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Legal deposit, electronic publications and digital archiving - the National Library of Australia's experience

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Abstract:

The National Library of Australia has been collecting, managing and providing networked public access to significant Australian online publications since 1996. Legal deposit law does not yet cover publications in electronic form at the Commonwealth level in Australia but action is now underway to amend the legislation. The paper discusses how the experience gained from the Library's digital archiving activity is shaping proposed changes to legal deposit legislation and also explains the constraints imposed by copyright law. Issues of concern to the National Library, publishers and government bureaucrats are highlighted and ways in which these are being addressed are outlined.

The National library of Australia has been collecting significant Australian online publications since 1996 without the support of legal deposit legislation but with the permission of the publishers concerned. It has been collecting physical format electronic publications for many years under the same circumstances. Legal deposit legislation at the Commonwealth level in Australia does not yet extend to publications in electronic form or to audiovisual materials but a process is now underway to attempt to rectify this situation. The practical experience that the National Library has gained with collecting, managing and

making accessible both physical format and online publications in electronic form will strongly influence the shape of revised legislation when it eventuates.

Legal deposit

In Australia, the legal deposit provisions that apply to the National Library are included in section 201 the Commonwealth *Copyright Act 1968*. The provisions state that publishers must deposit one copy of any “library material” published in Australia with the National Library. The definition of “library material” in the Act effectively limits the deposit requirement to items in a printed form. (It is defined as “a book, periodical, newspaper, pamphlet, sheet of letter press, sheet of music, map, plan, chart or table ...”) So, the provisions are in need of updating to accommodate not only publications in electronic form but also audiovisual materials.

In 1996 the Commonwealth government in Australia constituted a committee to advise on simplification of the *Copyright Act 1968*. This review extended to a number of related issues one of which was the extension of the application of existing legal deposit provisions to electronically networked information. The Library prepared a joint submission with ScreenSound Australia - the National Film and Sound Archive -that argued strongly for the extension of legal deposit to audiovisual and electronic publications. It also recommended that ScreenSound be given national repository status under legal deposit provisions for sound and moving picture materials.

In its 1999 report to government on the review of simplification of the Copyright Act, the committee supported the joint submission from the Library and ScreenSound, reinforcing the recommendations in the joint submission. However, it was not until late 2001 that a process was put in train by the government department (the Department of Communications, Information Technology and the Arts (DoCITA)) that the Library reports through, to address amendment of the Commonwealth legal deposit provisions.

The process involves the following key steps:

- Preparation of a joint statement of requirements by the Library and ScreenSound
- Preparation of a government position paper by DoCITA on proposed changes to legal deposit to be used for public consultation
- Preparation of an Regulatory Impact Statement that assesses the likely costs of the proposed legislative changes to the government and to the publishing sector
- Submission of a proposal for revised legislation to government
- Drafting new legislation (if the submission is approved by government)

So far, step one has been completed and step two is well advanced but it is not expected that the position paper will be released until late this year. So, there is still a long, bureaucratic road to tread but we remain optimistic of success.

One reason for our optimism is that through our experience with collecting and archiving online publications we are aware of issues that concern publishers and have put in place practices and technical infrastructure to address these. These issues will also influence the revision of legal deposit provisions.

Collecting online publications

The National Library accepts that it has a responsibility for preserving the documentary heritage of Australia in all forms, including electronic.

Consequently, in 1996 it commenced building the National Collection of Australian Online Publications (referred to as the Online Collection) when the PANDORA project was launched (<http://pandora.nla.gov.au>). Collecting online publications is now a routine activity for the Library and the collection includes around 2,400 titles. The titles comprise single documents, parts of web sites and whole websites. They include a range of file types and can be static or interactive. About one quarter of the titles are regathered on a regular basis. The Library developed harvesting and management software in-house to support its digital archiving work.

