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LEGISLATING THE RAINBOW:
Legal Deposit, Access and Distribution in a
Digital Environment

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Introduction

I thought of calling this paper The Grey Rainbow. This was partly because all of the other papers have titles including the words rainbow, pot of gold and so on. And partly because, frankly, the topic is not only unexciting, but neither I nor anyone else knows the answer.

I have two qualifications for presenting this paper. First, I have been involved with legal deposit, from many angles. When I started working in libraries twenty years ago, I started at the blunt end of legal deposit: stamping them, acknowledging them, and writing out temporary main entry cards to put into the catalogue so that no-one could ever find them.

Second, as director of VICNET, I am now an electronic publisher myself. As such, I am ultimately responsible for the irretrievable loss of megabytes of published material as we assiduously revise the content each day.¹

This paper does not deal with the mass of issues surrounding legal deposit collections - the conference covers most of these issues in great detail. I will try to answer a fairly narrow question: Is legal deposit - legislation or regulation requiring deposit of published material - relevant to the new media? And if so, in what way? I will be looking primarily at the practicability of legal deposit as a means of obtaining and preserving documentary material. I will use the following headings:

1 What is legal deposit?
2 How has it changed?
3 Can we define it?
4 Can we enforce it?
5 Can we do it?

A short comment on terminology. “New media”, of course, means any medium for the transmission of information invented since Johann Gutenberg’s brilliant idea, in the 15th century, of printing from movable type.

¹ VICNET can be accessed at: http://www.vicnet.net.au.
The Capturing the Rainbow theme of this conference refers to interactive multimedia - the picture on the cover of someone juggling brightly coloured disks gives us some idea of what the term “multimedia” means, if anything. I have not tried to define “multimedia”. No-one else at this conference has, so I don’t see why I should try. However, there is an official Victorian Government definition of multimedia, which I offer instead:

“a term that refers to combinations of images, text and sound which use newly converging telecommunications, computing and authoring technologies to provide traditional media and information services in new ways, as well as completely innovative services.”²

This paper is mainly concerned with the challenges posed to legal deposit by electronic publishing - particularly network publishing, and to a lesser extent electronic publishing using an artefact for transmission.

The word “thing” is pivotal to the conclusions of this paper, inasmuch as there are conclusions, and I shall return to it later.

1 Legal Deposit: What Is It?

Legal deposit can be defined as

“a government provision which compels producers of all types of publications to deposit a certain number of copies of each publication in designated libraries or similar institutions.”³

Legal deposit is implemented in Australia through legislation (for non-government publishing) and administrative directive (for government publishing).

The purpose of legal deposit is usually said to be the preservation of the published output of a country or state, and sometimes the provision of access is also added as a purpose. If there is a single purpose for legal deposit, it is about access and use, now and in the future - preservation itself has no point if the item is never to be used. This point needs to be made: some librarians have an imperfect grasp of it.

Legal deposit has only ever applied to published cultural artefacts. A variety of measures has been applied to preserve unpublished material. In particular, legislation has required preservation of unpublished material generated by government. Collection of non-government material has been largely voluntary.

The purposes of legal deposit are almost self-evidently desirable, and in fact compliance is fairly universal. Why would publishers not comply? Does the advent of electronic publishing change the likelihood of willing compliance?

Before trying to answer that question, I will quickly survey the ways in which defining “published” and “publication” became harder and harder between the late 19th century and the late 20th century.

2 How Has It Changed? - Publication and Printing

For most of the history of legal deposit, publication and printing were virtually synonymous. Over the past century, however, the two concepts ceased to coincide. The villains in this process have been:

- Thomas Edison and the phonograph, introducing the sound recording in 1877
- Edison again with moving images on film in the 1890s, and Warner Brothers for the talking movie
- Marconi began the broadcasting of sound in the 1890s, introduced on a mass scale in the 1920s, and followed by
- television, courtesy of John Logie Baird in 1926 and the BBC in 1936
- magnetic tape as a storage and distribution medium from the 1940s, followed much more rapidly by
- the first computer (ENIAC) in 1946
- optical storage and distribution media
- digital storage and transmission.

