

GUIDELINES FOR LEGAL DEPOSIT LEGISLATION

by

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A revised, enlarged and updated edition
of the 1981 publication by Dr. Jean LUNN

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Preface

The role of national libraries in ensuring universal and equitable access to information continues to be a cornerstone in the development of a knowledge society. A national library faces many challenges in ensuring that the published heritage of its country is acquired and preserved for all to use. An important vehicle in assisting national libraries meet this responsibility is legal deposit. The 1981 *Guidelines for Legal Deposit Legislation* prepared by Dr. Jean Lunn proved useful to many countries in developing their own legislation.

However, the advent of new formats, including digital publications, has raised new issues. It is imperative that information made available to the public in digital format be included as part of a national library's heritage collection. It is hoped that this new and enlarged edition of Dr. Lunn's work, which in particular addresses the issue of electronic formats, will similarly assist countries as they develop, update and revise their legal deposit legislation.

Sincere appreciation is due to UNESCO, which, through IFLA (International Federation of Library Associations and Institutions), provided the financial support for this research work, and to the National Library of Canada for directing the project.

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Advisory Committee on the Revision of the Guidelines

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INTRODUCTION

In 1981, UNESCO published a study prepared by Dr. Jean Lunn from Canada entitled *Guidelines for Legal Deposit Legislation*. Resulting from a recommendation of the 1977 International Congress on National Bibliographies held in Paris, the study had as its purpose to “draft a model legislation for legal deposit, which would serve as a basis for Member States in attaining national bibliographic control.”¹ Dr. Lunn was to look at existing legal deposit legislation and to take into consideration present and future requirements in relation to the objectives of legal deposit, as well as examine the relationship between copyright and legal deposit.

Most of the issues related to legal deposit were looked at in detail, and numerous examples were used to illustrate the proposed model legislation. Dr. Lunn’s analysis was prepared mainly using legislation from Belgium, Canada, France, Great Britain, New Zealand, Spain, Sweden and the United States. While there are occasional references to other countries such as Austria, Denmark, Greece, Israel, Italy, Norway, Romania and the USSR, there is no mention of African, South American or Asian legislation.

Dr. Lunn primarily studied the issues in relation to print material; as far as non-book material was concerned, she limited herself to microforms and audio-visual material. Only 17 lines were devoted to what was called at that time “machine-readable data files”. Significantly, however, this area was already being referred to as a future issue for legal deposit.

Dr. Lunn’s study is now almost 20 years old and since it was published, many jurisdictions have amended or significantly rewritten their legal deposit laws (Germany, Indonesia and Norway in 1990, France in 1992, Sweden in 1994, Canada in 1995, South Africa in 1997, Denmark in 1998, and Japan and Finland in 2000). Others are on the verge of doing so (Australia, Slovenia, Spain, Switzerland and the United Kingdom). As well, the forms of intellectual and artistic expression have evolved. New publishing media have been developed and electronic publications are now an integral part of many national published heritages.

The work of Dr. Lunn needs to be updated in order to review the application of the guidelines to a wider range of jurisdictions and to incorporate new forms of publishing such as electronic publications. This new environment brings a variety of fresh challenges, some being of a legal or

¹ Jean Lunn, *Guidelines for Legal Deposit Legislation* (Paris, Unesco, 1981) at i.

administrative nature, but many that are purely technical. Considering the incredible expansion of electronic publishing, the approach to legal deposit legislation must be re-examined in order to maintain the original characteristics of the system, the main one being to be as comprehensive as possible. On several occasions, the Conference of Directors of National Libraries (CDNL) has pointed out the necessity to review the guidelines in order to adapt them to the new publishing environment. In 1998, the Second International Conference on National Bibliographic Services, held in Copenhagen, produced a specific recommendation to this effect.²

This study is a completely revised and enlarged edition of Dr. Lunn's original work, with more emphasis on electronic material.

The purpose of the project is to provide useful and up-to-date guidelines to assist in the development and implementation of new legal deposit legislation or to revise legislation already in place. The guidelines are intended for those engaged in the drafting or revision of legislation on legal deposit. It must be clearly understood that this publication contains only suggestions, and these suggestions would need to be adapted to each individual jurisdiction. There is no one model of legal deposit legislation. The guidelines are presented as minimum standards and should not be considered as strict rules. They should also not be viewed as an inseparable set of rules. Each one should be looked at and applied individually, depending on the needs and circumstances of each country. As options are discussed, it is up to each jurisdiction to choose the type of legal provisions most appropriate to its internal situation.

On a practical note, the style of citation used is based on *Canadian Guide to Uniform Legal Citation/Manuel canadien de la référence juridique*, 4th edition, published by Carswell in 1998.

The content of this publication is the opinion of the author only and does not imply the expression of any opinion on the part of the International Federation of Library Associations and Institutions (IFLA), UNESCO or the National Library of Canada. The National Library of Canada did, however, play an instrumental role in the co-ordination of the project.

² Recommendation 16 reads as follows: "IFLA should support revision of existing sets of guidelines to make provision for all new and future forms of publication."

Chapter 1

NATURE AND ROLE OF LEGAL DEPOSIT

Legal deposit is a statutory obligation which requires that any organization, commercial or public, and any individual producing any type of documentation in multiple copies, be obliged to deposit one or more copies with a recognized national institution. It is important to make sure that legal deposit legislation covers all kinds of published material, that is, material generally produced in multiple copies and “offered to the public regardless of the means of transmission,” in order to differentiate from “archival” which refers to records, either governmental, corporate or personal and which are usually unique items, not available for public distribution and more of a private or personal nature. It should also be remembered that public distribution could mean “performance” or “display”. As an example, a radio or television program could be considered as “published” for legal deposit purposes when it has been broadcast. Within the electronic publications environment, it should be noted that a “one copy item,” such as a database stored on one server, could be subject to a legal deposit requirement since it is made available to the public through a technology enabling the public to read, hear or view the material.

Except for the Netherlands, where a national deposit collection has been built through voluntary deposit agreements between the national library (Koninklijke Bibliotheek) and the publishers, most countries rely on a legal instrument of some sort in order to ensure the comprehensiveness of their national deposit collection.

In many countries the measure requiring the legal deposit appears in a legal deposit act (France, Greece, Indonesia, Norway, Peru, South Africa, Sweden), while in other countries it is part of another act, such as the copyright act (Australia, Great Britain, United States), the national library act (Canada, Japan, Nigeria, Venezuela) or a general “libraries act” (Tasmania). In some jurisdictions, it takes the form of an administrative decree or ordinance (Chile, Cuba, Nigeria).

In all countries with a legal deposit system, published material, often described as library materials (books, periodicals, newspapers, microforms, sheet music, maps, brochures, pamphlets, etc.), constitutes the basis of the national deposit collection. But in many countries, audio-visual material (sound recordings, films, videos, etc.) is also subject to legal deposit (Canada, Finland, France, Germany, and South Africa). A few countries have already included electronic publications in their legislation, including Canada, Denmark, Finland, France, Japan, Norway and South Africa, among others, but they have done this in different ways. France and Japan, for example, have modified their

legislation to include electronic publications, but have specifically excluded on-line electronic publications because of the numerous unsolved technical problems related to the acquisition and preservation of such material.

Whereas the national institution chosen to receive the deposit material is often the national library of the country (China, Estonia, France, Lithuania, United Kingdom), it could also be the parliamentary library (Israel, Japan, United States), the national archives (Antigua, Bahamas, Senegal), one of the main government libraries (Chad, Ghana, Hong Kong) or, in a few cases, one of the main university libraries (Kuwait, Liberia).

The development of a national deposit collection of published material in its broadest sense has to rely on a legislative foundation in order to ensure that all publishers will comply. Furthermore, to be taken seriously by depositors, the legislation has to be enforceable. While it is necessary to have legal deposit based in legal statute, it is much more desirable for publishers to be involved because they are convinced that it is ultimately to their own advantage to systematically send copies of their published material to a national institution which will record and preserve their production for future generations.

The law is the sum of all enforceable rules governing the relations of individuals among themselves (private law), the relations of the state with individuals (public law) and the relations of states among themselves (international law). The purpose of laws is to organize the political and social life of a society in order to ensure its orderly development. With the Constitution as the fundamental law of a country, the two main sources of law are Statute Law, which is made up of acts passed by the legislative body of the country, and Case Law, which is made up of a body of court decisions, mainly courts of appeal, which act as a guide for judges in deciding future cases. In countries with a civil law tradition, the law is codified, for example into a civil code, an intellectual property code, a labour code, etc., and these codes are the main source of law. In countries with a common law tradition, judicial decisions have to take into account the rule of precedent, which binds courts to follow precedent cases. An act is a form of written law, which formally expresses the will of the state on a specific matter, such as a legal deposit system. The most important aspect of a law is the fact that it is enforceable, and therefore the state can use its vested constitutional power to force the members of a society, individuals and organizations, to comply.

Legal deposit legislation serves a clear national public policy interest by ensuring the acquisition; the recording, the preservation and the availability of a nation's published heritage. Such a national collection is undoubtedly one of the major components of a country's cultural policy and should also

be considered as the foundation of a national policy of freedom of expression and access to information. The role of a legal deposit system is to ensure the development of a national collection of published material in various formats. It should also support the compilation and the publication of a national bibliography in order to ensure bibliographic control over a comprehensive deposit collection. Finally, effective legal deposit legislation guarantees, to citizens and researchers within the country and abroad, access to a research collection of the country's published material. Bibliographic control and the accessibility of the national collection are also two international IFLA/UNESCO commitments, namely UBC (Universal Bibliographic Control)³ and UAP (Universal Availability of Publications),⁴ that all countries are invited to adhere to.

³ A long-term program for the development of a worldwide system for the control and exchange of bibliographic information.

⁴ A program by which a country ensures that at least one copy of everything it has published is preserved and can be made available through loan or copies to any scholar anywhere in the world who needs to consult it.

Chapter 2

HISTORY OF LEGAL DEPOSIT

The principle of a legal deposit system, aimed at the development and preservation of a national collection of published material, was first implemented in 1537 when King François I of France issued the “Ordonnance de Montpellier.” This royal decree forbids the sale of any book without first having deposited a copy in the library of his castle. The purpose of the decree was to “*mettre et assembler en notre librairie toutes les oeuvres dignes d’être vues qui ont été ou qui seront faites, compilées, amplifiées, corrigées et amendées de notre tems pour avoir recours aux dits livres, si de fortune ils étoient cy après perdus de la mémoire des hommes, ou aucunement immués, ou variés de leur vraye et première publication.*”⁵ The King wanted to collect and gather the current and the future production of all editions of the books “which deserved to be seen” in order to ensure that it would always be possible to refer to the original work as “first published and not modified.” According to historians, despite its official and royal character, the decree was not well respected, but the fact remains that the principle was now established and would be used in other countries. It is interesting to note that the legal deposit provisions were abolished under the French Revolution, in the name of liberty, and were reinstated in 1793 as a formality to obtain copyright protection.⁶ As early as 1594, Belgium had a legal deposit system in place,⁷ but it was abolished in 1886 following the signature of the Berne Convention, the first international treaty on copyright. Legal deposit was abolished because the Berne Convention required that no formality be attached to copyright. Most other countries maintained legal deposit, but not as a copyright formality, whereas Belgium just abolished it and reinstated it in 1966. The idea of legal deposit expanded during the 17th century when Ferdinand II, a Germanic emperor from 1619 to 1637, required in 1624 that one copy of each book published be sent to the library of his court.⁸ In Great Britain, a legal deposit mechanism was put in place in 1610 when Sir Thomas Bodley made an agreement with the Stationer’s Company. According to the terms of the agreement, the library at Oxford University was to receive free copies of all new books printed by members of the Company. In 1662, the agreement was confirmed by a

⁵ C. Fournier, “Le dépôt légal” (1993) 39:2 *Documentation et bibliothèques*, 96.

⁶ Josef Brock, “Le dépôt légal, hier et aujourd’hui” 1977:3 *IFLA Journal*, 62.

