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26 August 1999

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

Dear Ms Surtees

INQUIRY INTO THE ENFORCEMENT OF COPYRIGHT IN AUSTRALIA

The Copyright Agency Limited (CAL) is pleased to have the opportunity to respond to the Committee's inquiry into the enforcement of copyright in Australia and attaches its written response to the terms of reference and the Committee's inquiry booklet. This submission has also been forwarded by electronic mail to be made available on the Committee's website, as requested. There is no part of CAL's submission that is confidential.

CAL appreciates the opportunity to meet with members of the Committee face-to-face to provide oral testimony with respect to CAL's views.

Yours sincerely

Michael Fraser
Chief Executive Officer



Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs – Inquiry into enforcement of copyright in Australia, 1999

A. ABOUT CAL

1. CAL is a copyright management company, also known as a copyright collecting society, whose role is to administer permissions to copy published works. CAL represents authors and publishers as their non-exclusive agent and licences the copying of their works by the public, business, government and the educational sector.
2. CAL administers an important part of copyright for authors and publishers: the right to reproduce their works. CAL was established in 1974 and in 1999 will celebrate 25 years since its establishment as a not-for-profit company. In that 25 years CAL has distributed over \$100 million dollars to copyright rightsholders. CAL now represents the reproduction rights of thousands of Australian authors and publishers.
3. CAL provides a legal and practical method for users to copy published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of published materials including books, journal articles and essays through its licences to copy.
4. CAL is committed to encouraging the development of lively and diverse markets for published works by providing a range of commercial and non-commercial copying licenses.

B. INTRODUCTORY COMMENTS

5. As the foundation for international commerce shifts to ideas and information, CAL is committed to finding the appropriate balance for copyright owners and users to ensure access to information for the community and fair payment for use to copyright owners. However, this can only occur in an environment which is sympathetic to the needs of authors and publishers to reap adequate remuneration for the use of their materials.

6. It is CAL's view that the Committee must consider especially as part of its inquiry, how to ensure effective enforcement of authors and publishers rights in the digital environment. Without adequate enforcement measures available to copyright owners in the future, it is CAL's view that the true value of any rights will be illusory.
7. While CAL's submission does not address all of the Committee's terms of reference, CAL would be pleased to respond to any specific questions the Committee may have in relation to other matters when CAL provides its oral submissions at the Committee's public hearings.

C. EVIDENCE OF THE TYPES AND SCALE OF COPYRIGHT INFRINGEMENT IN AUSTRALIA

CAL's role in copyright infringement

8. As a copyright management company, CAL acts as agent on behalf of its member authors and publishers in providing copying licences to government, educational institutions, individuals and private sector organisations. The terms of CAL's licences generally require that licensees copy within defined copying parameters and do not infringe copyright.
9. Members of CAL are also able to seek assistance from CAL with respect to suspected infringements of copyright, that is, where individuals or organisations are reproducing copyright material without reliance on a licence scheme administered by CAL or are possibly in breach of the *Copyright Act 1968* (the Act).
10. Where CAL is informed that infringement of copyright may be occurring its general response is to:
 - contact the alleged infringer to substantiate the allegation;
 - suggest that the individual or organisation take out a CAL licence, where applicable;
 - remind a licensee of their obligations under a CAL licence; or
 - as a last resort initiate legal action where there is a potential to establish a legal precedent with respect to the rights of members of CAL and other copyright owners.
11. Apart from being informally approached by members and licensees and conducting general research to identify potential litigation strategies, CAL does not take a proactive role in the enforcement of its members' rights. In this respect its role can be contrasted with organisations such as the

International Federation of Phonographic Industry or the Music Industry Piracy Investigations.

12. Although CAL is not an enforcement or investigation agency as such, it is nonetheless acutely aware of the impact of unauthorised reproduction or piracy of its members' works. The manner in which such piracy is occurring is explained below.

The meaning of piracy

13. CAL is pleased to respond to the Committee's request at page 7 of its inquiry information booklet that submissions provide "an indication of what types of behaviour are classified and counted as pirate activity".
14. Clearly there are many views in relation to what constitutes piracy, but it is CAL's view that piracy should be defined as any unauthorised reproduction of a copyright owners works. Piracy should not be limited to instances where there is a large scale, systematic infringement of copyright works for the purpose of deriving a profit. Rather the following definitions of piracy should be considered by the Committee, especially that adopted by the *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994* (TRIPS Agreement).
15. The TRIPS Agreement provides as follows:
- "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation (Footnote 14, Article 51 of the TRIPS Agreement).
16. The International Intellectual Property Alliance (IIPA) has defined piracy as:
- the unauthorised copying, reproduction, distribution, performance, or manufacture of copyrighted products such as print publications.
17. In these definitions the focus is on the unauthorised nature of the activity and piracy clearly embraces any level of activity where that involves copyright infringement. In this respect CAL respectfully notes that the Committee's terms of reference require it to consider "copyright infringement", not "piracy". CAL submits that accordingly the Committee should not seek to limit its consideration of any enforcement issues by adopting an overly narrow definition of "piracy".

