

20 April 2012

Ms Toni Pirani
Assistant Secretary
Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
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By email: copyright@ag.gov.au

Dear Ms Pirani

SUBMISSION ON CONSULTATION PAPER: EXTENDING LEGAL DEPOSIT

The National Film and Sound Archive of Australia (NFSA), a statutory authority established by the *National Film and Sound Archive of Australia Act 2008* (Cth), is Australia's national audiovisual archive, responsible for collecting, preserving and providing access to the nation's moving image and recorded sound heritage (the National Audiovisual Collection).

The NFSA has considered the Consultation Paper on Extending Legal Deposit¹ and is grateful to the Attorney-General's Department (AGD) and the Office for the Arts (OFTA) in the Department of Regional Australia, Local Government, Arts and Sport for the opportunity to comment.

This submission is made by the NFSA primarily as a prospective legal deposit institution which has made submissions on this issue, along with the National Library of Australia (NLA), as early as 1995. The NFSA could also have deposit obligations as a publisher.

GENERAL COMMENTS

The NFSA continues to support the extension of the statutory scheme, so that electronic "library material" relevant to the NLA's statutory functions² are delivered to the NLA and audiovisual material relevant to the NFSA's statutory functions³ are delivered to the NFSA. The NFSA supports the proposed staged approach, with the scheme for the NLA being extended first through amendments to the *Copyright Act 1968* (Cth) (the Act), if this is the swiftest way of extending legal

¹ <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Extending-Legal-Deposit.aspx>

² section 6, *National Library Act 1960* (Cth)

³ section 7, *National Film and Sound Archive Act of Australia 2008* (Cth)

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deposit **and** it allows for the further extension of legal deposit to the NFSA in a second stage soon afterwards.

The NFSA's most recent public submissions on the subject, in response to the 2007 Discussion Paper on the Extension of Legal Deposit, were made on behalf of the NFSA as a division of the then Australian Film Commission (AFC).⁴ Strong support was given to the extension of the statutory (or legal) deposit in relation to electronic library material **and** audiovisual materials. Without this, the publicly funded institutions mandated to collect and preserve Australia's cultural output remain heavily dependent on active industry liaison and voluntary participation to undertake their core functions.

The existing scheme in place for "library material" published in Australia combined with the voluntary delivery of electronic "library material" is not practical for the NLA to develop an adequate national collection of library material. Similarly for the NFSA, despite cooperation from industry and government agencies, including from Screen Australia (a successor to AFC), the extension of legal deposit to audiovisual materials is still necessary for the effective and efficient development of the National Audiovisual Collection.

Under existing arrangements, there is a high risk of culturally significant material not being preserved by public institutions for future generations. The NFSA is aware that significant documentation of the floods of 2010-2011 in the State of Queensland and responses to political issues such as the recent Australian Labor Party leadership challenge have become inaccessible within a short period of time and are under-represented in national collections. Another example is the Australian Government-funded website Australian Music Online which was funded until April 2007. Its text and images are archived on PANDORA but no sound is available.⁵ On the recent launch of the latest round of consultations⁶ on extending legal deposit in the UK, The British Library referred to particular documentary material at risk:

"Internet and social media coverage of the 2011 London riots, the 2009 Parliamentary expenses scandal, and the 2005 London Bombings have already been lost and it has been estimated that less than 1% of all online activity of the 2012 London Olympics and Paralympics will be captured."⁷

While the NFSA welcomes the current consultation by AGD and OFTA, which is without prejudice to further consultation on the extension of legal deposit to audiovisual material relevant to the NFSA's functions, it considers that the impact of media convergence on industry and key differences in the practices of the intended legal depositories should be considered early. Some of those impacts and differences are addressed in this submission in the interests of ensuring that schemes for library material and audiovisual material can operate in harmony and with minimal imposition on the parties with legal deposit obligations.