⁷ Jan T. Jasion, *The International Guide to Legal Deposit* (Aldershot, Ashgate, 1991) at 117.

⁸ *Le dépôt légal : son organisation et son fonctionnement dans les divers pays* (Paris, Institut international de coopération intellectuelle, 1938) at 9.

law and the deposit became a legal requirement.⁹ A legal deposit system has been in force in Sweden since 1661, in Denmark since 1697 and in Finland since 1702.

While the original objective of legal deposit legislation was to improve the development and the preservation of a “royal” or “national” collection, it gained other purposes over the years. As an example, Crews reports that in France, “In 1617, deposit became a prerequisite to obtaining trade privileges.”¹⁰ It has also been used as a surveillance tool, even in certain cases as a means of censorship. While François I had been the first to implement a comprehensive legal deposit system aimed at collecting and preserving published material for future generations, ecclesiastical authorities had a form of deposit system since the early days of printing. But the objective of this system was to watch and control the material published to ensure that religious principles were respected, since there were religious conflicts in France at that time. As well, the 1661 Sweden edict clearly stated that “it appears appropriate and useful that His Majesty should be informed of all the books and the writings printed in his kingdom.”¹¹ Another interesting example is presented by Napoleon, who in 1810 amended the French legal deposit law to have the deposit copies sent to the Ministry of Police so that the surveillance of the press would be easier.¹² Finally, it should be noted that in Finland, “censorship and supervision were aspects that remained associated with the legislation for a surprisingly long time. Indeed, the Freedom of the Press Act of 1919 still stated that, for these reasons, printers were ordered to submit an extra legal deposit copy to the Ministry of Justice. Formally the statute is still in force, as it was not repealed when the present Legal Deposit Act was passed in 1980 and the legal deposit provisions were removed from the Freedom of the Press Act.”¹³

Legal deposit became closely related to copyright during the 18th century, when deposit became a formality for obtaining the legal protection of copyright. It all started with the Statute of Anne, the Great Britain Copyright Act of 1709, which was the first law aimed at protecting authors from piracy of their works. The law required that nine copies of works be deposited and distributed to several libraries in order to obtain copyright protection. In the United States, a requirement for legal deposit was first established as part of the 1790 Copyright Act and, as already mentioned France implemented a copyright deposit requirement in 1793.

⁹ Richard Bell, “Legal deposit in Britain (Part 1)” (1977) 8:1 *Law Librarian*, 5.

¹⁰ Kenneth Crews, “Legal deposit in four countries: laws and library services” (1988) 80 *Law Library Journal*, 551-576.

¹¹ *Ibid.* at 553.

¹² *Ibid.*

¹³ Esko Häkli, “Reform of the Finnish Legal Deposit Act” (1999) 1 *Tietolinja News*, 1.

When the Berne Convention was implemented in 1886, most countries had to modify their legal deposit system. Since the Convention clearly stated that the enjoyment and the exercise of the right to protection of literary and artistic work shall not be subject to any formality,¹⁴ legal deposit as a requirement to obtain copyright protection had to be abolished. Except for a few countries, such as Belgium, most countries retained deposit as a legal requirement through another means, such as a specific law on legal deposit. In 1938, the Institut international de coopération intellectuelle of Paris identified 52 countries that had a legal deposit system in place, through a law or another legal means such as a decree, an edict, an order or a regulation.¹⁵ Fifty years later, in 1990, Jasion surveyed 139 countries having a formal legal deposit system in one form or another.¹⁶

Over the history of legal deposit, requirements evolved and the legal texts were amended accordingly to adapt the system to the development of new means and types of publishing. New types of documents, such as audio-visual materials, were added; the number of requested copies was modified; and responsibility for receiving, recording and making available the deposit collections was shifted to another institution. As well, the objectives of legal deposit evolved over the years. In addition to the original aim of François I, which was to preserve the books for future generations, new objectives were added during the 20th century, such as the constitution of a national bibliography and the availability for research purposes of a collection of the nation's published material.

In recent years, many countries have been examining their legislation in order to address the issues raised by electronic publications. These issues represent the biggest challenge that legal deposit has ever had to face because of the incredible complexity of legal, organizational, technical and operational aspects related to the implementation of a legal deposit scheme for electronic publications.

Already some countries are involved in acquiring, recording and preserving on-line electronic material at a national level, even if a formal legal obligation is not yet in place because of all the technical and organizational problems. As an example, an ever-increasing number of electronic publications, including e-journals, are now accessible through the website of the National Library of Canada. The Library has negotiated individual agreements in order to have the material deposited on a voluntary basis and to have it available without restrictions. In Germany, the Deutsche

¹⁴ *Berne Convention for the Protection of Literary and Artistic Works*, September 9, 1886, Can. T.S. 1998 No. 18, art. 5(2).

¹⁵ *Supra* note 8, at 19.

¹⁶ *Supra* note 7, at 18-31.

Bibliothek is also collecting on-line documents through individual negotiations with the publishers, since there is no legal provision for depositing on-line material. But in certain cases, such as Denmark (1997), Finland (2000), France (1992), Norway (1994) and South Africa (1997), electronic publications have been specifically incorporated within legal deposit legislation, even if in most cases the legislation addresses only off-line material.

It must be noted that whereas certain legal deposit legislation does include electronic publications, the systematic acquisition, recording and availability mechanisms are not necessarily all in place and operational. Reports from the countries involved indicate that off-line electronic publications (i.e. the ones available on a physical support) do not create major problems, but the legal deposit of on-line material presents substantial challenges that will require a great deal of technical and legal expertise as well as close cooperation with the information producers. Legal deposit of dynamic electronic material, such as on-line databases, and publications only available through the Internet, is raising serious copyright problems as well as authentication and preservation issues. Following years of research and discussion, several projects are now in progress. A good example is a pilot project in the Netherlands, which has a voluntary deposit system, based on agreements with publishers. A pilot project was undertaken in 1996 by which the publishers Elsevier and Kluwer submit all journals available in electronic format with a Netherlands imprint. As an underlying principle, both parties agreed on an "on-site access" by which registered readers of the Dutch national library have access to e-journals. It was also agreed that remote-access experimentation would take place. This project, known as the NEDLIB Project since January 1998, has expanded to include 12 European partners aimed at becoming a "Networked European Deposit Library."

Chapter 3

LEGAL ISSUES RELATED TO LEGAL DEPOSIT

The obligation for a publisher and/or an author of any type of documentation to deposit with a designated national institution one or more copies of the material they have issued or produced in multiple copies and for public use is a well-accepted legal mechanism, even if some still argue that legal deposit without compensation for the depositor is a discriminatory form of taxation or confiscation of private goods. Because legal deposit ensures the preservation of the national published heritage and permits the compilation of a national bibliography, it is necessary for the national institution not to be dependent upon discretionary assignment of public funds for purchasing the deposited items. These two objectives aim at a third one, which is to provide access to a national collection of the country's published documentation for both researchers of the country itself and researchers abroad. These objectives should be clearly stated in the legislation, as is the case in the French and Finnish legislation and as recommended by IFLA at its Second International Conference on National Bibliographic Services.¹⁷ A clear statement of these objectives in the legislation is important in order to avoid situations where a national institution might decide to prioritize one objective over another or just ignore one of them.

In most countries, legal deposit is a matter of legislation that takes into account the country's publishing environment and traditions. Whenever a voluntary instead of a legislative route is chosen, it is necessary to ensure that the voluntary deposit system is based on the traditional objectives, including free and unconditional access to the material.

Considering the objectives of a legal deposit system and the requirements of a formal legislative structure to achieve them, a certain number of legal questions have to be carefully examined when developing a legal deposit scheme. The first is to decide on the legal route that will be favoured to implement the program. If the compulsory approach is chosen, the form of the legal obligation will have to be determined. It could be a stand-alone legal deposit law, such as in Belgium, the Dominican Republic, France, Iran, Latvia and South Africa. It could be part of another law, such as the national library act (China and Japan) or the copyright act (Australia, Great Britain, Ireland,

¹⁷ Recommendation 3 reads as follows: "New deposit laws, or regulations pursuant to such laws, should state the objective of legal deposit; should ensure that the deposit of copies is relevant to achieving the goals stated above; should be comprehensive in terminology and wording to include existing types of materials with information content and others which may be developed; and should include measures for enforcement of the laws. Such legislation may take into account the possibility of sharing responsibility for deposit among more than one national institution."

Mexico, New Zealand and the United States). While the act will establish the basic principles of legal deposit, it will usually be accompanied by regulations or another type of legal instrument that will specify the details of the system, such as the categories of material to be deposited, the number of copies, the exceptions, etc. Governments can also issue decrees or any other form of statutory order requiring the deposit of published material (Ivory Coast, Lebanon, Lithuania and Philippines). The legal instrument chosen depends on the legal system in place in that jurisdiction. If a country decides to go with a non-statutory deposit arrangement through voluntary deposit agreements with publishers, as in the Netherlands, all issues will have to be covered by the terms of the agreements, and the legal framework will be the one related to contracts.

It is much more preferable for a legal deposit scheme to rest on a separate and specific legal deposit law enacted by the national legislature. This will avoid the situation of major changes being made to a scheme following simple administrative decisions and without the public debate that an amendment to an act would normally require.

The legal deposit scheme should be established at the national level and as a national responsibility. However, this should not prevent countries where the legislative powers are divided among various levels of governments from having more than one legal deposit system in place. In countries with a federal structure, for example, there could be more than one law related to legal deposit – Australia, Canada, India, Switzerland and the United States are good examples. This could have an impact on the publishers, who will be required to deposit copies in more than one institution.

A very important question related to the implementation of legal deposit legislation is the issue of enforcement. To be effective, a law must be enforceable, and to be enforceable, a law must include a penalty if contravened. To rely on good will to ensure the comprehensiveness of deposit collections could be risky and might necessitate a complex administrative structure. With a penalty structure, pressure is placed on the depositor to comply. A fine for non-compliance is the usual enforcement mechanism used.

While the fine should be substantial enough to support the legal deposit requirements, it should not be unreasonable; otherwise, the law may be challenged in court as going against the principles of free expression. In France, for example, the fine for not complying with legal deposit ranges up to F500,000.¹⁸ In Canada, the maximum fine is C\$25,000 for a publisher and C\$2,000 for an

¹⁸ *Loi no. 92-546 du 20 juin 1992 relative au dépôt légal*, J.O., 23 juin 1992.

individual.¹⁹ In the United States, it could reach US\$2,500²⁰ and in South Africa, it should not exceed R20,000.²¹

It must be stressed that the use of such penalties should really be a last resort. Close co-operation between the national institution responsible for legal deposit and the publishers, as well as all the other information producers, is much more desirable and beneficial for all parties involved. It is essential that the documentation providers be informed about the legal deposit legislation and be convinced of the advantages to them of complying: increased visibility and wider publicity for their publications, better bibliographic control and a long-term guarantee of availability of their published material. The long-term guarantee of availability can be useful for the depositors themselves, in cases where the originals have been lost or destroyed.

The “copyright deposit” issue has to be looked at separately. As already mentioned, in many countries the early legal deposit collection was built up through the “copyright deposit,” whereby copyright could not be claimed unless copies of the book had been deposited. Even if fewer jurisdictions are taking this route, it may be considered for practical or administrative reasons. But before taking this approach, it is important to verify which of the two main international copyright legal instruments, the Berne Convention or the Universal Copyright Convention, the country is signatory to. The Berne Convention requires that copyright protection be available without any formalities,²² and therefore the deposit of copies cannot be compulsory. If the country has signed only the Universal Copyright Convention, it can include formalities, such as deposit, in its copyright legislation. Also to be considered is the fact that copyright deposit does not permit the requiring of material for which copyright is not sought; therefore, a parallel acquisitions scheme is necessary. Since legal deposit and copyright legislation are aiming at two different objectives, the one at preservation for posterity and the other at protection of rights, as Lunn stated, “logically there is no reason why legal deposit for libraries should have any association with copyright.”²³ But this should not prevent a country from including legal deposit within its copyright legislation, as in the United States and the United Kingdom, as long as legal deposit is not linked to obtaining copyright protection. Section 407(a) (2) of the United States Copyright Act clearly states that the deposit requirement is not a condition of copyright protection, while Section 15 of the 1911 United Kingdom

¹⁹ *National Library Act*, L.R.C. 1985, c. N-11, s. 13(4).

