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The Legal Deposit of Electronic Publications

by **Jim Vickery** (The British Library) <Jim.Vickery@mail.bl.uk>

NB: A version of this paper was delivered at the 17th Charleston Conference, 8 November 1997. British spelling has been retained. — KS

Introduction

I will be focusing in this paper on the intriguing challenges arising from the explosion of electronic material from a slightly unusual angle: that of legal deposit (also known as copyright deposit or mandatory deposit).

Legal Deposit Purpose

Legal deposit is the requirement that publications produced within a certain jurisdiction be deposited, usually in designated libraries which include the national library. The primary purpose is to build and preserve a comprehensive collection of publications as a record of the nation's culture and heritage, without being dependent upon funds for purchasing the items. So there should in theory always be a library of last resort for all publications. If carried out effectively worldwide, this forms a central component of the Universal Availability of Publications programme. The existence of the resulting national collection facilitates scholarship through the publications being made available to researchers, normally for reference purposes. And let us not forget that many new books could not have been written but for their authors working with the legal deposit collections.

A secondary but still vitally important function of legal deposit is to provide the basis for the national bibliography and associated bibliographic services. This can indeed be seen as an obligation on the deposit library. There are benefits for depositors too: a positive effect on sales often results from inclusion in the national bibliography.

Method

Deposit is usually based in legal statute, although argument and persuasion are the standard means of operation, backed up by the law only when absolutely necessary. There are in practice very few prosecutions for non-deposit, mainly because most publishers see the sense in sending in their material. Although it is generally agreed that legal sanctions are necessary as a last resort, it should be noted that the Netherlands manages very well on a voluntary basis, but this ultra-civilised country is the exception that proves the rule. The right to receive deposited material may be distributed across several designated libraries, but the national library's role remains paramount.

A Brief History of Legal Deposit

Legal deposit has its origins in censorship and state control of the printing press. The King of France was the first to realise the advantages of this in 1537. **Sir Thomas Bodley** of Oxford set up a similar arrangement in England in 1610, which was ratified by a British Act of Parliament in 1662. By the eighteenth century a more enlightened view was emerging. Here in America deposit began in 1790, and was formally assigned to the **Library of Congress** along with copyright registration in 1870.

The concept of legal deposit is now accepted worldwide, although it works patchily in the developing world. The form of

deposit varies widely in different countries: for example, the number of copies can vary from one to dozens, depending on the history, geography and federal nature of the state. The possibility of a single system for the whole European Union has been mooted, but it is unlikely that national boundaries will be broken down so easily.

In the last half-century or so, several new types of publication have caused unforeseen problems for the implementation of deposit laws. These include grey literature, audio-visual material, and microforms. All may be covered to some extent by existing legislation, but not necessarily by the national library: sound recordings, films and videos, for example, are often lodged with other institutions. Further problems are caused by broadcasts of various types; and photographs are another matter again.

The Need for Extension

That brings us to the main topic of this paper: electronic material. The justification for extending deposit into the electronic era is clear and unanswerable: the principle of legal deposit should apply to all the nation's knowledge, regardless of format. Since there is no need to make online publications accessible on shelves, it would seem at first glance that they should be easier to deposit and make available. We are now, in the late 1990s, reaching a critical point in the availability of electronic publications. There is a pressing need for solutions in to be put place or much valuable material will be lost to libraries forever. This particularly applies to deposit libraries, which are the guardians of each nation's heritage.

What makes this such a live issue is the increasingly fast rate of change, leading to blurring of boundaries and unpredictability. This diversity and pace of change means that broad solutions, not dependent on today's (or even tomorrow's) technology, are necessary. In the last few years the problems associated with electronic publications have become better-understood, but trial and error is not a suitable methodology when framing laws (though normal in the world of commerce), so an intensive scrutiny of the key issues at the outset is essential.

Electronic Material

Hand-held Material

Let us first briefly review hand-held material, including CD-ROM, diskettes, and mixed media. In general, libraries are finding ways of coping with this challenge, since the items display similar characteristics to books.

The main area of concern here is that of licences which limit use. This question does not cause major problems with traditional printed material, at least not when the relevant copyright legislation is in place and recognised. It is, however, possible to allay publishers' fears concerning uncontrolled dissemination of their works, protecting their legitimate commercial interests while still meeting the national library's needs: after 18 months negotiation with the information and publishing industries, the **Library of Congress** in 1993 successfully implemented its CD-ROM agreement, whereby either one copy is received for up to five simultaneous users on a local area network, or two copies for standalone

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use within the Library. The depositor may permit insubstantial downloading if the reader signs the relevant agreement, and security and monitoring arrangements are in place.