Instances of piracy

18. It is CAL's experience that both organisations and individuals reproduce published materials without the permission of the copyright owner for purposes that are clearly not covered by any exceptions to copyright infringement. Reproductions within small to large corporations for the business purposes of such organisations, if unlicensed by the copyright owner directly or by CAL, are highly likely to be infringements. However, such infringements are difficult to detect without a consistent and organised approach by copyright owners or their representatives.
19. CAL is seeking to legitimise the business activities of such corporations and organisations by offering a licence scheme for corporations that will permit photocopying by employees and organisations. However, until such time as that licence scheme is widely accepted, such organisations continue to engage in copyright infringement.
20. While the anton piller remedy may be available to copyright owners, and CAL acting on its members behalf, this is not a remedy that CAL has sought to exercise. The deterrent to utilising this remedy is the difficulty in establishing the essential preconditions to the granting of such a remedy, the cost of such an application and the chance that a court may not grant such an order. It is CAL's view that given these hurdles, it is unlikely that CAL's members would seek to pursue such a remedy independently of CAL.
21. In addition to the instances outlined above, there is also a significant market of trading in copies of works that have notionally been made under existing exceptions to copyright. As CAL recently submitted to the Attorney-General in respect to the Exposure Draft of the Digital Agenda Bill 1999 (submission dated 22 April 1999) there is wide spread, systematic, high volume copying being undertaken as "fair dealing" or in purported reliance on sections 49 and 50 of the Act (library copying provisions). In its submission at paragraphs 15-17 CAL stated as follows:

CAL notes that the Government has also failed to recognise the extremely prejudicial economic effects on rightsholders of the current level of use of the fair dealing and library copying provisions. The extensive very frequent and very voluminous use made of these provisions indicates that document supply by libraries is a significant industry. For example, the CAUL (the Committee of Australian University Libraries) statistics as to the number of items supplied by photocopy or e-mail to other libraries show that in 1996, the total items supplied as photocopies or e-mails by university libraries to other libraries was at least 317,550 items. [www.anu.edu.au/caul/stats].

When supplying an item a library is able to charge a fee (s.49(3) and s.50(6) of the Act). The Australian Council of Libraries and Information Services recommends that a cost recovery charge of \$12 per item apply to

this supply. The author and publishers do not receive any share of this fee.

CAL suggests that the Government re-examine the further exceptions it has proposed in respect of library copying. Given the sheer volume of photocopies of copyright works supplied by libraries even the existing provisions have a great commercial significance to copyright owners.

22. CAL also urged the Attorney-General to reconsider the proposed extension of the “reasonable portion” test to the digital environment because of its potential negative impact on publishers and authors. CAL submitted at paragraphs 76-79 as follows:

CAL notes that the Government has specifically requested comments from interests on “the appropriateness of extending the current reasonable portion test to material in electronic form, and the level of certainty which will be achieved for users through the proposed s.10(2)A”.

As the Government would be aware, CAL has always maintained that the current inclusion of the reasonable portion test in the Act is grossly unfair to copyright owners.

While at the time of its introduction, the reasonable portion test may have been intended to allow a minimal volume of unremunerated copying of works, its actual use by those who rely on it using powerful new copying technology has vastly exceeded the fair parameters of exceptions as intended by Government. Accordingly, its extension into the digital environment can only be of extreme concern to CAL.

The Government should be aware that the reasonable portion test does not apply just in relation to fair dealing, but is also incorporated into the libraries and archives copying provisions in sections 49 and 50 of the Act, in particular, s.49(5) and s.50(7A) and the educational copying provisions.

23. In its submission CAL also indicated that it was completely opposed to the extension of these existing exceptions in relation to the proposed new right of communication, on the basis that such extension would severely erode the emerging markets for online content delivery by publishers and authors.

Likely future trends in the scale and nature of copyright infringement

24. CAL notes that the Committee’s terms of reference 1(a)(vi) ask the Committee to focus on the “likely future trends in the scale and nature of copyright infringement”.
25. It is CAL’s view that now and increasingly in the future, the primary concern of authors and publishers will not be with the making of and trade in hard copy

reproductions of literary works, as has been described above, but with the making of exact reproductions made digitally and communicated endlessly internationally. The International Federation of Reproduction Rights Organisations (IFFRO)¹, in its response to the European Commission's *Green Paper on Combating Counterfeiting and Piracy in the Single Market*, has commented on this phenomenon as follows:

... piracy of printed works is by no means confined to the production and sale of illegal paper copies. Piracy of works in digital form is already widespread and will assume increasing importance in the future. Internet opens up the possibility of a whole new range of piratical activities.
(<http://www.iffro.org.papers.eupiracy.html>, 28 February 1999).

