Standing Committee on Legal and Constitutional Affairs

Inquiry into
The Copyright Amendment (Digital Agenda) Bill 1999

Submission made on behalf of various law firm Library Managers

1st October 1999

1. Introduction

This submission is made to the Standing Committee on Legal and Constitutional Affairs pursuant to the Committee's request for comment on the *Copyright Amendment (Digital Agenda) Bill* 1999 ("the DA Bill"), on behalf of the following law firm Library Managers:

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Linda Fong Peng, Baker & McKenzie
Louis Grosfeld, Blake Dawson Waldron
Elizabeth Harrison, Corrs Chambers Westgarth
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Philip Mullen, Middetons Moore & Bevins
Helen Eyles, Parish Patience
Cathy Wilson, Phillips Fox
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The submission addresses the following issues:

- The new definition of "library" and the lack of consultation with affected parties
- Inconvenient access to copyright material
- Insufficient means to obtain material directly from publishers
- Insufficient scope of licences with CAL
- Various research and educational uses made of libraries
- Inter-library loans
- Recommendations

2. The New Definition of Library

2.1 The New Definition

The DA Bill proposes a new definition of "library" in s 10(1) which states:

"***library*** includes a library owned by an educational institution, being an institution that is conducted for profit, but does not include a library owned by any other person or body carrying on business for profit if the person maintains that the library mainly or solely for the purposes of that business."

The Explanatory Memorandum to the DA Bill states that "[i]t is intended that the definition should operate to exclude libraries operated by for-profit organisations such as corporations and law firms."[1]

[1] Paragraph 18, Explanatory Memorandum.

2.2 The New Definition was Not Included in the Exposure Draft

The DA Bill was released on 2 September 1999 and was based largely upon proposals in the *Copyright Reform and the Digital Agenda* discussion paper (dated July 1997) and the exposure draft bill released in February 1999.

However, neither the discussion paper nor the Exposure Draft included the new definition of "library". Consequently, this change was not anticipated and libraries operated by for-profit organisations have not had the opportunity to respond to the inclusion of this definition in the DA Bill. There has been little opportunity since the release of the DA Bill to consult with the Government on the implications of this new definition.

2.3 Is the New Definition Relevant to a Bill with a Digital Agenda?

The rationale for the inclusion of this new definition of "library" in a bill focused upon copyright law in the digital age is questionable. This definition is an inappropriate inclusion in the Bill which "forms the Government's main initiative in addressing the challenges for copyright posed by rapid developments in communications technologies."[2] It is not a response to digital issues but rather amends over 30 years of copyright law by changing the balance between the public interest and copyright owners in the hardcopy print world.

3. Access to Copyright Materials Will be Compromised

3.1 Changes to the Way Lawyers Access Copyright Materials

The proposed changes to the definition of "library" will dramatically alter the means by which legal professionals access copyright materials. Lawyers will no longer be able to request their own library to copy (under s49) even though the lawyer may be entitled to make a fair dealing copy themselves. Currently, if a lawyer requires materials not already held by the firm library, the practice is to request the library to obtain the materials from another library. This practice is permitted by s50 and is necessitated by the fact that lawyers are under constant time constraints to deliver advice to clients in a timely manner. Of even greater concern is the loss of the benefit of s50 of the Act.

The new definition of "library", will require individual lawyers to access and reproduce required materials themselves. Whilst lawyers will remain able to reproduce copyright materials in certain circumstances in reliance on the fair dealing provisions in ss 40 and 43, they will be greatly inconvenienced by the fact that if they wish to obtain any material held by a library other than that within their own firm, they will have to obtain that material in person. This will simply reduce access to information, or increase its cost, to the detriment of the public.

3.2 Arranging access to materials via publishers and collecting agencies

An alternative to lawyers obtaining materials from other libraries individually would be for them to contact the publisher or collecting society directly and arrange access at a price. We submit that this alternative is unworkable.

[2] Explanatory Memorandum, p 1.

Firstly, there is no commercial system in existence between publishers and users of copyright material to enable rapid request, consent and access to their materials at the speed at which lawyers and their clients usually require them. Secondly, there is no statutory licence included in the DA Bill that would enable rapid access to copyright materials at a reasonable price. Even if there was such a statutory licence or a voluntary licence, Copyright Agency Limited (CAL) does not act for all publishers. Thus, these licences would not provide blanket coverage for all rights holders and consequently, access to all materials required by lawyers would not be guaranteed.

As a consequence of the new library definition, lawyers and other users of for-profit-organisation libraries may go from having a right of access without charge to having no right of access at all.

4. The Uses Made of Libraries Run By For-profit Organisations

4.1 Research and Educational Uses

Libraries run by for-profit organisations, especially law firm libraries, are not utilised merely for client-related work. Lawyers, paralegals and research clerks also use these libraries for purposes such as research and study, professional development, and post- and under-graduate work. Users of libraries run by for-profit organisations for these purposes will be subject to undue hardship by the proposed definition of "library".

5. Inter-library Loans

5.1 The Wide-Spread Practice of Inter-Library Loans

The wide-spread practice of inter-library loans will be greatly jeopardised by the proposed definition of "library" in the DA Bill. Both libraries run by for-profit organisations and not-for-profit libraries engage in inter-library borrowing and lending. The removal of for-profit-organisation libraries from the library exemptions in ss 49 and 50 of the *Copyright Act* will detrimentally limit the variety of sources available to all libraries.

5.2 Practical Ramifications of the New Definition of "Library"

The new definition of "library" will prevent a not-for-profit library from borrowing from or lending to a for-profit-organisation library, and vice versa. The range of resources available to both kinds of libraries will be severely restricted by these limitations. Not-for-profit libraries will be disadvantaged by these provisions.

5.3 The City - Country Divide

Many remote suburban and country libraries depend upon access to city libraries for materials which they cannot afford to stock. For example, it is not feasible for a mining company to maintain a fully stocked library for its research purposes, and such companies thus rely on their city counterparts for assistance. Another example is that of the small municipal library in a country town which might similarly engage in borrowing from specialist city libraries, many of which are operated by for-profit organisations.

The negative ramifications of the proposed changes in the DA Bill will thus have widespread reach. In particular, suburban and remote country libraries will be significantly disadvantaged by their inability to borrow items from city libraries that are better stocked.

6. Recommendations

6.1 Amendment of the Definition of Library

We recommend that the proposed definition of "library" in s 10(1) be amended so as not to exclude libraries operated by for-profit organisations, such as law firms, from the library exemptions in ss 49 and 50.

Item 11 of the DA Bill should therefore be amended to read:

"***library*** includes a library owned by an educational institution, being an institution that is conducted for profit, but does not include a library carrying on business for profit."

Item 22 of the DA Bill should be deleted so as to ensure that s 18 of the *Copyright Act* continues to operate to enable libraries run by for-profit organisations to take advantage of the library exemption provisions in ss 49 and 50.