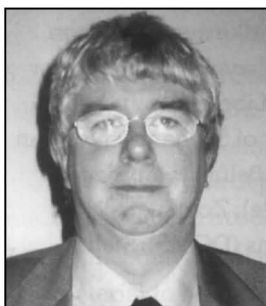


THE LEGAL DEPOSIT OF NON-PRINT PUBLICATIONS: THE 1998 WORKING PARTY ON LEGAL DEPOSIT

Geoff Smith

Paper presented at the 22nd UKSG Annual Conference and 4th European Serials Conference, Manchester, April 1999

The Government has accepted the recommendation of the Working Party, chaired by Sir Anthony Kenny, that legislation for the legal deposit of non-print publications is necessary in order to maintain the UK published archive. As an interim measure, representatives of the publishers and the legal deposit libraries are seeking agreement on a system of voluntary deposit.



Geoff Smith is Head of Modern Collections, British Library Reader Services and Collection Development, 96 Euston Road, London NW1 2DB
E-mail: geoff.smith@bl.uk

Introduction

Under existing UK legislation, incorporated in the Copyright Act 1911, a copy of each book or serial, or other printed publication which is published in the United Kingdom is required to be deposited, free of charge, in the British Library. Under the same Act, five other libraries (the National Libraries of Scotland and Wales, and the University Libraries of Oxford, Cambridge, and Trinity College Dublin) are entitled to receive, on request, free copies of any book or other printed publication published in the UK. This is known as the system of 'legal deposit' of printed publications.

While virtually all publication was as print on paper the system created by the 1911 Act was adequate for the creation and preservation of a national published archive of texts. But with the development of new media and the growth of publication in non-print forms, the existing legislation no longer ensures the continuation of a comprehensive archive of the nation's published material. The Act does not apply to texts published in microform, or electronically, or in any other non-print form.

Moreover, neither recorded sound nor moving images in the UK have been subject to any form of legal deposit. With the co-operation of the British Phonographic Industry, the British Library National Sound Archive (opened in 1955), has built up a substantial collection of sound recordings through a system of voluntary deposit. The government-funded British Film Institute has assembled materials for preservation and study, but the resulting collection is haphazard and incomplete. According to the Institute's estimate, as much as 80% of all silent cinema and up to 50% of all sound films have been lost or remain outside archival protection.

In January 1996 the British Library, in consultation with the other legal deposit libraries, the British Film Institute and other interested

parties, presented to the then Department of National Heritage a proposal to extend legal deposit to cover non-print materials, including audio-visual and electronic publications. Following this, the Government published 'Legal deposit of publications: a consultation paper' in February 1997, which invited respondents to submit their views on a number of specific questions relating to the existing system of legal deposit as well as to options for extension to electronic publications, sound recordings, film and video recordings and microform publications. A summary of the replies was published by the Department for Culture, Media and Sport.

In November 1997 the Secretary of State for Culture, Media and Sport wrote to the Chairman of the British Library Board, saying, *inter alia*:

"We had hoped to introduce legislation to amend the provisions of the Copyright Act 1911 in order to reflect the outcome of the consultation exercise on legal deposit which this Department conducted earlier this year. In the event, it was not possible to include this legislation in the timetable this Session. As a result, I have had to look at alternative means of plugging the rapidly increasing gap that is developing in the national collections in respect of non-print material".

In January 1998 the Secretary of State announced the establishment of a working group, chaired by Sir Anthony Kenny, comprising representatives of the British Library, legal deposit libraries, libraries in Northern Ireland, the British Film Institute, and publishing sectors. In announcing the setting up of the Working Party, the Secretary of State affirmed: "The Government believes that it is extremely important to ensure that material published in this country is incorporated into our national archive irrespective of the medium used. The arrangements for legal deposit, which are concerned primarily with published material in print form, underpin the nation's academic, research, and educational sectors. We intend to ensure that these benefits extend also to material published in formats other than print."

The terms of reference of the working group were as follows:

- (i) to advise on how an effective national archive of non-print material might be achieved,

taking into account the need to minimise the burden on publishers, the need to safeguard deposited material from unauthorised use, the archival value of the material, and the scope for making deposited material available among legal deposit libraries through secure IT networks;

- (ii) to draw up and agree a voluntary code of practice to achieve deposit of electronic and microform publications until such time as the Government may decide to introduce legislation;
- (iii) to ensure that such arrangements are compatible, where appropriate, with the existing arrangements for the voluntary deposit of films and sound recordings;
- (iv) to advise on the scope for developing the existing arrangements for the deposit of printed publications with a view to ensuring greater co-operation between the different legal deposit libraries, encouraging greater selectivity in the material claimed from publishers, and the scope for developing IT networking solutions which can in the longer term be used to reduce the statutory burden on publishers in complying with the deposit arrangements.

The Secretary of State also asked the Working Party to examine the scope for improved access in Northern Ireland to deposited material through IT networking. He asked for the report to be delivered within six months.

