



Tortoise or Hare? Learning from the development of e-legal deposit legislation in the UK

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Abstract:

UK legislation for e-legal deposit has been long in its gestation, from lobbying and a first consultation on the need for new legislation some fourteen years ago, through the passing of an enabling Act in 2003, to draft regulations for implementing e-legal deposit which should be approved this year. A review of the UK experience offers lessons for others, including how the legislative process is influenced by the cultural, economic and political context in which it is developed and how the choice of legislative vehicle may have important, and sometimes unanticipated, consequences. The UK legal deposit libraries have worked together with publishing representatives to understand the practical implications of implementing legal deposit for digitally-published material, and to shape the legislation in such a way as to address the entirely legitimate concerns of publishers and other stakeholders, especially with regard to the potential risks for publishers if there were no control over the ways in which deposited material is used. Due consideration has also been given to other regulations and requirements, which are not necessarily directly related to e-legal deposit but which nevertheless have practical implications for how it may be implemented by the libraries.

Introduction

Dame Lynne Brindley, Chief Executive of the British Library, has written of the “danger of creating a digital black hole for future historians and writers” unless urgent action is taken to preserve websites and other digital records “to ensure that our digital future can be a rich

goldmine and not a void"¹. The Vision for the Global Digital Library of the Conference of Directors of National Libraries (CDNL) states: "Our long-term vision is the development of a global distributed digital library - comprehensive, open, seamlessly-connected, and universally accessible on the internet - giving ready access to library materials in the collections of all the national libraries of the world in the interests of scholarly research, education and lifelong learning, innovation and economic development, and the promotion of international understanding"². Extending legal deposit legislation to cover digitally published content is a vital part of the strategy in most national libraries for collecting and preserving their nation's published heritage.

This paper, after outlining the up to date position, examines the progress of legal deposit legislation in the UK. It makes observations about the approach that has been taken and lessons learned, some with the benefit of hindsight, in order to inform the work of other national libraries and institutions. The paper describes the UK experience from four perspectives:

1. The UK cultural, economic and political contexts, and their influence on the progress of legal deposit legislation.
2. The choice of legislative vehicle and the sometimes unexpected ways in which this has affected the implementation of e-legal deposit.
3. How the UK Government and legal deposit libraries have sought to address the legitimate commercial interests and stakeholder concerns of the publishing industry.
4. Other legal and practical considerations which affect the implementation of e-legal deposit.

Electronic legal deposit in the UK

The Hare, boasting of his speed, challenged other animals to a race; the Tortoise quietly accepted his challenge. "That is a good joke," said the Hare; "I could dance round you all the way." At the start, the Hare darted away and was soon out of sight. Soon he stopped and, to show his contempt for the Tortoise, lay down to have a nap. The Tortoise, far behind, plodded onwards. When he awoke from his nap, the Hare saw the Tortoise just near the winning-post. He sprinted to the end but was not in time to save the race. The Tortoise said: "Slow but steady wins the race."³

Legal deposit in the UK is governed by the Legal Deposit Libraries Act 2003⁴ (the "2003 Act"), which was given royal assent on 30 October 2003 and implemented with effect from 1 February 2004. This reaffirmed earlier provisions in the Copyright Act 1911 for the legal

¹ Brindley, Lynne. 'We're in danger of losing our memories'. Observer, 25 January 2009

² http://www.cdnl.info/2008/CDNL_Vision_for_the_Global_Digital_Library.pdf

³ Aesop's Fables. 'The Hare and the Tortoise'

⁴ <http://www.legislation.gov.uk/ukpga/2003/28/contents>

deposit of printed publications at six libraries: the British Library, the Bodleian Library in Oxford, Cambridge University Library, the National Library of Scotland (including the transmission of law publications to the Faculty of Advocates Library in Edinburgh), the National Library of Wales, and the library of Trinity College in Dublin. The inclusion of a library that is in the Republic of Ireland might appear anomalous, but the right of Trinity College to claim one copy of every publication printed or distributed in the UK dates back to 1801 and is now part of reciprocal arrangements in which the UK legal deposit libraries also receive copies of publications printed or distributed in Ireland.

