



Australian Libraries Copyright Committee

Consultation Paper on Extending Legal Deposit

Submission of the Australian Libraries Copyright Committee

April 2012

Submitted by email to copyright@ag.gov.au.

1. Executive Summary

This submission is made on behalf of the Australian Libraries Copyright Committee (ALCC).

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee representing the following organisations:

- National Library of Australia
- National and State Libraries Australasia
- Council of Australian University Librarians
- Australian Library and Information Association
- National Archives of Australia
- The Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Australian Government Libraries Information Network

The ALCC considers the impact of copyright law reform on Australian libraries and archives, and advocates for copyright laws that strike a balance between reasonable access to creative works for copyright users, on the one hand, and the rights of creators on the other.

The ALCC thanks the Attorney-General's Department and the Office for the Arts in the Department of Regional Australia, Local Government, Arts and Sport for the opportunity to comment on the consultation paper, *Extending Legal Deposit* (the **Consultation Paper**).

The ALCC endorses in full the comments and recommendations put forward by the National Library of Australia (National Library) in its submission, and makes the following additional comments.

2. Introduction

The ALCC affirms the benefits of legal deposit legislation highlighted in the Consultation Paper. The current system for the delivery of published print material to the National Library under section 201 of the *Copyright Act 1968 (Cth)* has proven invaluable to accurately record, preserve and provide access to Australia's 'intellectual and creative endeavours, our cultural heritage, our history and way of life'¹.

As society embraces new and rapidly evolving digital technologies for the communication and use of information, the existing legal deposit mechanism must be extended to ensure continued efficient and accurate recording of Australia's cultural heritage. Appropriately archived, preserved and made accessible in accordance with other legal conditions (including copyright), citizens gain a stable and important link to past innovation, creativity, discussion and information².

¹ Attorney-General's Department Consultation Paper: *Extending Legal Deposit*, April 2012,

² A Paramaguru and S Christou, "Extension of Legal Deposit: Recording Australia's Online Cultural Heritage", (2009) 6:2, *SCRIPTed* 411, <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/paramaguru.asp>

Without a mechanism for the delivery of Australia's electronic and online creative output to the National Library under legal deposit, there is a very real danger that 'the record of published Australian [non-print based] creative expression and information will enter a digital Dark Age³.'

3. Comments on specific issues

A. Definition of library material

The current definition of "library material" under section 201(5) of the Copyright Act encompasses 'a book, periodical, newspaper, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work...'. It is nonsensical that this definition be retained in an extended scheme that strives for a definition 'adapted to the realities of the digital environment' (**Consultation paper**).

The existing definition of "library material" does not accommodate the "library material" of the digital environment, which encompasses e-books, e-journals, blogs, memes, and on Tumblrs and feeds. It does not anticipate that next generation of digital material we've yet to encounter.

For the definition of "library material", and the delivery of "best copies" to the National Library to be technology neutral, section 201(2) should also be amended. Section 201(2) mandates that copies delivered to the National Library be "bound, sewed, stitched or otherwise fastened together...on the best paper". These terms cannot be applied to electronic material.

It's essential, in the rapidly evolving digital environment, (and is acknowledged in the Consultation Paper) that legislative changes be technology-neutral. The definition of "library material" should not be medium specific, but could rather cover 'a print or electronic publication that is a literary, dramatic, musical or artistic work that is published'.

The extended legal deposit Bill currently before the Western Australia Parliament⁴ offers an alternative definition that may be of use to capture the scope of material to be delivered to the National Library. Parts 2 and 3 of that legislation refer to 'public documents' and 'WA internet documents' to be deposited with the State Librarian, with the term 'document' defined as:

"A document in any form and includes —

- (a) any writing on any material (for example, books, periodicals, newspapers, magazines, reports, newsletters, calendars, directories, handbooks, guidebooks, sheet 1 music, maps, plans and pamphlets); and*

³ National Library of Australia, response to 2007 Discussion Paper on the Extension of Legal Deposit,

⁴ Western Australia Legal Deposit Bill 2011,

[http://www.parliament.wa.gov.au/Parliament/bills.nsf/AC24A0425374659A48257943001DD792/\\$File/Bill244-1.pdf](http://www.parliament.wa.gov.au/Parliament/bills.nsf/AC24A0425374659A48257943001DD792/$File/Bill244-1.pdf)

- (b) *information recorded, stored or communicated by means of an electronic recording device, computer or other electronic medium (for example, audio cassettes, video cassettes, multimedia kits, computer magnetic tapes, computer optical disks, floppy disks, compact disks, CDRoms and DVDs); and*
- (c) *information recorded or stored by means of any other kind of device or medium (for example, a film, microfilm, microfiche or vinyl record); and*
- (d) *information on a website.*

While it does reference specific mediums, the WA definition is elaborative (“for example”), leaving scope for future digital formats to be captured by legal deposit.