²⁰ 17 U.S.C. §407(d).

²¹ *Legal Deposit Act*, South Africa act no. 54, 1997, s. 9.

²² *Supra* note 14.

²³ *Supra* note 1, at 22.

Copyright Act, which is still in force, requires that “the publisher of every book published in the United Kingdom shall, within one month after publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum.”

An issue that is closely related to copyright is the need for national legal deposit institutions to make copies for preservation purposes and/or for future use, which may conflict with the national copyright legislation in force. This issue is particularly critical in the non-print environment, where either the fragility of the support itself or the obsolescence of the equipment to use it may oblige the institution to reproduce the material. Two very good examples of such cases are the Beta videocassette format and the 5¼-inch diskette. Even with print materials, where the issue of preservation could be solved by making sure that two copies are deposited, one for preservation and one for use, there might be instances where the preserved copy is damaged or lost. But because copyright gives an author the exclusive right to authorize the reproduction and dissemination of a work, such activities can be performed only by the copyright owner unless formal permission is granted through a licence or a legislative exception. Although some jurisdictions, such as Australia, Canada, Great Britain and the United States, among others, have provisions in their copyright legislation allowing libraries to reproduce protected works that have been lost or damaged and are no longer available on the market, no country provides legislative permission to make backup copies of all types of library material in anticipation of need. Therefore, there might be a need to revise the copyright legislation to include a provision allowing copying for preservation purposes. Another option could be to include a notwithstanding or derogation clause in the legal deposit legislation allowing reproduction of a protected work for conservation purposes, regardless of format and despite the provisions of a copyright act that does not permit it. A notwithstanding or derogation clause is a partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force. Most legislative drafting experts agree that such a clause should be used with extreme caution to avoid leaving an impression of contradiction on the part of the legislator. The use of such clauses to permit the making of copies should be on an “exception” basis.

The copyright issue will also be critical when looking at the legal deposit of electronic publications. As publishers and information producers are becoming more concerned about the facility offered by new technologies to access and reproduce published material, they might be reluctant to get involved in a legal deposit scheme without some assurance that their intellectual property rights will be respected. It is obvious that they will fear uncontrolled dissemination of their material and may want to protect their legitimate commercial interests by providing only limited access. But limiting a researcher’s access to electronic publications to the premises of the legal deposit collection will

greatly reduce accessibility compared with that of traditional materials and, in the end, defeat the benefits of remote access.

There are two major problems related to legal deposit of electronic or digital material vis-à-vis copyright. The first is related to the deposit process itself. The legal deposit of electronic publications necessitates the reproduction of protected works. (Exceptions are the off-line carriers, where deposit procedures are quite similar to those for print material, and the cases where publishers/producers of digital documents “deposit” their documents themselves by sending them through the network at the national legal deposit institution.) Since digital material might have to be collected through downloading from the master copy on a server, the process raises the issue of permission to reproduce a protected work. Again, national copyright legislation or legal deposit legislation should provide legislative permission to reproduce documents for legal deposit purpose.

The second issue to deal with is access. Considering that it is widely recognized, at both the national and international level, that a copyright owner has an exclusive right to communicate a protected work to the public and that most electronic publications need to be “communicated to the public” in order to be seen and read, the deposit copy of such electronic publications might require a specific exception allowing access to the clientele of the national legal deposit institution.

Another important issue to look at when planning legal deposit legislation is the language of the law and the writing style used. While it is obvious that the national tradition and the historical rules and guidelines of each jurisdiction should always prevail, there might be some basic considerations applicable to all. A law is a form of communication that is unique, considering its consequences. It is imperative that the language and the writing style used to perform such a particular way of communicating meet certain standards. It must be remembered that legal deposit legislation is imposing an enforceable duty on individuals who have the right to know and understand what they are being asked to do.

A good legal writing style should have the following characteristics: it should be accurate, well-structured, clear and easy to read and concise. The fundamental rule is to avoid ambiguity and vagueness. A legal text will necessarily be interpreted and it is important that the intention of the legislator be identified. Legislative texts are designed to confer rights, privileges or powers, or to impose obligations or duties, or to prohibit something. The importance of a good legislative text is therefore quite obvious. It should contain three basic elements. First is the legal subject, which is a clear identification or description of the person or class of persons affected by the law: are only publishers affected by the legal deposit act? Are individuals publishing their own material subject

to the law? Are all categories of publishers included or only the ones corresponding to certain criteria? The second element is the legal action, which includes a description of the legal action or the legally significant impact that will result from the law: where should the copies be deposited? How many copies should be sent? The third element of legislative text is the case, which refers to a description of the circumstances or the conditions under which the law will apply: if a book that meets the identified criteria is published, it must be deposited.

Most of the time, the text of the law will be written by an expert legislative drafter. But the national library or the legal deposit national institution should be heavily involved in the planning of the legal deposit legislation to ensure that all aspects of the program will be covered.

Another legal issue, and one that is seldom looked at when considering a legal deposit collection, is the question of whose property it is. The law should clearly state that the collection is an integral part of the country's cultural heritage and that the sole owner is the national institution responsible for maintaining and preserving it. A good example of such a clear statement of property is contained in Canada's National Library Act. Section 3(2) states that "Every book placed in the case of custody of the National Librarian or delivered to or otherwise acquired by the National Librarian pursuant to this Act, otherwise than by loan, is vested in Her Majesty and forms part of the Library." But it should be made very clear to both the national legal deposit institution and the publishers that ownership of the collection does not mean ownership of intellectual property rights. A related property issue is the right of the depository to dispose of certain categories of material under certain conditions. The legislation should include a commitment by the depository that all possible and reasonable efforts will be made to permanently keep all material deposited, but the legislation should also include a right of disposal.

Finally, a legal issue that is important to consider when preparing legal deposit legislation is the possible conflict with other laws. The two best examples of such a problematic situation relate to pornographic material and hate literature. Even if most countries have laws forbidding the publication, production, distribution, circulation and possession of such material, any such material should be subject to legal deposit. Since both pornographic and hate material may be found on carriers subject to legal deposit (books, periodicals, videos, etc.) and is also extensively available in electronic format, it is worth considering the issue. One of the basic elements of this discussion is the fact that the issue deals with the values of society, which vary from one country to another and from one period to another. One of the objectives of a national legal deposit scheme is to build up a comprehensive collection of published material for preservation and research purposes, and not allowing such material to be deposited might jeopardize the historical and sociological value of the

national collection as the prevailing standards of tolerance evolve. From a strictly legal point of view, unless the legal deposit legislation clearly states that such material is not subject to legal deposit, it should be deposited. But after it has been deposited, the depository will have to comply with its jurisdiction's legal requirements with respect to access to material deposited.

Chapter 4

ELEMENTS OF A LEGAL DEPOSIT SCHEME

Legal deposit is an efficient means for building up a national collection of both print and non-print material “in order to secure the preservation of the national cultural heritage for posterity and for transmission of the national heritage by storing it and making it available now and for future generations.”²⁴ It is also a means for a country to commit itself to article 19 of the Universal Declaration of Human Rights, which gives to everyone “the right to freedom of opinion and expression, including the right to seek, receive and impart information and ideas through any media regardless of frontiers.” By collecting, recording and preserving all published material of a country, legal deposit guarantees each citizen access to the nation’s published heritage without making any judgement on the intrinsic value of the materials, should it be a judgement of moral, political, artistic or literary nature.

Any legal deposit program raises a certain number of questions that need to be carefully looked at to ensure that the scheme will meet its objectives, both for the present and for the future.

4.1 ORIGIN OF THE PUBLICATION

The origin or place of publication of each item is an essential consideration when forming a national collection. Countries normally limit legal deposit to their national production of publications issued under various formats. The basic publication details, such as origin or place of publication, issuing agency and publishing date, are therefore important data to consider in deciding whether to include an item in the legal deposit scheme. Some countries claim publications from all authors, printers, publishers and importers in the country.²⁵ France, for example, requires that printers deposit two copies, while publishers must deposit four copies. From a strictly legal point of view, a legal deposit law can only apply within the boundaries of the country, since a national law cannot apply on an extraterritorial basis. Therefore, if a country wishes its residents publishing abroad to deposit copies of their work with the national depository institution, it has to specify in the law that residents are subject to legal deposit

²⁴ Council of Europe, Council for Culture Cooperation, Culture Committee, *Guidelines on Library Legislation and Policy in Europe* (Strasbourg, 1999) at 23.

²⁵ Supra note 1, at 4.

regardless of where their works are published. As far as citizens living abroad are concerned, the national deposit library has to acquire their works through regular acquisition processes.

Within the electronic environment, and more specifically with on-line material, the question of national production raises an interesting legal deposit issue. Whereas the “nationality” of a print publication is easy to determine and cannot be argued, since it is not problematic to identify the physical location where a work is “published,” it is more difficult to determine the origin of an on-line publication and to decide which legal deposit law should apply. Several countries can be involved as sites for production and distribution of an on-line publication, and while the publication may be stored at a single location on the global network, many countries might claim a legal deposit right. In a report prepared in 1996 for the European Commission, J.S. Mackenzie Owen and J.v.d. Walle recommended that “The nationality of an electronic publication should be established using the following criteria (in order of significance): geographic location given in the publication or its accompanying metadata, the location of the publishing organization if it can be established, the domicile of the first author, the author’s nationality, or the primary location of the publication on the network.”²⁶

4.2 COMPREHENSIVENESS

Comprehensiveness is an important quality to analyze since it is the fundamental one on which the whole system is based. The key question is what materials should be subject to the legal deposit requirement. Whereas those Lunn calls the traditionalists assert that everything should be claimed in order to avoid losing that apparently insignificant material that could later assume historical value,²⁷ other considerations should be taken into account. Space and staff available, technical and technological capabilities as well as legal issues might limit the extent of comprehensiveness for very good reasons.

The law governing legal deposit should be as broad as possible in order to be flexible and should also include provisions to make exceptions. The wording should be more inclusive than exclusive. This would permit the inclusion of any new type of information carrier made available. As an example, recent legislation on legal deposit uses words such as “document” instead of “book” or “publication,” and “producer” in place of “publisher.”

²⁶ J.S. Mackenzie Owen and J.v.d. Walle, *Deposit collections of electronic publications* (Luxembourg, Office for Official Publications of the European Communities, 1996) at 22.

²⁷ *Supra* note 1, at 4.

In general, any type of library material, regardless of the format, as long as it is made available to the public and produced in multiple copies, should be an object of legal deposit. Legal deposit therefore applies to all types of print material (books, serials, pamphlets, maps, etc.), to most audio-visual material (sound recordings, discs, videos, films, multimedia kits, microforms, etc.) and to electronic material.

The history of legal deposit has demonstrated that print material, as well as most non-print material, can be handled without any major problems within any legal deposit scheme as long as the legislation has been well planned, and is flexible and enforceable. The new electronic or digital environment, however, is challenging the fundamental precepts of legal deposit, including comprehensiveness. While there is agreement that off-line electronic publications, such as diskettes and CD-ROMs, should be subject to legal deposit since they correspond to the traditional format of print material, mainly the relation to a physical support, there is no agreement on how to treat on-line material. Some argue that on-line electronic material, such as networked databases, is not meant to be preserved for future use since it is continuously updated (in real time) and therefore it should not be deposited. Others argue that such material should be deposited, but at the time it is removed from the network so that it can be stored off-line in a deposit collection. Still others suggest that at least snapshots should be taken on a regular basis in order to avoid losing valuable historical information. Another consideration is the fact that even if a depository library wants to preserve on-line publications, and the legislation provides the right to do so, there might be situations where the depository library cannot handle the material within its technical environment or the technology is just not there to store on-line material. However, it should be remembered that the national depository libraries still have a long-term preservation responsibility in spite of the difficulties raised by the electronic environment.