The 2003 Act's most significant innovation was to give powers to the Secretary of State for Culture, Media and Sport to make regulations which extend the deposit obligation to non-print publications, including digital publications on hand-held media such as disks, CDs or DVDs, and material that is made available on the internet. Thus the 2003 Act, as primary legislation, does not itself bring legal deposit of electronic publications into effect, but it provides a framework within which this can be achieved through secondary legislation.

In September 2005, the Government established the Legal Deposit Advisory Panel (LDAP) as an independent advisory non-departmental public body to advise the Secretary of State for Culture Media and Sport on both regulatory and non-regulatory (i.e. voluntary) options for the deposit of non-print material. LDAP was made up of fifteen members representing a spectrum of knowledge and interests: five from the legal deposit libraries, five appointed for their knowledge and experience of publishing, and five independent members including the Chair.

In 2009 LDAP submitted recommendations to the Secretary of State for the legal deposit of publications on CD-ROM and other offline media, and for the harvesting and archiving of material (both websites and documents) which, when published, is made freely available on the internet. The Government consulted widely upon these recommendations between December 2009 and March 2010.

In March 2010 LDAP made further recommendations, for regulations on the legal deposit of:

- online websites and documents that are protected behind a barrier which requires payment, registration or compliance with some other formality; this includes most commercially published e-books, e-journals and other types of digital publication.
- structured, enquiry-driven data sets which require additional software or systems for searching, selecting or displaying the data, such as a railway timetable enquiries database.
- content which is 'pushed' or delivered to the user by email or other means, such as a news feed to the computer desktop.

LDAP was wound up as a public body in July 2010. However, between September 2010 and January 2011, the Government consulted publicly upon draft regulations covering all of the above. The British Library, although voicing a concern about a number of points of detail, welcomed both the consultation and the draft regulations⁵.

⁵ http://www.bl.uk/aboutus/stratpolprog/legaldep/bl_response_legaldeposit20122010.pdf

The Government was also seeking evidence about the cost burden for publishers of depositing online-published material. Unfortunately, the consultation did not produce sufficient information to assure the Government that these costs would be reasonable and proportionate. Therefore the Government has indicated that it cannot proceed with regulations in the form drafted. However it is committed to delivering regulations for as much as possible. The process and costs of depositing publications on CD-ROM and other physical, offline media are much the same as those for depositing printed publications. Almost all of the cost burden for harvesting online material is borne by the legal deposit libraries, rather than by publishers. And a publisher who voluntarily agrees to deliver copies of their online publications to a legal deposit library, perhaps instead of depositing the printed version, must by definition be willing to bear the costs of doing so.

Therefore the UK Government has now signalled its intention to go forwards immediately with new regulations on this basis, and its expectation that the legal deposit libraries and publishers should work together to identify the true costs of delivering online-published material so that additional regulations, for deposit as well as for harvesting, can be made at a later date. New regulations are now being drafted, to be laid before Parliament this year. If Parliament approves, the British Library expects, before the end of this financial year, to have legislation in place for:-

1. the obligatory deposit (delivery) of publications on CD-ROM and other offline media;
2. harvesting websites and other online-published material that is made freely accessible;
3. harvesting e-books, e-journals and other individual documents and publications that are openly accessible
4. harvesting published material such as e-books, e-journals and other publications that are protected by a pay wall or any other kind of barrier - the publisher must provide the password, key or other means of permitting access for harvesting by one of the legal deposit libraries.
5. mutual agreements between individual publishers and the legal deposit libraries for deposit (delivery) of any online-published material.

The context for legislation

A man had two daughters, the one married to a gardener, and the other to a tile-maker. He asked how they fared. The gardener's wife was content but wished for a heavy fall of rain, in order that the plants may be well watered. The brick-maker's wife was also content but wished for dry weather with the sun shining hot and bright, so that the bricks might be dried." The man asked himself: "With which daughter am I to join my wishes?"⁶

In broad terms, national libraries across the world typically share certain characteristics and goals; all are responsible for acquiring, preserving and making accessible the publications

⁶ Aesop's Fables. 'The Father and his Two Daughters'

(of all kinds) of their country. In general every country also wishes to safeguard and to enhance its national culture and to preserve its published heritage. However the extent to which each country shares these concerns, the ways in which each country chooses to address them, and the circumstances in which each national library operates, are all different. Each nation's political, cultural and economic situation is unique, and the varying contexts for legislation can influence the choice of legislative approach, the process of legislating and even the scope or shape of legal deposit legislation itself.