This pragmatic approach was taken by LC in preference to demanding deposit from unwilling producers. Preservation and archiving are also worrying aspects of this material, as no one knows how long CD-ROMs will last. There may be a need to retain present technology to read them in the future, or for the various computer standards and formats to be supported indefinitely. Assuming that a variety of technical formats will be deposited, since obligatory deposit in the library's preferred format is unrealistic, the deposit library will have to cope with them by refreshing or migrating the data, for example on to gold-plated discs which are reputed to last for one hundred years.

Electronic Publications

Moving on from the relatively straightforward hand-held or offline products, I will now consider the latest electronic manifestations: online and networked publications, electronic journals, and digital texts, all of which are key scholarly material and so vital for research and particularly deposit libraries to collect. Electronic discussion lists are not generally regarded as publications, more as modes of communication, so thankfully are not required for deposit.

Dynamic databases that are available only on the Internet or over local networks pose special problems. Snapshots or updates may be all that libraries can cope with here, although access to live databases plus deposit of frozen ones may be a workable compromise. If it is true that some forms of publication cannot be physically deposited or retained for future use, this is of major significance for the role of national libraries in their efforts to preserve the world's knowledge.

Another tricky dilemma is posed by on-demand or tailored publications, which may not exist until someone requests or orders them. Which of these categories are 'published', and therefore liable for deposit, is a moot point. A separate manifestation of a work may exist as the original digital form of books and other publications prior to printing; but as far as I am aware there are no plans for deposit libraries to collect these automatically in place of the finished books.

Issues of Concern

I will now look briefly at some of the main areas of concern surrounding online electronic publications.

Deposit and Access

Deposit means the permanent transfer for retention by the library, not just temporary access from the library to a remote source. Simply allowing access is not equivalent to establishing a permanent store, and is insufficient for deposit purposes. Key practical questions are who is responsible for depositing (author, publisher, network operator ...), at what cost, when and where?

"... libraries should not be seen as competing with publishers."

The downloading process itself could be either automatic or determined at the receiving library.

Mechanisms for deposit will depend on type of publication. What is the definition of publication? A key issue is the definition of 'publication'. A useful working definition based on print experience is that a work is considered to have been published when either (a) copies are offered to the public or (b) it is made available through a technology enabling the public to view or hear it. It would be possible to devote a whole paper

to the niceties of this definition, but I will resist the temptation here.

Place of Publication

National legislation cannot easily cope with genuinely international publications such as worldwide online databases. If a place of publication cannot be determined, the location of the network distributor could conceivably be used. Perhaps we need something akin to the International Law of the Sea; although then some enterprising publisher will no doubt try publishing from satellites in space!

Bibliographic Control

Bibliographic identification is a traditional function of librarianship. Someone needs to authenticate each electronic publication, describe it, and provide access points. The concept of national bibliographies, based on legal deposit, should be extended to include such works, as there is little prospect of the networks themselves taking on this role.

Stability/Integrity

It is necessary to check the integrity of all items received, but electronic formats present special difficulties compared to printed material. This is a particular problem with works containing hypertext links to other documents on the Internet: should they all be deposited together? The spectre of different "versions" or "editions" also raises its head, with the extreme example being publications that are constantly changing.

Usage

The issue of controlling subsequent use is integral to the receipt and ownership of electronic material. The ideal solution would be a standard legal agreement, setting reasonable and mutually-acceptable conditions of deposit for copying, downloading, and multiple usage. Once deposited, the means of access must be established, whether on a stand-alone machine, within the building, over wide-area networks or through the Internet.

Although linked to the above, copyright is a separate issue, which should not be dependent on deposit but a right that automatically comes into being whenever a work is created. Can the 'fair use' concept be applied differently in legal deposit libraries, when material is deposited by right and not by commercial contract and much of the use is last-resort? Readers should expect to have reasonable access to and use of publications regardless of format.

Selection

The same criterion used for printed books and serials, that of being of lasting value to serious readers, should apply when selecting or accepting electronic material for the national collection. But in the short-term this will have to be pragmatic, as selectivity will be essential if we are to cope with the sheer volume and variety of material. It will be difficult to identify new publications from listings, since many producers of electronic material are not aware of the book trade. All formats should be deposited unless specifically exempted, although not all may be retained for the collection.

