

**SUBMISSION**  
to  
**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON LEGAL & CONSTITUTIONAL AFFAIRS**  
**ENQUIRY INTO**  
**THE COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999**  
By Arthur Robinson & Hedderwicks

## 1. Introduction

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### 1.1 Party Making Submission

This submission is made by Arthur Robinson & Hedderwicks (*ARH*).

### 1.2 Topic of Submission

- (a) This submission relates to the changes proposed in the Copyright Amendment (Digital Agenda) Bill 1999 (*the Bill*) which will exclude libraries operated by private organisations (*corporate libraries*) from the application of the library copying exemptions in the Copyright Act 1968 (*the Act*).
- (b) ARH operates a corporate library which will be affected directly by the changes proposed in the Bill (as discussed further below).
- (c) ARH submits that the changes proposed to limit the application of the library copying exemptions should *not* be enacted.
- (d) We discuss below:
  - the current library copying exemptions in the Act; and
  - the reasons why the application of those exemptions to corporate libraries should *not* be removed.

## 2. Current Library Provisions in the Copyright Act 1968

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### 2.1 Current Library Copying Exemptions in Sections 49 and 50 of the Act

- (a) In effect, sections 49 and 50 of the Act currently allow libraries (including corporate libraries) to provide copies of materials in the library's collection to:
  - (i) Library users (section 49); and
  - (ii) Other libraries (section 50).

Libraries may currently provide such copies upon receipt of an appropriate declaration signed by the user or other library.

- (b) Sections 49 and 50 avoid the need for libraries to obtain licences from owners of copyright (*rights-holders*) in order to make such copies.
- (c) We refer below to sections 49 and 50 as *the library copying exemptions*.

## 2.2 Current Application of Library Copying Exemptions to Corporate Libraries

- (a) The Interpretation Section of the Act does not currently contain a definition of “*library*” (sub-section 10(1)).
- (b) However, sub-sections 49(9) and 50(9) provide that sections 49 and 50 respectively do not apply to a library that is conducted for the profit of an individual or individuals (as distinct from a library which is not itself conducted for profit but is operated by an organisation which is conducted for profit).
- (c) Section 18 clarifies further the distinction between libraries conducted for profit (*for-profit libraries*) (which are excluded from sections 49 and 50) and libraries which are operated by organisations conducted for profit but are not themselves operated for profit (ie, corporate libraries). Section 18 provides that:

*“For the purposes of this Act, a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit.”*
- (d) That is, the Act currently recognises that although an organisation may be carrying on business for profit, the organisation’s internal library is not operated for profit.
- (e) Therefore, the library copying exemptions currently apply to:
  - (i) Public libraries (including libraries within educational institutions); and
  - (ii) Corporate libraries.

However, the library copying exemptions do not apply to for-profit libraries.

## 3. Proposal to Exclude Corporate Libraries from the Library Copying Exemptions

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### 3.1 The Effect of the Proposed Amendments in the Bill

- (a) The effect of the amendments proposed in the Bill will be to exclude corporate libraries from the application of the library copying exemptions.
- (b) This will mean that copyright law will apply to a corporate library whenever it makes a copy of material in its collection for a user or another library.

- (c) Accordingly, for a corporate library to be able to satisfy a copying request made by a user or another library without infringing copyright, a corporate library will require the permission of the relevant rights-holder to make the requested copy.
- (d) To obtain such permission, a corporate library will need to obtain a copyright licence from the relevant rights-holder, either directly from the rights-holder or, if the relevant rights-holder has engaged an agent (collecting agency), via the collecting agency.
- (e) As it would be impractical to seek permission from a rights-holder each time a copying request is made of the library, corporate libraries will need to obtain copyright licences for *all* material in the library's collection. However, there is currently no adequate method to achieve this because the Copyright Agency Limited (*CAL*) does not act as agent for *all* rights-holders. This is discussed further below.

