year or every two years, for example?

Ms Daniels—I think if somebody came to the government and said they had a desperate problem that really needed to be addressed before the four years was up, the government would seek to look at it.

Mr TOLLNER—So you cannot tell me anything about the four years and where that came from?

Ms Daniels—No. As Mr Jennings said earlier, no-one at this table was part of the negotiating team for the agreement.

Ms ROXON—Maybe it was to keep in line with the Olympic Games! I want to ask about the exceptions as well. We had some evidence from different people about the sort of form in which you should actually announce those. Some said that using the government *Gazette* would be the best way to do it. Others said it should be done through regulation. If I recall, I think that some of our witnesses said that legislation would be appropriate for perhaps the more major ones. Do you have a view on the most appropriate way to implement any permitted exceptions?

Ms Daniels—We have not formulated a final view to go to the Attorney with, but of all of those options you have outlined, I would have thought that regulations were the most—

CHAIRMAN—They give you flexibility.

Ms Daniels—Yes, and you do not have the time lag and it is still very public. Under the Legislative Instruments Act it is even more public.

Ms ROXON—You may need to take this question on notice. It does have a bit of impact in informing us while we are making our decisions on this inquiry. Can you tell us anything about how you are going with your fair dealing inquiry? If we are too tight for time to do that now, would you be able to give us a written response?

Ms Daniels—I can give you a general answer and if you want follow-up I am happy to do that. The department released an issues paper in May. We got about 170 submissions in response from a lot of individuals as well as all the usual stakeholders in copyright. We went through a process of examining the options put forward in the paper and, under the Attorney's authority, we had another short consultation period with some key stakeholders earlier this month. As a result of that consultation period, we are now working on some options for the Attorney. The plan is that the results of the fair use review and the digital agenda review, which are really addressing the same areas, both for individual users and institutions, will be considered by the government together.

Ms ROXON—Just so I am clear, the department will not be issuing a second discussion paper; it will be something that then comes out of government policy or something. You will be putting something to the government that will not be publicly available.

Ms Daniels—That is right. The only other thing I could mention is that it has three limbs to it. There is time shifting of broadcasts, format shifting of some copyright materials to use on another device and then there is the issues for institutions such as libraries, schools, universities et cetera of whether they should have some more general type exceptions to operate under or whether they should have specific exceptions to deal with their specific problems.

Ms ROXON—Do you have an expected time frame for when that is likely to go to government?

Ms Daniels—The Attorney is keen for early 2006.

CHAIRMAN—If there are no further questions, I would just advise you again that we are sending you more questions. We would like you to give us the additional responses you have undertaken to. If you could get the answers to the questions back as quickly as possible, that would be useful because we are hoping to table the report towards the end of February. We have report consideration and we are keen to have time to deliberate. Thank you very much for your assistance. I would like to thank everyone who has given evidence before this inquiry. It has been a very interesting inquiry on a fairly technical topic.

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

That this committee authorises publication of the transcript of the evidence taken by it at the public hearing this day.

Committee adjourned at 11.57 am