Irrespective of the arguments brought forward and all the expected technological problems, as a matter of principle, all electronic publications, both off- and on-line, should be subject to legal deposit. As more and more materials of national cultural value are now made available either simultaneously in print and in electronic format or only in electronic format, it is imperative to make sure that such material is preserved for posterity. The only way to get such a guarantee is to ensure that national legislation on legal deposit includes electronic publications. There is no reason for a legal distinction between electronic and non-electronic publications. Furthermore, despite their best intentions, commercial producers of electronic publications cannot guarantee that they will preserve or archive their material when it has lost its commercial value. It is also

important to ensure that the national legal deposit collections include all electronic publications as they are made available in order to avoid losing material that otherwise could eventually be inaccessible because of an obsolete technology. While there is no doubt that many aspects of the legal deposit of electronic publications are problematic and necessitate major investments in information technology resources and personnel, there is a certain urgency to the matter of developing efficient and practical methods of long-term preservation of electronic documentation.

It is obvious that despite the incredible development of information technology, especially at the networking of information level, the national legal deposit collections of electronic publications will develop on a gradual basis, as the national institutions responsible for legal deposit are not able to cope with new developments at the same pace as the information producers. Already countries such as Canada, Denmark, Finland, France, Germany, Japan and Norway have included provisions in their legal deposit laws to include electronic publications. Most of them are limiting legislation to off-line materials such as CD-ROMs and diskettes, but some countries such as the Netherlands and Finland are including on-line publications.

Finally, comprehensiveness raises the issue of the retrospective collection of both print and non-print material. Since in most countries, legal deposit is implemented on a gradual basis as new categories of material are added, there is always material that has not been collected because it was produced prior to the legal deposit legislation coming into force. As a matter of legislative principle, a law with a retroactive effect is exceptional and should be avoided as much as possible. The need to build up a complete national collection of published material cannot be considered as an "exceptional" situation. Also meriting consideration is the fact that the producer of the materials may no longer exist or the actual piece of information may no longer be available, two circumstances that would make a retrospective legal deposit law impossible to enforce. To develop a complete national collection, the depository library therefore has to undertake a systematic acquisition program for retrospective material, based on a voluntary deposit approach or on standard acquisition methods, namely purchase, gift or exchange.

4.3 THE DEPOSITOR

Current legal deposit laws generally require that all producers of materials subject to legal deposit should deliver copies to the national institution responsible for the implementation of the law. Some countries, such as France, require that all documents published, produced, printed or distributed, whether commercially or not, be deposited by the publishers, producers, printers or distributors. If imported books are claimed, the obligation to deposit may rest with the importer. In countries where there is a direct relation between copyright and legal deposit, the owner of the copyright could be the one responsible for delivering the copies.²⁸ To make sure that all material published is deposited, it is important that “publisher” be defined as broadly as possible so that commercial and private publishers are included and, whenever legally possible, government publishers as well. It is also important that the definition include producers of any type of non-print material, including both tangible and intangible electronic publications.

Again, it should not be too problematic to identify the producer or publisher of static or tangible electronic publication, but it might be difficult to determine one specific, homogeneous group as the producer of an on-line database. The responsibility for legal deposit for such material could belong to the “owner” or “distributor” of the on-line database.

4.4 THE DEPOSITORY

In most countries, it is the national library that is responsible for legal deposit. In some countries, another national institution, such as the Library of Congress in the United States or the National Diet Library in Japan, is called upon to play the role of national depository of legal deposit materials. In other countries, France and Sweden for example, other governmental organizations are involved in the legal deposit of particular materials. In France and Sweden, audio-visual materials (films, sound recordings, etc.) are deposited in national institutions that specialize in the collection of such items and that are able to provide more suitable accommodation and experienced staff. In France, it is the Centre national de la cinématographie and the Institut national de l’audiovisuel, whereas in Sweden it is the National Film Archive. Some countries require delivery of copies to other institutions as well as the one mainly responsible for building up the national legal deposit collection. As an example, the British Library is only one of six libraries entitled to receive a copy of every print item published in the United Kingdom. While British publishers are under a legal obligation to deposit published materials with the British Library, the five other libraries – the national libraries of Scotland and Wales, and the university libraries of Oxford, Cambridge, and Trinity College in Dublin – must

²⁸ 17 U.S.C. §407(a).

each request that the same publishers send them a free copy of any eligible title. Another example is Finland, where statutory legal deposit collections of print material are maintained in five university libraries and in the parliamentary library.

While there is no legal problem in decentralizing legal deposit within a jurisdiction and such a decision could help spread the burden of administering the law, it must be remembered that “the scattering of collections may, however, be inconvenient to the user seeking information from a variety of media and sources. Moreover, in the interests of uniformity of policy and its application, of standardization of bibliographic records, and of publication of the national bibliography, very close co-ordination and co-operation would be necessary.”²⁹

As far as the digital environment is concerned, it is evident that the depository institutions responsible for collecting, recording and organizing print material have a major leadership role to play in developing the national framework or infrastructure for the development of a national collection of electronic publications. Whenever a law is amended it is important to include electronic publications, so that the role of the national depository institution will be reinforced to give it the necessary legislative powers to enforce the legal deposit legislation in a digital environment.

4.5 NUMBER OF COPIES

In order to ensure that copies are available for preservation and for use by researchers having access to the national collection of legal deposit material, a minimum of two copies should be deposited. However, the number of copies deposited varies widely. As already mentioned, British law calls for six copies, one for the British Library, and the others for five university libraries involved in the legal deposit scheme. Sweden and Norway require that seven copies be deposited. The People’s Republic of China legal deposit law requires that five copies be deposited with the National Library and that two others be sent to the copyright library. France requires that publishers deposit four copies with the Bibliothèque nationale de France and one with the Ministry of the Interior. It is interesting to note that in France, the printer is also under obligation to deposit copies: two copies with each of the 30 authorized libraries of the 22 regions in metropolitan France (among them the Bibliothèque nationale de France for Île-de-France) and eight regions in the overseas departments and territories. Latvia also requires a rather high number of copies, with 20 being requested.

²⁹ Supra note 1, at 17.

While the law or the regulation establishes as a general rule the requirement that a certain number of copies be deposited, this number could be reduced for certain types or categories of materials. As an example, for expensive publications, such as art books, limited editions or motion pictures, only one copy might be requested. Another possible approach is to determine the number of copies to be deposited in relation to the number printed. In Canada, for example, two copies must be deposited when 101 or more copies are made, and only one copy when more than three but fewer than 101 copies are made. Such a measure is a means of avoiding undue financial burden on the publishers. There is no basic rule in this area. As explained by Crews, “the decision to increase the number of copies depends on practical and economic factors. Lawmakers must evaluate the effect of additional deposits on publishers and on their ability or willingness to comply. Lawmakers also must evaluate each library’s ability to contend with additional copies and the accompanying staffing and storage expenses.”³⁰

For electronic publications, the issue of the number of copies is still in question. For on-line material, the issue is the number of accesses or concurrent users. Some producers already had problems acknowledging the benefits of legal deposit of print material; they are also reluctant to accept legal deposit of electronic publications. As stated by Mackenzie Owen and Walle, “Publishers are reluctant to acknowledge the benefits of deposit; they tend to view it as an obligation which costs money with little return. In addition, they envisage problems with electronic publishing which also pertain to electronic deposit. Two major issues are: electronic information on networks and on diskettes can easily be manipulated. It is difficult to guarantee integrity and authenticity, both of content and of appearance. This problem is less apparent with CD-ROM publications. The other issue is that it is very easy to reproduce and distribute electronic information; therefore it is not easy to prevent unfair use and to ensure that copyrights are respected.”³¹

Deposit libraries are quite sensitive to the producers’ concerns and, as a matter of principle, most deposit libraries agree that access to publications should be controlled. While on-site consultation within a controlled environment within the deposit library should satisfy most producers and permit multiple concurrent users, remote access is more problematic, and finding solutions will necessitate more research and pilot projects. As a general rule, legislation on legal deposit should include the principle that access be limited. The number of concurrent users should be limited, just as the number of physical items to be deposited is.

³⁰ Supra note 10, at 564.

4.6 COMPENSATION

As a matter of principle, legal deposit should be free since its objectives are to serve the public interest, mainly to ensure the preservation and the availability for future generations of the intellectual record of the nation's economic, social, scientific and educational activities. Over the history of legal deposit, compulsory deposit of multiple copies has been a concern to publishers, especially when the number of copies has been increased. Even if legal opinion on this issue is not unanimous, when the number of copies to be deposited is limited, the principle is generally accepted. As stated by Lunn, "unpaid deposit has, notwithstanding undeniable if not excessive opposition, worked well for centuries."³² But this should not prevent countries, as is the case with Japan, from having a compensation system whereby a publisher could be paid the equivalent of the cost of producing the publication.

Some countries, such as Belgium and France, acknowledge publishers' concerns by limiting the number of copies for deluxe or limited editions. As a sign that it understands the financial concerns of publishers vis-à-vis legal deposit, the deposit library could make a policy decision to pay the full market price of a second copy of deluxe or limited editions. But such an arrangement should not be part of the legislation and should depend on the financial situation of the national legal deposit institution.

4.7 TIME OF DEPOSIT

The period of time allowed for deposit varies. It ranges from twice a year, in Denmark, at one extreme to the day of availability to the public at the latest, in France, at the other extreme. Between these two extremes, South Africa has a 14-day dispatch rule (i.e. the item must have been mailed or sent by another means within that period), and Canada has a seven-day deposit requirement. Finland requires that deposit be completed within two months and Indonesia, three months.

While there is no general rule, it is recommended that the deposit take place as soon as possible. As noted by Lunn, "the earlier the deposit the better, both to meet the needs of users seeking new publications and to permit prompt listing in the national bibliography."³³ Another reason

³¹ Supra note 26, at 16.

³² Supra note 1, at 21.

³³ Ibid. at 13.

for ensuring early deposit is that some publications go out of print quickly, and any delay in depositing material could mean the material will never be collected.

Chapter 5

OBJECT OF LEGAL DEPOSIT

In general, any type of library material, so called to differentiate it from archival material, should be an object of legal deposit as long as it is made available to the general public and produced in multiple copies. Legal deposit applies to all types of printed material (books, serials, pamphlets, maps, etc.), to most audio-visual material (discs, films, videos, multimedia kits, etc.), to broadcast material and to electronic publications (diskettes, CD-ROMs, on-line material, etc.).

5.1 PRINT MATERIAL

5.1.1. BOOKS

As the original object of legal deposit, books are included in the legal deposit legislation of all jurisdictions. It is important to clearly define what is considered as a book, since such a term can be very inclusive. The broadest definition is undoubtedly the Canadian one, which states that a “book means library matter of every kind, nature and description and includes any document, paper, record, tape or other thing published by a publisher, on or in which information is written, recorded, stored or reproduced.”³⁴ The definition might therefore need to include an “exclusion” list of material not to be deposited. Among the criteria to consider is the number of pages: Belgium, as an example, excludes publications of fewer than five pages. Material might be excluded when the print run is very small or the item is not for general distribution. As an example, in Canada, books printed in fewer than three copies do not have to be deposited. Material of very limited research or bibliographical value, such as owner’s manuals, price lists timetables for transportation services, colouring and cut-out books for children, might also be excluded. As recommended by Lunn, the law should make it clear “that residual power is with the list of inclusions, so that everything is subject to deposit unless specifically excluded.”³⁵ However, it should be remembered that an adequate infrastructure is required to process and list all items for a national bibliography.

³⁴ Supra note 19, at s. 2.

³⁵ Supra note 1, at 3.