26. It is abundantly clear that copyright infringement of literary works has been and will continue to be facilitated by the advent of the internet. Comparisons between usage statistics in 1994 and now show this dramatically.

27. In 1994 Professor Michael Blakeney, Professor of Law, Murdoch University, said:

*The improvements in electronic delivery technologies through digitization has immeasurably widened the opportunities for illicit copying. The internet System consists of 15 000 computer networks linked worldwide to **20 million users in over 175 countries** [Simicevic, Sydney Morning Herald, 11 April 1994, 47]. In such a system, policing the downloading of data for reproduction for commercial purposes or multitudinous individual sets of unauthorised copying is equally difficult (Electronic Infringement – The New Piracy, pp3-4, emphasis added).*

28. On 30 April 1999, the Computer Industry Almanac Inc., a US based organisation, reported that the number of weekly Internet users worldwide has increased from 61 million at the end of 1996 to over 150 million at the end of 1998 (see <http://www.c-i-a.com/199904iu.htm>). With the number of occasional Internet users included, the number of users at the end of 1998 was estimated at between 180 and 230 million. Australia was ranked sixth with between 5 and 6 million total internet users.

29. The Computer Industry Almanac also predicted that there will be about 320 million Internet users worldwide at year-end 2000 and over 720 million users by year-end 2005.

30. The increasing use of the Internet in Australia alone, is well documented by the Australia Bureau of Statistics in its Special Article, *The information society and the information economy in Australia* (<http://www.abs.gov.au>). The following statistics can be drawn from their analysis:

¹ IFFRO is an international non-governmental organisation representing national Reproduction Rights Organisations (RROs) worldwide. CAL is a member of IFFRO.

- in the 12 months to February 1999, nearly 5 million adults (37% of Australia's total adult population) accessed the Internet compared to 3 million (23% of all adults) in the 12 months to February 1998;
- about 14% of all Australian households and 27% of all home-based businesses were connected to the Internet at March 1998;
- the level of businesses using computers increased from 49% in June 1994 to 63% in June 1997 and 21% of all businesses had Internet access at June 1997;
- in the twelve months to March 1998 about 1.4 million adults accessed the Internet at work; and
- the major uses of the Internet as at June 1997 were email (20%) and "gathering information" (18%).

31. Given the burgeoning use of the Internet demonstrated by these statistics, the extent to which copyright infringements can occur undetected is potentially enormous. CAL draws the Committee's attention to reports by the American Society of Journalists and Authors, who represent the interests of freelance writers. They report that writers are finding unauthorised uses of their work on the Internet on personal hobby pages, on university student and faculty pages and on sites run by businesses (ASJA Contracts Watch #63, June 25 1999, <http://www.asja.org>). A recent article in *The Australian* also reports the view that lower prices for hard drives and Internet bandwidth are likely to increase opportunities for "massive piracy" (Brad Howarth, *Piracy on the Increase*, The Australian, 17 August 1999).

32. These kind of uses will severely erode the economic value of any rights that copyright owners may have in the digital environment where owners are not able to adequately enforce their rights and there is a lack of general respect for the legitimate rights of copyright creators and owners. One possible consequence, which CAL has already indicated to the government, is that the growth of a vital and engaging information economy is likely to be retarded as widespread infringement and piracy means that content creators have less and less incentive to create.

D. OPTIONS FOR COPYRIGHT OWNERS TO PROTECT THEIR COPYRIGHT AGAINST INFRINGEMENT

33. With respect to the options available to copyright owners to protect their works, CAL only wishes to comment on the government's proposals contained in the Exposure Draft of the Digital Agenda Bill as released in March this year.

34. Current thinking in relation to the protection of authors and publishers works on the Internet and otherwise in digital form is that encryption could be a method available to copyright owners to prevent access to works, unless the person seeking access is authorised by the copyright owner.
35. However, the proposed Digital Agenda Bill does not prohibit “use” of circumvention devices which are intended to defeat or overcome the encryption of works by copyright owner. The Bill does not prevent “commercial” dealings in circumvention devices, but only when the seller is reckless as to whether, after the sale, the device will be used to infringe copyright. Therefore the sanctions will not ever apply to those persons who use circumvention devices for copyright infringement.
36. Additionally, because of these provisions the copyright owner’s legitimate right to decide whether to grant access to and use of copyright material at all is undermined by the Bill’s proposals.
37. It is for these reasons that CAL has argued strongly to the Government that the proposed Digital Agenda Bill may not be sufficient to ensure Australia’s compliance with its international obligations, specifically under Article 11 of the World Intellectual Property Organisation (WIPO) Copyright Treaty which provides as follows:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