B. TPMs

The ALCC supports a provision in the extended scheme that would require publishers to remove TPMs before the delivery of materials to the NLA. The removal of TPMs would enable the National Library to undertake necessary preservation activities, and to provide access to works within existing conditions of the Copyright Act.

Where a deposited electronic work contains TPMs or similar protections, preservation of and use of that work may be effectively impossible, not only while the material is under copyright protection, but also after it has come into the public domain.

The ALCC notes that the Attorney-General’s Department anticipates conducting a review of the permitted circumstances in which TPMs may be circumvented under Schedule 10A of the *Copyright Regulations 1969* later this year. While permitted exceptions provide libraries with some scope for preservation and access to works within the Copyright Act, they cannot resolve those circumstances in which the National Library does not have a mechanism to remove a TPM, or is unable to.

In the digital environment, there is a real risk that content will be trapped by TPMs that have become obsolete, or the software or device needed to circumvent them is unavailable. Requiring publishers to remove TPMs before the delivery of materials to the National Library facilitates the long term preservation and provision of access to works for the benefit of future generations.

While a work is still in copyright, however, public access to an electronic work free of TPMs is likely to cause real anxiety for publishers, who would otherwise distribute it to the public with TPMs attached.

To mitigate the concerns of publishers, and to ensure sufficient public access to electronic works while protecting the rights of the creator, the ALCC proposes that an extended scheme require, where TPMs are present, the deposit of two copies of a work with the National Library: one free of TPMs, and the other with TPMs attached for public access.

In this way, the National Library will be able to undertake preservation of a work, and facilitate long term access in accordance with the goals of legal deposit, while ensuring that while a work is still in copyright, it is adequately protected by TPMs.

The ALCC recommends that section 201(2) of the Copyright Act be amended to incorporate as “best copies” for delivery to the National Library:

Two copies: one copy free of TPMs for preservation and long term access, and the other with TPMs attached for public access while the work is in copyright.

C. Administration and compliance costs

The National Library and affected publishers are best placed to expand on the administration and compliance costs associated with an extended scheme, and the ALCC makes only brief comment.

Potential administration and compliance costs faced by publishers for the delivery of material to the National Library must be balanced against the wider public interest in an accurate and comprehensive record of our cultural heritage. Costs claimed by publishers must also be viewed in light of the greater, long term administration and preservation costs incurred by the National Library whose mandate is the preservation and provision of access to Australian cultural output.

D. Public access to deposited material

The ALCC supports the Consultation Paper’s proposal that public access to deposited material be permitted within the existing copyright framework for libraries and archives.

Legal deposit is not intended merely to ensure the preservation of culturally significant materials; access to an accurate and comprehensive record of Australian cultural output for present and future generations is the overarching objective of legal deposit.

At minimum, the National Library should be able to provide public access to deposited material within existing provisions of the Copyright Act. Nonetheless, the ALCC notes that in the digital environment, where creators may elect to make their content freely available, unrestricted, to the public at large, it is anomalous that the National Library may not be able to provide the same level of access to that content under legal deposit. One solution to this issue may be an ‘opt out’ mechanism for the creator of this content, where otherwise the National Library could make the content available to the same extent as placed online by the creator (unrestricted, to the world at large).

E. Use of deposited material by the National Library

The ALCC supports the Consultation Paper’s proposal that use of deposited material be in accordance with relevant exceptions to copyright under the Copyright Act.

4. Conclusion

An international survey of national libraries undertaken by the British Library in 2009 indicated that of 34 responding countries, only Australia, Cyprus and Malta did not have legal deposit provisions for electronic publications⁵. Western Australia is close to implementing its own extended legal deposit legislation.

The ALCC welcomes the Government's consultation on extended legal deposit, and appreciates its efforts to implement a technology neutral and efficient scheme that would enable the National Library to properly record, preserve and provide access to Australia's digital cultural heritage.

Ellen Broad, copyright law and policy adviser for the Australian Libraries Copyright Committee, is the policy lead on this issue and can be contacted on (02) 6262 1273 or ebroad@nla.gov.au if there is further information that can be usefully provided.

Kind regards,

A handwritten signature in black ink, appearing to read 'JG Cochrane', with a horizontal line underneath.

Professor Tom Cochrane
Chairman
Australian Libraries Copyright Committee

⁵British Library, 'Consultation on the Draft Legal Deposit Libraries (Non-Print Publications) Regulations 2011', http://www.bl.uk/aboutus/stratpolprog/legaldep/bl_response_legaldeposit20122010.pdf