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30 September 2008

Expert Panel
Review of the National Innovation System
Department of Innovation, Industry, Science and Research
GPO Box 9839
CANBERRA, ACT 2601

Dear Members of the Expert Panel

REVIEW OF THE NATIONAL INNOVATION SYSTEM

CAL congratulates you on the publication of the Green Paper as part of your review of Australia's Innovation System. We take this opportunity to provide comment on the recommendations contained in the Green Paper – with our 12,000 author and publisher members' concerns in mind.

We agree with your overall findings to date: Australia must increase its investment in innovation if we are to prosper in the future. A key area for investment is in education – core to CAL's operations and to many of our members' activities as educational authors, academics and publishers.

This response addresses broad areas of interest and a number of specific recommendations that are of particular relevance to CAL.

Chapters 5 and 6

Chapters 5 and 6 of the report emphasise that education and research are central to the development of an innovative nation. We support the recommendations contained in these chapters; ensuring that Australia's investment in education is among the highest in the OECD is a worthy objective which pays long-term dividends. If investment in education lags behind our foreign counterparts, CAL agrees Australia's long-term prosperity is not secure.

For the education sectors to be most effective, they must have content on which they can rely, in the form of high quality reference and other research material. The government's attention should also be directed to the optimal creation of this content, in addition to funding for teachers and researchers.

A significant component of this content should be Australian made and oriented – to reflect the unique cultural, geographic and economic features of the nation and to ensure that Australian innovators are informed of specifically Australian concerns and conditions. This in no way implies that Australia should not also have easy and cost effective access to the best international content. Of course, there will always be a requirement for Australians to retain currency with foreign developments through access to foreign publications.

CAL submits that government policy should promote and support the creation of quality Australian texts.

Recommendation 7.3: *Professional practitioners and beneficiaries of the IP system should be closely involved in IP policy making. However IP policy is economic policy. It should make the same transition as competition policy did in the 1980s and 90s to being managed as such.*

Copyright is a specific form of intellectual property, as are trade marks and patents. CAL's comments are confined to copyright, which is not an industrial right. The *Copyright Act 1968* and the international treaties with which this statute complies, state that copyright encompasses both economic and non-economic rights. Non-economic rights contained in copyright include cultural and moral rights. Copyright should therefore not be considered purely from an economic perspective, though the economic value of copyright is naturally of importance to those who create copyright works. The cultural concerns relevant to creative industries may mean that purely economic concerns are insufficient as the only yardstick against which copyright policy is measured. A unique Australian publishing industry has both an economic and a cultural value.

Economic analysis as the single consideration for copyright policy in Australia may lead to a conclusion that, as a net importer of copyright works, Australia should reduce copyright protection afforded to all creators – foreign and local. This would, however, lead to a diminution in the creation of Australian works due to erosion of the economic return to those who can and want to publish local works. Australia would increasingly become a secondary, dumping market for the copyright works of other English speaking countries where robust copyright frameworks are in place, and future generations of Australians would be discouraged from entering the publishing industry.

It is unclear who the 'beneficiaries' referred to in the recommendation are in relation to copyright. They could be creators/ copyright owners, who benefit from the limited rights accorded to them under copyright law, or they could be copyright users/ consumers who benefit from the exceptions to the exclusive rights of copyright owners contained in copyright law which provide them with access to copyright works.

Recent reviews of Australia's copyright framework undertaken as part of the Digital Agenda amendments and review, the negotiation of the Australia-US Free Trade Agreement, and recent legislative amendments which came into force on 1 January 2007, all display immense interest from a variety of parties drawn from a range of interests. User and owners make up the market for copyright works, and it is the balance between their interests that is at the heart of copyright law. This balance is not always an economic one, though that is vital in reaching a policy position for copyright.

CAL submits that government policy in relation to copyright must take into account both cultural and economic concerns.

Recommendation 7.7: Australia should establish a National Information Strategy to optimise the flow of information in the Australian economy. The fundamental aim of a National Information Strategy should be to:

- *utilise the principles of targeted transparency and the development of auditable standards to maximise the flow of information in private markets about product quality; and*
- *maximise the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information).*

The second point of this recommendation is of particular relevance to CAL's membership – especially to CAL's publisher members who create value-added products as reference tools for

the government generated information to which they relate. The sorts of works which are relevant here are statutory instruments, guidelines and other documents relied upon by the professional and educational sector.

The Copyright Law Review Committee's 2005 review of Crown Copyright provisions underscored the difficulties brought up by this area – especially what works are 'government generated' for the purposes of copyright, and therefore ones to which any legislative provisions would apply which would 'maximise the flow of government generated information'. The CLRC's 2005 review made clear that this issue was one of debate between the different arms of government – States claiming that the Commonwealth was not in a position to overwhelm their prerogative copyright interests, and some judges asserting that they retained copyright in their judgments. CAL believes clarification of these areas would be of benefit to all. This recommendation in relation to government ownership of works and those of the CLRC 2005 review would need to be reviewed and accommodated in government's response to this recommendation.

Economic analysis might favour a 'user pays' model. To the extent to which any material is valuable, and a market develops to establish its value, there is less need for tax payer funds to be spent on the creation of these works.

CAL submits that clarification of what works are 'government generated' is necessary, as is economic analysis of different models for offering government works to third parties.

Recommendation 7.8: Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence.

As mentioned in response to Recommendation 7.7, CAL believes that clarification is required as to what publications can be considered to be ones in which government retains copyright. Once this has been addressed, and CAL contends that this is not a simple matter, CAL supports the objective of public access to government works. However, methods for achieving 'open publishing' are varied and careful consideration should be given before a model is adopted.

