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Extension of Legal Deposit: Recording Australia's Online Cultural Heritage

Abi Paramaguru* and Sophia Christou†

Abstract

In 2007 the Government commenced a review into the feasibility of extending the legal deposit scheme to include audiovisual and electronic material – submissions closed in May, 2008. In this paper we examine the history and significance of legal deposit as well as the relationship between legal deposit and cultural and technological change. We focus on the importance of integrating electronic, and specifically online, materials into the national legal deposit system. The current Australian legal deposit scheme is discussed with reference to the 2007 review and subsequent submissions to the review. The relationship between legal deposit and the public domain is analysed, highlighting the ways in which effective deposit schemes can enhance the national public domain. The importance of a flexible and considered approach to developing an appropriate threshold for inclusion of online materials in an extended legal deposit scheme is discussed. Finally, we make some suggestions for ways of implementing an efficient and effective legal deposit scheme that can encompass online materials of cultural value.

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* Research and Policy Officer, Cyberspace Law and Policy Centre, University of New South Wales, Australia.

† Postgraduate research student, Faculty of Law, University of New South Wales, Australia. The authors would like to gratefully acknowledge and thank Catherine Bond, Faculty of Law, University of New South Wales and Adam Arnold, University of New South Wales for their invaluable comments regarding this paper.

1. Introduction

Technological development has greatly increased the volume and nature of material that could be considered culturally significant to Australia. Along with electronic materials such as film, sound recordings and other audio and/or visual material, the wealth of material to be found on the Internet has contributed to a rich landscape of cultural artefacts particular to contemporary Australian society. With this increase in what may be regarded as “culturally significant” material, the question arises of how such material might be collected and preserved for the benefit of present and future generations. A national legal deposit scheme in place in Australia has answered this question with regard to print materials. However, the challenges presented by electronic and online materials have yet to be adequately addressed by the existing legislation.

The Australian Government commenced a review into the feasibility of extending the legal deposit scheme to include audiovisual and electronic material in 2007. The findings from this review have yet to be released at the time of writing. In this paper we examine the history and significance of legal deposit as well as the relationship between legal deposit and cultural and technological change. We focus on the importance of integrating electronic, and specifically online, materials into the national legal deposit system. Current Australian legal deposit provisions are discussed with reference to the 2007 review and subsequent submissions to the review. The relationship between legal deposit and the public domain is analysed, highlighting ways in which effective deposit schemes can enhance the national public domain. The importance of a flexible and considered approach to developing an appropriate threshold for inclusion of online materials in an extended legal deposit scheme is discussed with reference to “cultural significance”. Finally, we make some suggestions for ways of implementing an efficient and effective legal deposit scheme that can encompass online materials of cultural value.

2. History and Cultural Significance of Legal Deposit

The underlying principle of modern legal deposit systems may be traced to 1537 in France, when King Francis I issued the “Ordonnance de Montpellier.”¹ All French printers were required to deposit a copy of each book that they produced in the Bibliotheque Royale, “to augment its holdings, and perhaps in part to ensure that they were duly licensed and published”.²

“Legal deposit” has been implemented in various forms and in a variety of jurisdictions since its inception. Its use has been associated with obtaining trade

¹ P S Menell, “Knowledge Accessibility and Preservation Policy for the Digital Age” (July 2007) University of California Berkeley Public Law Research Paper No. 999801, at 8, available at <http://ssrn.com/abstract=999801> (accessed 28 May 2009).

² J Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London: Mansell Publishing 1994), at 98.

privileges, surveillance and censorship.³ For a time, legal deposit also became a required step in order to obtain copyright protection. This position was later changed following the implementation of the Berne Convention⁴ in 1886.⁵ The interplay between legal deposit regimes, copyright protections and limitations, and the public domain will be explored later in this paper.

Legal deposit plays a vital role in preserving cultural heritage: we believe that the current concern surrounding the narrow scope of the Australian scheme is warranted. Gathering a national collection of culturally significant materials is a valuable and necessary endeavour:

*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.*⁶

The system of legal deposit ensures that Australia's published heritage is preserved for present and future generations. Compulsory deposit of published materials is the most efficient and comprehensive means of achieving this.

Building a collection that provides a full picture of a nation's published cultural works and materials arguably reflects a further, seldom-raised, benefit of legal deposit systems. Advocating a centrally-organised and legislated deposit scheme speaks to fundamental "democratic" aspects underlying the creation of (and provision of access to) a comprehensive national collection of cultural works and other materials. That such a scheme would not merely be undertaken on a voluntary basis by public institutions, or organised by independent bodies, is significant. Where a nation's cultural output is appropriately archived, and made accessible in accordance with other legal conditions (including copyright), citizens gain a stable and important link to past innovation, creativity, discussion and information. The benefits of this to future innovation as well as cultural and political engagement should not be underestimated. The earliest deposit agreements and schemes in common law jurisdictions emphasised the importance of these schemes to learning and the production of knowledge.⁷ Moreover, as Peter Menell has argued in the context of the United States and the development of legal deposit provisions alongside the copyright

³ J Lariviere, *Guidelines for Legal Deposit Legislation: A revised, enlarged and updated edition of the 1981 publication by Dr. Jean Lunn (CII-00/W/S/7)* (United Nations Educational, Scientific and Cultural Organisation: Paris, 2000) at 7, available at <http://unesdoc.unesco.org/images/0012/001214/121413Eo.pdf> (accessed 28 May 2009).

⁴ *Berne Convention for the Protection of Literary and Artistic Works 1886*, World Intellectual Property Organization.

⁵ J Gilchrist, "Copyright Deposit, Legal Deposit or Library Deposit?: The Government's Role as Preserver of Copyright Material" (2005) 5.2 *Queensland University of Technology Law and Justice Journal* 177- 194, at 182.

⁶ Lariviere, see note 3 above, at 4-5.

⁷ Menell, see note 1 above, at 8-10.

regime, “[such] policies are prerequisites to the political awareness necessary in a participatory democracy.”⁸

One of the more contentious, yet equally important, aspects of a legal deposit system is its capacity to guarantee ongoing public access to culturally significant materials: ‘effective legal deposit legislation guarantees, to citizens and researchers within the country and abroad, access to a research collection of the country’s published materials.’⁹

This is especially valuable when deposited materials are no longer generally commercially available, which can, in some cases, occur relatively soon after publication. While the benefits of collection and preservation are generally agreed upon, the further step of allowing access to collected materials raises questions as to what degree of access should be permissible. A further concern stemming from this question of access is the issue of use, or reuse, of deposited materials. A range of comments have been made on this, particularly by copyright owners:

*Deposit material should only be accessible by genuine researchers on the deposit institutions premises and on terminals that do not allow copying or communication of materials. This would allow... access for research but would not undermine the broader markets for works.*¹⁰

*...CAL is of the view that electronic legal deposit works should only be made available...on terminals from which copies cannot be made or communicated. This would provide genuine researchers with access to materials for research purposes, while ensuring that broader markets for works are not undermined.*¹¹

From the above comments, it may be seen that only use for the purposes of research and study is considered a legitimate reason for providing access to deposited materials by most copyright owners. This neglects other exempted uses that are provided for under Australia’s *Copyright Act 1968* (Cth) (“the Act”), such as criticism¹² or parody,¹³ which arguably have equal significance for cultural engagement and knowledge production.

