

Claressa Surtees
Secretary,
House of Representatives
Standing Committee on Legal & Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Ms Surtees,

I write in response to the Committee's invitation to the National Library to make a submission on the Copyright Amendment (Digital Agenda) Bill introduced into Parliament last month. The National Library is grateful for the opportunity of making a formal submission and appearing before Committee members in hearings.

The National Library welcomes the introduction of the Digital Agenda amendments which, generally, replicate the traditional balance between protecting the legitimate rights of copyright owners and allowing reasonable public access to copyright materials. The National Library supports the extension of the Fair Dealing and Library and Archives exceptions to digital material and the new communication right. The many amendments designed to ensure the Copyright Act is technology neutral, such as the substitution of "copy" with "reproduction"; the improved definition of manuscript material; the browsing temporary copies exception and the extension of the limitations on libraries' liability for authorisation of infringement, are particularly welcome.

The National Library understands that a driving force behind the Digital Agenda amendments is the desire to protect the legitimate economic rights of copyright holders. However it is important to note that the vast majority of current Australian electronic publications are produced not for sale but distributed gratis and we believe this situation will continue for the foreseeable future. Given this situation some aspects of the Digital Agenda amendments may be seen as unnecessarily restrictive for freely accessible publications. We realise the difficulty of drafting legislation which adequately covers free and commercial publications. It may be worth noting that the National Library is currently engaged in discussions with Copyright Agency Limited (CAL) and the Australian Publishers Association to consider whether we can devise mutually accepted codes of practice for gratis material which are within the spirit of the legislation.

The Digital Agenda Bill includes several proposed amendments which are not supported by the National Library because they will impede reasonable access to copyright materials. It is on these amendments that we wish to comment in more detail.

1. s10(1) Proposed change to the definition of "library"

1.1 The National Library strongly opposes the exclusion of libraries in organisations conducted for profit from the definition of "library" within the Act. The implications of this proposed amendment will adversely affect the not for profit library sector. Libraries in corporations and businesses will no longer be included in the ss49 and 50 provisions which permit the supply of copies by a library to persons requiring them for research or study, or to another library.

1.2 Corporate libraries make a significant contribution to Australia's information resources, particularly those with specialised collections in subjects not well covered in the not for profit sector. There are 500 corporate and business libraries listed on the Australian Libraries Gateway, an Internet directory of 5000 Australian libraries (www.nla.gov.au/libraries). 39% of the corporate libraries on the Australian Libraries Gateway site are included in the Interlibrary Resource Sharing Directory, indicating their willingness to participate in national resource sharing. 33% of the corporate libraries contribute catalogue records to Kinetica, enriching the national bibliographic database with their significant and often unique holdings.

1.3 The Australian Library Collections Taskforce, a cross-sectoral body with representation from the Council of Australian State Libraries, the Council of Australian University Librarians, CSIRO, the National Academies Forum and the National Library has recently identified the comparatively low contribution of holdings to the national bibliographic database by Australian corporate and special libraries as a significant barrier to access to information for research and scholarship in Australia. If the amendment is implemented the exclusion from the national resource sharing network of specialised corporate library collections which currently contribute records to Kinetica, such as Polartech, F H Faulding, Snowy Mountains Engineering Corporation, ACTEW, Australian Submarine Corporation, Telstra Research Laboratories, SANTOS and others, will represent a significant reduction in access to library resources for the not for profit sector

1.4 In some instances there will be difficulties identifying whether libraries are in for profit institutions, such as hospital libraries and the libraries of professional organisations, leading to frustrating delays for researchers and additional administrative costs. Collaborative research initiatives such as CRCs which involve corporatised government agencies and for profit companies as industry partners with educational institutions and research organisations such as CSIRO will also be adversely affected.

1.5 It is doubtful that there will be significant financial benefits to copyright owners if the amendment is implemented and corporate libraries are required to acquire materials for their collections or remunerate owners for document supply via voluntary licences. The National Library is a major supplier of materials under the ss49 and 50 provisions with 43,000 copies supplied to other libraries in 1998/99. 40% of items supplied were greater than nine years old and thus not likely to be commercially available. Only 3% of requests to the National Library's Document Supply Service are from corporate libraries.

