

DA Bill – LACA committee report a mixed blessing

The LACA Committee Report on the Digital Agenda Bill

The Legal and Constitutional Affairs Committee (LACA) handed down its Advisory Report on the *Copyright Amendment (Digital Agenda) Bill 1999* late last year.

A mixed blessing, the report responded to library criticism of some elements of the Bill whilst introducing a plethora of new concerns. A significant win and a controversial loss for the library sector form the basis of this comment.

The *Digital Agenda Bill* contains a new definition of 'library' in Item 11, the effect of which is to exclude 'for-profit' libraries (such as those owned by corporations) from being able to rely on the exceptions for libraries and archives in the *Act* for copyright infringement. The furore which sprang from this provision's late entry into the Bill (it was not included in the Exposure Draft) was such that the LACA Committee have recommended the definition be omitted (Recommendation 2). The Committee recommended that further consultation be undertaken with interest groups and consideration given to the Copyright Law Review Committee's report on the *Simplification of the Copyright Act 1968*.

Whilst a definite win for the library sector, pressure on this issue needs to be maintained so that the Bill is amended in line with the Committee's recommendation.

Of greatest concern for all users is the Committee's recommendation that a right to first digitisation of a work be created exclusively for copyright owners (Recommendation 1). Essentially, you would not be able to scan/digitise a print work without the copyright owner's permission unless this act fell within a very narrow band of exceptions to the right. For libraries, these two exceptions are:

- reproducing and communicating copyright material for preservation and other purposes (the other purposes contemplated are those in sections 51A and 110B, including proposed amendments contained in the *Bill*); and
- reproducing and communicating copyright material by libraries and archives at the request of users, who, by reason of their location, cannot obtain a hard-copy of the work within four days through the ordinary course of the post.

The *Digital Agenda Bill* had already made provision for the digitisation of print works in its definition of 'reproduction'. Recommendation 1 distorts the balance between copyright owners and users to the detriment of users and cultural institutions. Whilst the reasoning for the provision is well-meant, determining that 'digital is different' for one particular method of dealing with a copyright work, subverts the ap-

proach of the entire Bill: 'that the current balance that exists in the print world between owner and user will be transferred to the digital environment'.

In effect, the provision provides a mechanism to expand the revenue streams of copyright owners, as is anticipated by the Committee: 'The Committee would expect that in most cases the conversion of copyright material from hard-copy to digital form would be the subject of commercial negotiations between copyright owners and libraries and archives, and between copyright owners and users.' The right to first digitisation gives copyright owners something new to licence, which in turn conflicts with the government's stated policy of not legislating to the cost detriment of libraries and user groups.

Further confusion arises when considering the recommendation in light of already available technology, such as digital photocopiers. The boundaries that encompass a first digitisation are unclear — the definition needs significant clarification.

In respect of the exceptions provided to the right of first digitisation, the lack of an exception for fair dealing for research and study purposes will result in educational institutions being greatly hindered in their development of technology to provide services to the nation's students. Whilst able to photocopy a book, students will not be allowed to scan the same fair dealing amount onto a disk — the use made of the work is the same in both cases and is for an educational purpose.

The exception to the right of first digitisation for remote users of libraries is further fraught with complications. As it stands, whilst a library can photocopy and fax a print work, they cannot scan and e-mail the same request to a user unless that user is four days away via Australia Post delivery schedules. Again, it is a case of making it harder for cultural institutions to utilise the benefits of new technology in their provision of services to users. Further complications arise when the question of 'when the four day rule applies from' is raised. From the day the request was received or from the day the work leaves the library?

It seems clear that the Committee's intention was not to restrict the library exceptions to the right to first digitisation by the other requirements attached to the general library exceptions in Section 49 of the *Act* [see paras 2.21 and 2.76]. Does this mean that whole works can be transmitted electronically as long as the recipient is a remote user in terms of Recommendation 1? Questions such as these need answers if the real implications of the rec-



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ommendation are to be understood by those in the industry.

Technological neutrality is consciously discarded by the Committee through this recommendation and whilst the three year review period is applauded, it could be anticipated that this recommendation will meet its use-by date far before then. Print-to-print reproduction is not going to play a major role in the future of information whereas print-to-digital and digital-to-digital will. If we can only digitise our print works, in limited circumstances, for minority groups, then what of all the print works that publishers/copyright owners do not digitise for commercial reasons? The loss of access to past research and work and innovation because it is in the wrong format [that is, print] does not aid the copyright user, the copyright owner or society as a whole.

Further, when considering how this provision would operate in practice in a library/archive, the difficulties of ascertaining firstly: whether a work has already been digitised (assuming such information is actually accessible if it is not a work already in their collection) and secondly: whom the copyright owner is would exacerbate the already expensive administration of these institutions. A further query is to consider whether the right to first digitise a work extends only to the first ever digitisation, or whether it extends to the first ever digitisation in that particular library?

Critically, this recommendation immediately renders void such document supply mechanisms as ARIEL, a long-standing initiative of the library and university sectors where documents are scanned and e-mailed in response to specific library requests. For the National Library of Australia, ARIEL is currently used to supply approximately 40 per cent of documents to other libraries, and represents a significant long term investment on the part of universities and libraries across Australia. This is a key issue for university libraries and libraries in general. If transmission by ARIEL is not permitted, Australian libraries and their users will be significantly disadvantaged, as it is a technology used heavily around the world by libraries to supply material to each other and to their users.

The government will soon provide its response to the LACA Advisory Report, at which point we shall see how many of the Committee's recommendations are accepted as amendments to the Bill. Pressure needs to be maintained on the government and opposition at this critical time. We need to demonstrate to them how a right to first digitisation will impact the library sector and we need to reinforce our support the deferral of discussion regarding the definition of library.

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