⁸ *Ibid*, at 26.

⁹ Lariviere, see note 3 above, at 5.

¹⁰ Reed Elsevier, *Submission in Response to the 2007 Discussion Paper on the Extension of Legal Deposit* (May 2008), at 9 available at http://www.arts.gov.au/_data/assets/pdf_file/0003/80976/Reed_Elsevier.pdf (accessed 28 May 2009).

¹¹ Copyright Agency Limited, *Re: Feasibility of extending the current legal deposit scheme to include audiovisual and electronic materials* (February 2008), at 3, available at http://www.arts.gov.au/_data/assets/pdf_file/0007/80944/Copyright_Agency_Limited.pdf (accessed 28 May 2009).

¹² See *Copyright Act 1968* (Cth), section 41.

¹³ See *Copyright Act 1968* (Cth), section 41A.

The issue of costs and arguments as to the appropriate burden on publishers has also provoked substantial comment.¹⁴ Arguably, legal deposit schemes can be of significant use to publishers. Such schemes may provide:

*[I]ncreased visibility and wider publicity for their publications, better bibliographic control and long-term guarantee of availability of their published material. The long-term guarantee of availability can be useful for depositors themselves, in cases where the originals have been lost or destroyed.*¹⁵

Indeed, the Stationers Company recognised in 1610 that one benefit of deposit would be future access to the deposited books if required for reprinting.¹⁶ This is arguably still a considerable advantage to publishers and other copyright owners who deposit works and other materials. With the widespread use of the Internet to share knowledge and information about out-of-print materials, comes the potential for unexpected demand for such materials to be brought back into print. Publishers themselves may not be able to access any other copy of the work in question, other than through a depository institution. However, while there are clear advantages for publishers, it is unlikely that they would be willing to archive their own publications where there is no direct, immediate or obvious financial benefit.

The evolving cultural and technological environment has demanded a re-evaluation of our current legal deposit scheme to ensure the scheme is able to retain its original characteristics, such as comprehensiveness.¹⁷ However, tackling issues raised by electronic publications has proven to be a challenge:

*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.*¹⁸

Online materials in particular pose significant hurdles particularly with respect to methods of collection and copyright implications. The important role of legal deposit highlights the need to re-examine the variety of materials or “publications” included in the current Australian legal deposit scheme.

¹⁴ See for example Feather, note 2 above, at 108, discussing early protests by British publishers against deposit obligations in the 1800s; see also Australian Publishers Association, *Comments on the Feasibility of Extending the Current Legal Deposit Scheme to Include Audiovisual and Electronic Material* (March 2008); Reed Elsevier, *Submission in Response to the 2007 Discussion Paper on the Extension of Legal Deposit* (May 2008), at 2.

¹⁵ Lariviere, see note 3 above, at 12.

¹⁶ J Gilchrist, “Copyright Deposit, Legal Deposit or Library Deposit?: The Government’s Role as Preserver of Copyright Material” (2005) 5.2 *Queensland University of Technology Law and Justice Journal* 177- 194, at 178.

¹⁷ Lariviere, see note 3 above, at 1-2.

¹⁸ *Ibid*, at 8.

3. Current Provisions – What’s Missing?

Legal deposit is covered under section 201 of the Act. Publishers of “library material” published in Australia are required to deposit a copy in the National Library of Australia. The deposited copy must be the “best copy” or best version available, where the best copy is defined as a:

[C]opy of whole material...finished and coloured, and bound, sewed, stitched or otherwise fastened together, in the same manner as the best copies of that material are published, and on the best paper on which that material is printed.¹⁹

“Library material” is defined as:

[A] book, periodical, newspaper, pamphlet, sheet of letterpress, 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.²⁰

Publishers must deposit at their own cost. This has been an issue of contention, particularly with regard to special cases such as limited edition texts, where deposit can be a costly burden on publishers. Publishers may be liable to pay a \$100 penalty if they do not comply with legal deposit provisions.

Most Australian states and territories also have legal deposit schemes, and these schemes run in parallel to the federal scheme. In New South Wales legal deposit is addressed in sections 5-7 of the *Copyright Act 1879* (NSW). Every book first published in New South Wales must be deposited in three state libraries within two months of publication. “Book” is defined as: ‘any volume part or division of a volume newspaper pamphlet libretto sheet of letter-press sheet of music map chart or plan separately published.’²¹

In Victoria, deposit is required under section 49 of the *Victorian Libraries Act 1988* (Vic). As in New South Wales, deposit must be made within 2 months of publication. However, the publication only needs to be deposited in one library (in addition to the National Library). Publication is defined as:

[T]he whole or 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

¹⁹ *Copyright Act 1968* (Cth), section 201(2).

²⁰ *Copyright Act 1968* (Cth), section 201.

²¹ *Copyright Act 1879* (NSW), section 2.

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.

Notably absent from the list of deposited materials under the federal scheme (but existing in some Australian states and territories) are films, sound recordings, broadcast materials and other materials in electronic form – including online material, which is the focus of this paper. Increasingly, valuable materials are being published in electronic form. It is important that these materials are collected and preserved “to ensure a complete record of a nation’s published cultural material.”²² These gaps in the federal legal deposit scheme were the subject of a 2007 review of the Australian legal deposit system.

4. Review of Legal Deposit in Australia

In October 2007, the Department of Communications, Information Technology and the Arts (DCITA) and the Attorney-General’s Department (AGD) set out to review the possible extension of the Australian legal deposit system. After structural changes following a change in government in November 2007, the review was jointly undertaken by the Department of Broadband, Communications and the Digital Economy (DBCDE), the Department of Environment, Water, Heritage and the Arts (DEWHA) as well as the AGD. A Discussion Paper was released at the commencement of the review. The aim of the review was to establish the feasibility of extending the legal deposit scheme to include audiovisual and electronic materials.²³ Submissions closed in May 2008 and the Discussion Paper, together with twenty-seven submissions from organisations including libraries, publishers and NGOs has since been published online.²⁴ At the time of writing the results of the review have not been released. The concern is that the legal deposit scheme in Australia appears out-of-step with technological developments and this may have unfortunate consequences for future generations.

