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**Cyberspace Law and Policy Centre**  
A Centre for the Public Interest in Networked Transactions

## **Legal deposit's role in the public domain**

**Submission to the Attorney-General's Department and DCITA**

### *Review of the Extension of Legal Deposit*

Graham Greenleaf  
Professor of Law  
Chief Investigator, Unlocking IP Project

Abi Paramaguru  
Research Assistant, Unlocking IP Project

Catherine Bond  
PhD Researcher, Unlocking IP Project

Sophia Christou  
Research Assistant, Unlocking IP Project

Cyberspace Law and Policy Centre, UNSW Faculty of Law

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## 1. Background - the Unlocking IP Project

Researchers at the Cyberspace Law and Policy Centre, based at the University of New South Wales, are involved in intellectual property research through the Australian Research Council Linkage project ‘Unlocking IP’.<sup>1</sup> This paper is a response to ‘2007 Discussion Paper on the Extension of Legal Deposit’ published by Attorney-General’s Department exploring the extension of the legal deposit scheme to include audio-visual and electronic material (Attorney-General’s Department, 2005).

## 2. Legal deposit’s other role: enabling the public domain

One requirement for the effective operation of the public domain at the expiry of copyright in a work is that there is at least one copy of the work available to the public for subsequent reproduction by anyone. In Australia this requirement is satisfied for print works by ‘legal deposit’ requirements in federal law and that of various States<sup>2</sup>, but they do not apply to audio-visual works (now very often digital) or texts published in digital form. So there is no guarantee that a copy of a published digital work will be in a publicly accessible repository when its copyright expires. Menell sums up the danger:

The newly developed ability to preserve knowledge electronically has an important temporal dimension. Like endangered species, many forms of human knowledge are vulnerable to extinction. Therefore, societies run the risk of losing aspects of their cultural heritage by forestalling the process of digital archiving. (Menell, 2007, p. 27)

In addition, if these digital works are increasingly only accessible through access control systems or distributed with technological protection measures, it is also possible that copyright in such works may expire with no copy *which can be accessed technically* being available.

We are pleased that the Australian federal government is holding an enquiry into the extension of legal deposit to audio-visual and digital text works. However, the enquiry’s *Discussion Paper* does not specifically mention the importance of legal deposit schemes to the maintenance of a healthy public domain in Australia, stressing instead that the purpose of such schemes around the world is ‘in order to preserve national heritage, and to provide the public with access to that material for research or study’ (para 10). It refers to reports by the Copyright Law Review Committee (CLRC) in 1959, which stressed the purpose of legal deposit was ‘to build up a complete collection of Australian literature’, but made no mention of the use to which such a collection should be put, and again by the CLRC in 1999, when it stressed accessibility to the public for research or study purposes. The Whitford Committee which reviewed the law in the UK in 1977 concluded that legal deposit schemes had dual functions, those of ‘facilitating claims to copyright’ and ‘establishing public archival collections for scholars’ (as cited by Gilchrist, 2005: 184).

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<sup>1</sup> See the Project’s pages at <<http://www.cyberlawcentre.org/unlocking-ip/>>

<sup>2</sup> For links to a number of state government legal deposit schemes, see <[www.nla.gov.au/services/ldeposit.html](http://www.nla.gov.au/services/ldeposit.html)> (National Library of Australia)

Neither approach explicitly or adequately recognise the other objective function of legal deposit schemes, which we can call the ‘public domain function’. One aspect of this is that legal deposit provides copies of works which may be republished, or re-used in other ways, once the legal deposit material is no longer subject to copyright protection because of expiry of copyright. This is the narrow ‘public domain’ function of legal deposit.

Even when a work is still within the term of copyright protection, if the only publicly accessible copy of it is one which is provided by a legal deposit institution, then legal deposit is essential before even the uses which are allowed by copyright law may be enjoyed. These may arise under exceptions to copyright (such as fair dealing exceptions), limits of copyright (such as ‘substantial part’ or implied licences) or compulsory licence provisions<sup>3</sup>. This is a broader ‘public domain’ function of legal deposit.

Having a copy of a work available so that it can be used by copying (not merely read or viewed), within the limits of what the law allows at any given time, to create new transformative works, is therefore an additional ‘public domain’ function of legal deposit. In the context of national public deposit schemes, it is crucial to a nation’s capacity for cultural renewal and innovation.