The National Library is developing the Online Collection in collaboration with the Australian state libraries and with ScreenSound Australia. Selection is based on detailed guidelines, which give emphasis to publications that have research value for studying the history of Australian society. From the outset, it was understood that collecting was for public access, both now and into the future. This objective has shaped the Library's approach to building the Online Collecting. For instance, all titles are catalogued onto the national bibliographic database to facilitate resource discovery, the online collection is also available to the public through the Internet via its own interface, and the vast majority of titles in the collection have no access restrictions imposed. (The Library does apply access restrictions to some titles at the request of the publisher to protect their commercial interests or for reasons to do with the sensitivity of the content. However, about 98% of titles in the Online Collection are gratis publications and their publishers are happy for us to make them available to the public through the Collection.)

Why we want legal deposit to be extended

Even though we have been able to develop a respectable research collection of online publications without the support of legal deposit, the Library considers it is essential to advocate the extension of legal deposit provisions to this form of publishing. The main reasons are that legal deposit would:

- strengthen the legitimacy of the claim that online publications are an important component of a nations' documentary heritage;
- provide a legal underpinning to our collecting role that would enable us to collect any important online publication without the permission of the publisher;
- provide a more efficient and reliable framework for the Library and publishers to work within (as for print publications); and
- overcome access constraints inherent in copyright law.

Major benefits that would result from applying legal deposit to online publications would be that more resources of national significance would be saved, known about and available for use into the future; and more cost-efficient and effective work procedures would be possible for both publishers and the Library.

Copyright

In Australia, copyright law is contained in the *Copyright Act 1968*. Following a lengthy and widely debated review process that began in 1994, the Act was amended by the *Digital Agenda Act*, which came into operation on 4 March 2001. The objects of the new Act are outlined in the Act itself and concern ensuring the efficient operation of relevant industries in the online environment and providing reasonable access and certainty for end users of copyright material online. Some of the main features of the *Digital Agenda Act* amendments are: a "broad-based technology neutral" right of communication to the public;

sanctions against the circumvention of technological protection measures; and the extension into the digital environment of special exceptions for libraries and educational institutions.¹

The exceptions that have particular relevance to legal deposit and electronic publications are those that allow collecting institutions to do the following with works in their collection without payment or the owner's permission.

- Copy and supply a reasonable portion of a work to a user in response to a request (subject to certain requirements)
- Copy and supply a work to another library (subject to certain requirements)
- Copy and communicate for replacement purposes published material that is or has been held in their collection that has deteriorated or been damaged, lost or stolen
- Make published works obtained in an electronic form valuable on computers within the library premises.

While generally considered to be generous in terms of access to purchased online publications, these exceptions do not extend to the basic requirement of the National Library to be able to copy a whole online publication for inclusion in its digital archive and to provide national access to it.

Proposed changes to the legal deposit provisions

The public consultation paper that will be issued later this year will propose that the legal deposit provisions in the *Copyright Act 1968* be amended to reflect the following requirements and obligations.

- Publishers would not be required to notify the relevant deposit institution about new electronic publications or to supply them unless requested to do so by the institution. Where a deposit institution wished to take in encrypted material the publisher would be required to give the institution the means to copy and use it for legal deposit purposes.
- Copying of all electronic publications selected for a national collection would be allowed for preservation and administrative purposes.
- The deposit institutions would have the right to copy “free” online publications for legal deposit purposes and to make them available to the general public via the Internet - this would be an exception to existing copyright law.
- In order to protect the economic interests of publishers of commercial electronic titles acquired under legal deposit, access conditions would be more restrictive than they are under copyright law for commercial titles that have been purchased – ie, “fair-dealing” for research and study purposes would not apply.

Other issues that arose during preparation of the consultation paper that are not reflected above include how to translate print based concepts such as “publication” and “place of publication”; “deposit” and “edition” or “best copy” into the online environment; how to represent publisher obligations unambiguously when old definitions and processes no longer apply; the role of regulations or Codes of Practice in amplifying and clarifying legal deposit intentions; linking assignment of persistent identifiers with legal deposit; and the need to be able to explain and quantify the costs involved for all stakeholders in extending legal deposit.

¹ Australian Copyright Council. *Digital Agenda Amendments: a discussion paper*. Australian Copyright Council, May 2001 (B109v1) p. 2

In finding solutions to these and other complex issues associated with extending legal deposit to electronic publications, it would be beneficial for national libraries to work together in a more structured way to share experiences, ideas and models.