The Discussion Paper released in 2007 invited submissions regarding all the categories of materials listed above. For example, the discussion paper asked:

- Should the legal deposit scheme be extended to include audiovisual and electronic materials?²⁵
- How do you define the materials that should be deposited?²⁶

²² I Verheul, *Networking for Digital Preservation Current Practices in 15 National Libraries* (International Federation of Library Associations: Paris, 2006).

²³ DCITA and AGS, 2001 *Discussion Paper on the Extension of Legal Deposit* (2007), available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(454DFAFE2D6830FB1D0597823A67B5D6\)~Final+Legal+Deposit+discussion+paper+PDF+version.PDF/\\$file/Final+Legal+Deposit+discussion+paper+PDF+version.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(454DFAFE2D6830FB1D0597823A67B5D6)~Final+Legal+Deposit+discussion+paper+PDF+version.PDF/$file/Final+Legal+Deposit+discussion+paper+PDF+version.PDF) (accessed 29 May 2009).

²⁴ As listed at http://www.arts.gov.au/public_consultation/submissions-closed/discussion_paper_on_the_extension_of_legal_deposit_of_library_material/submissions (accessed 26 May 2009)

²⁵ DCITA and AGS, see note 23 above, Issue 1.

²⁶ *Ibid*, Issue 2.

- Should an extended legal deposit scheme apply to online materials hosted outside of Australia?²⁷
- How do you tackle the issue of technological protection measures which can inhibit preservation of electronic materials?²⁸
- On what basis, if any, should access be restricted to materials that are deposited under an extended legal deposit scheme?²⁹

Submissions were generally supportive of extending the legal deposit scheme to include audiovisual and electronic materials.³⁰ Some noted that extension may be desirable, but had significant reservations regarding implementation.³¹ Several submissions did not indicate if extension was desirable or “did not oppose” extension (rather, indicating how it should be implemented, or raising concerns with proposed implementation methods).³² There were a number of submissions that were opposed to an extension of legal deposit in specific areas of audiovisual and electronic

²⁷ *Ibid*, Issue 10.

²⁸ *Ibid*, Issue 14.

²⁹ *Ibid*, Issue 15.

³⁰ See Association of Parliamentary Libraries of Australia (APLA) *Submission regarding 2007 Discussion Paper on the Extension of Legal Deposit in the Copyright Act 1968 (Cth)*; Australian Film Commission, *Submission to the Attorney General’s Department and the Department of Broadband, Communications and the Digital Economy 2007 Discussion Paper on the Extension of Legal Deposit* (January 2008); Australian Government Information Management Office, *Response to the 2007 Discussion Paper on the Extension of Legal Deposit*; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission to the review of the feasibility of extending the current legal deposit scheme to include audiovisual and electronic material* (January 2008); Australian Libraries Copyright Committee, *Review of the Extension of Legal Deposit – Submission of the Australian Libraries Copyright Committee* (January 2008); Australian Library and Information Association, *Submission to the 2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008); Council of Australian University Librarians, *Re: Review of the Extension of Legal Deposit* (January, 2008); Cyberspace Law and Policy Centre, *Legal Deposit’s Role in the Public Domain: Submission to the Attorney-General’s Department and DCITA Review of the Extension of Legal Deposit* (May, 2008); Parliament of Australia Department of Parliamentary Services, *2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008); Media, Entertainment and Art Alliance, *Submission by Media, Entertainment and Arts Alliance to the Attorney-General’s Department and Department of Broadband, Communications and the Digital Economy Regarding 2007 Discussion Paper on the Extension of Legal Deposit* (April, 2008); National and State Libraries Australasia, *2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008); National Library of Australia, *Submission to the Attorney-General’s Department and the Department of Broadband, Communications and the Digital Economy on 2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008); Screen Producers Association of Australia, *Submission to the Attorney-General’s Department and the Department of Broadband, Communications and the Digital Economy* (January, 2008); Vision Australia, *Vision Australia’s Submission to the Department of Communications, Information Technology and the Arts Review of the Extension of Legal Deposit* (January, 2008).

³¹ See Australian Broadcasting Corporation, *RE: 2007 Discussion Paper on the Extension of Legal Deposit* (March, 2008); CSIRO Publishing, *Re: Comments on 2007 Discussion Paper on the Extension of Legal Deposit* (February, 2008).

³² See Australian Copyright Council, *Response to 2007 Discussion Paper on the Extension of Legal Deposit* (May, 2008); Australian Publishers Association, *Comments on the Feasibility of Extending the Current Legal Deposit Scheme to Include Audiovisual and Electronic Material* (March, 2008); Australian Society of Authors, *Re: Review of the Extension of Legal Deposit* (April, 2008).

material, such as broadcasts,³³ films and television³⁴ and internet materials.³⁵ There was a minority of submissions that appeared generally unsupportive of extension.³⁶

5. The Relationship between Legal Deposit and the Public Domain

Beyond the functions of preservation and archiving, legal deposit requirements have an important role to play in enhancing the public domain. Benefitting the public domain implies that there is some provision for access to, and use or reuse of, materials collected under a legal deposit scheme:

*One requirement for the effective operation of the public domain at the expiry of copyright in a work is that there is at least one copy of the work available to the public for subsequent reproduction by anyone.*³⁷

As was discussed earlier, the significance of ensuring that materials in the public domain are accessible is vital to the broadly “democratic” concerns that underpin the notion of a public domain. Materials may be considered part of the public domain when they have never been eligible for protection under copyright law, their copyright term has expired, or because some uses of the material are permissible as specified under copyright law.

As noted briefly above, the extent of access to deposited materials has provoked much debate. For example, in submissions in response to the above-mentioned 2007 Discussion Paper on the Extension of Legal Deposit, comments upon access to deposited materials included the following:

...the existing restrictions placed on the use of material should continue to apply – that is, limiting access to viewing on the [deposit institution’s] premise... The Alliance strongly asserts that

³³ See Australian Subscription Television and Radio Association, *2007 Discussion Paper on the Extension of Legal Deposit* (2008); FreeTV Australia, *2007 Discussion Paper – Extension of Legal Deposit* (January, 2008).

³⁴ See Australian Visual Software Distributors Association Ltd, *Submission by the Australian Visual Software Distributors Association (AVSDA) to the Legal Deposit Review* (January, 2008).

³⁵ See Google Australia, *Submission in Response to the 2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008). Google expressed opposition to deposit but recommended a specific exception in the *Copyright Act* for collection of online materials; News Ltd, *Extension of Legal Deposit* (January, 2008); Queensland University of Technology, *Submission to the Government Inquiry on the Extension of Legal Deposit to Electronic and Audiovisual Materials* (January, 2008).