PROPOSED MODEL

The NFSA supports the outline of the proposed model to extend the legal deposit scheme for "library material" for the NLA. The NFSA is aware that the NLA is considering a range of technological solutions to come in the detail of the model. An automated demand and delivery

⁴ <http://www.arts.gov.au/about-office-arts/public-consultations-submissions/archived-consultations/discussion-paper-extension>

⁵ <http://pandora.nla.gov.au/pan/44131/20071122-0001/www.amo.org.au/default.html>

⁶ Consultation on the Legal Deposit of Non-Print Works, Department for Culture, Media and Sport (DCMS), 24 February 2012, <http://www.culture.gov.uk/consultations/8878.aspx>

⁷ British Library welcomes public consultation on non-print legal deposit, Press Release, The British Library, 27 February 2012, <http://pressandpolicy.bl.uk/Content/Detail.aspx?ReleaseID=1398&NewsAreaID=2&ClientID=1>

solution for library material online could significantly minimise the resources required by parties with legal deposit obligations and the NLA. The NFSA believes that, in the absence of broader rights for the NLA to fulfil its functions, this level of automation promises significant advantages over the existing manual processes for the NLA and parties with deposit obligations.

However, a significant difference for further consultation on the extension of legal deposit for audiovisual material for the NFSA is a notification step. The NFSA considers notification of publication as a preferable first step for the selection and collection of all audiovisual material and necessary for managing any audiovisual material which is not online or otherwise capable of electronic delivery to the NFSA.

DEFINITIONS

The drafting of definitions requires consideration of the impact of media convergence on material to be delivered and the respective functions of the NLA and the NFSA. Other terminology also warrants attention.

Library material (Consultation Paper Issue 1)

The NFSA supports the proposal to adapt the existing definition of "library material" to the realities of the digital environment. The NLA and the NFSA have discussed the definition of material, particularly in relation to material of mutual relevance to their respective functions. A working draft of material and potential overlaps is attached to this submission at **Appendix 1**.

Any amendment to the definition needs to be technology-neutral, future-proof, and maintain the distinction between material of relevance to the NLA and material of relevance to the NFSA. This becomes challenging for drafting purposes when dealing with mixed material of a literary and audiovisual nature. An example in the working draft is websites containing audiovisual content. The definition for a content-specific scheme would need to clarify that electronic library material (intended for the NLA) excludes material which is predominantly audiovisual (intended for the NFSA). Although any overlaps or misdirected delivery of material could be managed through the arrangements of the NLA and NFSA, the NFSA considers that an extended scheme or schemes should strive for the appropriate delivery of material from the outset.

The Convergence Review⁸ attracted submissions by stakeholders concerned about the implications of a convergent media environment. The NFSA encourages AGD to consider any comments made by the Review Committee about those submissions in its final report scheduled for release this year.

Deposit v delivery

In the absence of an alternative right or mechanism for the NLA to collect relevant material, the NFSA supports the position of the NLA in using "delivery" as a more technology-neutral and media-neutral term than "deposit" to describe the act of a party fulfilling its legal deposit obligations.

Selectivity and cultural significance

The NFSA foresees itself operating a selective scheme for audiovisual material considered to be culturally significant. Accordingly, to the extent that the proposed scheme is selective for library material online delivered to the NLA, the NFSA recommends consideration of terminology to reflect

⁸ http://www.dbcde.gov.au/digital_economy/convergence_review

that the basis for the demand, delivery and retention of the material is its cultural significance in the view of the NLA. Existing terminology in the Act may be useful to adopt if clarification is warranted.⁹

Publisher

Another definition which may warrant attention is the party with legal deposit obligations. While the 'publisher' of library material offline is unlikely to be contentious, the legal deposit obligations in respect of library material online could be complicated by the existence of distributors, aggregators and other intermediaries. The NFSA supports a model where the obligations to deliver library material online lie with the party best positioned to fulfil them with the greatest efficiency and lowest burden.

In relation websites, the NFSA considers it appropriate for the scheme to apply to the widest extent possible to material on websites which have an audience in Australia.

Regulations

The proposal to use a legislative instrument in the form of regulations to detail material types would be appropriate if periodic review is undertaken. This mechanism could be used in anticipation of or in response to technological developments around material types, formats, carriers, computer program languages and Technological Protection Measures (TPMs). The NFSA anticipates that review would be required at least every 3 years in respect of electronic materials containing audiovisual materials, subject to changes in industry cycles.