### 3.2 The Proposed Amendments – the Sections of the Bill effecting the Change

- (a) The Bill will exclude corporate libraries from the application of the library copying exemptions by:
  - (i) Inserting a new definition of “*library*” in the Interpretation Section of the Act (sub-section 10(1) of the Act, as amended by section 11 of the Bill). The new definition provides that:

*“library includes a library owned by an educational institution...but does not include a library owned by any other person or body carrying on business for profit if the person maintains the library mainly or solely for the purposes of that business.”*
  - (ii) Repealing the current section 18 of the Act (section 22 of the Bill).
  - (iii) Repealing sub-sections 49(9) and 50(9) (sections 57 and 66 respectively of the Bill). (Sub-sections 49(9) and 50(9) are made redundant by the new definition of “*library*” which effectively excludes corporate libraries and for-profit libraries from the term “*library*”).
- (b) The Explanatory Memorandum (Item 11) confirms the intention is that the new definition “*should operate to exclude libraries operated by for-profit organisations, such as corporations and law firms*”.
- (c) This change was completely unexpected. The exposure draft of the Bill did not contain amendments to this effect.

## 4. How the Library Copying Exemptions are Used Currently

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### 4.1 Inter-Library Document Exchange to Avoid Duplication of Public Resources

- (a) ARH is currently an active participant in the inter-library loan system. Under this system, participating libraries rely on the current library

copying exemption in section 50 to provide copies of materials in their collections to other participating libraries upon receiving a request (with an appropriate declaration).

- (b) The materials copied and provided under the inter-library loan system are often specialised materials which are used less often by library users and are therefore kept by fewer libraries.
- (c) Corporate, court, academic and public libraries participate in the inter-library loan system. The system therefore benefits not only corporate libraries but also court libraries, academic libraries and public libraries and thus the broader community. The system avoids unnecessary duplication of public resources by enabling all library users (members of the public and employees of private organisations) to access material in any participating library's collection for the purpose of research or study.

## 4.2 Supporting Research

ARH's library collection includes some specialised legal materials which are not found in any other library collection in Melbourne. Under the inter-library loan system, ARH currently provides copies of these materials to the law libraries at Monash University and the University of Melbourne. These materials are often requested by the university law libraries for post graduate students who are researching specialised areas of the law.

## 5. Implications of Excluding Corporate Libraries from the Library Copying Exemptions

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### 5.1 Reducing the Value of the Inter-Library System and Creating Inefficiencies

- (a) If the Bill is enacted in its current form, corporate libraries will only be able to participate in the inter-library loan system if they obtain a CAL licence specifically allowing external document delivery. This would entail a further expense which private organisations may not be able to justify. If corporate libraries therefore only obtain a corporate licence from CAL, copies could only be made for employees and clients of the licensee, not for other libraries. Therefore, even corporate libraries which obtain a corporate CAL licence will be excluded from the inter-library loan system.
- (b) If a corporate library user (such as an employee of ARH) needs a copy of a publication held in another library's collection, the library user will need to:
  - (i) physically visit that other library and make the copy of the required material himself or herself under the fair dealing provisions of the Act. This would be, at best, inefficient and, in many cases, impossible, either due to the physical location of the other library or due to the other library refusing access to external parties; or

- (ii) if the material is held by a public library, make a direct request of the public library to send a copy to him or her in accordance with the section 49 exemption. The administration of such requests will be less efficient than receiving streamlined requests in the appropriate form from corporate libraries on behalf of such library users. Public libraries may have insufficient resources to meet individual requests of this type.
- (c) Users of public libraries will no longer be able to ask a public library to obtain a copy of a publication held in a corporate library's collection unless the corporate library has a licence from CAL allowing external document delivery. The same applies to users of academic, court and government libraries.
- (d) The result of this will be that:
  - (i) users of public, court, governmental and academic libraries will have access to fewer resources (particularly specialised publications); or
  - (ii) public, court, governmental and academic libraries will need larger budgets in order to increase the number and type of publications in their collections. This will, in turn, require more storage space for those libraries to house these additional materials.

## **5.2 Dividing the Library System and Replicating Public Resources**

- (a) The overall effect of the implications described in the previous paragraph will be to divide the resources of the library system between public libraries and individual corporate libraries.
- (b) To continue providing library users with access to all materials which they currently have access to under the inter-library loan system, public libraries and individual corporate libraries will need to replicate the existing resources of the broader library system.

