

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

Dear Mr Cordina

Extension of Legal Deposit discussion paper

We, the below signed, are writing in response to the Extension of Legal Deposit discussion paper released by the Department of Communications, Information Technology and the Arts. We represent Intellectual Property: Knowledge, Culture and Economy, a collection of legal research projects based at the Queensland University of Technology which have an interest in ensuring adequate preservation of and access to copyright material in the digital age.

The extension of Australia's federal legal deposit scheme to electronic and audiovisual material is long overdue. As the discussion paper makes clear, in this area Australia is far behind its international contemporaries. Over the last ten years the principal production and distribution of copyright material has without question moved to electronic media. Materials of major cultural significance – from political party campaign statements to popular entertainment products – are increasingly being produced in digital and audiovisual formats or released exclusively online. A legal deposit scheme which focuses exclusively on printed materials can no longer be said to provide an accurate record of Australian culture, knowledge and heritage.

In order to ensure that Australia's national collection remains world class, our legal deposit scheme must be able to adapt to the rapidly changing technological environment. In line with best practice standards and the general approach in the Australian *Copyright Act 1968*, the legal deposit scheme should therefore be designed to be technologically neutral and to not discriminate between media or format. Although for practical purposes some variation with regard to the method of collection will be required, where ever possible the legal deposit scheme should also be phrased so as to apply to all material published within Australia or of cultural significance to Australia.

The system of voluntary agreements which the National Library of Australia and Australian Film and Sound Archive currently utilise to collect and preserve these materials is inefficient and costly. By requiring officers of the relevant institution to actively seek out and negotiate rights in relation to non-print materials, this system results in incomplete and inadequate collection of culturally significant material whilst expending unnecessary manpower and time.

We therefore strongly urge the new Government to take the long overdue step of extending Australia's legal deposit scheme to digital and audiovisual materials.

A submission addressing those issues raised by the Extension of Legal Deposit discussion paper on which we wish to make specific comments is attached. If you have any questions or require further clarification on any matters, please do not hesitate to contact Jessica Coates on 07 3138 8301 or at j2.coates@qut.edu.au.

Yours Sincerely

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**Submission to the Government inquiry on the extension of legal deposit
to electronic and audiovisual materials**

**Intellectual Property: Knowledge, Culture and Economy
Queensland University of Technology
January 2007**

Issue 1: Should the legal deposit scheme be extended to audiovisual and electronic materials and, if so, how should such materials be defined (including the quality of legal deposit materials, such as the ‘best copy’)?

As is indicated by our statements in the covering letter, we submit that it is vital that Australia’s legal deposit scheme be extended to audiovisual and electronic materials.

With respect to the definitions of ‘electronic’ and ‘audiovisual’ materials, we believe that they should be sufficiently broad to cover both online (eg web pages, blogs, downloadable videos) and offline (eg DVDs and CDs) materials, and should be technologically neutral, to ensure that they do not become outdated in the rapidly changing technological environment. They should not make reference to specific technologies such as ‘videotape’ as is the case in some recent amendments to the *Copyright Act 1968* (eg s110AA).

Issue 3: How many copies of published material should a publisher be required to deposit under an extended legal deposit scheme?

On the proviso that the new s51B, which allows multiple preservation copies to be made of cultural significant works by key collecting institutions, applies to the new legal deposit materials, one copy should suffice. However, publishers should be required to provide this copy free of technological protection measures that would prevent access or preservation copying.

On the assumption that websites will be archived by the institution, rather than being deposited by the publisher, the scheme should also include a provision that ensures that archiving may occur regularly or at least whenever significant updates occur. This is necessary to ensure adequate preservation of the ephemeral content available online. It could be achieved, for example by defining a website with significant changes to amount to a ‘new edition’, or by specifically allowing websites to be harvested at certain intervals.

Issue 4: Should the existing requirement that material be deposited at the publisher’s expense continue to apply under an extended legal deposit scheme?

Yes, for any materials delivered to the institution. Due to the low cost of producing multiple copies of digital materials, in most cases this is unlikely to amount to an unreasonable burden on the institution. Higher-cost materials such as film reels may place a greater burden on the publisher; nevertheless, such a policy remains fair and consistent with the current scheme.

Publishers should not be required to cover the cost of materials harvested by the archive (eg websites and broadcasts).

Issue 7: Should an extended legal deposit scheme apply to electronic versions of printed material?

Yes. An electronic version of a document will often contain additional content and features such as search functionality that substantially changes the presentation of the material. This means that, in effect, the electronic version amounts to a separate edition. As such, it warrants a separate entry in the national collection.

Issue 9: Should an extended legal deposit scheme apply to broadcasts? If so should this be limited to any particular types of material? Should the scheme apply to internet material hosted in Australia?

The scheme should apply to broadcasts and should not be limited to particular types of material, as it is often difficult to categorise or separate different elements of broadcasts (such as announcements, advertisements and primary programming).

Deposit institutions should be given the ability to harvest broadcasts by off-air taping. They should also be given the right to request copies of broadcasts from broadcasters, as the cultural significance of material will not always be apparent in advance.