The precursor of all legal deposit schemes in the common law world, the grant in 1610 by the Stationers’ Company of ‘one perfect copy of every book printed by them’ to the public library which eventually became the Bodleian Library at Oxford, was partly about reproduction of books. The two conditions of the grant were that the Stationers ‘should have liberty to borrow those books if needed for reprinting, and also to examine, collate and copy the books which were given [by] others’ (Gilchrist, 2005:178<sup>4</sup>).

The *Discussion Paper* is therefore somewhat lacking in that it does not explicitly address these public domain aspects of legal deposit schemes in the questions it asks.

1. *Submission: The Review should explicitly consider the role that legal deposit plays in supporting and making effective Australia’s public domain.*

### **3. Extension of Legal Deposit Scheme**

#### **Issue 1: Should the legal deposit scheme be extended to audiovisual and electronic materials and ....**

An extension of the current Australian legal deposit scheme to include audiovisual and electronic material would address the incongruity in Australia’s legal deposit scheme, which currently provides only for the preservation of print works. The inclusion of such materials would reflect the fundamental manner in which Australian cultural creations have expanded to include newer forms of content. This is particularly the case in relation to electronic materials; the inclusion of these materials would further strengthen

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<sup>3</sup> The need to take authors’ interests into account in the operation of this aspect is discussed later.

<sup>4</sup> Gilchrist says ‘to’, not ‘by’, but this does not make sense.

innovation and creative output in Australia, as well as contributing to the preservation of Australia's cultural heritage.

Australia is now internationally out of step in not extending legal deposit to these types of subject matter. In the USA, the mandatory deposit with the Library of Congress of works published in the USA (since 1978) includes digital and audio-visual works. The UK, Canada and New Zealand have extended legal deposit to such materials, as have Tasmania and the Northern Territory (see for a summary, Gilchrist, 2005: 190).

Extension of the copyright term is another compelling reason to extend legal deposit to electronic materials. The copyright terms of most works and other subject matter were extended as a result of the AUSFTA. Consequently, the possibility that significant audiovisual materials will have physically degraded to a point beyond use by the end of their copyright term is of increasing concern. This is the case even where materials are archived, for example the US Library of Congress indicates that less than 20% of U.S. feature films from the 1920s remain wholly intact in American archives (Menell, 2007:28). This supports not only the case for archiving, but also digital archiving. The proliferation of audiovisual materials in digital form and other electronic materials may appear to overcome the problems associated with physical copies; however works and subject matter published in digital formats are prone to obsolescence. Extending a legal deposit scheme to capture such materials will enable both preservation and the possibility of future conversion of the subject matter by libraries and archives into newer/more stable formats as these develop. A critical component of this is ensuring that the materials deposited are effectively free from technological protection measures. This will ensure that material still under copyright, and in the public domain, continues to be accessible and useful.

2. *Submission: We support the extension of the legal deposit scheme to audiovisual and electronic materials, and submit that it is now a matter of urgency because of the extension of the copyright term by an extra 20 years.*

### ***Definition of materials to be included***

**[Issue 1] .... if so, how should such materials be defined (including the quality of legal deposit materials, such as 'best copy')?**

Currently publishers of library material in Australia must deposit a copy of that material with the National Library. Library materials is defined as "book, periodical, newspaper, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of such a work, but does not include a second or later edition of any material unless that edition contains additions or alterations in the letter-press or in the illustrations".

The breadth of what is now protected by copyright means that what must be deposited cannot possibly be defined as broadly as any subject matter which attracts copyright protection. In relation to printed works, current definitions such the one above are limited to (i) published works (only 'publishers' have an obligation) and (b) only those works that fall within the definition of 'library materials'. Unpublished works, and

reproductions of artistic works unless they are published in the form of ‘library materials’ are not required to be deposited.

In relation to audio-visual and electronic works, the same emphasis on ‘publication’ makes sense, but will require some special interpretation. In particular, it would be impossible to require active deposit of all self-publishing via the World-wide-web (including YouTube and other methods of distributing user-generated-content (UGC)), because each individual would not comply with the requirements. It is also unnecessary to require ISPs or other intermediaries to make active deposits, because it is more efficient for the depository institutions to use web spiders to collect the information (as the National Library does with Pandora). There also needs to be a capacity to exclude some freely-accessible email lists (and similar means of distributing ephemeral content) because active deposit of them will overwhelm legal deposit with ‘riffle raffé’ (as Thomas Bodley would say). The best answer here is to allow the depository institutions to use selective collection where they need to (as legal depositories have always done).