The members of the working party were:

Sir Anthony Kenny (Chair); Andrew Phillips (British Library); Geoff Smith (British Library); Clive Bradley (Publishers' Association); Andrew Lucas (Reuters); Anthony Watkinson (Thomson Science); Stephen Hall (Chadwyck-Healey); Peter Fox (Cambridge University Library); Ian McGowan (National Library of Scotland); Norman Russell (Queen's University Belfast); Clyde Jeavons (British Film Institute); Zoe Everest-Phillips (DCMS); Chris Atkins (DCMS); Stella Pilling (British Library - Secretary)

The working party met six times and held an open meeting in June 1998 for external interested parties. It presented its report to the Secretary of State in July 1998. In December 1998 the Secretary of State gave his response to the report in a parliamentary answer. The report was then made

available publicly on the DCMS Web site at: <http://www.culture.gov.uk/LDWGRPT.HTM>

The Working Party's conclusions

The Working Party was convinced that only a system of legal deposit will be adequate to secure a comprehensive national published archive for non-print publications. Agreement was reached on the following general principles for such a system:

- 1 legislation should empower the Secretary of State, after appropriate consultation, to declare, from time to time, publications in specific new media to be subject to the obligation of legal deposit;
- 2 whenever an item in a specified medium is published, the rights owner should enable the national published archive to hold that item both for purposes of archiving and of access to that archive;
- 3 in the case of items published in more than one medium, the publisher's obligation to any repository of the national published archive shall be satisfied by deposit only in a single medium, but the choice of the medium of deposit should be made by the repository;
- 4 once a work has been deposited in a repository of the national published archive, access should be given to authorised users of that repository, unless it belongs to a category for which it has been determined that access will be temporarily restricted;
- 5 the dissemination of the work in whole or in substantial part beyond the confines of the national published archive shall be permitted only (a) after the expiry of copyright or (b) by agreement with the rights holders;
- 6 the Secretary of State, in declaring a medium to be subject to the obligations of legal deposit, may exempt certain categories of material whose deposit would place an unreasonable burden on their publishers;
- 7 applications from publishers for additional material to be excluded or embargoed, and points of dispute about the application of the obligation of legal deposit should be determined by a standing committee, responsible to the Secretary of State, containing representatives both of publishers and repositories and their users.

The principles were deliberately general and abstract, so that they can apply to publications in different media, including media not yet invented. Appendices to the report discuss and spell out how they should apply to particular media currently in existence.

It was recognised that no single institution or repository could provide the appropriate home for the deposit of all non-print material. It was recommended therefore that the national published archive should be a distributed one, made up of a number of distinct repositories, including, but not necessarily restricted to, the six current legal deposit libraries and the British Film Institute. No change was proposed in the number of repositories currently entitled to the legal deposit of printed publications. However, further measures were proposed for the streamlining of the existing arrangements for the deposit of printed publications

The main area of contention in the Working Party's deliberations was about access arrangements within a distributed system. The minimum form of deposit which would enable a national published archive to be created would be the deposit of each item in a single location, with access restricted to a single user at that location at any one time. Beyond this minimum requirement, the Working Party was not able to reach a unanimous conclusion about the most desirable form of the distributed national published archive. In the opinion of the publishers' representatives, an effective national published archive of these information media can be created by deposit in a single location, with access restricted to a single user in that location at any one time. They considered that deposit in multiple copies, or networked access at more than one location, would be unacceptably burdensome, could allow control of the data to be lost, and in some cases would endanger the commercial viability of a publication.

In the view of the repositories, it is important that items should be generally available for consultation in the context of the historical research collections in each of the legal deposit libraries that together form the distributed national archive of printed publications. They agreed that, regardless of the electronic medium of publication or deposit, access to a given publication within each of these libraries should

be restricted to one single user at any one time. Any wider access should be allowed only with the agreement of the relevant rights holders on licensing, which might include the payment of a royalty to rights holders. With these restrictions, they believed that 'hand-held' electronic publications, such as CD-ROMs, once an agreed level of sales in the UK was achieved, should either be deposited in up to six copies if claimed by the libraries, or deposited in a single copy in one legal deposit library with access over a network to other legal deposit libraries, and a designated node in Northern Ireland.

It was seen as important that some forms of on-line publications, in particular monographs and journals, should be included in deposit arrangements and preserved in an appropriate repository, with categories of exemption and restrictions on access such as are necessary to safeguard the viability of publication and avoid compromising the rights of rights holders. However, there are problems of definition and complex technical and commercial issues relating to other forms of on-line publication, such as databases and Internet publications other than journals and electronic books. These should be excluded initially and given further consideration in future. It was recommended that primary legislation should be framed in terms which are broad enough for on-line publications to be within the scope of the system, but which allow the inclusion of some types of publication and exclusion of others to be defined and to be modified over time.