³⁶ See Copyright Agency Limited, *Re: Feasibility of Extending the Current Legal Deposit Scheme to Include Audiovisual and Electronic Materials* (February, 2008); Reed Elsevier, *Submission in Response to the 2007 Discussion Paper on the Extension of Legal Deposit* (May, 2008).

³⁷ Cyberspace Law and Policy Centre, *Legal deposit’s role in the public domain: Submission to the Attorney-General’s Department and DCITA Review of the Extension of Legal Deposit* (May, 2008), at 3.

*the rights of copyright owners must continue to be strictly enforced and protected.*³⁸

*Allowing the public to view deposited material on-site provides sufficient access to the public for the purposes of the scheme.*³⁹

While deposited materials are still under copyright protection, maintaining a national collection provides one means of access for purposes that fall under copyright exceptions, such as access and use for the purposes of research, criticism and review.⁴⁰ However, it may be seen that by adopting such cautious attitudes towards public access of deposited materials, limitations upon copyright such as those under the exceptions for fair dealing for the purposes of research, criticism, or creating parodies, are frequently sidelined in the interests of protecting commercial markets for the materials. Underpinning such submissions would appear to be the view that legal deposit serves the specific purpose of preservation, and that in order to exercise other “rights” of fair dealing, as set out under the Act, purchase of the relevant work or material should still be encouraged. Furthermore, Issue 15 in the Discussion Paper,⁴¹ to which the above comments were responding, merely suggested “access.” The above respondents would undoubtedly be greatly concerned by the prospect of materials being open to reuse for excepted purposes under copyright law.

A further concern, primarily with regard to access to or reuse of deposited electronic materials, is the increasing use of Technological Protection Measures (TPMs) and other methods of embedding limited (or no) access, reuse or copying in the work or material itself.⁴² Where a deposited electronic copy contains TPMs or similar protections, access and use or reuse may conceivably be impossible, both while the material is still under copyright and after the term of protection has expired. This would also create difficulties for the depository institution in making further copies for archival purposes – an important activity in the likely instance that older technologies are superseded and deposited copies become technically “inaccessible”. A number of submissions to the Discussion Paper argued that such protections and “rights management” measures were vital to the interests of publishers and copyright owners. For example, Copyright Agency Limited’s submission stated:

Expanding legal deposit to require that DRMs be removed from electronically deposited materials, so that the library can access the

³⁸ Media, Entertainment and Art Alliance, *Submission by Media, Entertainment and Arts Alliance to the Attorney-General’s Department and Department of Broadband, Communications and the Digital Economy regarding 2007 Discussion Paper on the Extension of Legal Deposit* (April, 2008), at Issue 15.

³⁹ Australian Visual Software Distributors Association Ltd, *Submission by the Australian Visual Software Distributors Association (AVSDA) to the Legal Deposit Review* (January, 2008), at 5.

⁴⁰ *Copyright Act 1968* (Cth), sections 41 and 103A (criticism, review), sections 40 and 103C (research, study), and see also sections 41A and 103AA (parody, satire).

⁴¹ DCITA and AGS, see note 23 above, Issue 15.

⁴² This includes what is also referred to as Digital Rights Management policies and measures (DRM).

*materials, will only further reduce the incentive for creators to invest in digital publishing.*⁴³

Interestingly, CAL appeared to regard “access” by the depository institution itself as undesirable, and as reducing the incentive for digital publishing altogether. Including legislative provisions, that enable libraries and archives to legally circumvent such protection measures under certain conditions, will not remove the burdens of undertaking such circumvention from these institutions.⁴⁴ In addition, it is questionable whether such a provision would be permissible with regard to Australia’s obligations under the Australia-United States Free Trade Agreement 2005.⁴⁵ For these reasons, we believe that a more useful definition of “best copy” under legal deposit provisions would, for the purpose of electronic materials, refer to a copy free from TPMs.⁴⁶ In order for legal deposit schemes to continue their important role in enhancing the national public domain of cultural works and materials, attention must be paid to concerns such as these. Issues of access and use will arguably become increasingly pressing if the deposit of electronic and digital materials is integrated into the current scheme. We now turn to the issues created by such a proposition.

6. Online Materials and the Question of Cultural Significance

Online publications or materials have proven particularly difficult to tackle in the legal deposit area – primarily due to the volume and dynamic nature of these materials. Ease of distribution, replication, accessibility and the lack of a physical item to deposit can lead to major issues in the context of legal deposit.⁴⁷ As technology has evolved the variety of materials available online has increased rapidly:

*Legal Deposit legislation therefore requires a new legal framework in order to encompass digital publications. The complications associated with the collection and control of electronic materials, together with the lack of a comprehensive legal model, have made drafting appropriate legislation problematic and slow.*⁴⁸

These materials range from general publicly accessible information to password protected database content. Content includes everything from blogs, e-journals, government publications, news and video:

⁴³ Copyright Agency Limited, *Re: Feasibility of Extending the Current Legal Deposit Scheme to Include Audiovisual and Electronic Materials* (February, 2008), at 4.

⁴⁴ National Library of Australia, *Submission to the Attorney-General’s Department and the Department of Broadband, Communications and the Digital Economy on 2007 Discussion Paper on the Extension of Legal Deposit* (January, 2008), at 12.

⁴⁵ Queensland University of Technology, *Submission to the Government Inquiry on the Extension of Legal Deposit to Electronic and Audiovisual Materials* (January, 2007), at Issue 14.

⁴⁶ For further argument upon this point, see Cyberspace Law and Policy Centre, *Legal Deposit’s Role in the Public Domain: Submission to the Attorney-General’s Department and DCITA Review of the Extension of Legal Deposit* (May, 2008), at 14-15.

⁴⁷ Verheul, see note 22 above, at 25.

⁴⁸ *Ibid*, at 52.

With the advent of new 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.⁴⁹

This leads to problems associated with:

[C]opyright, preservation requirements, public access, scope of coverage, method of collection, protection of publishers’ rights, penalties, and implementation of revised legislation.⁵⁰

One example of the technical decisions that need to be considered in the context of preservation of online materials is whether digital objects should be preserved by migration (updating the format of the digital object itself), emulation (recreating the environment that the digital object is displayed in), a combination of these, or by another means entirely. The difficulty lies in ensuring that the digital object is preserved in authentic form, including the object’s content, context, structure and behaviour.⁵¹ A balance needs to be achieved between preserving the content and preserving the original “look and feel.”⁵² For example, if migration is adopted as a preservation technique, then there is the risk that an exact digital copy cannot be made as technology develops.⁵³ Over time this leads to the risk of error propagation as further migration takes place⁵⁴ – a virtual game of “Chinese whispers”.