3. *Submission: We submit there should be two criteria for inclusion of audio-visual and electronic materials in legal deposit:*

- (i) *For any materials (except free access materials on the Internet), if they are sold, or distributed for free, deposit by the publisher should be required under the same conditions as would make a person a ‘publisher’ in relation to print materials. This would apply to all materials sold on CD, DVD or other medium, or delivered via the Internet by any means other than the World-wide-web).*
- (ii) *All materials available for free access on the Internet should be included, and provision by that means should be considered to be publication. Depository institutions should be entitled to make copies of such materials for the purposes of legal deposit, without the publisher being required to provide a copy. They should be authorised by law to ignore robot exclusion protocols for this purpose. However, if the publisher uses any technical means to prevent the depository institution collecting a copy of the materials, a depository institution may require deposit of copies as with (i).*

**‘Best copy’**

It might be desirable that electronic materials be provided in accordance with open standards, to ensure the long-term accessibility of these materials, but such standards are not yet accepted for many types of materials, and conversion of materials to such standards might often impose a significant and unnecessary technical and financial burden on publishers. We therefore recommend that publishers provide the material in the form they normally provide it to their customers, and if it is available for free access

on the Internet then in whatever format it is there available. The question of provision of material subject to technological protection measures (TPMs) is dealt with later.

Since the quality of the ‘best copy’ will change as technology advances, any definition of the quality of materials that should be deposited needs to allow for flexibility, for example. The method we recommend will achieve this, by linking provision to what is normally provided to recipients of the material. Because publishers may provide materials to recipients in a number of formats (eg high resolution vs low resolution; ‘thumbnails’ vs large sizes), deposit should be in the best quality form so provided.

4. *Submission: We submit that publishers of any materials (except free access materials on the Internet) should be required to submit material in the best quality format in which it is provided to those to whom it is published. However, if the depository is unable to display the materials in the same way that these recipients can display or use the materials, it may require the publisher to either (i) provide software to allow such display or use; or (ii) provide the material in another format in which it can be read by the depository institution with no significant loss of functionality.*
5. *Submission: Where material is available for free access on the Internet, its provision by that means will normally satisfy the legal deposit requirements, except where the depository institution cannot download the material by automated means, in which case it will be entitled to require provision of the data in accordance with the previous paragraph.*

#### **4. Statutory location**

##### **Issue 2: Should an extended legal deposit scheme be in the Copyright Act 1968 or is a separate piece of legislation more appropriate?**

We don’t consider that this is an important question. The current *Copyright Act 1968* is currently at 673 pages and it is arguable that it is undesirable to add large new areas of subject matter to it. On the other hand, if legal deposit provisions are enacted pursuant to the copyright power in the Constitution (see Gilchrist, 2005: 184-5), then leaving it in the *Copyright Act* may be desirable in order to indicate this connection. One of the main points of this submission is to underline the continuing relationship between legal deposit and the ‘public rights’ aspects of copyright.

A separate piece of legislation, similar in nature to the *Public Lending Right Act 1985* (Cth) or the *Archives Act 1983* (Cth), could be enacted. It might best be included in a broader *Copyright (Public Rights) Act*, but that is a broader question than is being considered by this enquiry<sup>5</sup>.

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<sup>5</sup> See the submission by Graham Greenleaf to the *Review of the National Innovation System* for proposals along these lines.

6. *Submission: Legal deposit is best kept within the Copyright Act unless there is separate legislation dealing with public rights aspects of copyright.*

## **5. Number of copies and expense of deposit**

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

The fragility of much audio-visual and electronic material makes it essential that depository institutions can make copies for archival and preservation purposes.

7. *Submission: We support the current requirement to deposit one copy, provided depository institutions have or are given sufficient powers to make sufficient back-up copies for archival and preservation purposes. One copy should be available for whatever public accesses are allowed, and other copies for archival and back-up uses.*

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

Most if not all works required to be deposited in Australia will have been created with inputs from Australia's past cultural and intellectual heritage. The requirement of legal deposit, and their small costs, is how current generations of creators and publishers are required by law to pay their small share of continuing the cultural and intellectual heritage that has enabled them to be creative, and profit from that creativity, in the first place.

Having stated this general principle, the costs of operation of a legal deposit scheme should be kept to a minimum so as not to impose unnecessary costs on publishers and creators. They should be able to complain to the Commonwealth Ombudsman (as they would be able to) if deposit requirements were administered unreasonably.