38. CAL respectfully submits that the Committee must give serious consideration to how the policy objectives of enforcement of rights and the prevention of infringement of copyright in the digital environment can be combined with the government’s proposed Digital Agenda reforms. Article 11 of the WIPO Copyright Treaty requires “effective legal remedies” to be put in place by member countries. Whilst in strict legal terms the Digital Agenda Bill may meet this obligation, the Committee needs to have regard to the practical implication of not providing recourse in Australian law for copyright owners against those who *actually* use circumvention devices for copyright infringement and whether this practical effect would place Australia at risk of not meeting its international obligation.

E. OTHER MATTERS

39. As CAL has not had a significant role with respect to copyright infringement actions or border enforcement actions, it has chosen not to comment directly on the Committee’s other terms of reference. Although, as previously

indicated in this submission, CAL is happy to speak generally to these matters when it meets with the Committee.

40. In relation to the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright (terms of reference, 1(g)) and the level, manner and priority of enforcement of copyright by police authorities, CAL is aware that there is some general concern as to the effectiveness of the existing arrangements.
41. It is CAL's understanding that public prosecutions undertaken by the police and the Director of Public Prosecutions may not be handled at all or as swiftly as copyright owners would prefer due to a lack of appropriate resourcing. However, this is a matter to be addressed by the responsible government Ministers and Departments.
42. With respect to the priority assigned to copyright infringement matters, CAL respectfully submits that it is essential that the government commit adequate resources to enable the adequate enforcement of rights by copyright owners whether in their private capacity or with the assistance of government agencies. As CAL stressed in its introductory comments, increased rights for copyright owners are meaningless without the ability to enforce those rights.
43. The Committee may be aware that the US Department of Justice, the Federal Bureau of Investigation (FBI) and the US Customs service announced on 23 July 1999 a joint new initiative to combat intellectual property piracy both within the US and internationally (<http://www.usdoj.gov/criminal/cybercrime/docs.html#doca>). Of note is that the FBI has elevated intellectual property crime to one of its white collar crime priorities. This coordinated approach and prioritisation to intellectual property related infringements may be one that Australian authorities need to seriously consider.
44. CAL also notes that the UK Government announced on 25 May 1999 its decision "to raise awareness and understanding of copyright laws" in direct response to the Government's view that:

Few laws have such a wide effect and yet are so little understood by the public. As a result they have been widely and casually flouted. Technological developments will mean copyright becomes even more important as more and more businesses operate in the electronic environment This issue is fundamentally important to the continuous success of our creative industries ...
45. Responsibility for this issue has been given to the UK's Creative Industries Task Force, which has as its goal the assessment of the creative industries needs and the maximising of their economic impact. The terms of reference for the intellectual property subgroup are:

To promote the contribution made by intellectual property to the success of the creative industries and the knowledge of and respect for intellectual property rights among creators, business, users, enforcement authorities and consumers in general.

46. It is CAL's view that any enforcement initiatives undertaken in Australia could benefit from a similar approach, that is, a public education government campaign about the importance of and need for a respect of copyright laws.
47. Another matter that law enforcement agencies in Australia need to consider is mutual assistance and cooperation with overseas law enforcement agencies, especially those in neighbouring Asian countries, with regard to copyright infringements. In addition to protecting the rights of Australian authors and publishers in Australian territory, their rights also need to be adequately protected in regions where Australian published materials are used and valued. CAL understands that publishers, in particular, continue to suffer losses due to piracy in neighbouring countries, although CAL has not attempted to independently quantify the level of infringement.
48. The Committee may wish to consult the website of the International Intellectual Property Alliance (IIPA, http://www.iipa.com/html/worldp_piracy_losses.html) which shows the level of estimated losses suffered by US based copyright industries in particular countries, including Australia's neighbouring countries. The piracy levels recorded by the IIPA are estimates by IIPA member associations as a representation of the share of a country's market that consists of pirate materials. In relation to books only losses are shown and not the level of piracy in a particular country.
49. For example, The People's Republic of China appears to have a large number of sales of unauthorised books in their market (\$125 million in 1997-1998) and the loss has not decreased in this period; the copyright in those works may belong to Australian authors or publishers. In other countries such as Thailand, Indonesia and the Philippines the loss has decreased but in Singapore, South Korea and Taiwan the loss has increased.
50. It appears reasonable to conclude that Australian authorities should remain vigilant in detecting infringements and undertake increased international cooperation to arrest any increase in unauthorised copying activities.