Another aspect to consider is to make sure that the legislation clearly specifies that variations in content, language and/or form of the same book should be deposited. As stated by Lunn, “books may be issued in various editions, revised, corrected, enlarged, abridged. Obviously editions thus varying in content should be treated as new works, subject to all requirements of the deposit law. Translations, the same work appearing in different languages, must of course be subject to deposit as new and separate publications.”³⁶ A decision also has to be made regarding the variations in the form of a book. While the content may not vary, the form might, the same work being issued in a trade edition and in a deluxe edition, in hard cover and in soft cover, in pocket book format, in microform and in some cases in Braille or as a talking book on tape or CD. It is very important that the law be explicit with respect to any special conditions that may attach to any of these forms. As an example, if the law specifies that two copies have to be submitted it could perhaps specify that in the case of a deluxe edition only one copy has to be deposited. Impressions and reprints also have to be dealt with. The law must specify whether only the first printing of a book has to be deposited, or whether new impressions (i.e. reprints without alterations) should be deposited as well. Facsimile reprints of works long out of print should undoubtedly be subject to legal deposit.

Electronic monographs are now a reality, and national legislation for legal deposit must therefore include the proper provisions to ensure that this new medium will also be preserved for future generations. At present, most titles are also available in a print edition, but already some titles are only available electronically. One of the major issues that will have to be analyzed is how the material will be accessed. For off-line material, the procedures of deposit should be quite similar to those for print material. Such material will have to be accompanied with appropriate instructions for use. But on-line material will have to be either sent in directly by the publisher or downloaded by the national institution responsible for legal deposit. This way of accessing material is raising serious copyright questions, since it is agreed that downloading is reproduction. Other questions to consider will be the number of concurrent users and the possibility of mounting the off-line documents on local area networks within the national legal deposit institutions. Other situations that will have to be looked at are publishing on demand and e-books. Some already say that when such material is being made available on the market, it should be considered as “published” and the legal deposit legislation should reflect that. Such publishing does correspond to the criteria of a legal deposit

³⁶ Supra note 1, at 5.

system. Technically speaking, it could mean that the database of e-books would have to be deposited with the national depository institution or downloaded from the publisher's server and kept up-to-date as new titles are added. This raises a very interesting question: would it be possible to "order" an e-book from the national collection instead of from the server of the publisher? Most copyright laws, if not all, would consider such an activity as an infringement of copyright. Since the national deposit collection is built up for research and consultation purposes as well as for preservation, users of the national legal deposit institution should normally have free access to e-book databases, just as they have free access to all other parts of the national deposit collection. Copyright and legal deposit laws might have to be amended accordingly and appropriate exceptions granted. If e-book databases are deposited and kept up-to-date for preservation, the issue of access to such a commercial database by the users of the national legal deposit institutions will have to be carefully analyzed with regard to copyright legislation. It will be necessary to make sure such access does not violate the provision of the Berne Convention (Section 9(2)) prohibiting the introduction in a national copyright act of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author.

5.1.2. SERIALS

Serial publications constitute the biggest part of any collection of library material. The number of new titles published each year is impressive. Serial collections are also an invaluable research source, both for current and historical information. Legal deposit of serial material is therefore an important component of any deposit scheme.

Serials include all types of publications issued periodically, even on an irregular basis. They therefore include journals, newspapers, law reports, directories, lists, indexes, annual reports, loose-leaf services, newsletters, etc. To enable the deposit institution to build up a comprehensive national collection of serials, the legal deposit legislation has to require that each and every issue of every title be deposited. Such a requirement obviously calls for an efficient organization, including sufficient staff and space. As an example of the efficiency needed, a claiming system has to be put in place to make sure that all issues are delivered. Another example is the handling of the numerous updates of the loose-leaf services. This kind of publication is a useful research tool as long as it is kept up-to-date. Comprehensiveness is the ideal to be reached for, but this should not

preclude considering the possibility of identifying some exceptions for materials that might be considered as ephemeral. While it is extremely difficult, not to say hazardous, to decide on the contemporary or historical research value of an item, the question should at least be raised. As an example, should all annual reports of companies and/or commercial organizations, mainly containing financial data, be deposited? Should all newsletters of all organizations, mainly containing ephemeral information, be submitted? There are no standards to be followed or even recommended, since the answer ultimately depends on the philosophy of the national program of legal deposit. In France, as an example, even if the legislation is rather inclusive, the Bibliothèque nationale de France does not collect and retain everything, such as publicity material and some types of loose-leaf. A compromise solution for such material could be to require that the first issue be deposited for recording in the national bibliography, but that subsequent issues not be sent in. Canada has such a policy for most print newspapers.

The phenomenon of electronic journals and e-books also has to be taken into account. Some electronic journals and e-books replicate in electronic format the existing print material, and others exist only in electronic format. The first question to be asked is whether they are subject to legal deposit. The answer will depend on the original definition of material to be deposited. If it has been restricted to “print” documentation, the legislation has to be amended. But if the definition has purposely been made broad enough to include any type of written material, there might not be a need to revise the legislation. The second element to consider is the type of support: if the material is made available off-line, such as on a CD-ROM or a diskette, it will be quite easy to include in the legal deposit collection, as is the case now in many countries. But if it is available only on-line, there are numerous issues to look at, some technical – such as compatibility of in-house systems to support the access protocols – and some purely organizational – such as the physical set-up of the work stations allowing access to the material.

Finally, the economic component will have to be examined carefully, as there are financial considerations for the e-journal providers and e-book publishers that cannot be ignored. It must be remembered that the new information and publishing technologies require a large investment by the publishers and that it is only normal that they would want to protect their investment. Considering that technological developments now permit a journal article to be available worldwide when a single copy has been put on a server in a national legal deposit institution, the publishers want to make sure that access

to their deposit material will be controlled. But the objective of accessibility to the national deposit collection cannot be ignored either. A citizen wishing to access the national collection of deposited e-journals for private research should be able to do so without having to pay. The principle of free access to the national deposit collection must apply within the electronic environment, as it applies within the print environment.

5.1.3 PAMPHLETS AND OFFPRINTS

Pamphlets should be deposited, even ones containing a minimum number of pages. Whereas on one hand, Belgium excludes from deposit publications of fewer than five pages, on the other hand, Canada has not established any criteria based on minimum number of pages. But as so rightly mentioned by Lunn, “the comprehensive indiscriminate claiming of pamphlets is, however, likely to net a quantity of trivia and ephemera.”³⁷ As an example, the enormous amount of publicity folders of all sorts could easily become a nightmare to administer.

Another category to look at is offprint. Defined as extracts from books and periodicals, they should not be subject to legal deposit. Again as stated by Lunn, “The work is already available in the publication from which it is extracted, much of it can be located through periodical and other indexes, the processing of numerous small items is time-consuming, they may not be worth listing in the national bibliography if they are author’s offprints, few in number and not available for general distribution.”³⁸ But some consideration might have to be given to offprints that have been repaginated and issued for public distribution, as well as to ones that are part of a series.

³⁷ Supra note 1, at 7.

³⁸ Supra note 1, at 6-7.

5.1.4 MUSIC SCORES

Printed music is an important part of a nation's cultural heritage and should be systematically collected and preserved through legal deposit. Because of its nature, sheet music should be considered as a separate type of material.

5.1.5. ICONOGRAPHIC MATERIAL

Iconographic material, such as posters, broadsides, photos, post cards, engravings, etc., is an important element of a country's culture and represents a valuable research tool. Some countries, such as France, include such material as part of their legal deposit requirements. It is important to remember that legal deposit deals only with "published" material (i.e. reproduced in multiple copies and made available to the public) and does not, by definition, consider "archival" material (i.e. a unique item, not available for public distribution and more of a personal or private nature). The distinction is important with iconographic material, which often includes archival material. When considering whether to include iconographic material in a legal deposit scheme, serious thought has to be given to the substantial number of items involved and to the related storage and recording problems.

5.1.6. GOVERNMENT PUBLICATIONS

Government publications, also known as official publications, are part of the legal deposit scheme in most countries, even if they are not always part of the general legislation covering legal deposit. Depending on such factors as the nature of the state, centralized or not, the constitutional requirements, such as the Crown or executive privilege, the organization of the administration, for example whether government publishing is done by a government agency or by commercial publishers on behalf of the government, there might be a need for separate legislation or a different legal instrument to include government publications within the legal deposit program of a country. While some countries, such as Japan, the Philippines and Nigeria, include deposit of government publications in their main legal deposit law, others, such as Poland and the United States, have other legislation to cover the legal deposit of official publications. It should be noted that often, for example where a federal system of government is in place, the central government cannot impose legislative requirements on the constituent

governments. In these cases, it is through administrative arrangements based on the good will of the parties that constituent government publications may be made part of the national legal deposit scheme. Canada is a good example of this, where provincial and territorial government publications are sent to the National Library by means of a variety of administrative arrangements.

The question of municipal publications has to be looked at in a similar way. As noted by Jasion, “A sector of government publishing which is rarely included specifically in legislation is that of municipal or local government publications. Japan specifically refers to them, as do several states of the USA, though many do not. Canada specifically excludes them from national deposit. If we presume that local government is a basic unit of democracy, then the information produced by local government should be made available and be preserved, not just for local use, but for the nation as well.”³⁹ Very often the reason for not including municipal publications is a legal and constitutional one. The separation of legislative powers in countries with a federal system might prevent a national institution from imposing an obligation of deposit on organizations that are under the jurisdiction of another level of government, as is often the case with municipal governments. As a general guideline, it could be recommended that municipal publications should be collected and preserved at the level of government that has the legislative power to vote a law to this effect.

In many jurisdictions, the government is the most prolific publisher, from the point of view of both the number of titles and the variety of material produced. Monographs on all subjects, periodicals of all categories (journals, law reports, parliamentary papers, monographic series, statistical reports, etc.), audio-visual material, maps and pamphlets are all part of any government publishing program. And today, governments are often acting as leaders in electronic publishing. More and more government publications, mainly reports and studies, are now made available electronically, including some e-journals. As well, more and more parliamentary papers are also being made available electronically, both off-line (CD-ROM) and on-line. As many countries are in the process of revising their legal deposit legislation in order to adapt it to the new electronic publishing environment, a recommendation of Mackenzie Owen and Walle, made in their study on deposit collections of electronic publications, is of major interest. Their

³⁹ Supra note 7, at 15.

recommendation is that “Priority should be given to publications by ‘official’ publishers.”⁴⁰

Not including government publications in a national legal deposit scheme would be depriving the nation’s cultural heritage of an important component.

Finally, while the collection, preservation and bibliographic control of the publications of intergovernmental organizations (from the United Nations to the World Trade Organization) are extremely important from both a research and long-term preservation point of view, these publications cannot be subject to national legal deposit according to the rules of international law. Following international agreements, such as the 1975 Vienna Convention on diplomatic relations and individual specialized agency conventions, as well as headquarters agreements with countries, international and intergovernmental organizations enjoy immunity from every form of legal process. Known as the immunity from jurisdiction, such a provision is quite comprehensive and covers all property and assets of the organizations, including their publications. Considering the tremendous amount of material published by the intergovernmental organizations for so many years now and the extensive use being made of electronic formats, there is an urgent need to raise the issue of an “international legal deposit scheme” in order to preserve and ensure long-term availability of this particular category of material.

5.1.7. MAPS

Since the scope of legal deposit legislation should include all materials of possible research and/or bibliographic interest for the present and/or the future, maps undoubtedly should be included. However, not all countries are systematically collecting, recording and preserving them. Whereas most countries will include maps published in a book format, such as an atlas, a limited number of countries include separate maps in their legal deposit scheme. Algeria, France, South Africa, Spain, Switzerland and the United States (as government publications) do. Mostly produced by governments, maps are more and more being commercially produced as well and made publicly available.

The handling of maps within a legal deposit scheme requires expertise from both a recording and a preservation point of view. Their research value is indisputable and they

⁴⁰ Supra note 26, at 22.

are definitively part of a nation's historical heritage; they therefore should be preserved as such. However, as for audio-visual material, it might be more efficient if the responsibility for collecting, recording and providing services to users were delegated by the legal deposit institution to another national organization more specialized in the handling of maps and geographical information and data.