8. *Submission: The costs of deposit under an extended scheme should be at the publishers' expense. However, publishers should have avenues of complaint against unreasonable operation of the scheme.*

## **6. Depository institutions**

### **Issue 5: Should there be a role for other organisations, in addition to the NLA and NFSA, to act as repositories for material under an extended legal deposit scheme?**

We are not experts on which organisations are best suited to collect and make available different classes of materials. We recognise that technology changes the nature and categories of materials over time, and that there could be advantages in having a number of specialised depository institutions. On the other hand, we recognise that there is also a

benefit in the majority of resources being diverted to a limited number of organisations responsible for collection and preservation.

We consider that the best approach is one which is flexible (allowing new repositories to be added, and their responsibilities in the system to change), but is based on a number of principles, including (i) minimisation of cost to publishers, by requiring deposit with only one depository; (ii) effective resolution of disputes about where deposits must be made; and (iii) requirements on repositories to collaborate in providing national integrated services. Replication of deposited materials in different depositories is not needed provided there can be sufficient back-up copies kept, and appropriate inter-institutional loan facilities.

9. *Submission: Regulations should provide a list of national repositories, and that publishers are only required to deposit materials with one repository. There should be a procedure for resolving disputes about which repository is appropriate for particular materials. All repositories should be required to collaborate in providing an integrated and consistent national system for finding deposited materials.*

**Issue 6: How might duplication of material collected by legal deposit agencies be avoided? For example, should publishers be required to deposit relevant material with more than one institution?**

At present, publishers may be required to deposit materials under both the Commonwealth scheme, and under State and Territory schemes.

If arrangements are made to reduce the multi-jurisdictional deposit burden on publishers, they should be coupled with the requirement that copies of the deposited materials can be provided to the other jurisdictions as required.

The European Digital Library Project (funded by the European Commission), completed in February 2008 integrated bibliographic catalogs and digital collections of various European National Libraries to create ‘The European Library’.<sup>6</sup> Consolidation of digital collections is an extremely useful exercise, helping to reduce duplication of archival work (and associated expense) as well as increasing the pool of resources available and accessible.

10. *Submission: If arrangements are made to reduce the multi-jurisdictional deposit burden on publishers, they should be coupled with the requirement that copies of the deposited materials can be provided to the other jurisdictions as required.*

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<sup>6</sup> See <http://www.edlproject.eu/> (accessed April 2008). The European Library can be found at <http://www.theeuropeanlibrary.org/portal/index.html> (accessed April 2008).

## 7. Material to be collected

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

We consider this should apply, but only if the electronic version is published. Both the printed version and the electronic version should be deposited. There are a number of reasons. First, printed versions may become damaged over time. Electronic versions may be easier to preserve, and will be easier to reproduce and distribute (once copyright has expired).

Second, “[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” (QUT/IPKCE Submission, 2007) This will be especially useful when the copyright in the work expires.

A third reason is that it would increase the difficulty of determining whether electronic works were required to be deposited, if there had first to be an enquiry into whether some parts of them had been deposited in book form. When is the (electronic) whole greater than the sum of the (printed) parts?

*11. Submission: Both electronic and print versions of a work should be required to be deposited, if both are published.*

### **Issue 8: What other material should an extended legal deposit scheme apply to?**

As noted above, the scheme should apply to any subject matter to which copyright protection can apply, so long as it is published (and therefore capable of deposit). Electronic materials should include things such as published computer programs and computer games. These fall under the definitions of copyright subject matter under the *Copyright Act*, and are also capable of deposit.

*12. Submission: Published computer games and computer programs should be included.*

It may useful to consider how materials that are not capable of deposit can still be included in a national collection. For example this could be achieved by creating an obligation to deposit digital photographs of significant artworks or buildings. It would be taking this another step further to require videos of culturally significant theatre productions. Turning static works into a ‘form capable of deposit’ by the taking of a good quality digital photograph could be at the expense of the Government, or alternatively could be at the depositor’s expense since digital photography is now inexpensive.

*13. Submission: There should be a further enquiry into what other materials (including works of the visual arts and theatre), or representations of them, should be included in some way in a comprehensive archive of national culture by means equivalent to a legal deposit scheme.*

**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?**

Because of the current exclusions mentioned above (some artistic works), it is too simple to say that the legal deposit scheme should apply to all subject matter to which copyright protection applies.

Digital recordings of significant broadcasts should be preserved, though it should be a matter for the selection policies of repositories exactly which broadcasts are preserved. For example, some news broadcasts etc may have substantial cultural significance.