The reality now is a convergence of media, in that all can be stored and transmitted - published - in the same way, creating dilemmas for legal deposit.

### 3 Can We Define It? New Approaches to Definition

Until quite recently, Australian legal deposit legislation largely referred to printed materials, such as books, maps, charts, and the like. It caught up with Edison in the 1960s and 1970s by adding film, sound recordings and video recordings.

Victorian legislation in 1988 attempted to bring this further up to date, by opening out the definition:

> "any part of
> (a) any printed book, periodical, newspaper, pamphlet, musical score, map, chart, plan, picture, photograph, print and any other printed matter; and
> (b) any film (including a microfilm and a microfiche), negative, tape, disc, sound track and any other device in which one or more visual images, sounds or other data are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it."^4

And in Western Australia:

> "Published material" means any book, periodical, newspaper, pamphlet, printed matter, poster, map, plan, sheet of music, film, sound recording, video recording, computer software and any other matter or thing whereby words, sounds or images are recorded or reproduced whether by electronic or other means. (WA, proposed Sept, 1992)^5

It should be noted that all three definitions rely on the existence of a “thing”, or in the Victorian definition a “device”, or Western Australia a “matter” or a “thing.” That is, something is a vehicle upon or in which the “publication” resides.

Others have also done some work. In Canada an electronic publication is defined as:

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^5 Communication from the Library and Information Service of Western Australia to the author.
“a document resulting from the act of publishing in which information is encoded, accessed, and made intelligible through the use of a computer. Electronic publications fall into two broad categories: those that are distributed in multiple copies on ‘hard’ media, such as compact discs, diskettes and magnetic tapes; and those that reside on the host computer and are accessible over a communications network.”  

The National Library of Australia, working with the National Film and Sound Archive, is now seeking extension of Section 201 of the Copyright Act, which deals with legal deposit. It is planned to seek extension of legal deposit to cover non-print forms, as well as the right “to select and acquire without impediment” from networked information.

The submission makes a number of proposals, and includes a rationale. Part of this rationale is an admission of the necessity of selection from published material: that is, there can be no comprehensive preservation of published material, even though there may be an obligation on all publishers to make all publications available to the deposit institutions.

The core proposal is that there be guaranteed acquisition on fair and reasonable terms. This appears to mean that the provider of a copy of a work should be obliged to provide it where this can be done “without being subjected to undue cost or hardship.”

In terms of definition, it is proposed that “the scope of publications to be covered by the legal deposit provisions of the revised Copyright Act be extended to include microforms, audio-visual materials of all kinds and electronic publications, both networked and artefactual (eg CD-ROM), or formats yet to be developed ...” (Rec. 6.3.1)

The most exciting new work on definitions has been done in a different context. The New Zealand Film Video and Publications Classification Act 1993, as well as dealing with films, videos and books, covers “any electronically stored “thing” (ii) On which is recorded or stored any information that, by the use of any computer or other electronic device, is capable of being reproduced or shown as any word, statement, sign or representation...”

The Act then goes on to define which such things are objectionable. The definition appears to encompass information stored anywhere in a computer. The definition of publication has been extended.

In Victoria, an Act was passed by Parliament last Thursday dealing with the same subject. It uses definitions from Commonwealth legislation, including the following:

A publication is “any written or pictorial matter ...” other than a film or computer game or advertisement for any of these. (S.5)

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7 Information provided by the National Library of Australia.
A film is “...any other form of recording from which a visual image, including a computer generated image, can be produced.” (S.5)
A computer game is “a computer program and associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game.”

The Victorian bill also has a definition of “publish”
“publish includes sell, offer for sale, let on hire, exhibit, display, distribute and demonstrate;” (S.3)

It differs from the Commonwealth Act in that it includes a section dealing with “on-line information services” (Part 6). These are defined as “a service which permits, through a communication system, on-line computer access to or transmission of data or communication programs.” (S.56)

This discussion of definitional issues raises several critical questions, and a few fairly obvious conclusions.