1.6 The importance of document supply to corporate libraries is demonstrated by the fact that 19% of the members of Kinetica, the national resource sharing network, are corporate libraries. The exclusion of corporate libraries will result in an adverse impact on Australian business if the proposed amendment is implemented since researchers in for profit organisations will no longer be able to be supplied with information resources not commercially available or covered by voluntary licences.

1.7 A recent survey by the National Library of publications indexed in the Australian Public Affairs Information Service, a general periodicals index in humanities, social sciences and current affairs, revealed that only 20% of the titles sampled were registered with CAL and thus eligible for coverage by a voluntary collective licence. Coverage of science and technology publications and overseas material is likely to be even lower. If corporate libraries are excluded from the ss49 and 50 provisions it will considerably frustrate access by researchers in business and industry to a significant proportion of information resources.

1.8 In conclusion we believe that more consideration of the policy implications of this amendment is required. The proposed amendment will have a significantly adverse impact on not for profit libraries and the research community as well as on libraries in for profit organisations. The amendment has not been the subject of the extensive consultation process which has characterised other Digital Agenda amendments. The amendment is in conflict with Copyright Law Review Committee (CLRC) recommendations on Simplification of the Copyright Act.

Recommendation: The National Library recommends that the proposed amendment which changes the definition of "library" and excludes libraries in for profit organisations be removed from the bill pending fuller consultation with affected interests and consideration of the CLRC report recommendations.

2. s50(1) Proposed limitation on supplying copies to another library

2.1 The proposed amendment requires that a library supplying copies to another library of a periodical publication or published work must hold the requested item in its collection. The effect of this amendment will prevent the operation of services such as SUPPLY 1, provided by the National Library, which supports small and medium libraries who wish to acquire copies of material not held in

Australian library collections. Recent library clients of the SUPPLY 1 service include: Queensland Health Scientific Services; the University of Canberra; Wollongar Agricultural Institute; NT Museum & Galleries; Cochlear; SMEC; IP Australia; Attorney General's Department; Sugar Research Institute. Similar services are provided by state libraries which play an important role supporting public libraries throughout Australia.

2.2 As the holdings of overseas publications in Australian library collections decrease services like SUPPLY 1 play an important role in the increasingly complex document supply environment. Small and medium size libraries often lack expertise or access to the tools which enable them to locate holding libraries overseas. Foreign currency transactions are a barrier for occasional users of overseas document supply services and many suppliers require the establishment of deposit accounts which are uneconomic for occasional users. Some important suppliers of overseas publications, like the US National Library of Medicine, will only supply to other national agencies, such as the National Library of Australia.

2.3 The National Library's SUPPLY 1 service satisfies some 1700 requests each year, with 93% of the copies requested by other libraries and the remainder by individual researchers. If the proposed amendment is implemented only the individual researchers could use the SUPPLY 1 service. Although services such as SUPPLY 1 represent only a small proportion of total document supply transactions in Australia the removal of the provision would adversely impact on Australians' access to overseas collection materials.

Recommendation: The wording of the s50(1) amendment should be changed to read "publication, being a periodical publication or a published work held in the collection of another library;"

3. s50(7B) Introduction of a commercial availability test for supply of electronic works

3.1 The proposed amendment introduces an additional requirement for the supply of works in electronic form which requires that a library officer make a declaration that the work is not commercially available within a reasonable time at an ordinary commercial price, no matter how small the portion requested.

3.2 To require a commercial availability test for the supply of a reasonable portion of an electronic work imposes an additional administrative burden on libraries which will present a considerable obstacle to efficient document supply. Libraries will need to check a variety of vendors and on-line commercial aggregators such as Lexis-Nexis, SilverPlatter, ProQuest, EBSCO, H.W.Wilson, Dow Jones Interactive and Dialog; major electronic publishers such as Elsevier, Springer, and Academic Press; library consortia such as OCLC FirstSearch, CARL Uncover, JSTOR and professional organisations such as the American Chemical Society.