Legal deposit should apply to broadcasts on a similar basis as for internet material hosted in Australia, namely that the default position should be not that broadcasters have an obligation to deposit copies but rather that the repository has the right to collect copies from the broadcast itself. Deposit institutions should be given the ability to harvest broadcasts by off-air taping. They should also be given the right to require copies of broadcasts from broadcasters where they have not collected the broadcast when it was broadcast, perhaps because the cultural significance of material was not apparent in advance.

*14. Submission: Legal deposit should apply to broadcasts. The default position should be not that broadcasters have an obligation to deposit copies but rather that the repository has the right to collect copies from the broadcast itself. Depositories should also be given the right to require copies of broadcasts from broadcasters where they have not collected the broadcast when it was broadcast.*

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

It is necessary that legal deposit apply to Internet materials hosted outside Australia, because the location of servers bears no necessary relationship to the cultural significance of the material available from them. Whether a *.com*, or *.au*, or some other domain is used also bears no necessary relationship to the physical location of servers.

For example, it is possible that all three major Australian legal publishers, LexisNexis Australia, CCH Australia and the Law Book Co, could at some future point have the entirety of their Australian digital content hosted offshore at the location of their parent companies. It is necessary for a complete collection of Australian cultural materials that these influential interpretations of Australian laws be contained in Australian depository institutions.

We support the following submission by Fitzgerald et al (2008):

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. (QUT/IPKCE Submission, 2008)

The basis of the obligation should be provision on request by the depository institution.

- 15. Submission: Depository institutions should have the right, within the legislative competence of the Australian Commonwealth Parliament, to require the deposit of materials hosted outside Australia which are published on the Australian (.au) county domain or created by Australians or otherwise considered to be of cultural significance to Australia.*

The operation of search engines has been generally accepted in most countries including Australia without any serious challenge (Greenleaf, 2007). Nevertheless, the Copyright Act could confirm this for the benefit of depository institutions and other search engine providers.

- 16. Submission: Depository institutions should have the legal right to make copies of free access web sites (whether or not they are located in Australia) containing legal deposit materials for the purposes of the legal deposit scheme, and to make them searchable. The Copyright Act should confirm that depository institutions (and perhaps other search engine providers) are entitled to do this.*

## **8. Collection policy: comprehensive, selective or hybrid?**

We recommend above utilising a broad initial threshold for eligibility of materials capable of deposit. Because of this broad threshold some selectivity will have to be applied. This selectivity could be embodied in guidelines, as addressed above. These guidelines could embody a variety of considerations.

**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?**

Cultural significance of certain materials may not become apparent until much later, so it may be wise for the complete content of the Australian free access Internet to be spidered, and for all broadcasts to be downloaded.

Criteria for deposit could include (a) cultural significance, potential and current and (b) costs of preservation. In cases of dispute, the repository can decide if they should accept the material.

One reason for selective collection (or at least, retention) of Internet materials has been discussed earlier: legal deposit of print materials has never required deposit of all printed materials, otherwise it would have been drowned in insubstantial and often personal materials ('riffe raffe'), so the requirement of publication moderated this. The availability of User Generated Content (UGC) on the Internet now places a means of publication in the hands of every school child and adult, and the ability to change the publication by the day, hour or minute as well. A national repository such as the National Library's Pandora should not be obliged to capture or retain all of this Internet content, or every iteration of it. Selectivity is necessary. Privacy considerations are also relevant. The personal revelations of every Australian teenager do not need to be captured for all time in our national cultural collection. Search engines have procedures to remove web pages from the search functions, and their stored caches. Repositories will have to develop selection policies which take such factors into account.

17. *Submission: For materials other than free access materials on the Internet, and broadcasts, collection policy should be one of comprehensive collection based on publication, as it is now for printed materials. For free access materials on the Internet, the policy should be one of selectivity based on cultural significance to Australia, cost considerations, privacy considerations, and the exclusion of 'riffe raffe'. For broadcasts, comprehensive collection would be desirable, but the depository should have the ability not to retain some content, where the costs of providing continuing access and preservation are too high.*

## 9. Storage and preservation

Different rules could apply to materials available online, as it is much easier to access these materials without the assistance of the publisher. Archiving schemes such as that used by the Internet Archive<sup>7</sup> could operate to archive Australia's online material.

### **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?**

If provisions are to be situated in separate legislation as discussed above then it may be a good opportunity to make sure obligations and rights related to storage and preservation are even more clear.

Effective storage and preservation is essential to ensure that materials are accessible when they fall into the public domain.

