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Library and Archives Canada: Legal Deposit Requirements as set out in Legal Deposit of Publications Regulations (Library and Archives of Canada Act)

On reviewing these new regulations the Canadian Copyright Institute (CCI) expressed concern that its members would be vulnerable on several of the requirements for legal deposit:

- the definition of electronic publications is ambiguous,
- if “deposit on request” is actually made for online databases, publishers would be unable to comply,
- the question of access is raised in the impact statement.

The discussion of access is particularly of concern since CCI does not believe that compliance with legal deposit regulations should equate to giving any rights to access. Legal deposit is for preservation and LAC’s mandate should be limited to preservation.

It also does not appear that the consultations on these regulations have followed the normal procedure and this has increased CCI’s concern that its full membership might not have had the opportunity to consider the potential impact of the new requirements. Jackie Hushion, CCI Chair, had a lengthy conversation this week with John Stegenga, Manager, Library Archives Canada, Legal Deposit, re CCI’s concerns. His comments did alleviate some of the immediate anxiety.

However, the regulations are drafted in a manner that permits a much broader interpretation and implementation than LAC says it currently intends and, therefore, may still reflect future risk.

Context

New regulations dealing with legal deposit requirements are scheduled to come into force January 1, 2007. Apparently, a number of consultations were conducted over the last 2 years to support the drafting of these regulations including consultations with the publishing community. The June 2004 consultation with several publishers included a review of the draft of the regulations.

Comments on the Regulations

The discussion with LAC addressed most of the areas that CCI identified as being problematic ([see text boxes for LAC’s comments](#)).

Highlights of Regulations

Interpretation

“publisher” means a person who makes a publication available in Canada that the person is authorized to reproduce or over which the person controls the content. It does not include a person who only distributes a publication. (éditeur)

Deposit – Non-paper publications

This section requires publishers to

- Decrypt
- Disable security
- Provide a copy of software
- Provide technical information
- Provide descriptive data

LAC Comment: LAC recognizes that decryption and disabling of security might cause publishers to be anxious about the protection of their interest in the information and the possibility of unrestricted access or dissemination. Assurances were made that no material provided via this requirement would be made available without the agreement of the publishers as to the basis on which it would be available. These requirements are to ensure that the publications being preserved are not lost because encryption and security prevent any access incidental to archiving and preservation objectives.

LAC also acknowledges that software licenses may prevent compliance with the requirement to provide a copy of any software. It is committed to working with the publishing community to address these licensing issues and if no satisfactory terms can be arrived at then LAC could not require compliance.

Deposit – One Copy

- Musical sound recordings
- Multi-media publications (2 or more parts in different formats)
- Publications of which fewer than 100 copies have been produced
- On demand publications from a master copy (fewer than 100)
- Online publications

LAC Comment: In the requirement to deposit one copy, online publications are limited to online versions of what would otherwise have been required in print. LAC absolutely states that legal deposit applies only to Canadian-created content.

Deposit on Request

This is quite a lengthy list, but of particular interest:

- Deliberations of electronic discussion groups, listservs, bulletin boards and emails
- Websites, including portals, personal websites, service sites, intranets and websites consisting primarily of links to other sites
- Dynamic databases and raw data

LAC Comment: This section “Deposit on Request” is intended to be, and in practice has been treated as, a list of exclusions from the requirement to provide a copy of a publication for legal deposit. Specifically, LAC articulated that it did not have the infrastructure to even consider requiring the delivery of most of the items in this list. It could not capture, store, catalogue or support access to this volume of content.

Level of Risk

Definition of Publisher and Publication Requiring Legal Deposit

The regulations that have been passed are somewhat ambiguous in the definition of “online publications”. It would seem to be possible to interpret this somewhat differently than the current LAC approach.

Deposit on Request

Although the LAC views this list as an exclusion list, the regulation as drafted gives LAC the right to require deposit of 2 copies of any item in this section on written request. If at some point LAC felt it did have the technical capability and resources to “manage” the volume of information, it has provided itself with the regulatory framework in which to require legal deposit. **THIS IS A RISK.**

Access

The open-ended approach to access will also need to be monitored very carefully. Recent decisions in the Supreme Court of Canada¹ have broadened the definition of research and private study to include commercial research and have introduced a significantly stronger emphasis on “user rights”. There is high-profile pressure in many sectors to provide open access to online and electronic information. The library and educational communities are pressing for additional exceptions involving electronic or online material. Library and Archive Canada has a clearly stated mandate re access:

Equitable access

*All Canadians should be able to access information in a timely, affordable and equitable manner. LAC will continue to play its key role in assuring the accessibility of information.*²

LAC Comment: LAC stated in the briefing that access will not be granted to online materials without the agreement of the publisher.

According to the impact analysis statement the publishers consulted agreed with and accepted the inclusion of online materials in the legal deposit requirements.

*There was also a consensus that additional discussions were desirable to address the issue of how LAC’s holdings of online information would be made available for access by researchers or the public. Publishers were willing to engage in an ongoing dialogue with LAC to define these details in a mutually acceptable manner.*³

Conclusion

CCI members will have to consider whether the Library and Archives Canada comments in the briefing discussion with the Chair sufficiently alleviate concerns re the expanded legal deposit regime. In the near term the risk would seem to be manageable but it will be essential to monitor the LAC strategy documents carefully. It is recommended that the CCI send a letter to Minister Oda to ensure that concerns about the ambiguity, open-endedness and lack of clarity of these regulations are recorded for purposes of further discussions.

¹ CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339

² Directions for Library and Archives Canada: Creating a New Kind of Knowledge Institution, June 2004

³ Regulatory Impact Analysis Statement, Beverley J. Oda, Minister of Canadian Heritage