



AUSTRALIAN
COPYRIGHT
COUNCIL



***Response to 2007 Discussion Paper on the
Extension of Legal Deposit***

May 2008

Australian Copyright Council

The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.

Some of the organisations affiliated with the Copyright Council have made separate responses to the 2007 Discussion Paper on the Extension of Legal Deposit (the Discussion Paper).

Summary of our position

We support the objective of preserving significant items of Australian culture for future generations. We think, however, that the current legal deposit provisions, and any extension of them, need to be more closely aligned to this objective.

Because legal deposit material is compulsorily acquired, and because the producers of the material incur costs and in some cases forgo revenue, we think that some of the provisions in the Copyright Act that allow certain uses of material in library collections should not apply to legal deposit material.

Finally, we think that where there is an obligation to deposit, that obligation should apply to only one library. The obligation to deposit should be linked to an obligation on the deposit library to preserve, and it seems to be a duplication of resources to have more than one institution engaged in the preservation of the same material.

If the legal deposit provision is to be extended, we propose the following conditions:

- The obligation to deposit should only apply to content that is “of historical or cultural significance to Australia”, and that phrase should be defined in the Copyright Act;
- Some types of historically or culturally significant material could be subject to deposit in all cases, and others to notification and deposit on request;
- The obligation should not apply if a copy has already been deposited with a legal deposit library (including under State or Territory legislation, or under another provision of the Copyright Act such as s107, or voluntarily);
- The obligation should apply to the “best copy” of the historically or culturally significant content;
- The obligation could apply to a copy in a format different to that of the “best copy” if the copy in the different format is, in itself, of historical or cultural significance to Australia;
- The deposit library should be allowed to make any number of preservation copies, provided the uses that can be made of the preservation copies are limited;
- The provisions of sections 49 and 50 allowing supply to clients and other libraries should not apply to legal deposit material, or preservation copies of that material;
- Legal deposit copies should be clearly marked, to help ensure they are not used for purposes other than preservation;
- Public access should be provided only onsite at the deposit library;

- External online access could possibly also be provided to bona fide researchers, subject to limitations such as the material being view only, and accessible only for the period of time necessary to carry out the research;
- If a publisher deposits material that the library does not want for its preservation collection, the library should be obliged to notify the publisher so that the publisher does not incur expense in depositing similar unwanted material in the future; and
- The publisher should be compensated an amount equal to the production and delivery costs of the deposit copy if those costs exceed a threshold prescribed in the Regulations (say \$200).

In our view, these same restrictions should apply to material already covered by s201 of the Copyright Act.

Issues raised in the Discussion Paper

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')?

If the legal deposit provision is to be extended, it should apply only to content that is “of historical or cultural significance to Australia”, and that phrase should be defined in the Copyright Act.

Section 201 currently requires that the copy deposited be the same as the “best copy” published. We think that the “best copy” concept could be used for any additional material covered by the legal deposit obligation. However, given that the term “best copy” may differ according to the type of material, and may evolve over time, its meaning in relation to particular types of material may be best addressed in guidelines agreed between the deposit library and publishers of that type of material. Agreement on such guidelines would be facilitated by an obligation to compensate a publisher where the best copy is expensive.

For example, if a film producer is required to deposit an unused cinema-quality film print to the National Film and Sound Archive (NFSA), the producer may need to produce an additional print just for this purpose, and should be compensated for it. Alternatively, the guidelines could allow the producer to deposit the used print after the initial cinema screenings have finished.

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

The objective of the legal deposit obligation is, of itself, unrelated to copyright rights and obligations. Section 201 only applies to material in which copyright subsists, but there is not a necessary connection between copyright subsistence and material of significance that a library may want to preserve.

Having said that, however, we think that some of the special exceptions allowing libraries to copy and communicate material in their collections should not apply to legal deposit material, and that that exclusion – at least in relation to the National Library of Australia (NLA) and perhaps the NFSA – may be more effective if the legal deposit obligation is also in the Copyright Act. There can be unintended consequences if a

provision in the Copyright Act refers to another Act, and that other Act is amended without regard to the implications for the Copyright Act.

We think the restrictions should also apply to material deposited under State and Territory legislation, so there may still be some reference to other legislation, depending on how the restrictions were drafted.

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

In our view, there should be an obligation to deposit only one copy with one library. We think that the obligation should not apply if a copy has been deposited under State or Territory legislation, or under another provision of the Copyright Act such as s107(5). In other words, we think that there should be one institution in Australia which has the obligation of preserving a particular type of historically or culturally significant material. This would obviously require coordination between Commonwealth, State and Territory libraries.

We think that the nominated institution should be allowed to make any number of preservation copies, provided the copies are genuinely for preservation and their use is restricted.

The only case in which more than one copy may be justified is where the content is available in another format and that format is, of itself, historically or culturally significant.

The deposit library can, of course, request the voluntary deposit of additional copies, and publishers may well respond to such requests if there are acceptable undertakings relating to the use of the material. It can also purchase material to be made available for wider access.

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

Section 201 is based on an assumption that the deposit item has been produced as part of a large print run, and that the cost of to the publisher will be minimal. That assumption may not be valid for the additional material proposed for an extended legal deposit provision.

We propose that the publisher be entitled to compensation if the production and delivery costs of the deposited item exceed a threshold amount prescribed in the regulations.

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?