Investment should also be made in appropriate search technology to locate archived material, digital or otherwise, decades later. Searches that can look for information about a digital work (often the case with libraries now) as well as within the content of a digital

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<sup>7</sup> See < <http://www.archive.org/index.php>>.

work are far more desirable, especially for research purposes. Images and videos may prove to be difficult to tackle as search possibilities are more limited in such cases.

## **10. Timeframes**

**Issue 13: What timeframe should apply for deposit under an extended legal deposit scheme?**

**Is the timeframe for deposit suggested by the CLRC appropriate in the context of a selective approach to extending legal deposit?**

**Should different time frames apply to the deposit of different published materials if legal deposit is extended?**

One month as proposed by the CLRC appears suitable and reasonable. A longer grace period could apply when the new extended scheme commences to allow depositors to adjust to the change.

*18. Submission: We support the period of one month as proposed by the CLRC*

## **11. Technological protection measures (TPMs)**

**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?**

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

Publishers should be required to ensure that the copy of published material provided under a legal deposit scheme is accessible. This is of fundamental importance.

If digital works are increasingly only accessible through access control systems or distributed with technological protection measures, it is also possible that copyright in such works may expire with no copy *which can be accessed technically* being available. Libraries and archives are permitted to circumvent TPMs in some circumstance, however we consider there should be an obligation on depositors to provide a version containing no TPMs. Such a version will always exist, and as a result, should be the deposited version. The definition of ‘best copies’ could also encompass ‘a version with no TPMs’. In the event that the deposited version is protected by a TPM, the protection should be required to be removed upon expiration of the copyright term. A provision to this effect may be necessary where the AUSFTA limitations on anti-circumvention measures will result in practical difficulties for libraries and archives.

In relation to this question, Fitzgerald, Coates and Kiel-Chisholm (2008) have submitted to the legal deposit review that:

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.

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.

We support this submission.

*19. Submission: We support the submissions by Fitzgerald, Coates and Kiel-Chisholm concerning technological protection measures.*

## **12. Use of electronic materials**

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

As we have detailed elsewhere in this submission, in relation to deposited materials in which copyright has expired, there should be no restriction on access and reproduction. No publisher should be able to impose any such restrictions as a condition of deposit. Steps should be taken to prevent TPMs imposing such restrictions.

*20. Submission: In relation to deposited materials in which copyright has expired, there should be no restriction on access and reproduction. No publisher should be able to impose any such restrictions as a condition of deposit. Steps should be taken to prevent TPMs imposing such restrictions.*

In relation to materials in which copyright has not yet expired, the question is much more difficult. We suggest that the correct answer lies in achieving three objectives: (i) ensuring that one copy of legal deposit materials is available for public access at the depository institution, or more than one copy if the materials are no longer commercially available through normal commercial channels; (ii) ensuring that legal deposit materials

are reasonably available for any of the purposes allowed by the Copyright Act during the period in which the material is protected by copyright; and (iii) ensuring that any conflicts with the interests of publishers and creators do not go beyond the achievement of the first two objectives.

On-site depository access should be permitted for these materials still protected by copyright, for a single user. More liberal access should be provided to materials that are no longer commercially available. These forms of access should allow users to exercise rights of use of the materials allowed by the Copyright Act.

21. *In relation to materials in which copyright has not yet expired, on-site depository access should be permitted, for a single user. More liberal access should be provided to materials that are no longer commercially available. These forms of access should allow users to exercise rights of use of the materials allowed by the Copyright Act.*

**Issue 16: Under any extended legal deposit scheme should legal deposit materials be subject to separate provisions concerning their use by the repository institution and the public? What kind of provisions are desirable to ensure that repository institutions can provide the public with adequate access to legal deposit materials under any extended scheme?**

22. *Submission: Repository institutions need considerably broader rights to use legal deposit materials, for preservation, access facilitation and archival purposes. They should be given whatever rights they need, subject to their observing any restrictions on public access that may be imposed.*

### **13. Other issues**

**Issue 17: Are there any other issues that you consider relevant to the extension of the legal deposit scheme?**

#### ***Awareness by depositories of the expiry of the copyright period***

Many of the above submissions depend for their effective operation on depository institutions being aware of whether or not copyright protection of a work has expired.

23. *Submissions: Depository institutions should be part of a national scheme to identify which materials they hold that are no longer protected by copyright, and should be entitled to require information to be provided to them at the time of deposit so as to assist them to determine this.*

#### ***Awareness by depositories of public rights voluntary licences***

Some legal deposit materials collected by depositories will now be subject to open content licences (such as Creative Commons or AShareNet/TVET licences) or free/open source software (FOSS) licences. These licences change considerably what a depository is entitled to do with the materials, by way of providing public access, before

copyright has expired. Materials subject to these ‘public rights’ licences are part of the public domain in the broadest usage of that term.