The UK's publishing industry is amongst the world's largest, with a combined turnover of at least £20 billion, more than 8,500 companies and directly employing around 167,000 people. Overall in the UK:

- creative industries contributed 5.6% of the UK's Gross Value Added in 2008
- exports of services by the creative industries totalled £17.3 billion in 2008, equalling 4.1% of all goods and services exported
- there were an estimated 182,100 businesses in the creative industries on the Inter-Departmental Business Register (IDBR) in 2010, this represents 8.7% of all companies on the IDBR
- software and electronic publishing make the biggest contribution to Gross Value Added of the creative industries, at 2.5% in 2008. They also make up a large number of total creative firms (81,700)⁷.

Thus the creative industries, especially publishing as an important driver of innovation and new content, are of great economic importance to the UK and the publishing industry is well organised, with a powerful voice, especially through newspapers and other press media. Any Government, of whatever political persuasion, will naturally wish to ascertain the business impact of any new legislation, and to ensure that the costs are properly understood, justified and proportionate. This is particularly true of the Coalition Government in the current economic climate, which seeks to reduce the regulatory burden on industry wherever possible.

This has tended to mean that, compared with some other countries, the UK Government has placed great emphasis on the examination and testing of alternative models such as voluntary deposit schemes, and upon the need for a rigorous assessment of the costs and administrative impacts for publishers of different methods of deposit. The reasons for e-legal deposit, including the requirements that it should satisfy, have been much discussed and the need for legislation has needed to be justified. As evidenced by the last consultation, the Government will not regulate until it is completely satisfied that these aspects are thoroughly understood. It has also tended to mean that the legal deposit libraries have needed to evidence precisely how the digital content they collect will be acquired and managed securely; the shared technical infrastructure for storing digital content has already been developed and implemented well in advance of any legislation.

In contrast, the promotion, protection and preservation of its national culture is perhaps of less significance to the UK Government, relative to other nations, as measured by the amount of investment in national institutions and by the level of emphasis on centrally

⁷ http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx#Creative

organised initiatives to safeguard the nation's heritage. This may in part be because of the increasing globalisation of publishing, with different parts of the process being carried out across the world, and with the huge and increasing volume of content published in the English language. Perhaps expressions of the UK's national culture are less unique or distinctive than, for example, material published in the Scandinavian languages. In the application of territoriality rules for e-legal deposit, it is certainly more difficult in practice to find easy ways of identifying content published in the UK separately from content published in say the USA, Canada, Australia or elsewhere.

As a UK-specific example, Scotland and Wales are culturally distinct from England, and both the Scottish Government and Welsh Government attach great importance to recording and preserving their separate heritages. There is no separate national government for England, nor a distinct national library for England—the British Library's remit is for the whole of the UK. Also, proportionally, the UK Government in Westminster does not seem to place quite so much emphasis on culture as an issue. All three of the British Library, National Library of Scotland and National Library of Wales collect both in order to preserve the cultural heritage of the nations and in order to serve the needs of scholarly and other research. But the National Libraries of Scotland and Wales strike a slightly different balance from that of the British Library in the degree of emphasis given to archiving the web space, as representative of a nation's cultural expression, as opposed to collecting scholarly publications and other research materials.

All this has influenced the legislative process; after the 2003 Act, the development of actual legal deposit regulations has effectively been governed through an independent body in which the legal deposit libraries were only one of three stakeholders, with equal weight being given to both publishers and other independent experts who were chosen to represent the wider public interest.

It is clear from the UK experience that the political, economic and cultural contexts have all influenced the way in which legislation is being developed. National libraries of other countries may need to consider the environment in which they operate, in order to select the approach that is most adapted to their circumstances.

Legislative vehicles

An Ass, whose master gave him too little food, petitioned to be released from his present service and provided with another master. Shortly afterwards, finding that his second master gave him heavier loads to carry and harder work, he petitioned again for another change. He was sold to a tanner. Having fallen into worse hands, the Ass groaned: "It would have been better for me to have been either starved by the one, or to have been overworked by the other of my former masters, than to have been bought by my present owner, who will tan my hide and make use of me even after I am dead". He that finds discontentment in one place will not always find happiness in another place.⁸

The UK's primary legislation for governing legal deposit is the 2003 Act. This is separate from the legislation which governs copyright, principally the Copyright Designs and Patents

⁸ Aesop's Fables. 'The Ass and his Masters'

Act 1988, and also from other legislation such as the British Library Act 1972. It contrasts with the legal framework in other countries such as Austria, Canada, France or Ireland, in which legal deposit is achieved as part of other legislation such as a National Library Law, Copyright Law, Communications Law, Cultural Property Laws or legislation relating to universities or education.