1 In future (as in practice in the past) legal deposit will recognise the need to select for preservation, and the impossibility of collecting everything. This was just conceivably possible with print, but is no longer so.

2 Previous definitions have used terms such as:
   • thing
   • document
   • device
   • matter or thing
to describe the vehicle by which the information is made available. Terms like “thing” are essentially means by which drafters of legislation keep their options open by being as non-specific as possible. However, future definitions must focus less on the container of the information, and more on the information.

3 The definition of publication must also be extended. The NLA and NFSA propose that this be by including the concept of publication by transmission, or “making the material available to the public by electronic means”, as is foreshadowed in recent censorship legislation.

4 New legislation will have to be flexible, and it is proposed that much of the content of the legislation should be in regulations.

The conclusion is that definitional issues alone will not really prevent us, by legislation and regulation, from developing the internationally-accepted institution of legal deposit to apply in a networked environment.

4 Can We Enforce It? or, Why Would Publishers Not Comply?

Definitional issues are only part of the matter. Could we enforce such legislation? Would publishers comply?

Legal deposit exists to serve a clear national interest: the preservation for all Australians, now and in the future, of their documentary heritage. To us, it is hard to see a case against this. And in fact, few publishers ever argue against it. Compliance with legal deposit is near-universal, and if it is not always spontaneous,
we find that when publishers are informed of legal deposit requirements, they are mostly happy to comply. Why would they not?

In asking the question *Can we enforce it?* we need to look at the practical administration of legal deposit in the new electronic publishing environment, and at some of the problems which arise now in a small way and might arise in the future in a larger way.

There are some cases where a publisher might not want to comply:

1. Inertia and ignorance. These are the main reasons currently for non-deposit: a publisher does not know of the requirement, or does not bother. Libraries put a great deal of effort into legal deposit. Most publishing is non-commercial, and most publishers do not know about legal deposit. Much effort now goes into chasing up material. Given that we can all be publishers now, on the World Wide Web, ignorance and chasing up are going to become even more serious problems.

2. There is a high marginal cost of depositing. e.g. limited editions, short print runs. Some publishers object to any deposit as an unjust imposition on them.

3. The publisher does not want the publication in a library because its presence there will diminish the value of the remaining copies; e.g. a high-cost newsletter containing inside information, or a very expensive subscription online information service. Or, presence in any library would make the item susceptible to illegal copying, or any copying, which may substantially diminish revenue from sales. e.g. an electronic publication - there is less concern with print.

4. Presence in a library is normally subject to licensing conditions, which increase the return to the publisher on the basis that many people will use the electronic publication. CD-ROMs are often subject to licensing, and this will be true of many charged network publications. Legal deposit does not normally permit the publisher to impose conditions on the deposit of a publication.

5. The publisher may have contractual obligations which actually prevent deposit. For example, a publisher may have a contract with the owner of the software used in a publication.

6. Current legislation requires delivery by the publisher of the “thing”. It also requires deposit of every new edition. However, where the “thing” is not an artefact which is fixed in form and content, but a machine-readable text or multimedia file which changes frequently, this obligation will become immensely onerous, and is likely to be widely (and not unreasonably) ignored.

These are all reasons why people would not want to comply with legal deposit, or would oppose updating the existing legislation. They are all legitimate concerns of publishers, and I think that they can probably be overcome.

In the final section of this paper, I will look at some practical issues in doing this.

5   Can We Do It? - Issues in Legal Deposit
There have been substantial contributions to this by Margaret Henty\textsuperscript{12} and Ray Edmondson of the National Film and Sound Archive\textsuperscript{13}, and I am indebted to their contributions, and to the National Library’s thinking on the matter.

There are formidable practical problems, and I do not have the answers to them. To conclude this paper, I will summarise the issues involved in moving legal deposit to an electronic publishing environment.