Despite these clear obstacles: “...there is 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.”⁵⁵ Almost ten years ago a representative from the National Library of Australia noted that it is:

[I]mportant that the principle of legal deposit be recognised as applying equally to digital materials both to ensure their long-term preservation and to the serve the public interest in allowing fair access to and use of this material.⁵⁶

The rapid rate of technological development makes it difficult to determine what the future of “publication” will be. An extended legal deposit scheme will need to be flexible enough to deal with unanticipated technological changes; comprehensive

⁴⁹ Lariviere, see note 3 above, at 54.

⁵⁰ Verheul, see note 22 above, at 25.

⁵¹ *Ibid.*, at 54-55.

⁵² *Ibid.*, at 55.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Lariviere, see note 3 above, at 56.

⁵⁶ J Fullerton, “Developing national collections of electronic publications issues to be considered and recommendations for future collaborative actions”, paper presented to the workshop *Legal Deposit of Electronic Materials*, Amsterdam, 20 August 1998, available at http://www.nla.gov.au/nla/staffpaper/int_issu.html (accessed 27 May 2009).

enough to gather materials of cultural significance; and practical enough to feasibly implement in light of resources available. We recognise that one of the benefits of the public domain is that everything is “free”, so even a work that may have been undervalued on creation can, once copyright has expired, be reworked into a greater piece. However, this simply highlights the difficulties in posing questions about the new relationship between legal deposit and online materials: what should be the threshold? In this paper, online materials are considered with reference to the idea of “cultural significance” in order to establish whether online materials should be included in an extended legal deposit scheme and what, if any, threshold should be applied for inclusion.

Below we consider just a few examples of the materials that are, or have been, prevalent on the Internet. In doing so, we identify ways in which to tackle the questions of preservation and cultural significance.

6.1 Bulletin Boards / Usenets

Popular even from the early days of the Internet, “organised public communications” sent over open networks, such as “listservs”, have been used as a simple method of communication for groups of people. Lariviere suggests that material that is found in these should be excluded 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.”⁵⁷ There may however be circumstances where preservation of “organised public communications” is worthwhile, due to what the content demonstrates about the contributors, and hence the relevant community or culture at the time. For example, Google has undertaken the task of archiving over 20 years of Usenet archives into Google Groups –amounting to over one billion Usenet messages circa 1981. Google believes this to be “the most complete collection of Usenet articles ever assembled and a fascinating historical document.”⁵⁸

For example, a search reveals a post in 1984 where the user poses a unique question:

*Does anyone out there have an instruction manual for the Microsoft Flight Simulation video game on IBM's? I need to know specifically how to drop bombs in the 1917 version, but I would also like to get a command summary if you would mail it to me.*⁵⁹

The responses read:

This is blatantly illegal. People like this really irritate me! Here we are, a network of people, many of whom rely on income from

⁵⁷ Lariviere, see note 3 above, at 42.

⁵⁸ Google, “How Far Back does Google’s Usenet Archive Go?” [undated], available at <http://groups.google.com/support/bin/answer.py?answer=46439> (accessed 29 May 2009).

⁵⁹ Keves, “Microsoft Flight Simulation” (24 Mar 1984, 7.54pm) available at http://groups.google.com/group/net_games.video/browse_thread/thread/187d3977825b6375/e4419c527ea3759 (accessed 29 May 2009).

*software sales for our living, and some dimwit has the gall to do this!!...*⁶⁰

*As far as I can tell, there is no legal way to get a copy of the flight simulator without getting the instruction manual. If you can explain how such a thing came about, I will gladly mail the instructions, having purchased the package.*⁶¹

*...If this person had PURCHASED the game instead of STOLEN it, he would have the manual. Theft is theft; there is no excuse for it. We do not need to support such activities...*⁶²

With the current pervasiveness of pirated software, “cheat codes” and software information, this exchange reveals a significant shift in societal and cultural norms, particularly within the computer gaming community. In this way, such information may be deemed culturally significant.

6.2 Blogs

Blogging has become quite prevalent in recent times. There are many examples of popular and influential Australian and international blogs. ProBlogger,⁶³ an Australian blog about blogging, has grown to be quite well known – with the blogger, Darren Rowse, even making his way into the *Forbes* “Web Celebrity List.”⁶⁴ Australian blogs such as Lavatus Prodeo, “an Australian group blog which discusses politics, sociology, culture, life, religion and science from a left of centre perspective,”⁶⁵ contains content discussing topics ranging from economic theory⁶⁶ to football games.⁶⁷ Even gossip blogs such as Defamer Australia⁶⁸ have also become quite

⁶⁰ The Master of Sinanju, “Microsoft Flight Simulation” (24 Mar 1984, 7.54pm) available at http://groups.google.com/group/net.games.video/browse_thread/thread/187d3977825b6375/e4419c527ea3759 (accessed 29 May 2009).

⁶¹ Stephen Perelgut, “Microsoft Flight Simulation” (24 Mar 1984, 7.54pm), available at http://groups.google.com/group/net.games.video/browse_thread/thread/187d3977825b6375/e4419c527ea3759 (accessed 29 May 2009).

⁶² Zemon, “Microsoft Flight Simulation” (24 Mar 1984, 7.54pm) available at http://groups.google.com/group/net.games.video/browse_thread/thread/187d3977825b6375/e4419c527ea3759 (accessed 29 May 2009).

⁶³ D Rowse, “ProBlogger”, available at <http://www.problogger.net/> (accessed 29 May 2009).

⁶⁴ D M Ewalt (ed), “The Web Celeb 25” (18 December 2007) *Forbes.com*, available at http://www.forbes.com/2007/12/18/internet-fame-celebrity-tech-cx_de_07webceleb_1218land.html (accessed 29 May 2009).

⁶⁵ Lavartus Prodeo, “About Larvatus Prodeo”, available at <http://larvatusprodeo.net/about-larvatus-prodeo/> (accessed 29 May 2009).

⁶⁶ Mark, “Against Economic Theories of Democracy” (April 2005) Lavartus Prodeo, available at <http://larvatusprodeo.net/2005/04/29/against-economic-theories-of-democracy/> (accessed 29 May 2009).

⁶⁷ Brian, “It’s On Again – SOO 2009” (3 Jun 2009) Larvatus Prodeo, available at <http://larvatusprodeo.net/2009/06/03/its-on-again-soo-2009/> (accessed 29 May 2009).