Preservation/Archiving

Ultimately it is the content rather than the format that the deposit library is interested in preserving. Given the huge volumes of data, retention will have to be carefully planned and disposal policies agreed upon, and each nation or region will require a policy on the number and location of archival collections. Either data will have to be refreshed or migrated regularly at great cost, or obsolescent machines will need to be retained to read it. Dynamic

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publications, even if copiable on to disc or microform, cannot be satisfactorily preserved in their entirety. I comment further on the archiving problem below.

Current State of Extension Worldwide

The chart below shows the current state of legal deposit legislation in some key countries.

New Legal Deposit Legislation

	<u>Date</u>	<u>CD-ROM</u>	<u>Online</u>
Norway	1989	Y	Y
Germany	1990	Y	
France	1992	Y	
USA	1993	Y	
Sweden	1993	Y	
Canada	1995	Y	

So: countries with new laws include Norway, Germany, France, the USA, Sweden, and Canada. Other countries such as Russia and Poland have general legislation in place, and are at the initial stages of accepting electronic material. Denmark, Finland, Italy, Spain, Australia and the United Kingdom are all actively pursuing new legislation, having produced major reports in the last 2-3 years. There is much work taking place across the globe, in the rush to bring legal deposit up to date. Norway has been the front-runner in these stakes, and is the only country actively seeking deposit of online material. Approximately 500 Norwegian titles have been downloaded from the Internet since 1994 and stored on gold-plated CD-ROMs, but very few online databases have been received, and no public access is allowed for three years. Sweden has recently downloaded all five million Swedish documents from the Internet, and is investigating models for storage and access to this material. Australia has hosted but not acquired several hundred electronic journals, and **PANDORA (Preserving and Accessing Networked Documentary Resources in Australia)** has been set up in collaboration with publishers to establish a national archive. Canada has acquired some electronic journals in both electronic and print form, and is accepting electronic deposit of some statistical data. In the USA the requirement to deposit online material is in process of clarification, given the narrow definition of "publication" in the **Code of Federal Regulations**, but no new legislation is pending. France is currently receiving around 1,500 offline publications, mostly disks, per year. Denmark is following Norway's example, seeking access to static databases plus deposit on cessation; electronic public records are deposited in the National Archives, and research data in the Danish Data Archive.

The UK has adopted a phased approach, concentrating initially on hand-held items and framing the legislation to accommodate online publications at a later date within the new law. After much spadework by the British Library and others, including publishers, the UK government issued a consultation paper in February 1997. The initial proposal is for standalone access to CD-ROMs at all six Copyright Libraries, whilst allowing the British Library to retain its right to automatic deposit. Selected publishers are voluntarily depositing electronic journals on a trial basis.

The Netherlands has no national legal deposit legislation, but the **Dutch Depository of Electronic Publications**, which was set up in 1993, provides access to 400 Elsevier and Kluwer journals for registered readers of the national library. Since May 1997 remote access via the Internet has been tested. It is too early yet to judge the success of any of the new legislation, and there has been little policing of compliance, since most of the effort has been devoted to drawing up the regulations and finding practical ways of making them work.

Role of National Libraries

National libraries of course have a special role to play in the extension of legal deposit. Following an international workshop in 1995 a working group of the **Conference of Directors of National Libraries** established guidelines for bodies preparing cases for government approval.

As noted earlier, archival collections should guarantee the integrity and authenticity of electronic publications, and who will provide them if not national libraries? Creators of works may maintain their own archives, but given the limited lifespan of individuals and publishers long-term retention should be the responsibility of national organisations, with all items being deposited at the time of publication. One of the main functions of national and research libraries is to provide access to 'out-of-print' or 'offline' publications, since publishers do not normally wish to retain or provide access to such material once its main economic life is over. This point is closely related to the theme of 'perpetual access', which has recently become a key topic for discussion. National libraries are generally leading the process to establish a national electronic archive; in the USA the **Library of Congress** is working closely with organisations such as **OCLC, Center for Research Libraries, JSTOR, Cooperating Institutions in Consortium** and the **Digital Library Federation** to reach a workable strategy. If publishers can supply readers directly over