Many of the legal deposit issues concerning maps are related to new mapping technologies and are quite similar to those concerning other digital databases and electronic publications. But GIS (Geographic Information System) software, which merges automated mapping and database management capabilities to provide users with personalized, comprehensive spatial information, is raising specific legal deposit problems, to the point of putting the future of large-scale mapping production in question. Because users are able to develop their own individual maps by using the data stored on a server, the issue is to decide on the legal deposit status of such a database of spatial information and of the maps as downloaded. First, whereas with on-demand publications, the product resulting from the "order" of a book from a server already exists as an "intellectual" separate entity within the server, a map does not exist as an "intellectual" separate entity until an individual gathers data from a server and creates a map using the appropriate software. And second, the map is produced in a very limited number of copies, often only one copy and often for personal research use, not for public distribution. Such a system almost makes it irrelevant for an organization, governmental or commercial, to publish maps any more. But if such a database is not preserved within a national legal deposit institution or through another legal mechanism, invaluable and irreplaceable data will be lost. And as with other databases, the need for a retrospective archive of digital maps for historical purpose is still there. A certain number of studies are currently being conducted and initiatives taken, namely in the United Kingdom and Denmark, to preserve electronic maps on CD-ROM, diskette or the Internet. But as in many other areas of legal deposit of electronic material, time is becoming a major issue: there is a serious risk that information will be lost forever while analysis and pilot projects are going on.

As a matter of principle, the database – and not the products derived from it for personal use – should be subject to legal deposit. But as discussed in Chapter 6, databases made up of raw data (i.e. unorganized data that could be used to select, gather and structure

information to create a separate independent intellectual entity) should not be object of legal deposit

5.1.8. OTHER TYPES OF MATERIAL

In principle, any print material may be of contemporary or historical value. That said, however, acquiring all printed matter could be an uncontrollable process that would make it impossible to handle all the material received and result in getting trivial and ephemeral material. It is, therefore, important at an early stage to clearly identify and to properly define the types of material to be deposited and to evaluate the practical consequences of the decision. France, for example, has a very broad definition, including engravings, post cards, posters, plans, maps, musical scores and photographs, with a very limited list of exclusions. On the other hand, Canada, which also has a broad definition of a “book,” has a list of 26 exclusions that limit its definition.

As already discussed in the comprehensiveness section, decisions relating to the level of comprehensiveness have to be taken keeping in mind various considerations, such as staff, space, budget and legal or philosophical issues. The point is that a country has to make decisions in order to be able to live with its definition of materials to be deposited.

5.2. NON-PRINT MATERIAL

This is a category that is taking on more and more importance in library collections. It presents particular problems, mainly related to the fact that each different medium calls for special conditions.

5.2.1. MICROFORMS

Publication of microforms is defined as the production of a microform master from which copies can be made, such copies being offered to the public. Micropublications are usually reprints of works already published, but they may also be original works published solely in microform. The microform edition should be subject to deposit, as are editions of books that vary in form but not in content. The original microform should also be subject to legal deposit, like any other original work. The depository should be free to specify the deposit of microform editions instead of one or more copies of the original print edition, for example when requesting newspapers. The law should include all the technical specifications required for deposit. The law should also make it clear

that “microform” includes all varieties, films, cards, fiches, etc. Care should be taken to collect microform reprints of government publications, often produced by private firms by arrangement with government, and to claim university theses often published in microform only.

5.2.2. AUDIOVISUAL MATERIAL

Sound and visual recordings, separate or combined, should also be collected, recorded, preserved and made available for research, as part of a country’s cultural property and national heritage. They should, therefore, be subject to a legal deposit requirement whenever it refers to material made available to the public and intended to be heard or seen, regardless of the numbers of copies produced. It is important that the legislation establish a clear distinction from “archival” material, which includes original documentation not made available for general distribution and more of a private nature, such as photographs. Broadcast material, both radio and television should also be subject to legal deposit. Intended for public reception and/or consumption, broadcast material is not considered by many countries as archival material any more, but rather as material that falls under the criteria of a legal deposit scheme. As stated in the United Kingdom Report of the Working Party on Legal Deposit, “there is no logic in the exclusion of television production from a legal deposit system; its omission both contradicts the aim of comprehensiveness and threatens a huge and anomalous gap in the maintenance of an audio-visual national archive. Some might argue that television output has become the most vital and important part of our moving image heritage in terms of contemporary culture and historical record keeping. Television is not, in any case, an alien or separate medium; it is simply another means of publishing moving images.”⁴¹

Audio-visual material differs from traditional written publications mainly because of the need to use specific equipment to have access to the recorded information, but also because of the susceptibility of both the information carrier and the equipment to technological change or obsolescence. While this will also be a problem with electronic documentation, it is even more critical with audio-visual material, because of the numerous formats involved. Audio-visual documentation includes materials such as discs, CDs, tapes, slides, films, videotapes, videodiscs and multimedia kits. Examples

⁴¹ United Kingdom, “Report of the Working Party on Legal Deposit,” on-line: Department of Culture, Media and Sport <<http://www.culture.gov.uk/LDWGRPT.html>> (date accessed: 22 December 1999).

of such problems of obsolescence include the Beta/VHS videocassette format and the eight-track cassette.

Because of the great variety of formats and the specific handling and preservation problems related to each one, the legal deposit legislation should clearly define which types of audio-visual material will be covered and include as well an exclusion list, if any material is to be excluded. As with books, all different formats should be deposited. For example, if a sound recording is produced as a CD and as a cassette, both formats should be deposited. There is no common approach to audio-visual material for legal deposit purposes. Whereas some countries, such as France, cover almost all categories of audio-visual material, including radio and television programs created and/or broadcast within the country, Denmark refers to sound recordings (music and speech), films and video games, photography, Braille and combined publications. Canada has a fairly unusual arrangement for the Canadian content of sound recordings. Excluded from legal deposit are sound recordings that are only manufactured or distributed in Canada, but have no Canadian content or major Canadian contributor such as a composer, artist, narrator, conductor, orchestra, performer, writer or producer.

As a general rule, it is recommended that “the material shall be deposited by the producer, editor, or distributor of the audio-visual material having his headquarters or habitual residence with the country, irrespective of any co-production arrangement made with a foreign manufacturer.”⁴²

As with all library materials, there are important issues related to copying for preservation purposes, but these issues are accentuated when dealing with audio-visual material. As already mentioned audio-visual materials are fragile and need special treatment for long-term preservation, including in some cases a transfer to another support. Since a general right to make copies for preservation purposes is not considered as an exception in international copyright treaties and does not appear as well in many countries' national legislation on copyright, each country will have to determine whether a provision for copying for preservation purposes is required in the legal deposit or copyright legislation. Also to be taken into consideration is the potential for any researcher to have easy access to the legal deposit collection and to be able to make a copy of the audio-visual material for personal research use.

⁴² Birgit Kofler, *Legal questions facing audiovisual archives* (Paris, Unesco, 1991) at 32.

The digital environment is drastically transforming access to audio-visual material, raising new technical, organizational and legal problems related to legal deposit. A good example is multimedia-networked publications, which can be made up of text, sound, pictures, music, moving images, etc. Each of the elements, as well as the multimedia work itself, may be protected. In order to collect such works, a national legal deposit institution needs to access them, and in order to access them, it might have to reproduce them. As already mentioned, making a copy of a protected work requires permission, which is granted through a licence or a legislative exception.

Another problematic area is the advent of systems which digitally encode music. Such systems enable music to be sent over the Internet. Musical sound recordings can now be made available in a standard format (CD, tape) or on the Internet, or both. As for electronic publications, legal deposit legislation should include provisions ensuring that such material is subject to legal deposit; therefore, copyright issues related to the reproduction of such material should be dealt with.

Finally, the question of decentralizing legal deposit of audio-visual material should be examined. Some countries involve more than one national institution in legal deposit of audio-visual material. The ever-increasing amount of material and the diversity of formats to be deposited and preserved, along with the complex problems related to organizational, technical and legal issues, require more specialized personnel, equipment and physical facilities. Material will all be collected on the basis of unique legal deposit legislation, but with decentralized implementation. In France, for example, the Centre national de la cinématographie et l'Institut national de l'audiovisuel are involved with legal deposit of audio-visual material, while the Bibliothèque nationale de France is responsible for all print material. To achieve efficient results with such an organizational set-up, a sound communications infrastructure and a good deal of inter-institutional co-operation are required.

5.2.3. OTHER NON-PRINT MATERIAL

A deposit law can include virtually anything a country wishes to collect and preserve. Some countries require deposit of medals, coins, banknotes, stamps, etc. But in general, legal deposit is usually assumed to be associated with library materials and the depository assumed to be a library. As a matter of principle, legal deposit should not be concerned with archives and museum material.

Chapter 6

LEGAL DEPOSIT OF ELECTRONIC PUBLICATIONS

The advent of powerful new information technologies as a means of publishing and/or disseminating recorded knowledge makes it imperative for legal deposit legislation to ensure that its original objectives are maintained. Even if the media or the information carriers change, the need to record, preserve and make available the content of the material deposited remains, whether in the digital or the printed environment. But because of their complexity, the legal, technical and organizational problems related to electronic publications represent a formidable challenge for any legal deposit scheme. As already discussed in the previous chapter, each type of material presents its own specific problems.

The first issue to look at is the definition of the material to be deposited. The definition has to be as inclusive as possible to ensure that electronic publications are covered regardless of the type of carrier. If the current law of a country does not include them, it should be amended in order to clearly specify that they are covered. Since more and more material is being made available only in electronic format, it is important to act as soon as possible to avoid losing track of valuable material forever. Because information technology evolves rapidly, it is essential to make sure that the definition is worded in such a way that amendments will not be necessary each time a new mechanism or technique for providing information is made available. The best definition of material to be deposited is undoubtedly the South African one, which defines a “document” as “any object which is intended to store or convey information in textual, graphic, visual, auditory or other intelligible format through any medium, and any version or edition of a document which is significantly different from that document in respect of its information content, intelligibility or physical presentation, is considered to be a separate document; a medium means any means of recording or transmitting information intended for subsequent reading, listening or viewing.”⁴³

There are two main categories of electronic publications that should be included in legal deposit legislation. The first is “off-line” or tangible publications, which are made available on a physical data carrier such as diskettes and CD-ROMs. They are sometimes also identified as “packaged electronic publications.” Since these are distributed as individual physical objects, their legal deposit process is quite similar to that of printed products. But the legislation should specify that they are to be deposited together with any associated software manuals and accompanying material needed

⁴³ South Africa. *Legal deposit act*, 1997, s. 1.

to enable them to be used. It should also be made clear that any new version or update to the original diskette or CD should be deposited. The other category is “on-line” material. This type of material is characterized by the fact that it exists only as a unique copy that is stored on a computer host system or a worldwide collection of computer systems (Internet). Whereas in the printed and off-line environment, one of the conditions of legal deposit is the existence of multiple copies available for public distribution, in the on-line environment, there is one single copy owned, stored and controlled by the publishers/producers. The real challenges for legal deposit libraries lie with the on-line media. The range of types of on-line publications is increasing as technology evolves. It varies from the independent and complete unit that is stored in a database accessible only through a controlled access code and password, to the Internet website that allows the user to make up his/her own natural resources digital map. It includes e-journals and multimedia materials that can be easily accessed on-line and personal e-books that can be ordered only from a master copy available from the publisher’s database.

The so-called “dynamic electronic publications,” including databases, are the most difficult to deal with from a legal deposit point of view. A dynamic publication is one that is kept up-to-date on a permanent basis, sometimes weekly, daily or hourly and sometimes even on a continuous basis (real-time updating). As Mackenzie Owen and Walle stated, “By definition a dynamic document is intended to be accessed in its current state. A copy taken at an earlier moment in time represents an invalid instance of the document, i.e. it is not the document as intended by its author if it has changed since the copy was taken. The only and valid correct instance of the document is its most current version. It could even be the case that when a networked document ceases to be available, the author intends it to be non-existent.”⁴⁴ While some suggest that depository libraries should not be collecting dynamic electronic publications because their permanent updating implies they are not meant to be preserved, others say that it is the responsibility of a national deposit library to collect, preserve and make available the cultural and intellectual heritage of a country no matter how it is expressed. While it is almost impossible to keep a permanent deposit copy up-to-date unless a publisher agrees to maintain two parallel versions, the legislation could require that the publisher send a “snapshot” of its dynamic publication on a regular basis as fixed by the law. The legislation could also include a provision specifying that whenever a dynamic publication ceases to be available on-line, its final version will be deposited.