⁶⁸ Jess McGuire (ed), “Defamer Australia”, available at <http://www.defamer.com.au/> (accessed 29 May 2009).

significant in their popularity and cultural reach. While the quality of content may vary considerably between blogs, there are clearly bloggers creating content that is comparable in quality to print publications. Indeed the practice of “crossing over” from blogging to mass media is not uncommon. These factors, coupled with the popularity and significance of blogging and its relationship to society demonstrates that there are many blogs that could be considered culturally significant and worthy of preservation.

In Australia, one notable example is “Weatherall’s Law”⁶⁹ – the now-retired blog of prominent intellectual property academic Kimberlee Weatherall. “Weatherall’s Law” ran from 2002 to 2006 and featured analyses on a range of intellectual property statutes and case law. When Kim Weatherall announced that she would be ceasing blogging in December 2006, she commented that over her four years of blogging she had “spilled approximately 385,000 words onto the pages of this blog. That is over 800 pages at twelve point font, single spaced, in a Word Processing Document.”⁷⁰ Weatherall could have parlayed her comments on intellectual property in Australia into a mass of publications (or approximately four doctoral theses) – instead, she chose to disseminate her analysis and findings through a blog. “Weatherall’s Law” is just one example of scores of high-quality blogs that should arguably be preserved for future generations, particularly for the purposes of research and study. Indeed, the significance of this particular blog has been recognised by the National Library of Australia: “Weatherall’s Law” has been archived in the Library’s PANDORA electronic collection.⁷¹ The PANDORA Archive is discussed in greater detail later in this paper.

6.3 Email

Researchers have long studied and drawn upon personal communications – from letters, to diaries, to drawings – to develop a better understanding of particular cultures, times and places. In 2008, the Powerhouse Museum commenced a joint project with nineMSN aimed at creating Australia’s first email archive. The Powerhouse Museum website notes:

Our archives include letters written in the past and from these we can learn about events, relationships, how people thought and felt. We rely on this primary evidence to help us understand our history.

While we know that paper records properly stored can last for hundreds of years electronic records – like email – may not be available in twenty. This is because computers, software and media quickly become obsolete and the information, including email records, cannot be retrieved. Indeed there is something in the nature

⁶⁹ K Weatherall, “Weatherall’s Law”, available at <http://weatherall.blogspot.com/> (accessed 29 May 2009).

⁷⁰ K Weatherall, “The Last Post (and Five Things You Didn’t Know About Me)”, 10 January 2007, available at <http://weatherall.blogspot.com/2007/01/last-post-and-five-things-you-didnt.html> (accessed 29 May 2009).

⁷¹ See National Library of Australia, PANDORA, <http://pandora.nla.gov.au/pan/52713/20051114-0000/weatherall.blogspot.com/atom.xml> (accessed 13 July 2009).

*of emails that people are less inclined to deliberately file them, to value them as a permanent record as they would as a hand written letter.*⁷²

The project is titled “Email Australia” and the project website rightly notes that because of the rapid pace of technological development, the technology used for creation and viewing of electronic communications may quickly become obsolete.⁷³ This highlights the inherent urgency for the preservation of electronic materials. For a period of time the project welcomed submissions of emails from the public in order to obtain a “snapshot” that captured contemporary society and the way we utilise emails.⁷⁴

Many day-to-day emails may not meet the standard for inclusion. Indeed, many of us may cringe at the prospect of our quickly-typed emails being archived for posterity. Emails may provide one of the more difficult areas to categorise: should only the emails of certain individuals – prominent Australian authors for example – be archived? What about politicians? In the same way that historical letters can be considered culturally significant, email communications, in certain circumstances, may be worthy of preservation.

The personal yet public nature of examples such as bulletin boards and emails raises broader questions about the role of libraries as collectors of strictly “library materials,” as opposed to the role of archives as collectors of “archival materials”. It might be argued that the line between each is becoming increasingly blurred. This is especially evident when examining materials in an online environment where, for example, what constitutes “publication” may be debatable. This issue certainly warrants further exploration, but is beyond the scope of this paper. As discussed above, an effective legal deposit scheme that enables collection of electronic materials by collecting-institutions could simultaneously ensure the development of a national collection of materials, preservation of those materials, and ongoing access to those materials, regardless of whether specific examples that are still deemed to be culturally significant fit into the traditional category of “library materials.” In light of these goals underpinning an extended legal deposit scheme, the breakdown of the demarcation between “library materials” and “archival materials” may arguably be less troublesome under a regime where deposit of physical items by publishers is no longer the sole means of building the national collection.

6.4 Online Video

According to Wikipedia the “Free Hugs Campaign” is a “social movement involving individuals who offer hugs to strangers in public places.”⁷⁵ The campaign originated in Australia and became internationally known due to an Australian music video

⁷² Powerhouse Museum, “Email Australia be a Part of History” [undated], available at <http://www.powerhousemuseum.com/whatson/email.asp> (accessed 29 May 2009).

⁷³ Email Australia, “About Email Australia”, available at <http://emailaustralia.ninensn.com.au/About/> (accessed 29 May 2009).

⁷⁴ *Ibid.*

⁷⁵ Wikipedia, “Free Hugs Campaign”, available at http://en.wikipedia.org/wiki/Free_Hugs (accessed 29 May 2009).

uploaded onto YouTube featuring the campaign.⁷⁶ Is this video worthy of being deemed culturally significant to Australia? At the time of writing the video had been viewed over forty million times and had been given a five star rating by over 100 000 YouTube voters. Comments posted by users in response to the video included: “that really touched my heart! Beautiful and nice to see that there is still love in the modern age for those that can bring it out in the open :)”⁷⁷ and, “this is one of the most moving things I have ever seen.”⁷⁸ The video has also spawned a plethora of similar contributions to YouTube.⁷⁹ The statistics and the feedback certainly seem to reveal that this example is something that may be worthwhile preserving for future generations.

Many Australian bands have made their music and videos available online on band websites⁸⁰ and other content-hosting sites such as Myspace⁸¹ and YouTube.⁸² Arguably, this is now becoming the norm, particularly for independent or unsigned artists. Additionally, not all such content is hosted under the “.au” domain, which would have implications for the collection of materials if specific domains were to be used to define and limit what material is collected. For this reason, in the event that an extended legal deposit scheme is adopted, there are persuasive reasons against automatically narrowing the scope of collection to content hosted under the “.au” domain. In the above-mentioned “free hugs” video, for example, the visuals were produced in Australia; the music was made by an Australian band; and the video uploaded onto YouTube by Australians. Thus, although the content is technically hosted overseas, the video certainly has strong ties to the Australian cultural landscape.