As stated above, we think there should be one institution in Australia whose role it is to preserve particular types of material of historical or cultural significance to Australia. The objective of preserving Australian culture would not seem to be served by duplicating efforts in relation to the same material. We do not see how the preservation of Australian culture is served, for example, by depositing the same publication with three State libraries as well as the National Library (which is currently the case in NSW). A policy of nominating one institution for a category of material requires coordination between Commonwealth, State and Territory governments, and – if it is to apply to all material – requires amendments to State and Territory legislation relating to legal deposit.

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?

In our view, the role of preserving Australian culture should be a Commonwealth responsibility, done by the NLA and the NFSA, and the State and Territory legal deposit provisions should be repealed. In the absence of that, s201, and any extended version of it, should not apply to material that is the subject of legal deposit obligations in other legislation.

If the NFSA is to be the sole repository for audiovisual material, then it would seem to make sense to amend the references to the Australian Archives in ss47 and 107 to refer to the NFSA.

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

If the printed version is the “best copy” and thus subject to the legal deposit obligation, then the only case in which the electronic version should be subject to the obligation is where it has a historical or cultural significance that is separate from the historical or cultural significance of the printed version and its content. In other words, the legal deposit obligation should only apply to a format other than the “best copy” format if the alternative format, as an artifact, has historical or cultural significance to Australia.

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

Section 201 defines legal deposit material partly by reference to the format in which content has been published (for example, book, newspaper, sheet of music), but also by reference to particular types of content (map, plan, chart, table). An item is only covered if it contains material protected by copyright (which may be copyright in the published edition), and if it has been published.

As noted above, there is no necessary connection between something being of historical or cultural significance and its being protected by copyright. The requirement that the item contain material protected by copyright, and/or the use of terms defined in the Copyright Act, are, however, ways to differentiate the material covered by the legal deposit obligation from other material that may have historical or cultural significance.

Section 201 could be extended to cover cinematograph films and sound recordings that have been published or broadcast or played or screened in public, and are of historical or cultural significance to Australia.

It could also cover any significant material made available to the public online.

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?

Radio broadcasts

Section 107 already effectively requires the delivery of broadcast sound recordings of “exceptional documentary character” to the Australian Archives. Section 107(5) allows a broadcaster to destroy a recording rather than deliver it to the Archives, but we do not

know to what extent, if any, this occurs in practice. It is not clear from the Discussion Paper what radio broadcast material in addition to that collected by the Australian Archives under s107 is contemplated by the above question. We seek more information about what radio broadcast material of historical or cultural significance to Australia, if any, is not currently being preserved.

Television broadcasts

If the legal deposit provision is extended to cinematograph films, it would cover television programs. Where an off-air recording of the broadcast is the best copy, the provision could allow the NFSA to acquire the program that way.

We do not think the obligation should apply if the material has been deposited voluntarily. We note the description of existing arrangements for deposit of broadcast materials in the submission of Free TV Australia.

Internet material

The legal deposit provision could allow the National Library to copy, for preservation, significant material from websites.

Our proposal would be of limited assistance to projects such as PANDORA, however, because we think that access to such copied material should be limited. In any event, it is not clear from the Discussion Paper, or from the PANDORA website, what the NLA wants to do with PANDORA that it thinks would be assisted by an extended legal deposit provision. We would be happy to comment further on receipt of further information about this.

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

Provided “historical or cultural significance” is properly defined, and the internet material is accessible in Australia, it should not matter where it is hosted from.

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?

As stated above, we think that the legal deposit obligation should be limited to material of historical or cultural significance to Australia, and that this phrase should be defined in the Act.

Some types of historically or culturally significant material could be subject to deposit in all cases, and others to notification and deposit on request.

In general, we think that the criterion should be applied to the content rather than its format. Where there is more than one format, the format that is the “best copy” would need to be determined according to agreed guidelines. In addition, there may be situations where an additional format is, of itself, historically or culturally significant.

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?

We think that the nominated legal deposit library should be able to make any number of preservation copies, including in different formats, provided the copies are truly for preservation and their use is limited to onsite viewing.

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?

We think that a reasonable timeframe may vary according to the type of material and the definition of “best copy”. For example, where a “best copy” of a film is a cinema-quality print after the initial cinema screenings have finished, then a longer timeframe will be needed than for a copy of a book. For that reason, the timeframe may be better addressed in guidelines or regulations than in the Copyright Act.

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?

Any additional provisions allowing libraries to circumvent technological protection measures would obviously need to comply with the Australia-US Free Trade Agreement.

Issues relating to accessibility may be best dealt with in agreed guidelines between the collecting institutions and publishers, given ongoing technological changes. Publishers and producers are generally sympathetic to the objective of preserving Australian culture, provided there are limitations on how deposited material will be used, so we think that this issue, and others, could be effectively addressed by agreed guidelines.

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

We think that access to legally deposited material, and any preservation copies of it, should be limited to onsite viewing. This could include viewing on onsite terminals that do not allow copying or communication of the material. It may also be acceptable to allow remote online access to fide researchers, provided the material is view-only and accessible only for the period necessary for the research.

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?

We think access to legal deposit materials, and preservation copies of them, should be limited to onsite access, including via dumb terminals. We may be able to support external online access by bona fide researchers, providing the access is view-only and for a limited time.

In our view, the provisions allowing supply of material to clients and other libraries in ss 49 and 50 should not apply to legal deposit material.

Libby Baulch
May 2008