## **5.3 Increased costs for Legal Research**

If the Bill is enacted in its current form, law students will be unable to obtain copies of specialised legal materials in ARH's library collection. If law students are to be able to continue to use such materials for the purpose of research or study, the university law libraries will need to purchase those materials.

## **5.4 Lack of Satisfactory Alternative Method to enable Corporate Libraries to Comply with the Proposed Changes**

- (a) As noted in paragraph 3.1(e) above, if corporate libraries are excluded from the application of the library copying exemptions, it will be necessary for corporate libraries to obtain permissions from rights-holders in order to make copies of materials in their collections.

- (b) The Copyright Agency Limited (**CAL**) does not represent *all* rights-holders in Australia. Therefore, if the Bill is enacted in its current form, in respect of those rights-holders which are not represented by CAL, corporate libraries will need to obtain individual permissions each time a copy needs to be made of a work of such rights-holders. This would not only be administratively difficult (if not impossible), but would also require significant additional resources.
- (c) A licence from CAL does not currently allow a licensee to make digital copies. ARH understands that CAL's ability to license such copying is uncertain. This would reduce further the usefulness of a licence from CAL.

### **5.5 Increased Costs for Corporate Libraries**

- (a) The cost of obtaining a licence from CAL would impact significantly on the operating budgets of corporate libraries such as ARH's library.
- (b) As noted above, there would also be significant costs involved in administering a system to obtain individual permissions from rights-holders who are not represented by CAL, as well as the licence fees involved in obtaining such permissions.

### **5.6 Potential Discrimination against Library Users unable to visit Corporate Libraries**

- (a) If a corporate library regards it as too expensive to obtain individual permissions from rights-holders who are not members of CAL, the library will be unable to make copies of those rights-holders' materials for library users (for example, employees and clients). However, a library user who requires a copy of material not covered by a licence may still be entitled to physically visit the corporate library and make a copy of that material himself or herself under the fair dealing provisions in the Act.
- (b) This creates an anomaly. A library user may be able to copy material himself or herself but he or she cannot ask the library to make those same copies on his or her behalf.
- (c) This anomaly may be regarded as discriminating against library users who are unable to physically visit the corporate library which has in its collection the material required by the user. Such library users are likely to include the physically handicapped and people in remote locations.
- (d) For example, ARH's library currently provides copies of materials to employees in ARH's Perth office. Under the proposed changes, if an employee in ARH's Perth office needs a copy of an article in ARH's library in Melbourne but the author of that article is not represented by CAL, it may be administratively impractical to obtain an individual permission from that author. ARH's library would therefore be unable to provide the requested copy to the Perth employee. In contrast, if that employee were located in ARH's Melbourne office,

the employee could more readily visit the library and make a copy of the article himself or herself under the fair dealing provisions in the Act.

- (e) In ARH's experience, corporate libraries often contain materials which are very specialised and not otherwise available from public libraries. Those specialised materials may be precisely the type of materials that physically handicapped and isolated library users may have the greatest need to access.
- (f) This anomaly is particularly ironic given that the purpose of the Bill is to take account of the online environment which eliminates many of the inefficiencies of the physical world.

## **6. Recommendation**

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### **6.1 ARH's recommendation**

ARH recommends that the changes proposed in the Bill to exclude corporate libraries from the application of the library copying exemptions should not be enacted.

### **6.2 ARH's support for the submissions of ALLG and ALCC**

ARH understands that the Australian Law Libraries' Group (*ALLG*) and the Australian Libraries' Copyright Committee (*ALCC*) are each also making a submission requesting that corporate libraries not be excluded from the library copying exemptions. ALLG provided ARH with a draft of its submission on 30 September 1999 and ALCC provided ARH with a copy of its submission which ARH understands was submitted on 1 October 1999. Based on those documents, ARH supports the concerns raised by the ALLG and ALCC.

**Arthur Robison & Hedderwicks**

7 October 1999