TECHNOLOGICAL PROTECTION MEASURES (TPMs) (Consultation Paper Issue 2)

As a matter of principle, the NFSA prefers the delivery of material in its original published form for the reason that legal deposit has traditionally served the purpose of collecting and preserving material as it was made available to the public. However, to ensure that the contents of material can be preserved, the NFSA also supports the delivery of material unencumbered by TPMs and any other form of restriction that would prevent or hinder the NLA from undertaking its functions. If this flexibility is not available, the less efficient option to circumvent would be required. Therefore the NFSA supports the delivery of library material both in its unprotected form and in its protected form (if applicable). This would result in at least two copies being delivered. If for any reason a scheme cannot provide for the delivery of material unencumbered, a broad right to circumvent the TPM or other protection in the most efficient way possible will be essential. Any right of circumvention would need to be accompanied by an expanded legal immunity for developing and applying TPMs for specific purposes.

ADMINISTRATION AND COMPLIANCE COSTS (Consultation Paper Issue 2)

The impositions of legal deposit could be minimised through the broadening of a depository's rights (e.g. TPM circumvention) and the automation of demand and delivery processes to the fullest extent possible. The technological solutions under consideration by the NLA have potential to make implementation and compliance as close to cost-neutral as possible. The selective nature of extended legal deposit in relation to library material online, combined with a technical solution controlled by the NLA, could offer significant efficiencies.

⁹ Sections 47(6), 70(6), 107(6) and 248H(6), *Copyright Act 1968* (Cth), provide for the delivery of material "of an exceptional documentary character" to the National Archives of Australia, with the consent of the Director-General, as a condition of compliance with specific copyright exceptions to facilitate broadcasting.

PUBLIC ACCESS TO DEPOSITED MATERIAL (Consultation Paper Issue 4)

The NFSA considers that rights of public access to collections in general are insufficient. However, the NFSA supports the proposal for public use of material subject to an extended legal deposit scheme to be subject to copyright exceptions in the Act. This is consistent with existing arrangements.

USE OF DEPOSITED MATERIAL BY THE NLA (Consultation Paper Issue 5)

The NFSA considers that the rights of libraries and archives in general are insufficient for libraries and archives to fulfil their functions. However, the NFSA supports the proposal for the use of material subject to an extended legal deposit scheme to be subject to provisions of the Act. This is consistent with existing arrangements.

The NFSA expects that the forthcoming Copyright Review by the Australian Law Reform Commission¹⁰ will consider, among other issues, the adequacy of public access rights **and** the rights of libraries and archives. The NFSA encourages AGD to consider submissions made to that Review while progress is being made with the extension of legal deposit. (The ALRC is due to report no later than November 2013).

PENALTIES

The NFSA considers that penalties for intentional non-compliance need to be of a magnitude that equals or exceeds the cost of compliance. In many cases the current penalty of \$100 will not be a disincentive.

NFSA AS A PUBLISHER

The NFSA as a publisher and statutory authority supports the proposed model if it does not require the delivery to the NLA of NFSA's materials which are already subject to delivery to the National Archives of Australia under the *Archives Act 1983* (Cth).

The NFSA appreciate AGD's consideration of this submission and would welcome further opportunities to comment on the development and implementation of proposals as they relate to the NLA and/or the NFSA.

If you have any questions, please contact Adam Flynn, Principal Legal Officer, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely



Michael Loebenstein
Chief Executive Officer

¹⁰ <http://www.alrc.gov.au/inquiries/copyright>

APPENDIX 1

WORKING DRAFT LEGAL DEPOSIT MATERIAL LIST

	LIBRARY MATERIAL	ELECTRONIC LIBRARY MATERIAL OFFLINE	ELECTRONIC LIBRARY MATERIAL ONLINE	AUDIOVISUAL MATERIAL	ELECTRONIC AUDIOVISUAL MATERIAL
<p>Material relevant to the NLA for inclusion in an extended legal deposit scheme</p>	<p><i>library material</i> as defined plus:</p> <ul style="list-style-type: none"> • microform <p>Enforcement is and will remain selective (ie if some materials are not required by the NLA, it does not follow up on a failure to deposit these materials)</p> <p>Existing definition of <i>library material</i></p> <p><i>s201 Copyright Act 1968 (Cth)</i></p> <p><i>library material</i> means a book, periodical, newspaper, pamphlet, sheet of letter press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of such a work, but does not include a second or later edition of any material unless that edition contains additions or alterations in the letter press or in the illustrations. (<i>illustrations</i> includes drawings, engravings and photographs.)</p> <p>material needs to be “published”.</p>	<p>literary, dramatic, musical (noting the predominantly sound recording exception under “Audiovisual material”) and artistic <i>library material</i> in the following formats:</p> <ul style="list-style-type: none"> • Physical carriers of digital content such as CD-ROM or DVD. • Library material distributed by email. • Catalogues • Non-web based digital library material that is published and intended for use by the general public 	<ul style="list-style-type: none"> • Digital equivalents of those categories already listed in s201 • Scholarly e-journals • E-magazines • Ephemeral publishing such as e-zines • Online newspapers • Publicly available databases • E-books • E-prints i.e. separate articles printed outside of a journal but considered published such as: electronic versions of printed publications and may extend to university digital repositories. • Blogs, discussion lists • Websites • Conference proceedings • Other ephemera – assumed to be ephemera related to the above. <p>• ‘Loose leaf’ updateable materials –electronic versions replace obsolete printed versions which are discarded. NLA is considering whether these are required</p>	<ul style="list-style-type: none"> • Conference proceedings e.g. videos of presentations of written papers already collected by the NLA <p>NLA definitely does not desire / no overlap:</p> <ul style="list-style-type: none"> • Commercial sound recordings (i.e. predominantly audio recordings such as music recordings) • Films • Broadcasts • Games • Apps and software (all of these being on any carrier) 	<ul style="list-style-type: none"> • Websites including those with sound or film file as part of the publication, but not the commercially released CD or DVD version of the audiovisual content. • Games – selective collection where appropriate.
<p>Material relevant to the NFSA for inclusion in an extended legal deposit scheme</p>	<p>Documentation in the form of:</p> <ul style="list-style-type: none"> • Posters • Stills (can be likened to the <i>illustrations</i> in existing <i>library material</i>) • Publicity (eg publicity kits and noting that brochures fall into existing definition of library material) 	<p>Documentation in the form of:</p> <ul style="list-style-type: none"> • Posters • Stills • Publicity • Audio Books - can be CD or downloads • Performance – material relating to performances (e.g. event programs) is sometimes of interest to the NFSA but is unlikely to include <i>library material</i> deposited to NLA 	<ul style="list-style-type: none"> • Published scripts • Posters • Stills • Publicity • Audio Books / ebooks - can be CD or downloads 	<ul style="list-style-type: none"> • Film – especially feature films • Television • Radio • Published music and actuality (sound recordings that aren’t music eg bird calls) – including digital scores, recorded music, sound effects, oral histories (frequently but not always unpublished or in a documentary) • Games with significant audiovisual content. 	<ul style="list-style-type: none"> • Film – especially feature films • Television • Radio • Published music and actuality • Digital born moving image and recorded sound productions: ranging from online film/sound release distribution (eg. <i>The Tunnel</i>); • Online games. The nature of many contemporary online games certainly fits within the NFSA’s definition of significant audiovisual content, in a new non-linear form. • New media including “apps”

APPENDIX 1

WORKING DRAFT LEGAL DEPOSIT MATERIAL LIST

POTENTIAL OVERLAP ISSUES	<ul style="list-style-type: none"> • Published scripts • Publications with CD or DVD supplements • Posters – NLA obtains some through donation. NFSA interested in those relating to film, sound and performance. • Manuscripts – NFSA would desire original notated manuscripts but not for every production – probably not published and therefore outside this scheme • Performance – material relating to performances is sometimes of interest to the NFSA. 	<ul style="list-style-type: none"> • Published scripts • Publications with CD or DVD supplements. • E-Publications with significant audiovisual content, especially those with subject matter in the areas of sound and moving image culture • Electronic press kits (EPKs) for film and/or sound . 	<ul style="list-style-type: none"> • Publications with CD or DVD supplements • E-Publications with significant audiovisual content, especially those with subject matter in the areas of sound and moving image culture • Online text based resources documenting music, film, TV and Radio - including electronic press kits (EPKs), fan sites etc (currently managed in partnership with NLA through Pandora • Electronic press kits (EPKs) for film and/or sound – separate from Pandora unless embodied in website 	<ul style="list-style-type: none"> • mixed media e.g. e-books • music – digital music notation 	<ul style="list-style-type: none"> • websites containing audiovisual content (the NLA would generally be interested in websites <u>containing</u> audiovisual content whereas the NFSA is generally most interested in websites which <u>are</u> audiovisual content). • Online publications that combine printed music notation together with audio renditions of the music. The iPad app version of Bjork's new album includes examples of this • Web based social media with a strong music, audio or moving image focus - e.g. soundcloud, YouTube, fan sites.
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