3.3 Many of these aggregator services will not supply a reasonable portion, such as one article in a periodical, or a few pages of a monograph, but only provide expensive subscription access to large numbers of titles. The impact of the amendment if implemented will be particularly burdensome for small and medium libraries which lack expertise in the increasingly complex environment of commercial document supply and electronic publishing.

3.4 The exclusion of parliamentary libraries from the commercial availability test requirement suggests that at least one well placed sector of the library community understands that this provision will create a real barrier to fast and convenient access to information resources. It is difficult to see why, if an exclusion is justified for for one category of Australian library users, this provision should not be extended to all libraries, at least for supply of a reasonable portion of electronic works.

3.5 The market for Australian electronic publications is relatively undeveloped, however it should be noted that the overseas scientific, medical and technical publishing sector (owners of the rights to most material requested under the document supply provisions) continues to thrive in the electronic publishing environment. Reed Elsevier, one of the largest publishing conglomerates in the world, continues to post profits of over 800 million pounds per year. Reed Elsevier's licence agreements for its electronic publications permit library document supply without a commercial availability test.

Recommendation: The Bill should be amended to permit libraries to supply a reasonable portion of electronic publications under the provisions of s50(7B) without the additional requirement of a commercial availability test.

4. s51A Preservation copying

4.1 The National Library supports the broadening of the preservation copying provisions to make them technology neutral and permit digital copying as a preservation strategy.

4.2 The provision that such copies may be made for "administrative purposes" and only made available on the premises to officers of the library or archives effectively negates the intention to expand the scope of the section, as stated in the Explanatory Memorandum. Access by staff to published and unpublished works in libraries and archives for administrative purposes is relatively infrequent and would not justify the expense of preservation copying, whether in microform or by digitisation. The preservation copying provisions are required to ensure the long term preservation of original heritage collection materials by enabling public access to surrogate copies.

4.3 Libraries which take responsibility for preservation of documentary materials, such as the National Library and state libraries, need to be able to make copies available not for administrative purposes, but to protect the original from physical

deterioration through viewing and handling by users, or because the original (eg material on cellulose acetate) cannot be prevented from deterioration. The administrative purposes limitation effectively undermines our ability to preserve heritage material for use by current and future generations of Australians.

4.4 The National Library is also concerned that a narrow interpretation of this section could prevent public access to copies of important Australian publications in online (eg web) or physical (eg CDROM or diskette) format, which have been copied or migrated to a new format in order to overcome technological obsolescence which inhibits user access to the original format.

Recommendation: The amendment should be rephrased to permit access to preservation copies by users, as well as by staff on the premises of a library or archives. The reference to computer terminals should be deleted as this restricts the recommendation to digital copies only.

5. s116A Circumvention devices and effective technological protection measures

5.1 The National Library supports the provisions which ensure that libraries and archives have the right to acquire circumvention devices and services where technological measures are used to prevent them from making copies under ss49 and 50.

5.2 The National Library is, however, very concerned that the proposed amendment excludes libraries from using these devices for preservation purposes. The CLRC report on Simplification of the Copyright Act recommends the extension of the legal deposit provisions to cover digital publications and endorses the National Library's role in preserving these publications. The National Library will not be able to preserve a large proportion of Australian digital publications if it cannot copy the software which facilitates the use of the publication (a common feature of CDROM publications) or the multi-media and access mechanisms of the publication (a common feature of web publications).

5.3 The National Library is currently investing a significant resource in developing preservation techniques which will enable the future migration and/or emulation of digital publications to new platforms in order to maintain their useability for future generations of Australian researchers. The National Library must be able to access the full functionality and copy the files that are locked behind protection measures in order to preserve accessibility to these publications.

Recommendation: The permitted purposes should be expanded to cover preservation copying to allow libraries and archives to acquire circumvention devices and services to make preservation copies of electronic material in their collections.

Conclusion

The National Library's submission to the Committee details amendments which we believe will have an adverse impact on services and operations of the National Library. The National Library is a member of the Australian Libraries Copyright Committee (ALCC) and endorses the fuller submission on the Digital Agenda amendments made by the ALCC to the Legal and Constitutional Affairs Committee enquiry.

Yours sincerely

Jan Fullerton
Director-General
11 October 1999