24. *Submission: Depository institutions should, insofar as they can, recognise which legal deposit materials are subject to public rights licences, and provide greater access to it in accordance with its terms. The access mechanisms they provide should allow such materials to be found by those public rights criteria.*

### ***Should the content of legal deposit be searchable?***

Both Google Books in the United States, and other projects in Europe and North America, are making the complete texts of many works searchable.

Where copyright has expired, this is not contentious and clearly desirable. There is not much doubt that, if left to overseas providers, Australia’s public domain will be significantly under-represented in such search facilities. If left to commercial providers, it is likely that there will be no facility to limit searches to materials in which copyright has expired (as is the case with Google Books now).

25. *Submission: Consideration should be given to making searchable the full texts of all Australian legal deposit materials in which copyright has expired.*

In some cases, where the copyright term has not expired, this provision of ‘searchability’ is done with the consent of the publishers. In other cases the search providers argue that they can make texts searchable without breach of copyright provided they only display small ‘snippets’ of the retrieved texts, enough to show the context of the search terms.

26. *Submission: Consideration should be given as to whether the Copyright Act should allow depository institutions to make the full texts of deposited materials searchable, provided they only provide the minimum amount of contextual information in any search results (or confirm they may do so).*

### ***Government compliance with legal deposit requirements***

Australian legal deposite schemes have generally not applied to governments, although they have apparently generally complied with their terms (Gilchrist, 2005: 190). Despite the fact that it may be difficult to impose penalties on government agencies (Gilchrist, 2005: 190), the legal deposit scheme should require that they do so.

27. *Submission: Governments should be required to comply with legal deposit on the same basis as the private sector, irrespective of the enforceability of penalties.*

### ***Penalty for Failing to Comply with legal deposit requirements***

The original legal deposit scheme contained a sanction of imprisonment for non-compliance, enforced before the Star Chamber (Gilchrist, 2005: 179). Times change.

28. *Submission: We do not recommend bringing back the sanction of imprisonment for failure to comply with legal deposit requirements.*

## References

Attorney-General's Department (2005) - Australian Government, Attorney-General's Department, 'Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age', Issues Paper May 2005, available at <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Copyright-ReviewofFairUseExeption-May2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005)>

Fitzgerald, Coates and Kiel-Chisholm (2008) – Fitzgerald B, Coates J and Kiel-Chisholm *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, 2008

Greenleaf (2007) - Greenleaf, G. "Creating commons by friendly appropriation" (2007) 4:1 SCRIPT-ed 117

Gilchrist (2005) – Gilchrist, J 'Copyright deposit, legal deposit or library deposit?: The government's role as preserver of copyright material (2005) 5:2 QUTLJJ 177-194

Menell (2007) – Menell, Peter S., "Knowledge Accessibility and Preservation Policy for the Digital Age" (July 10, 2007). UC Berkeley Public Law Research Paper No. 999801 Available at SSRN: <<http://ssrn.com/abstract=999801>>

## Table of questions and submissions

1. Submission: The Review should explicitly consider the role that legal deposit plays in supporting and making effective Australia's public domain.

***Issue 1: Should the legal deposit scheme be extended to audiovisual and electronic materials and ...***

2. Submission: We support the extension of the legal deposit scheme to audiovisual and electronic materials, and submit that it is now a matter of urgency because of the extension of the copyright term by an extra 20 years.

***[Issue 1] ... if so, how should such materials be defined (including the quality of legal deposit materials, such as 'best copy')?***

3. Submission: We submit there should be two criteria for inclusion of audiovisual and electronic materials in legal deposit:

(i) For any materials (except free access materials on the Internet), if they are sold, or distributed for free, deposit by the publisher should be required under the same conditions as would make a person a 'publisher' in relation to print materials. This would apply to all materials sold on CD, DVD or other medium, or delivered via the Internet by any means other than the World-wide-web).

(ii) All materials available for free access on the Internet should be included, and provision by that means should be considered to be publication. Depository institutions should be entitled to make copies of such materials for the purposes of legal deposit, without the publisher being required to provide a copy. They should be authorised by law to ignore robot exclusion protocols for this purpose. However, if the publisher uses any technical means to prevent the depository institution collecting a copy of the materials, a depository institution may require deposit of copies as with (i).