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A PLEA FOR BALANCE

by **Michael Gorman** (California State University, Fresno)
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NB: Adapted from a talk given at the RASD/CODES program "To Net or Not to Net?" at the ALA Annual Conference, San Francisco, June 29th 1997. — KS

As most of us do, I absorb cultural change and view the popular culture landscape through among other things, advertisements. A recent series of TV ads for the communications company MediaOne — has been most instructive. The first ad combined flashy graphics, that annoying post-modernist advertising device of turning the words of the ad into a kind of round game with different overlapping voices completing the previous sentence, and vaguely New Age-y music. The message was that "the future has arrived" in the shape of MediaOne laying down broadband cable all over these United States. Over pictures of people playing sports, reading, thinking (signified by doped-up looking people staring into space), enjoying "quality time" with each other, etc., the voices intoned: "This is the way you are going to learn; this is the way you are going to work; this is the way you are going to play; this is 'The Way' (cut to image of glowing cable).

MediaOne's broadband, in short, is going to change society, change our lives, change everything, and *all for the better!* MediaOne is presented as a beneficent, even philanthropic force. Looking at the images of the radiant broadband cable and listening to the music, one could almost think this is not a commercial firm but something more like a cult. One feels like jumping to one's feet and saying "I believe, I believe!!! Broadband will save me!!!" I even saw a MediaOne van near my house one day and was so happy that I could hardly

stand it. Broadband is coming! All will be well!

Then I saw the next two ads. Same vaguely religious music — plain chant meets Enya kind of thing — but this time MediaOne was about to show us the miraculous, life-enhancing, transformational things that Broadband was going to do for us all. And what were they? World Championship Federation Wrestling and the edifying Mike Tyson/Evander Holyfield fight!

The MediaOne campaign is techno-hype at its most refined and shows us, more clearly than ever before, the two fallacies deep at the heart of the Cult of Information and Technology. First, there is the concentration on the *medium*, which, despite the much misunderstood Marshall McLuhan, is *not* the message. Lauding the magic powers of broadband is much like showing images of a real library and saying "paper is going to change your life." It is what is *on* the paper and the skills one needs to use that content that are important. Anyone who doubts this need only spend an hour or so wading hip-deep in the disorganized rubbish and ephemera that makes up most of the World Wide Web. No one can have that experience without realizing that it is content not the vehicle of communication that matters and that the vehicles of communication should be judged on

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networks, then general libraries may no longer subscribe to such journals or databases; in this case the legal deposit library may be the only library holding a copy.

Conclusion

In conclusion, several themes are emerging. Since around 1990 the potential loss of valuable material has been growing exponentially. Seven years is not a long time to form a new vision of the function of legal deposit, but it is the technology not the libraries that is setting the pace.

Although there are as yet few solutions, at least the magnitude of the task is universally recognised. Progress is likely to be evolutionary as the practical considerations are weighed and options explored. Technical solutions for identifying, capturing, refreshing, storing and accessing data are not too far away. More nebulous are the economic implications of deposit: both the effect on publishers' revenues, and the cost of maintaining the deposit systems in libraries: the latter is a major governance issue that has hardly been addressed so far. If it is the role of national libraries to preserve deposited electronic material for future generations, where is the extra funding to come from? Other, potentially more intractable political implications could include: state control of networks; censorship masked as selection; and the social responsibilities of publishers. This all sounds strangely

reminiscent of the birth of legal deposit in the sixteenth century!

Although some of their interests may appear to be in conflict, libraries should not be seen as competing with publishers. Libraries must work closely with all concerned towards the long-term aim of automatic deposit under standard, legally-binding conditions. As with print, persuasion is preferable to coercion, and a balance between the needs of publishers and libraries must be established. Given the lesser economic threat posed by legal deposit libraries, it may be easier for them than for purchasing libraries to achieve a mutually beneficial alliance with publishers, especially when taking on the responsibility for older material.

This is, above all, an international issue; communication (and ideally harmonisation) across national boundaries is essential, if sensible progress is to be made as uniformly as possible for the good of all peoples.

I would like to sum up with a statement of four key principles concerning the legal deposit of electronic publications:

1. Published knowledge must be available to future generations.
2. The essential role of deposit libraries is valid for all forms of publication.
3. Deposit libraries are required to collect and preserve electronic material.
4. Libraries should work collaboratively with publishers and others to achieve these goals.

That is the agenda. Now we just have to make it a reality. 🌱