Again, this is an area that was considered by the CLRC into Crown Copyright. Some of the reasons that a blanket removal of copyright from government published works was not supported in that review remain relevant. There is concern that without copyright protection, third parties could publish commercial (or non-commercial) versions of government works which are not accurate, and which therefore do not provide the public with access to government information – rather to disinformation. Copyright in this context can be used to exercise quality/ accuracy control.

The suggestion for the use of Creative Commons (CC) licensing poses similar, and in some ways more complex, concerns than the government asserting no copyright interest whatsoever over its works. There are similar issues in relation to the accuracy of any material which is provided under CC licensing. One of the key marketed benefits of CC licensing is the ability of consumers to 'reuse' content in whatever ways they wish, usually on the basis that they will attribute the creator of the work they have reused, and offer it on similar terms – i.e. with a requirement for attribution, but no economic return where the reuse is non-commercial. There is no requirement for accuracy in the 'reuse' made. Government would not be able to renegotiate the terms of CC licences after a set period as they are drafted to endure for perpetuity.

Some governments have therefore determined that rather than removing copyright from works or offering government works on CC or other open licensing terms, a partial waiver of copyright over government works is more appropriate. These waivers usually permit non-commercial use

of works – say for download and reproduction of works in a classroom or a work-place to ensure awareness of government policies and laws. Most provide that where commercial use is to be made of government work, say by commercial publishers, licence terms must be negotiated with government. Some examples of these waivers are those used by parts of the NSW government, and the UK government.

Some confusion will arise regardless of whether government amends the *Copyright Act* so that 'government works' are copyright free or applies CC or other open licensing models to its works. The confusion relates to those users of such works who do not appreciate that whatever copyright exemption or licence is applied to government works, does not apply to the commercially produced publications which reproduce these government works. These are works such as annotated statutes which contain detailed cross-referencing, glosses and other analyses which are distinct from the unembellished government works on which they rely. To remove any confusion in relation to the application of any government work copyright exemption or open licence, the UK government has clarified that its waiver over government works does not extend to these works. CAL believes that there are a number of issues, including this one, which need to be considered to achieve the outcomes contained in these recommendations of the Innovations review.

CAL submits that government should carefully review options for amending the copyright terms on which government works are made available. In addition, any amendment to the copyright terms on which government works must take into consideration any impact it may have on third party commercial publishers – clarifying that these works are separate works to which such copyright terms do not apply.

Recommendation 7.10: A specific strategy for ensuring the scientific knowledge produced in Australia is placed in machine searchable repositories be developed and implemented using public funding agencies and universities as drivers.

Recommendation 7.11: Action should be taken to establish an agreed framework for the designation, funding models, and access frameworks for key collections in recognition of the national and international significance of many State and Territory collections (similar to the frameworks and accords developed around Australia's Major Performing Arts Companies).

Recommendation 7.14: To the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons. This should be done whilst the Australian Government encourages other countries to reciprocate by making their own contributions to the global digital public commons.

CAL believes these three recommendations raise similar issues, and will therefore address them as a group.

Recommendations 7.10 and 7.11 do not take into account the large repertoire of works which are not government owned, and which CAL argues cannot therefore be appropriated by government without both a compelling public interest policy basis and the calculation and payment of 'just terms'. Many of the scientific works published in Australia are owned by private individuals and entities. Mandating that they be provided on machine readable repositories with public agencies and universities as 'drivers' will undermine the incentive for private investment in the creation of these works. Copyright is a method of both rewarding past endeavour and encouraging the creation of new works in the future.

Similarly, works held in the collections of government institutions, including galleries, libraries and museums, will include many works in which the government does not own copyright – but where the copyright is retained by third parties, often the original creators of works. Again, CAL believes that mandating that these works be made available on the terms prescribed would undermine the interests of the copyright owners and act as a disincentive to the creation of future works.

Recommendation 7.14, if applied, would undermine the incentive for commercial entities to enter into partnership agreements with government or Australian universities and research institutes to undertake research and development, as it would disentitle them to ongoing economic reward in the form of copyright royalties for works which they had created which were successful.

Coupled with the recommendation for the use of CC licences, this would discourage innovation in the form of new works, and instead encourage the proliferation of a 'cut-and-paste' community, where those who might otherwise have undertaken serious research or creative endeavour will not, because CC models and terms of government funding would compel them to create works with no ability to derive an ongoing economic return from them.

This model is more akin to a 'government patronage' model, than one where the competitive market forces (in our members' terms this is the market for works of intellectual value) are removed. CAL believes the result of such a model would be a reduction in the diversity and quality of works created.

There are separate issues in relation to government copyright ownership and the desirability for publicly funded institutions to be able to generate income from the works they publish in which they own copyright. The recommendations, if applied, would disenfranchise government from participating in the economic market for intellectual works, open to other copyright owners, and may mean they are at a competitive disadvantage and will not have the resources they might otherwise have to create new copyright works.

CAL submits that government should not implement copyright provisions over third party works that would detrimentally impact on their economic rights. In addition, economic modelling and analysis should be undertaken into the relative merits of government being able to exploit the use of works where it is the copyright owner.

Conclusion

CAL believes innovation is fundamental to Australia's future prosperity. We believe that given Australia's specific geography, urban concentration, level of educational aspiration and small population base, the proper utilisation of intellectual endeavours is a prime concern for Australian policy. Digital information technology provides delivery platforms which break down the physical barriers to trade in intangible property. For members of Copyright Agency Limited, the proper legal framework will deliver remuneration streams to those who invest their time, talent and skill in publishing creative works, and allow them to compete and contribute on the world stage to their own, the nation's and the world's benefit.

Jim Alexander
Chief Executive