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11 February 2008

Mr Simon Cordina
Assistant Secretary
Content, Programs and Regulation Branch
Department of Communications, Information Technology and the Arts
GPO Box 2154
Canberra ACT 2601

Re: Feasibility of extending the current legal deposit scheme to include audiovisual and electronic material

CAL is an Australian rights management company that bridges the gap between copyright users and creators.

Since 1974 CAL has managed the copyright interests on behalf of more than 10,000 direct author and publisher members. CAL's indirect members, of which there are hundreds of thousands, include both Australian and international creators of copyright works.

If the underlying objective of legal deposit is to ensure there is a complete collection of Australian literature housed in Australia's National Library, CAL agrees it is a worthy one. CAL remains in support of such a collection - despite reservations about the practicalities of such - the benefits of which will continue to be of value to many future generations.

What CAL does not support, and in fact strongly objects to, is any attempt by government to broaden the scope of the scheme beyond this objective.

In short, any of the suggested expansions to the scheme, particularly those which contemplate access as well as collection and preservation as the purpose of the scheme, would have deleterious effects on not just CAL's members, but all Australian authors and publishers.

The issue of access

The suggestion in the Discussion Paper that legal deposit exists "to develop a national collection of published material...and to provide the public with access to that material for research or study" departs radically from the conclusion of the 1959 Spicer Report, and the subsequently broader determination by the CLRC in 1999, which said that the purpose of legal deposit in Australia was "important for the preservation of materials that are part of the nation's cultural heritage."

CAL believes expanding the definition to include providing "...the public with access..." would give new meaning to the objectives of the legal deposit scheme – results of which would not have been envisaged, nor could have been contemplated, when the scheme was first introduced.

Providing access to or supplying copies of legal deposit works to patrons under fair dealing, research and study and library copying provisions, ultimately prejudices copyright owners' legitimate economic interests, by discouraging library patrons from purchasing these works at commercial rates, and by discouraging traditional library acquisition of works.

Any requirement that publishers deposit electronic and audio-visual works with the scheme would be unjust, placing an unfair burden on them for no reward. At the other end of the spectrum, this injustice would be compounded by the lack of limitations on access to the works. Without limitations to access, legally deposited materials could be used for purposes which are unfair in their operation to copyright owners.

Why should creators of works be compelled, for no remuneration, to deposit their works with the National Library, when these deposited copies can then be used for a variety of research and study purposes, and to satisfy inter-library loan requests?

Why should Australian businesses be able to obtain copies of copyright works – avoiding paying the copyright owner for their commercial use of these works - by relying on legal deposit and inter-library loan and library copying provisions?

And why, given the ability for works to be exploited using various digital technologies, should these issues be compounded further by enforcing the removal of DRM tools for electronic legal deposit works?

Limits and regulations must be applied

CAL believes that the scope of the legal deposit scheme must be carefully delimited to ensure the legitimate economic interests of copyright owners are not affected by its operation. In particular, where a work is being commercially exploited, legal deposit copies must not be made available to the public in ways that would discourage the sale of these works.

To further allay concerns over access, especially within a digitally-enabled environment, CAL believes access to legal deposit materials must be strictly regulated.

For example, CAL is of the view that electronic legal deposit works should only be made available to patrons of the National Library who visit in person, and then only on terminals from which copies cannot be made or communicated. This would provide genuine researchers with access to

materials for research purposes, while ensuring that broader markets for works are not undermined.

The Practical Issues

CAL believes the proposed expansion of the scheme raises practical issues that must be addressed.

Criteria and obligations

The purposes for which material is to be collected under any extended legal deposit scheme, and what materials are to be subject to electronic or audio-visual legal deposit, must be clarified. A set of criteria should be established to ensure creators know their obligations.

Much of the material published on the internet would never have come under the terms of the traditional legal deposit scheme. Many organisations, particularly those for which publishing is not a primary or core business activity, will not be aware that they are obliged to deposit materials with the National Library. This non-compliance with the legislation means they are liable for fines under the proposed terms of the scheme.

Frequency

The current legal deposit scheme requires materials to be deposited within one month of their publication in Australia.