4. Submission: We submit that publishers of any materials (except free access materials on the Internet) should be required to submit material in the best quality format in which it is provided to those to whom it is published. However, if the depository is unable to display the materials in the same way that these recipients can display or use the materials, it may require the publisher to either (i) provide software to allow such display or use; or (ii) provide the material in another format in which it can be read by the depository institution with no significant loss of functionality.

5. Submission: Where material is available for free access on the Internet, its provision by that means will normally satisfy the legal deposit requirements, except where the depository institution cannot download the material by automated means, in which case it will be entitled to require provision of the data in accordance with the previous paragraph.

***Issue 2: Should an extended legal deposit scheme be in the Copyright Act 1968 or is a separate piece of legislation more appropriate?***

6. Submission: Legal deposit is best kept within the Copyright Act unless there is separate legislation dealing with public rights aspects of copyright.

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

7. Submission: We support the current requirement to deposit one copy, provided depository institutions have or are given sufficient powers to make sufficient back-up copies for archival and preservation purposes. One copy should be available for whatever public accesses are allowed, and other copies for archival and back-up uses.

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

8. Submission: The costs of deposit under an extended scheme should be at the publishers' expense. However, publishers should have avenues of complaint against unreasonable operation of the scheme.

***Issue 5: Should there be a role for other organisations, in addition to the NLA and NFSA, to act as repositories for material under an extended legal deposit scheme?***

9. Submission: Regulations should provide a list of national repositories, and that publishers are only required to deposit materials with one repository. There should be a procedure for resolving disputes about which repository is appropriate for particular materials. All repositories should be required to collaborate in providing an integrated and consistent national system for finding deposited materials.

***Issue 6: How might duplication of material collected by legal deposit agencies be avoided? For example, should publishers be required to deposit relevant material with more than one institution?***

10. Submission: If arrangements are made to reduce the multi-jurisdictional deposit burden on publishers, they should be coupled with the requirement that copies of the deposited materials can be provided to the other jurisdictions as required.

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

11. Submission: Both electronic and print versions of a work should be required to be deposited, if both are published.

***Issue 8: What other material should an extended legal deposit scheme apply to?***

12. Submission: Published computer games and computer programs should be included.

13. Submission: There should be a further enquiry into what other materials (including works of the visual arts and theatre), or representations of them, should be included in some way in a comprehensive archive of national culture by means equivalent to a legal deposit scheme.

***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?***

14. Submission: Legal deposit should apply to broadcasts. The default position should be not that broadcasters have an obligation to deposit copies but rather that the repository has the right to collect copies from the broadcast itself. Depositories should also be given the right to require copies of broadcasts from broadcasters where they have not collected the broadcast when it was broadcast.

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

15. Submission: Depository institutions should have the right, within the legislative competence of the Australian Commonwealth Parliament, to require the deposit of materials hosted outside Australia which are published on the Australian (.au) county domain or created by Australians or otherwise considered to be of cultural significance to Australia.

16. Submission: Depository institutions should have the legal right to make copies of free access web sites (whether or not they are located in Australia) containing legal deposit materials for the purposes of the legal deposit scheme, and to make them searchable. The Copyright Act should confirm that depository institutions (and perhaps other search engine providers) are entitled to do this.

***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?***

17. Submission: For materials other than free access materials on the Internet, and broadcasts, collection policy should be one of comprehensive collection based on publication, as it is now for printed materials. For free access materials on the Internet, the policy should be one of selectivity based on cultural significance to Australia, cost considerations, privacy considerations, and the exclusion of 'riff raff'. For broadcasts, comprehensive collection would be desirable, but the depository should have the ability not to retain some content, where the costs of providing continuing access and preservation are too high.

***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?***

***Issue 13: What timeframe should apply for deposit under an extended legal deposit scheme?***

***Is the timeframe for deposit suggested by the CLRC appropriate in the context of a selective approach to extending legal deposit?***

***Should different time frames apply to the deposit of different published materials if legal deposit is extended?***

18. Submission: We support the period of one month as proposed by the CLRC

***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?***

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

19. Submission: We support the submissions by Fitzgerald, Coates and Kiel-Chisholm concerning technological protection measures.

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

20. Submission: In relation to deposited materials in which copyright has expired, there should be no restriction on access and reproduction. No publisher should be able to impose any such restrictions as a condition of deposit. Steps should be taken to prevent TPMs imposing such restrictions.

21. In relation to materials in which copyright has not yet expired, on-site depository access should be permitted, for a single user. More liberal access should be provided to materials that are no longer commercially available. These forms of access should allow users to exercise rights of use of the materials allowed by the Copyright Act.

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