1 We will need to develop the concepts of delivery and receipting, which exist in existing legislation. While the importance of documenting what a depository library has received will remain important, it may be possible for the depository library to help itself to networked publications: this would involve an institution copying any electronic publication, or for that matter radio or television broadcast, at its own discretion and in accordance with clear regulation.

2 The issue of access is critical, and many objections which publishers might have could be overcome by restricting access to deposited electronic publications in various ways. This conflicts with the access role of legal deposit, and there is no clear answer. Some restriction on access and copying will probably be critical in gaining acceptance.

3 For preservation, reformatting is critical. We do this with newspapers, which are a less durable format. We will need to do it with magnetic tape formats, which are far less durable than newsprint. We will need to do it with digital publications, to make its future use possible as software changes. Reformatting infringes the rights of copyright owners, and has the potential for major infringement, but without reformatting legal deposit is useless. There will need to be answers sorted out for this.

4 As pointed out, selective acquisition and retention is axiomatic. But what basis will we use for selection? And, more difficult, how will we justify individual decisions? Some publishers demand that their material be accepted and retained - there will be many more of these as the vast new possibilities for vanity network publishing are exploited. We will not be able to make everyone happy. We will need to be accountable for our non-selection decisions.

5 At present Victoria and NSW estimate that perhaps 40% of material received - monographs at least - lacks significant Australian content. Should future legislation limit legal deposit by some kind of Australianness test? Should we be applying such criteria in our own selection decisions? If we did, this would conflict with IFLA’s concept of Universal Availability of Publications.

6 What will be the respective roles of the National Library and the state depository libraries? Print publications have clear places of publication, network publishing less so. It might be argued that for network publishing, re-publication becomes extremely common. Is a mirror site a republisher? or a reprinter? There is a case for the states to graciously waive to the National Library the role of collecting network publishing, and I must admit that this has been suggested by my own staff. However, in the end we will not want to do that - state collecting policies are unlikely to permit it, and no library wants to be relegated to the pre-electronic age.

\textsuperscript{12} Henty, Margaret, Australian Networked Information: the Role of the NLA. 1995.
\textsuperscript{13} Edmondson, Ray. Communication with Margaret Henty. 3 July, 1995.
7 Another and related issue is cost and scope. The costs of fulfilling our traditional role and extending it to electronic publishing are potentially vast. Our traditional role continues unabated - in fact print is continuing to grow. To this will be added acquisition and preservation roles which may well be even more cost-intensive. What would it cost to digitise Australia’s output of publications on magnetic tape? What will it cost to store terabytes of digitised deposit material? The resourcing issue is almost unimaginable, and we need to take it seriously.

8 Copyright is currently a major impediment to much we would like to do with electronic publishing. Again, this raises the issue of access versus preservation: preservation without contemporary access is likely to be far more acceptable. Perhaps it will be necessary to choose. Electronic publications in a client/server environment are by definition copied by the user, and legal deposit with free access takes control of use out of the hands of the publisher.

9 The use of much documentary material is often now regulated by contract law rather than by copyright law. Licensing of information is no doubt a form of publication, but a fairly new one. What kind of license would legal deposit of an electronic publication confer, if any? What kind of obligations will deposit of a licensed product impose? And if a title is published as a lease rather than a purchase, what does this mean?

10 The definition of publish and publication can probably be managed, but there will still be grey areas. Is COLLIBS [an online list] a publication? Archived files of discussion lists? Is every web site a publication? We will solve this as we do now, by making judgements, but we are far more likely to have our judgements tested. It seems most likely that the whole, vast World Wide Web is publishing in the current sense of the term.

Conclusion: What is achievable?

So there are ten issues. When we have sorted these out, we should be set up for the electronic publishing age. Unfortunately, I have not been able to suggest clear directions for any of them.

There are two simple steps we might take now.

- Cooperation is going to be critical - no one institution can do everything. We probably need to establish a wider network of cooperative mechanisms, with other research libraries, cultural institutions, and the like.

- There needs to be further work on just how we are going to frame legislation, and we need to work for a common approach with publishers, copyright owners and other parties.

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