Websites are dynamic publishing tools, many of which are updated constantly throughout the day. A requirement for creators to continually deposit materials would be unreasonable. If legal deposit is to extend to electronic materials published on internet sites, the burden to deposit should not fall on the publisher.

Market erosion

Many of CAL's established members, such as publishers of business and legal content, and newspaper publishers, have been publishing content electronically for some time.

Expanding the legal deposit scheme to capture electronic works will - should the scheme be broadened to include the notion of access by the general public - raise real concerns in relation to commercialisation of these works. Allowing these materials to be used under inter-library loan provisions will undoubtedly erode the legitimate commercial interests of such organisations.

CAL believes that term restrictions should apply to access to legal deposit works. If works are being commercially exploited by creators, and are readily available to people who want access to them (for a fee or on other terms set by the creator of the work), they should not be able to be supplied from legal

deposit copies. CAL suggests a moratorium on access to such works for a term of 25 years.

Removing Digital Rights Management (DRM) devices

Expanding legal deposit to require that DRMs be removed from electronically deposited materials, so that the library can access the materials, will only further reduce the incentive for creators to invest in digital publishing. CAL's publisher members are already reluctant to produce digital materials, citing lack of security in digital environments.

Government must stipulate that legally deposited materials only be accessed by genuine researchers on the premises of the National Library, on terminals that do not allow copying or communication of materials. If such restriction on the access to legally deposited materials applies, this would allay CAL's members' fears.

Including audio-visual and electronic works

CAL notes that the expansion of legal deposit would extend to both audio-visual and electronic works. Some would have to be deposited with the National Library and some with the National Film and Sound Archive. Many CAL members are creating works which could potentially come under both categories, and CAL believes duplication of depositing requirements should be avoided.

Same content, different format

Additionally, where a work is provided with the same content in electronic and hard copy, CAL does not support an obligation for creators to deposit both versions of the work.

Data compatibility for electronic works

CAL members are concerned that technical issues would hamper the fluid operation of any expansion to the scheme. For the scheme to operate unimpeded, the National Library or other collecting institution would need appropriate software and other technological infrastructure capable of receiving material deposited in the forms in which they are created.

The National Library would be required to equip itself to receive data from many different software forms and containing numerous complex programming languages. For instance, webpages published with text and reduced diagrams which can be expanded through hyper-links.

It would be an unreasonable burden on publishers to expect that they would adopt IT standards compatible with the National Library's systems.

Conclusion

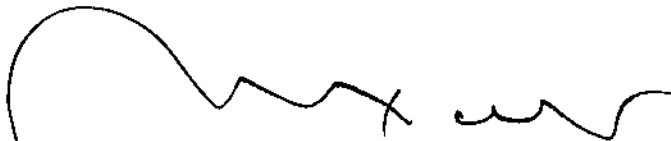
CAL is grateful for the opportunity to provide comment in response to the Discussion Paper. CAL has consulted with the Australian Publishers' Association, the Australian Society of Authors and numerous key author and publisher members who share the concerns we have raised in our submission. CAL understands a number of them will be making independent submissions in relation to the proposed expansion of legal deposit to cover electronic and audio-visual material.

While CAL looks forward to further discussion and consultation in relation to the issues raised in the Discussion Paper, and in our submission, as the review proceeds, we wish to send a strong message to government.

The legal deposit scheme was established for cultural heritage purposes. CAL trusts the scheme will remain just that, a repository that will over time become a valuable source of materials used for cultural heritage purposes.

Based on the Discussion Paper in question, CAL recognizes the potential for the scheme to become a repository of cultural heritage benefit to future generations. Notwithstanding, CAL is concerned that this potential benefit be weighed against the concerns of creators, and its terms closely drafted to ensure that materials are not able to be accessed, and potentially misappropriated, by those with the capacity to pay. This is an all-too alarming prospect, the ramifications of which would unjustly prejudice, and place considerable economic burden and onerous obligations on, our members.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jim Alexander', with a large, sweeping flourish on the left side.

Jim Alexander
Chief Executive