If networked access is permitted for any form of information, it was seen as essential that publishers and other rights holders can have confidence in the security and monitoring of any such network among the legal deposit libraries. They must be satisfied that adequate monitoring procedures have been put in place to safeguard their concerns about the risk of unrestricted access to deposited publications and their unauthorised duplication and use. A standard set of terms and conditions, governing the use of networked material and services by users, should be drawn up by the repositories in collaboration with publishers.

Whatever arrangements are agreed for the deposit of non-print media, they must include provision for copying for the purposes of

preserving information and allowing continued access to that information in the event of the obsolescence of the original hardware and software platforms and data formats.

Secretary of State's response to the report

The Secretary of State gave his response to the report in a written parliamentary answer in December 1998. In this he concluded:

"I agree with the report's conclusion that a voluntary code will not be viable in the longer term and I believe the report makes a convincing case for moving towards legislation for the legal deposit of non-print publications on the basis of minimum burden on publishers and minimum loss of sales.

It will be necessary to do further work on definitions and the impact on business and I have asked Sir Anthony Kenny to take this forward through the medium of the technical group of library and publishing experts. Once that is done we shall move towards legislation".

The further work he requested consists of two elements; the first was that as an interim measure a code of practice for the voluntary deposit of non-print publications should be drawn up, agreed and implemented between publishers and the deposit libraries. The second was that it would be necessary to prepare a 'regulatory impact assessment' of the costs and benefits of the statutory deposit of non-print publications before the proposed legislation is drafted. This assessment is expected to be prepared during the 1999/2000 financial year.

Although the Secretary of State's parliamentary answer suggests that the Working Party's report "... concludes it would not be feasible to include on-line publications and databases ...", the report actually recommends that some kinds of on-line publications, such as monographs and journals, should be included in deposit arrangements, and it is expected that these will be included in the proposed code of practice.

Subsequent developments

The work of drawing up a code of practice for voluntary deposit has been under way since the beginning of 1999. An initial draft is being prepared by representatives of the British Library

(Geoff Smith) and the publishing industry (Sally Morris and Anthony Watkinson). This draft will be circulated in the near future for comment to the legal deposit libraries and to publishers' representative bodies. Once the code of practice is agreed it is expected that it will be endorsed by the libraries, publishers' bodies, and DCMS and will then be issued to publishers.

At the time of writing the provisions of the draft code of practice are as described below. It should however be recognised that the code is not yet agreed and that therefore the provisions may change in the final version.

Deposit of a publication will be required if the item is published or distributed in the UK, and if it is substantially 'fixed' in form at the time of publication.

Publications which appear with substantially identical content in more than one medium only need to be deposited in one medium, with the choice of medium to be with the repository.

While the British Library and the other legal deposit libraries are already able to accept voluntary deposit of microform and 'off-line' electronic publications such as CD-ROMs, the deposit of on-line publications need at this stage to be treated as pilot projects. During the voluntary period it is likely that the deposit of on-line publications will be limited to journals and monographs.

Deposit will not be required if an item is published only for private internal use within an organisation; if it is already been deposited under a publishing agreement; if it is an excluded category e.g. software, games; if it is continuously updated or dynamic in nature; e.g. databases, Web sites

For off-line publications, one copy must be deposited; with up to five more on request from the other deposit libraries at the publisher's discretion

For on-line publications it will be necessary for publishers to discuss suitability for deposit, and method/formats for data transfer, with the library before depositing.

If a single copy only is deposited, publishers should specify at the time of deposit whether or

not tightly controlled network access is permitted. Where permitted, such access would be across a closed network between deposit libraries to a single user. This might be either a single user at a time across the whole network or a single user at a time within each library.

Wider access will only be permitted under explicit licence from the publisher, with payment of licence fees and/or royalties where appropriate

Limited printing out of parts of the content would be permitted, equivalent to the private research/study photocopying of printed materials. Downloading, or copying to hard or floppy disk or other device, would be permitted only within the PA/JISC guidelines on Fair Dealing¹.

The copying of the contents of electronic publications to other media for preservation purposes by the deposit libraries will need to be permitted.

A research project is being undertaken under the auspices of Book Industry Communication (BIC) to identify and recommend appropriate standards for transfer and archiving of electronic publications. The technical recommendations from that project will form an appendix to the code of practice.

A period of voluntary deposit, ahead of an eventual statutory scheme, offers publishers and deposit libraries an opportunity to work together on the complex technical, legal, economic and management issues associated with creating, preserving and providing access to a national distributed archive of UK non-print publications. I trust that the importance of this long term endeavour will encourage all sides to do their best to ensure that it is achieved successfully.

References

1. Guidelines for Fair Dealing in an Electronic Environment. Joint Information Systems Committee and the Publishers Association, 1998. <http://www.ukoln.ac.uk/services/elib/papers/pa/fair/>
(Summary at: <http://www.ukoln.ac.uk/services/elib/papers/pa/licence/fairnote.html>)