JS/lk

30 September, 1999

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

Dear Ms Surtees,

Thank you for your letter dated 10 September 1999, seeking a response to the Copyright Amendment (Digital Agenda) Bill 1999. In its submission on the exposure draft, the University of Queensland Library congratulated the Commonwealth Government on its initiative in attempting to create a legislative scheme that addresses the challenges of protecting copyright in the online environment, while at the same time, supporting the legitimate access to copyright material. It is therefore with some degree of disappointment that we note that the Digital Agenda Bill introduced into the House of Representatives on 2 September, 1999, strays from the above objective in a number of significant areas. While this may be inadvertent, the net effect is that if passed with its current wording, the Bill will significantly upset the delicate balance between copyright owners and copyright users. One can only assume that the effects of copyright owners are seem to be outweighing those of users. I would add that the Bill and its content are complex and we may have misunderstood some of the provisions.

The University of Queensland Library is particularly concerned with the impact of the Digital Agenda Bill in three areas:

- Exceptions for fair dealing
- Exceptions for libraries
- Statutory licences

Furthermore, there is still a lack of clarity about licences signed by purchasers of electronic resources. The licence usually specifies a range of permitted uses of the data which appear to be independent of the act.

## Exceptions for fair dealing

The University of Queensland Library welcomes the extension of the definition of "reasonable portion" to include information in electronic format. However, the ability to exercise this right of exception is constrained by a number of factors.

- The definition of what constitutes a ***reasonable portion*** of a work in electronic form *[Item 20. After Subsection 10(2)]*, seems to assume that the work has been converted from print. It uses terms such as *number of words* in the work or *single chapter*. These are concepts taken from the print world and they do not necessarily relate to the electronic world. It is easy to anticipate that the application of the definition in practice may be rather difficult.

- The Bill makes it illegal to circumvent electronic protection devices in order to exercise the right fair dealing. As an aside, it is somewhat incongruous that circumvention of electronic protection devices is allowable under the Part VB statutory licence.

- Subsection 49 (5a) states that for material held electronically in a library or archive, an onsite user may only make a hardcopy, not an electronic copy, of the work. This is clearly restricting the application of fair dealing. The references to “communication” are not uniformly treated and leave confusion in our minds.

- In an academic institution, the copying of printed works which would otherwise constitute fair dealing, are caught up by the educational statutory licence. It is likely to be the same result under the new statutory licence for electronic works.

It is a puzzle as to why section 40 that covers fair dealing for the purposes of research or study has not been updated to expressly include electronic works? Does this meant that there is no such thing as fair dealing in electronic works? At the very least, the word “Copying” should be replaced by “Reproducing and communicating works”. When an item is “communicated” communication is carried out by the user, not the librarian.

## Exceptions for libraries

The Library is pleased to note that the Bill allows libraries to make available electronic reproductions under section 49 and 50. However, libraries and their users appear to be paying a high price for this reform:

- The definition of "library" has been narrowed to exclude libraries owned by for profit organisations. The explanatory memorandum on the Bill offers no explanation for this shift in policy. It has never been part of the Digital Agenda discussions. It is the opposite direction recommended by the Copyright Law Review Committee in 1998. The CLRC recommended that all provisions in the Act permitting royalty-free copying by libraries, including sections 49 and 50, apply to all libraries, whether or not they are conducted for profit. As the Report notes, "...determining whether or not a library is conducted for profit has become an extremely difficult task."[1] For example, all libraries in Australia are encouraged to participate in the voluntary Inter-Library Resource Sharing scheme. The

[1] *Simplification of the Copyright Act 1968. Part 1: Exceptions to the exclusive rights of copyright owners.* Copyright Law Review Committee, 1998, section 7.26.

purpose of the scheme is to encourage the sharing of information resources to promote research and private study. No distinction is made as to the type of library. The effect of the proposed Bill would be to ostracise the arbitrarily defined "for profit" libraries and deny Australian researchers legitimate access to valuable and unique material. There is no evidence that the current arrangements for libraries owned by so-called “for profit” institutions are causing financial hardship to copyright owners.

As long as the copying is for the purposes of research or private study, the modus operandi of both the library and its parent organisation are irrelevant. Such copying would not infringe the legitimate interests of copyright owners. So why the decision to split the library world into two? At best, it leaves corporate libraries at the mercy of collection agencies. At worst, with a stroke of the pen, libraries in commercial organisations may have been condemned to extinction. Is this the intention of the Commonwealth Government? It would also make traffic between for-profit and not-for-profit libraries impossible.

- Under subsection 50(7B) if a copy is made from an electronic work, no matter how small the portion, it can only be supplied to another library if it was not commercially available to the requesting library. The commercial availability test has long been a nightmare for libraries. The nightmare has just got worse. The marketplace for electronic works is considerably more complicated than the print equivalent. For example, it may be the case that the data vendor expressly allows the making of a copy for the purposes of inter-library resource sharing. This means that the requesting library must check with potential supplying libraries that this is the case for the specific work. If not, they must investigate the marketplace. In practice, the "within a reasonable time" will more than likely be reached. The net effect is that the requesting library wastes time and money and the researcher has to submit to delays and uncertainty.

## Statutory licences

The University of Queensland Library was hoping for some streamlining in the statutory licensing provisions. Instead, an already complex area has been made even more complicated with the addition of a separate statutory licence scheme for electronic material. Given that the parties cannot come to an agreement on the existing scheme for hardcopy material, just imagine the chaos that will arise with not one, but two schemes. Under these circumstances, too great a burden is being placed on the Copyright Tribunal to act as the umpire. In the absence of any compelling evidence, the Bill should be enunciating a single and workable statutory licence that is technology neutral.

There are a number of specific concerns with the two statutory licence schemes:

- Multiple reproduction and communication of insubstantial parts of works that are in electronic form does not infringe copyright. The definition of insubstantial is 1% of the total words. The item may not consist of words. An electronic item’s length is also difficult to determine. In addition, there is also uncertainty about the necessity for records to be kept for insubstantial copying.

- The management of the scheme for electronic scheme contains new, but as yet unquantifiable expenses. The Bill speaks of an "electronic use system". It is unclear how

this system will work, whether there are such systems available in the marketplace and how much they will cost. A manual recordkeeping system would be prohibitively expensive. Why is there no option to use sampling for electronic material?

- The lack of a statutory licence to cover the communication of materials in hardcopy seems to be an oversight. The digitisation of hardcopy material is becoming a standard practice, particularly for the purposes of preservation. Is the communication of these digitised versions deemed to be in breach of the Act?

- Organisations are required to "take all reasonable steps" to ensure that its licences communications are only received by "persons entitled to receive or access" said material. The Bill is unclear as to who constitutes "entitled persons".

It is to be hoped that the wording of the Digital Agenda Bill will be suitably amended to give force to the Commonwealth Government's expressed policy of maintaining the balance between copyright owners and copyright users into the digital age.

Yours sincerely

Janine Schmidt
University Librarian