As is discussed below, the scheme should also apply both to internet material hosted in Australia, and to select materials hosted outside Australia.

Issue 10: Should an extended legal deposit scheme apply to internet material hosted outside Australia and in what situations?

The basis for the collection of internet material should be similar to that currently used by the NLA's PANDORA project. That is, the scheme should apply to internet material:

- published on the Australian domain;
- created by Australian authors; or
- of cultural significance to Australia.

The breadth of this collection is necessary due to the fact that overseas websites and servers (particularly those within the .com domain) are frequently favoured as primary addresses by Australian creators and companies.

Issue 11: What approach, comprehensive, selective or hybrid, should be used for collection of materials under an extended legal deposit scheme? Should 'significance', say to Australian audiences, be the basis of any extension of legal deposit? Should online and offline material be treated differently and if so, on what basis?

A hybrid scheme combining comprehensive deposit and selective archiving would be the most efficient and cost effective approach.

Under such a scheme, all 'hard copy' electronic materials (eg CDs, DVDs, tapes) would be required to be deposited by the publisher, just as is the case for printed materials. This will reduce costs associated with identifying and requesting copies of material for libraries, whilst also provide clarity for publishers. As is discussed further below, publishers should also be required to provide copies unencumbered by technological protection measures (TPMs), or to provide way through TPM for preservation purposes.

For web materials, deposit would clearly be impractical, so selective archiving approach should be used. As is discussed above, deposit institutions should have the right to copy all web materials published on Australian domain, by Australian authors and of cultural significance to Australia, with more detailed guidelines determined and published by the deposit institutions themselves (as is currently the case for PANDORA).

As is discussed above, libraries should also have right to copy broadcasts and to request copies from broadcasters as required.

Issue 12: In light of the existing provisions in the Copyright Act, is there a need

for any additional provisions to ensure the safe storage and preservation of legal deposit materials?

The new s51B and 110BA exceptions introduced by the *Copyright Amendment Act 2006* apply best practice preservation exceptions to culturally significant material held at key cultural institutions. On the assumption that these exceptions will apply to legal deposit material, no additional preservation or storage provisions should be required.

Issue 14: In light of the recent amendments to the technological protection measure provisions in the Copyright Act, are any additional provisions required to ensure access to materials deposited under an extended legal deposit scheme?

If the national collection is to be maintained adequate preservation practices must be able to be undertaken by libraries. This is particularly important for electronic and audiovisual material, which must be migrated regularly as hardware and software formats become outdated. Furthermore, as time passes and technological protection measures attached to current storage formats become obsolete, it will become difficult or even impossible to disable the measures to allow adequate preservation or access, even with the original publisher's cooperation.

Libraries should therefore be granted an exception under s116AN(9) (prescribed acts) to allow them to circumvent technological protection measures where necessary to allow preservation of material in the library's collection, including legal deposit material, under ss51A, 51B, 110B and 110BA.

If possible, libraries should also be granted exceptions to ss116A0 and 116AP, to allow them to effectively obtain and create devices to implement the above exception. However, it seems likely that the limitations imposed by Article 17.4.7 of the US Free Trade Agreement will prohibit this.

• Should publishers be required to ensure that the copy of published material provided under an extended legal deposit scheme will be accessible?

The limitations imposed by the US Free Trade Agreement in relation to exceptions to Australia's anti-circumvention laws will act to severely hamper the practical effectiveness of any exception introduced to allow libraries to circumvent technological protection measures.

Therefore, to enable deposit institutions to effectively preserve and provide access to the legal deposit materials in their collections, publishers should be required to provide the materials free of technological protection measures. Publishers of online material should be required to provide an effective means to disable or circumvent any technological protection measures (eg by providing a key) necessary to access the material on request.

Issue 15: On what basis, if any, should access be restricted to material deposited under an extended legal deposit scheme?

It is vital that the general public is provided access to legal deposit materials even where they are unable to physically access the collections of the national institutions in Canberra. The majority of the legal deposit archive held at the National Library (or other Federal institution) is made up of obscure material for which there is little or no commercial value, and for which the legal deposit copy is the only copy available in an Australian library. Indeed, legal deposit copies will generally only be accessed for such material, for which an alternative copy is not available at the State or public level. As a result, if the general public is not able to access the legal deposit collection material electronically on reasonable terms much valuable material will essentially be lost to all Australians unable to obtain physical access to the National Library collection until it falls out of copyright. This is a particular disadvantage in a country with the geographic limitations of Australia, where the closest library will often be more than a day's drive from the researcher in question.

Legal deposit material, whether text or audiovisual based, should therefore be available to users upon request for the purposes of research and study, where it is not otherwise available in a reasonable time at an ordinary commercial price. This would require legal deposit material to be treated the same as other material within the library collection, and for those provisions currently in place for works in s49 of the Copyright Act to be extended to subject matter other than works.

The commercial availability test that applies in s49, and in particular the fact that it specifically takes electronic copies of a work into account, should be sufficient to limit any commercial disadvantage to publishers of material.