Another area of electronic material that is often a matter of discussion from a legal deposit point of view is the “organized public communications” sent over open networks, such as NetNews, listservs,

⁴⁴ Supra note 26, at 25.

etc. Some consider these as a “separate intellectual entity” kept up-to-date as databases, and others consider them as archival material, claiming that to them they are no different from personal or private correspondence. There seems to be a consensus for excluding such material, mainly because it is made up of material that is not edited and cannot be considered as “a publication,” which is normally defined as an independent, self-contained and organized entity.

Whereas in a print environment it has been relatively easy to define what should be considered as a “publication” for legal deposit purposes, including material such as compilations, the definition ends up being a bit more complex in a digital environment. A publication is generally defined as a document consisting of sequential text and/or other data such as images, sound, etc., which is structured or organized and edited as an independent unit. It exists on a physical support that is made available to the public in multiple copies and can be acquired by anyone. Within a digital environment, a publication is a document that is produced, distributed and stored in electronic form. Available either in a tangible format, such as a diskette or a CD-ROM, or on-line, such as databases or Internet documents, it is a combination of information content and software that provides search capabilities not available within a print environment. Just like a print publication, an electronic publication could be an independent and well-structured entity, or it could include bits and pieces of information not necessarily linked together, such as a GIS database or a statistical database. The way the information is organized, accessed and managed within a digital environment creates specific legal deposit problems, such as the one related to listservs.

Despite all the problems related to the legal deposit of on-line publications, they should be included in the definition of material to be deposited. This will ensure that as problems are solved, the depository library is in a position to request these publications and enforce the legislation. At this point it is important to make a clear distinction between a number of concepts within the legal deposit of electronic publications environment. What should be deposited are the separate and complete “intellectual” units that are stored either separately or as part of a database. Whenever a database is made up of separate and complete units – such as a legal database that includes cases, journal articles, etc. – it should be an object of deposit. But when a database is made up of raw data (i.e. unorganized data that could be selected and gathered on order by an individual to create a separate and complete “intellectual” unit for his/her own private use), it should not be subject to legal deposit. While there is a need to preserve those raw data, it is not within the normal mandate of a national legal deposit institution to be responsible for collecting and preserving them. But that same institution could play a leadership role in convincing governments that such valuable information and/or material should be preserved for future generations. As Mackenzie Owen and Walle write,

“The conclusion to be drawn is that publications which cannot be acquired as an independent, self-contained and coherent entity (in general documents, which cannot be downloaded from the network but only accessed) should not be selected for deposit. Providing access to such documents is not a task for the deposit function.”⁴⁵

It is very important that the deposit library be in a position, both legally and technically, to store and control the electronic publications as deposited. Solely providing access is not sufficient and does not meet the objectives of legal deposit. Legal deposit of electronic publications 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.”⁴⁶ National legal deposit institutions must therefore resist the temptation to leave publishers with the responsibility of archiving and preserving electronic publications. As stated by Van Drimmelen, “Are the publishers going to take care of long-term availability? They did not in the case of printed material, so why should they in the case of electronic publications? Their primary concern lies with the continuity of their business operations, and rightfully so.”⁴⁷ Since publishers have no economic incentive to develop an expensive infrastructure to preserve electronic material on a long-term basis, it is much better to let the deposit library play the role of a last-resort source for publications that for economic reasons would otherwise not be preserved.

Already some countries have taken action to include electronic publications in their legal deposit scheme. Canada, France, Germany, Iran, Italy, Japan, Sweden and the United States have specifically identified off-line electronic publications as being subject to legal deposit by referring in their legislation to the necessity of depositing a physical item or a publication in a fixed format. Other countries, such as Denmark, Finland, Norway and South Africa, are including on-line material as well, through a definition that accommodates current new publishing formats and those of the future and through eliminating from the definition any reference to a physical format. As an example, Denmark’s legislation states that two copies of any work published in Denmark must be deposited, a work meaning a delimited quantity of information that must be considered a final and independent unit. A work is also considered to be published when notice is given to the public that the work is available from a database from which a user can retrieve a copy. Another example is the 1997 South Africa Legal Deposit Act, which refers to documents to be deposited as being “any object which is

⁴⁵ Ibid.

⁴⁶ Jim Vickery, “The legal deposit of electronic publications” (1998) 36:1 *Against the Grain*, 38.

⁴⁷ Wim Van Drimmelen, “The Netherlands depository of electronic publications at the Koninklijke Bibliotheek” (1997) 21:3 *Library Acquisitions: Practice & Theory*, 321.

intended to store or convey information in textual, graphic, visual, auditory or other intelligible format through any medium.”⁴⁸ The same act refers to “published” as meaning “produced to be generally available in multiple copies or locations to any member of the public, whether through purchase, hire, loan, subscription, licence or free distribution.”⁴⁹

Another critical issue for legal deposit of electronic publications is access to the deposited material. As already mentioned, electronic publications need to be accessed before the user is able to get to the information available, whether it is off-line or on-line material. For the user to have access to the material, there are both technical and legal considerations to be taken care of. From a technical point of view, it is important to make sure that the information is accessible both currently and retrospectively. The legislation must include provisions ensuring the deposit of any associated software, manuals and accompanying material needed to currently consult the deposited electronic publications. But it is just as important that the legislation also include provisions allowing conversion to new formats and/or migration to new operating environments without infringing other laws, such as copyright. The obsolescence of technology is a major concern when considering the legal deposit objective of long-term availability for researchers. As recommended by the Working Group on Legal Deposit of Electronic Publications of the Conference of Directors of National Libraries, “It is important that legal deposit provisions be worded in such a way that repositories have permission to copy, reformat, refresh or migrate deposited publications for preservation purposes. If this permission is not granted, it will not be possible to maintain materials for posterity.”⁵⁰

A sensitive issue related to access is the licensing issue. While there seems to exist a consensus among the deposit libraries that access to deposit electronic material should be controlled, the information producers still fear that a statutory obligation to provide access to their electronic material could jeopardize their revenues and compromise their ability to compete in the international market of information. Mutual understanding of the concerns and objectives of both parties should help to resolve the issue. It is necessary for the publishers to understand that the national deposit institutions have a public interest duty to preserve and safeguard the authenticity and integrity of publications for future generations and to ensure that any citizen of a country has access to the

⁴⁸ Supra note 21, at s. 1.

⁴⁹ Ibid.

⁵⁰ Conference of Directors of National Libraries, Working Group on Legal Deposit of Electronic Publications, *The Legal Deposit of Electronic Publications*, on-line: Unesco
<<http://www.unesco.org/webworld/memory/legaldep.htm>> (date accessed: 22 December 1999).

entirety of the national intellectual production regardless of the format in which it is available. On the other hand, the legislator should recognize the financial and human resources investment required to develop digital products. Considering that a single copy stored at a single location on the Internet could serve the whole planet, it is understandable that publishers need to know that their commercial interests are respected by depository institutions. As presented by Van Drimmelen, "The question is, how should legitimate access be defined in order to restrict access to last resort use only?"⁵¹ But there is also a legitimate need to define legitimate access in terms of equal accessibility for everyone, a principle that cannot be sacrificed.

Legal deposit legislation should therefore provide that a site licence be granted with the deposited electronic material, both off-line and on-line, in order to allow researchers to search the electronic sources for private and non-commercial use. For off-line publications, the licence should cover both use through a local area network and stand-alone access. The legislation should determine the number of concurrent users, as in the print environment, where legislation determines the number of copies to be deposited. With the encrypted password mechanism and the IP (Internet Protocol) address of workstations, publishers should be less concerned with the protection of their intellectual property rights. It is obvious that the national deposit institutions would also have to put security measures in place to avoid abuses. For remote access, the legislation should include provision for at least one registered user at a time to access the material as long as he/she has demonstrated through a signed agreement that he/she is performing private and non-commercial research.

Before legal deposit of on-line electronic publications becomes fully implemented in most countries, there are still a number of technical problems to be resolved and legal issues to be clarified. But it is important for any country wishing to include electronic publications in its legal deposit scheme to make sure that the appropriate legislation is properly amended, even if the scheme would not be fully operational. As with copyright legislation, legal deposit legislation within the electronic environment should be the result of a compromise based on the balance of rights between citizens and publishers. Whereas including a provision for unlimited free access for the users of a national legal deposit institution would be abusive, not providing at least one access to the registered users of such an institution would be as unreasonable.

⁵¹ Supra note 47, at 323.

Chapter 7

LEGAL FRAMEWORK FOR A NATIONAL LEGAL DEPOSIT SCHEME

Legal deposit is becoming an increasingly complex issue. Considering its valuable objectives and its importance as a national public policy matter, it is vital for the long-term maintenance of legal deposit that it be based on a legislative ground. The legal framework proposed here introduces the guidelines in point form in order to summarize the argument or discussion on the major issues.

7.1. BASIC PRINCIPLES

- 7.1.1. Legal deposit should be a statutory obligation. While feasible, a voluntary deposit system is not recommended.
- 7.1.2. Legal deposit should be established as a national responsibility. This principle should not prevent other jurisdictions within the national entity from developing their own internal legal deposit system if they have the legislative power to do so.
- 7.1.3. The national deposit collection should be the property of the state, and the depository should make every possible effort to keep the material received on deposit, considering its preservation responsibility.
- 7.1.4. Legal deposit should be based on the principle that any published material, in its broadest sense, that is made available to the public is subject to deposit unless specifically excluded in the law.
- 7.1.5. No compensation, financial or otherwise, should be granted to depositors.
- 7.1.6. Access to legal deposit collections should be free, both on the premises and through interlibrary loans. The request of reasonable administrative fees should not be considered as a breach of this principle.
- 7.1.7. The copyright act might need to be amended in order to allow reproduction of protected work for long-term preservation purposes. The derogation clause, while always feasible, is not recommended.

7.2. LEGISLATION

- 7.2.1. The legislation could be a separate legal deposit law or part of another law, such as the national library act. If it is decided to make the legislation part of the copyright act, it should be made clear that there is no direct link between the deposit of copies and the granting of copyright.
- 7.2.2. The act should reflect all basic principles.
- 7.2.3. The objectives of legal deposit should be clearly stated in the law.
- 7.2.4. The law requiring legal deposit should be enforceable and include a fine structure for non-compliance.
- 7.2.5. The language of the law should be clear, accurate, concise and easy to read. Ambiguity and vagueness should be avoided.
- 7.2.6. The law should include clear definitions of the terms used in order to ensure that the intent of the legislator is understood.

7.3. ELEMENTS OF LEGAL DEPOSIT

7.3.1. Origin of the Publication

The origin or place of publication of each item should be the basic consideration of any legal deposit scheme. Authors, publishers, producers, distributors, printers and importers may be required to deposit copies.

Since a national law cannot be applied on an extraterritorial basis, material published or produced abroad by national citizens and publishers should be deposited on a voluntary basis by them or acquired through traditional acquisition means.

For on-line electronic publications, the publication source should be identified by using the geographic location of the publishing or producing organization or individual.

7.3.2. Comprehensiveness

- 7.3.2.1. The definition of the material to be deposited should be as broad as possible in order to include all types of information carriers independent of the format.
- 7.3.2.2. All types of print material as well as audio-visual documents should be subject to legal deposit. Broadcast material, both radio and television, should be subject to legal deposit. The legislation should also cover electronic

publications, both off-line and on-line, including multimedia networked publications, even if the national legal deposit agency is not yet in a position to collect such material. In this area, the law should remain as general as possible since technology evolves rapidly.

7.3.2.3. The basic criteria for being an object of legal deposit should be that the material is produced in multiple copies and made available to the public.