While such videos and other audiovisual materials may still be accessible online in ten years time, the greater question is whether, in the absence of legal deposit requirements, they will still be accessible in eighty years. Due to the rapid rate of technological development, and hence the increasingly important issue of

⁷⁶ Wikipedia, “Free Hugs Campaign”, available at http://en.wikipedia.org/wiki/Free_Hugs (accessed 29 May 2009) and “Free Hugs Campaign – Official Page (music by Sick Puppies.net)”, Uploaded by PeaceOnEarth123, available at http://www.youtube.com/watch?v=vr3x_RRjdd4 (accessed 29 May 2009).

⁷⁷ Sharangcool (30 May 2009), available at http://www.youtube.com/watch?v=vr3x_RRjdd4 (accessed 31 May 2009).

⁷⁸ [Gracelillymouse](http://www.youtube.com/watch?v=vr3x_RRjdd4) (30 May 2009), available at http://www.youtube.com/watch?v=vr3x_RRjdd4 (accessed 31 May 2009).

⁷⁹ For example, see the results list from a search for ‘free hugs campaign’ conducted over YouTube: http://www.youtube.com/results?search_type=&search_query=free+hugs+campaign&aq=f (accessed 2 June 2009).

⁸⁰ See Tame Impala, available at <http://www.tameimpala.com/> (accessed 21 May 2009).

⁸¹ See Hungry Kids of Hungary, “Hungry Kids of Hungary on Myspace Music – Free Streaming MP3s, Pictures and Music Videos”, available at <http://www.myspace.com/hungrykidsofhungary> (accessed 21 May 2009) or Sia, “Sia on Myspace Music – Free Streaming MP3s, Pictures and Music Videos”, available at <http://www.myspace.com/siamusic> (accessed 21 May 2009).

⁸² See liormusic, “Lior- I’ll Forget You (feat Sia)”, uploaded 14 Feb 2009, available at <http://www.youtube.com/watch?v=H4Ufb1D-vyY> (accessed 29 May 2009), and harrywhite1992, “Sleep Again – Papa VS Pretty”, uploaded 15 April 2008, available at <http://www.youtube.com/watch?v=oRT2UsmbIEg> (accessed 26 May 2009).

obsolescence, the most likely answer is that these materials will eventually become “unreadable” and therefore lost to future generations.

6.5 Articles / Blogs / Videos / Comments

Many websites are increasingly combining and presenting many different types of media and functionality. Such websites can contain anything (and everything) from articles to blogs; and from videos to user-comments. It is not necessarily just one of these characteristics considered in isolation that will render a website worthy of being deemed culturally significant to Australia. Nor does the material contained necessarily have to be in traditional “publication” form. The value of the material does not derive from its title, author or structure, but rather, the contribution it has made to, or what it reveals about, Australian society and culture. Thus, refusing online materials the same treatment as traditional publications means running the risk of neglecting a significant and transformative aspect of local culture. For example, the *Sydney Morning Herald* has traditionally offered a print version of their newspaper for deposit. The print version may or may not be superior to the online version, but ultimately they have very different characteristics – particularly in the organisation of information and links, and therefore both are arguably worth preserving in their own right.⁸³ Furthermore, sites such as *newmatilda.com* provide independent news, analysis, satire and are only available online. This site has featured articles from Australians such as John Pilger⁸⁴ and Irfan Yusuf⁸⁵ and the information is being collected and preserved under an agreement with the PANDORA Archive (discussed later in this paper).⁸⁶

In this article, we have discussed just a small sample of online materials. There are legal publishers, online journals and even universities (such as the University of New South Wales) making lectures available online on YouTube channels.⁸⁷ The Discussion Paper discussed above, regarding the Australian legal deposit review and the submissions to this review, are all available online.⁸⁸ The review is aimed at exploring the preservation of culturally significant materials. Surely the process of retaining these materials is of intrinsic cultural significance too?

⁸³ See *Sydney Morning Herald*, available at <http://www.smh.com.au/> (accessed 29 May 2009).

⁸⁴ John Pilger, “Breakfast with War Criminals”, *newmatilda.com*, 15 Apr 2009, available at <http://newmatilda.com/2009/04/15/breakfast-war-criminals> (accessed 3 Jun 2009).

⁸⁵ Irfan Yusuf, “Don’t Get Over It”, *newmatilda.com*, 24 Jul 2008, available at <http://newmatilda.com/2008/07/24/dont-get-over-it> (accessed 3 Jun 2009).

⁸⁶ See for example, John Pilger, “Breakfast with War Criminals”, *newmatilda.com*, available at <http://pandora.nla.gov.au/pan/43431/20090428-0001/newmatilda.com/print/5791.html> (accessed 3 Jun 2009).

⁸⁷ See University of New South Wales, eLearning Channel, available at <http://www.youtube.com/user/unswlearning> (accessed 3 Jun 2009).

⁸⁸ Discussion Paper, see DCITA and AGS, note 23 above. Submissions to the review are available at Australian Government, Department of the Environment, Water, Heritage and the Arts, ‘Submissions to the 2007 Discussion Paper on the Extension of Legal Deposit’, available at http://www.arts.gov.au/public_consultation/submissions-closed/discussion_paper_on_the_extension_of_legal_deposit_of_library_material/submissions (accessed 22 May 2009).

7. Existing Online Collection Strategies – “PANDORA”

Attempts have already been made to capture and preserve at least some artefacts from Australia’s online environment. The PANDORA Archive has made a tremendous start despite the absence of compulsory legal deposit requirements or copyright exceptions for archival collection in the context of online materials.⁸⁹ The Archive was established by the National Library of Australia (NLA) in 1996 and has since gained 9 additional partners, including libraries and cultural collecting societies.⁹⁰ The relationship between the National Library and partner state libraries and organisations is significant as it demonstrates one way in which the collection of electronic materials may be coordinated under deposit legislation. A system of formal and mutual agreement on which types of electronic materials will be the responsibility of each institution provides for efficient and cost-effective collection – whilst going some way to ensuring that the most extensive range of materials possible is collected, without duplication. Further, in partnering with organisations such as the Australian Institute of Aboriginal and Torres Strait Islander Studies, the collection benefits from specialist knowledge and expertise brought to the collecting activity, particularly with regard to assessing the “significance” of materials collected.

The PANDORA Archive selects specific online publications and negotiates the right to collect, preserve and provide perpetual access to the publication with online publishers.⁹¹ According to the National Library’s submission to the legal deposit review, experimental “snapshots” of the Australian domain have been taken.⁹² These snapshots of the Australian domain cannot be made available to the public due to copyright protections.

Extending the ambit of the legal deposit provision would reduce the burden of labour-intensive negotiations and would arguably result in the ability to collect an increased amount of quality online materials, which, ultimately, would provide an improved national collection.⁹³ Further investment might also then be made into collection technologies, which could increase the efficiency of collection.

The NLA website notes that it has struggled to find a useful working definition of publication. Currently, “publication” is defined as:

[I]nformation, regardless of its format or method of delivery, that is made available to the general public, or to an identified public, either free of charge

⁸⁹ *PANDORA: Australia’s Web Archive*, National Library of Australia, available at <http://pandora.nla.gov.au/> (accessed 29 May 2009).

⁹⁰ National Library of Australia and Partners, Overview, available at <http://pandora.nla.gov.au/overview.htm>. (accessed 17 April 2009). See also the various partner organisations’ Selection Guidelines for collected materials, based upon these agreements, available at <http://pandora.nla.gov.au/guidelines.html> (accessed 20 July 2009).

⁹¹ National Library of Australia and Partners, Policy and Practice Statement, available at http://pandora.nla.gov.au/policy_practice.html (accessed 17 Apr 2009).

⁹² National Library of Australia, see above n 30, at p 4. It is worthwhile to note that similar provisions to this effect are to be found in the *Legal Deposit Libraries Act 2003* (UK). See for example section 6, allowing for regulations regarding deposit of non-print publications (including online materials), and section 8, regarding copyright issues related to the deposit of electronic and online materials.

⁹³ *Ibid.*

*or for a fee. In theory this includes everything publicly available via the Internet.*⁹⁴

Categories of information archived by PANDORA include journals, newspapers, reports, speeches, and “web sites or parts of web sites, which provide substantial or unique information about a topic, organisation, person of national significance, project or event.”⁹⁵ Due to the selective approach, limited resources and the difficulties of obtaining copyright permissions, many (but not all) of the examples provided earlier are not collected by the PANDORA Archive.

In order to determine if material collected online is significant to Australia, PANDORA asks if a significant proportion of the work is:

- about Australia; or
- on a subject of social, political, cultural, religious, scientific or economic significance and relevance to Australia and written by an Australian author; or
- is written by an Australian of recognised authority and constitutes a contribution to international knowledge.⁹⁶

The collected material can be located on an Australian or overseas server. Australian authorship or editorship alone is insufficient grounds for national preservation, and PANDORA selection guidelines note that, in the context of online publications, content is the pre-eminent factor in determining selection.⁹⁷ The authority behind the publication and the long term research value of the content is also taken into consideration.⁹⁸

The Archive has already done extensive research in the area of online collection and preservation. Consideration of the appropriate implementation of an extended legal “deposit” scheme should clearly build upon the work already undertaken by this Archive.

8. Extended Scheme: Online Collection Strategy Proposal

As demonstrated by the discussion in this paper, there is great value in extending the legal deposit scheme to include online materials (among other valuable areas of extension). Due to the volume and breadth of material published online and the dynamic nature of this material, it would be too burdensome to hold publishers responsible for the deposit of online publications.

In cases of dynamic online content, we recommend a collection model which would allow authorised libraries or archives to collect materials available online. However,

⁹⁴ National Library of Australia and Partners, *Online Australian Publications: Selection Guidelines for Archiving and Preservation* by the National Library of Australia, available at <http://pandora.nla.gov.au/selectionguidelines.html> (accessed 17 April 2009).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

these authorised libraries or archives should also be given the power to request materials in cases where they are not able to collect it themselves. Such cases may include access issues arising due to password protection. The library or archive should also be able to request a version free from technological protection measures or, if unavailable, the information required to access the materials. Specific permission to collect and request materials in particular circumstances will require express inclusion under the legislation in order to overcome copyright implications.

The method of collection plays a key role in the development of an effective legal deposit scheme. Comprehensive collection ensures that no valuable materials are neglected and that the process of collection does not involve the imposition of value judgments on the cultural validity of the material. However, as we have discussed above, there are practical limitations to comprehensive collection. Comprehensive collection may be too resource-intensive due to the dynamic nature, and volume, of online materials. The sheer volume of data on the Internet would also mean that it would be more difficult to find quality materials among the surrounding, less significant, “noise.” Accurate cataloguing of these materials may also present insurmountable challenges. Alternatively, the archiving process could continue as an expansion of PANDORA’s collection model, where material is selectively included in the archive. However, this may also be overly resource-intensive, especially in view of likely exponential growth of data. Additionally, reliance upon selective collection alone could lead to gaps in preserving Australia’s online cultural heritage.

If appropriate exceptions are put in place, the answer may lie in a hybrid model: a combination of automation and selectivity. There is potential for the collection process to become more comprehensive as technology evolves, and more powerful as automated tools to store and locate culturally relevant materials are developed. Furthermore, we suggest that guidelines for the definition and categorisation of “culturally significant” materials should be developed by the library or archive. This has been undertaken to an extent by the development of the PANDORA guidelines. Such guidelines should be easily accessible and reviewed regularly. We also recommend an online notification facility, whereby publishers can alert the relevant library or archive when culturally significant materials become available. There is also scope for backdated preservation to occur on a voluntary basis.

We appreciate that, in order to establish the best implementation model, ongoing consultation between all stakeholders involved is necessary. However, this process, which is already underway, must be accelerated if the already substantial amount of “culturally significant” material, particularly that is “born digital,” is to be captured and preserved in the same way that traditionally published material has been in the past.

9. Conclusion

Legal deposit has played a significant role in preserving cultural heritage for future generations and providing access to culturally significant materials for purposes permitted under Australian copyright law. A legal deposit requirement can also ensure that a copy of the work is available upon expiry of copyright and released into the public domain. Current Federal Australian legal deposit provisions are limited to traditional print publications. Technology has changed the way we consume information and engage with society. The exponential growth in online publishing and

utilisation of the Internet as a key means of communication demonstrates the urgency of extending the legal deposit scheme to include online materials.

There is an infinite variety of materials available online and the form of this material is difficult to categorise. Culturally significant online materials come in all manner of media and styles. However it is not the medium of origin that should determine what material is deposited. What is important is the contribution it has made and what it can teach us about Australian society and culture. Attempts have already been made to preserve Australia's online legacy through voluntary archiving projects such as PANDORA. Labour intensive negotiations have led to inefficiencies in the collection and preservation process. Expansion of the legal deposit scheme to include online materials is a critical step in recording Australian heritage. Due to the volume and dynamic nature of online materials, an extended legal deposit scheme should include mandated collection of online materials by the library or archive, rather than require deposit by the publisher. The applicable library or archive should be given the power to request deposit in circumstances where access issues arise. Technological protection measures should be removed or access information provided. Flexible guidelines should dictate the collection model and these guidelines should be regularly reviewed. Naturally, ongoing consultation is required to develop a practical implementation model. What is certain is that the Government, law reform bodies, copyright owners and other stakeholders need to start taking Australia's online cultural heritage very seriously. At risk are some of the most significant and transformative aspects of Australian culture today.