7.3.2.3.1. For on-line electronic publications, as well as radio and television programs, the only criterion should be accessibility to the public.

7.3.2.4. A legal deposit law should not be retroactive and the material published/produced prior to the entry into force of the law should be collected through voluntary deposit or traditional acquisition means.

7.3.2.5. Legal deposit legislation should be neutral as far as content of the material to be deposited is concerned. Therefore, any type of material corresponding to the basic criteria should be deposited disregarding any value judgement of the material, should it be of a moral, political, artistic or literary nature.

7.3.3. Depositor

7.3.3.1. The depositor should be the organization or the individual responsible for publishing/producing and making available the copies of a document. If it is decided to assign the deposit responsibility to the owner of the copyright, the law should be very explicit and clear on this matter. With on-line material, since there will be more and more individuals “publishing” or “producing” their own material, the legislation should include them as depositor.

7.3.4. Depository

7.3.4.1. The national library of the country, or any other national institution playing a similar role, should be the depository. Legal deposit may also be decentralized and involve other national agencies as depositories for more specialized material. In that case, there should be a statutory mechanism for the co-ordination of the various agencies responsible for legal deposit, and measures should be adopted to ensure that users have seamless access to the national published heritage in all media.

7.3.5. Number of Copies

- 7.3.5.1. At a minimum, two copies should be deposited, one for preservation and the other for use. But this number could vary depending on the national objectives of the scheme.
- 7.3.5.2. There could be an exception for certain types of material that is more expensive to produce and/or for which the market is more limited. In such cases, only one copy could be deposited.
- 7.3.5.3. For electronic publications, the issue of the number of copies is replaced by the issue of the number of concurrent users of the product. The law should make it compulsory for the publisher/producer to provide access to a minimum of one user at a time.

7.3.6. Time of Deposit

- 7.3.6.1. There is no standard to follow, except that it should be as soon as possible after publication, preferably within one week but not later than four weeks.

7.4. OBJECT OF LEGAL DEPOSIT

7.4.1. Books

- 7.4.1.1. Books represent the basic object of legal deposit. The definition of what constitutes a book has to appear in the law and should be clear. Inclusions and exclusions should be defined. The minimum number of pages required and the minimum number of copies printed should be determined by the regulations.

The law should also specify that variations of a book, whether variations of content (other editions), language (translations) or form (trade, deluxe, pocket editions), should be deposited.

- 7.4.1.2. Books also published in electronic format, whether off-line or on-line, should be deposited. The way such material will be accessed should be carefully looked at in order to respect the requirements of international conventions.
- 7.4.1.3. Only the first printing of a book must be deposited, unless further printings have a different physical presentation.

7.4.1.4. All accompanying metadata should be deposited as well, for all categories or types of material.

7.4.2. Music Scores

7.4.2.1. Music scores, printed or in electronic format, should be subject to legal deposit

7.4.3. Serials

- 7.4.3.1. Legal deposit legislation should include all types of publications issued periodically, even on an irregular basis, and loose-leaf services with updates.
- 7.4.3.2. Every issue of a serial should be deposited in order to build up as comprehensive a research collection as possible.
- 7.4.3.3. There could be exceptions to the comprehensive collecting of each issue: only the first issue of ephemeral material, such as internal newsletters of organizations, could be collected.
- 7.4.3.4. Serials also published in electronic format, off-line or on-line, should be deposited.

7.4.4. Pamphlets and Offprints

- 7.4.4.1. Pamphlets should be deposited, including ones with a minimum number of pages.
- 7.4.4.2. Offprints that are repaginated and issued for public distribution should be deposited.
- 7.4.4.3. Leaflets, posters, broadsides, post cards and other iconographic material could be deposited, but processing and handling procedures have to be well planned.

7.4.5. Iconographic Material

- 7.4.5.1. Posters, broadsides, photographs, post cards and engravings should be deposited if a country wishes to be as comprehensive as possible.

7.4.6. Government Publications

- 7.4.6.1. Government publications should be part of any national legal deposit scheme, even if their deposit might not be compulsory for internal legal reasons.
- 7.4.6.2. While it might be difficult to collect all municipal and/or local government publications, administrative arrangements should be negotiated to collect them at least at a regional level.

- 7.4.6.3. International and intergovernmental government publications cannot be subject to national legal deposit legislation because of the jurisdictional immunity principle.

7.4.7. Maps

- 7.4.7.1. Maps should be part of a national legal deposit collection.
- 7.4.7.2. As maps can now be produced on demand by using Geographic Information System software, legal deposit of maps could become problematic. As long as the databases remain complementary to the print material, there should be no major problems.
- 7.4.7.3. Maps are a good example of where another national institution, more specialized in handling the material, could get involved in the national legal deposit scheme.

7.4.8. Microforms

- 7.4.8.1. The microform edition of a print work should be subject to legal deposit, as is any other edition of a work.
- 7.4.8.2. With certain categories of material, such as newspapers, the depository could opt for the deposit of the microform edition only.
- 7.4.8.3. Original publications in microform format should be deposited.

7.4.9. Audio-visual Material

- 7.4.9.1. Sound and visual recordings, separate and combined, should be subject to legal deposit. All accompanying material should also be subject to deposit.
- 7.4.9.2. Because of the susceptibility of the carriers and equipment to technological changes and obsolescence, there could be a need to amend national copyright laws or provide the national legal deposit law with notwithstanding clauses allowing reproduction in current formats.
- 7.4.9.3. Networked multimedia works should also be subject to legal deposit, but all the problems related to legal deposit of electronic publications should be taken into account.
- 7.4.9.4. Radio and television broadcast material should be an object of legal deposit.

7.4.10. Other Types of Material

- 7.4.10.1. Before deciding on exactly what type of material should be subject to legal deposit, it is very important to evaluate the practicality of certain decisions. As an example, ephemeral material, such as internal organizational newsletters, might consume a lot of resources for a limited national historical research value.

7.5. ELECTRONIC PUBLICATIONS

- 7.5.1. Off-line and on-line electronic publications should be subject to legal deposit and should be deposited along with all appropriate accompanying material including proper software.
- 7.5.2. Dynamic on-line electronic publications (i.e. the ones kept up-to-date on an ongoing basis) should also be subject to legal deposit. The deposit could be handled through a “snapshot” deposit on a regular basis and when the title ceases to be published/produced. The first version of a dynamic on-line electronic publication should always be deposited. Databases made up of unorganized or unedited data should not be an object of legal deposit.
- 7.5.3. The legislation should include provisions to ensure that registered users of the national legal deposit agency have access to the electronic material deposited.
- 7.5.4. To avoid abuse of the free access provided through the national legal deposit agency, access should be limited; however, publishers/producers should be required to permit a limited number of concurrent users.
- 7.5.5. As for audio-visual material, there may be a need to amend national copyright laws to permit the national legal deposit institution to download, and therefore reproduce, electronic publications for legal deposit purposes.

Chapter 8

THE FUTURE OF LEGAL DEPOSIT

For nearly five centuries, different national agencies around the world have been collecting, recording, organizing and making available the cultural and intellectual heritage of nations through a statutory obligation known as legal deposit. One of the major achievements of legal deposit schemes is that they have been able to adapt to new information carriers as these were made available on the market. This has permitted the preservation and the availability of legal deposit collections that are as comprehensive as possible. Today, a scholar or a citizen of any country may borrow, or use on site at the national depository, material published or produced years ago, if not centuries ago, because it has been deposited and properly preserved for future generations. Another important accomplishment of legal deposit legislation has been to guarantee permanent free access to the national legal deposit collection of the country. Throughout the history of legal deposit, the availability of the deposited material without any monetary obligation for the citizen has been an undisputed rule. A well-organized legal deposit scheme is considered as an essential element of any national public policy of freedom of expression and access to information. Furthermore, “if carried out effectively worldwide, this forms a central component of the Universal Availability of Publications programme.”⁵²

With the advent of new information technologies and more specifically of the digital environment, the feasibility of maintaining legal deposit schemes has come into question. As the nature of the material changes, documents are no longer “published” but “made available” on networks. “Copies” are no longer “sold”; instead, “paid subscriptions” are required from the users to “access” the material. Most legal deposit schemes have been able to integrate off-line electronic publications without any major problem, mainly because of their physical support and the fact that their handling is quite similar to that of print material. But the on-line environment, and more particularly the case of dynamic electronic publications, is creating serious legal deposit problems. The main one is obviously the fact that the information is constantly being updated in real time, so that data and information systematically disappear in a matter of seconds and are not available any longer as historical records. The biggest challenge for legal deposit within an electronic or digital environment is the issue of preservation for future generations. And as Vickery correctly states, “If it is true that

⁵² Supra note 46, at 36.

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."⁵³

Another issue related to "publishing" on networks such as the Internet is the incredible proliferation of "private" or "individual" publishers. As more and more individuals make their material directly available on the Internet, the situation could easily become a nightmare for any national legal deposit agency that wishes to ensure the deposit of all the works of its citizens. At the rate technologies evolve, it is now almost impossible to predict, even for the near future, how material will be accessed. A good example of this evolution is the MP3 environment for sound recordings, which now makes music directly available to users on the Internet.

Do these issues mean that the national legal deposit agencies should limit their responsibility to preserve knowledge and information for future generations to tangible materials only? The answer to such a question is an unambiguous no. The preservation of the national cultural and intellectual heritage is a clear matter of public interest and is a state responsibility. It is absolutely necessary that the "collective memory" be identified, described in the national bibliography and preserved. A legal deposit is an essential element of any program aiming at such an objective.

It is very important that the national legal deposit agencies resist the temptation to let the information producers archive their own electronic material for future generations. It is not up to the producers to do so. Moreover, if there is no financial benefit, why would they take on such a major responsibility? But it is obvious as well that the philosophy, and therefore the legislation, of legal deposit will have to change. While traditional information carriers (books, serials, microforms, CDs, videocassettes, etc.) will remain, the digital environment will bring along new types of material in new formats that cannot be handled in the same manner and with the same approach as the traditional carriers. Like copyright legislation, legal deposit legislation will have to be based on a balance of interests between the rights holders and the citizens who have a right of access to information. While rights holders stress the importance of legislation ensuring the legal protection of their material against any unauthorized use, access solely through licences controlled by the information producers may limit the citizens' right of free access to information.

Not only should national legal deposit schemes be maintained, but they should be expanded to include material that traditionally has been considered as "archival" material and therefore not subject to legal deposit. Dynamic publications, such as databases, existing in one copy that is stored

⁵³ Ibid.

on a main server accessible to any authorized user should also be subject to legal deposit since they now constitute a major portion of the cultural and intellectual heritage of a country. Legal deposit should therefore include material that exists in one copy only, as long as it is publicly accessible material. With the acceptance of this principle, other “archival” material, such as radio and television broadcasts, could become subject to legal deposit – as is the case in France and in Norway. In many countries, this would require a major modification to the laws related to radio and television broadcasters to ensure that legal deposit is compulsory for both public and private stations.

As a matter of principle, electronic publications of all types should be subject to legal deposit. It is unjustifiable that because of unsolved technical and legal problems, an important component of the world’s published heritage would not be preserved. It is absolutely necessary that all national legal deposit legislation include digital material. National legal deposit agencies have always co-operated with information producers to ensure an efficient legal deposit system, and there is no reason to believe that this would change within a new publishing environment.

There are big challenges ahead in balancing the rights of creators with the rights of users. It is clear that there must be close Cupertino between the national agencies and the rights holders within an efficient copyright clearance system. Solutions must be found. In fact promising models are currently being developed to track the use of material in the networked digital domain and that may include the ability to ensure equal access to information for everyone.

It is very important for all national legal deposit agencies to get involved in the discussions, as the sole organizations able to preserve the cultural and intellectual heritage of nations and to be the guardian of the democratic right of freedom of access to information for all citizens. Legal deposit legislation throughout the world should reflect this responsibility. But there is a certain urgency. As technology evolves, the threat of potential loss of valuable material is growing. Indeed, in certain areas, the situation is almost at the point of no return.

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