The principal benefit of the 2003 Act was perceived to be its flexibility; thus new regulations could be made for each category of publication, tailored for different circumstances, at any time in the future, and without the need for enacting new or revised primary legislation. To permit such flexibility, the 2003 Act deliberately avoided making detailed statements about the form or content of such regulations, but it did define a few important parameters. It also had the advantage that legal deposit was effectively given a mandate all of its own, separate from the legislation for copyright or other cultural property matters.

With the benefit of hindsight, however, this approach has perhaps not been quite so successful as first envisaged and has led to some unanticipated consequences.

Firstly, in order to assure the publishers and other stakeholders that their interests would be taken into proper consideration for any future regulations, the 2003 Act laid down parameters for how regulations are to be made. Full consultation of all relevant stakeholders must take place. A full impact assessment must be carried out, to demonstrate that the regulations will not be “[dis-]proportionate to the benefit to the public”, nor “unreasonably prejudice” publishers’ interests. And the regulations can only be passed by affirmative resolution, i.e. a vote by members in both Houses of Parliament, which means that they are dependent upon finding an appropriate time in the parliamentary timetable. Thus, in practice, the regulatory process for legal deposit may be almost as demanding and as time-consuming as the process was for the 2003 Act itself, as primary legislation.

Secondly, separating out legal deposit from the other legislation that governs copyright and intellectual property has opened the door to questions about the use of certain core definitions and how they are to be applied in the different contexts. For instance the words ‘publication’, ‘work’ or ‘published in the UK’ (territoriality) may be given subtly different meanings within the regulations for legal deposit. Indeed both the legal deposit libraries and publishers, in their responses to the last consultation⁹, raised questions for the Government about certain legal definitions, and important inconsistencies, in the draft regulations.

Thirdly, and partly because it was separated out as an Act in its own right, the UK’s legal deposit legislation was framed in terms of a core obligation upon publishers to deposit relevant material. This is subtly different from enabling legislation which entitles the legal deposit libraries to collect the same material. The wording of the 2003 Act tends to describe a publisher’s obligations in delivering the material, i.e. presuming so-called ‘push’ deposit, rather than mentioning how a legal deposit library may collect it by ‘pull’ methods. Thus the UK legislation does not of itself give any automatic entitlement to the legal deposit libraries for harvesting, even though web archiving and the collection of such material was clearly discussed by all stakeholders at the time of the 2003 Act. This has led to some interesting questions for the Government’s advisers drafting the regulations; how can they permit a legal deposit library to collect material by harvesting within a legal framework which obliges the publisher to deposit? Their answer has been to describe the process in terms of a publisher delivering the material by automated means in response to a request in writing,

⁹ <http://www.culture.gov.uk/publications/8029.aspx>

albeit automated, from the library. Thus a solution has been found but, in hindsight, perhaps some slightly different language in the primary legislation might have avoided the problem in the first place.

Finally, and most importantly for the legal deposit libraries, the separation of legal deposit from other general legislation covering copyright and intellectual property has allowed a distinction to be made between how legal deposit material may be used, and how other purchased, licensed or donated material may be used, even after the term of copyright has expired.

In order to give publishers the assurance they needed that regulations could not be made which might unduly prejudice their legitimate commercial and other interests as rights holders, the 2003 Act prohibits by default all uses of deposited material; so legal deposit material may only be used (i.e. accessed for reading), copied, adapted, lent, transferred or destroyed as explicitly stated in the regulations. Therefore, unless the regulations contain an explicit link to other copyright and intellectual property legislation, or include equivalent clauses, many of the fair dealing provisions that are available to UK users for other copyrighted material cannot be used for legal deposit content. And the restrictions upon access that are properly applied to legal deposit material, in order to safeguard the publisher's legitimate interests as rights holders, may apply forever because the legal deposit framework of legislation is no longer directly linked to the term of copyright.

There were strong arguments in favour of enacting legal deposit via a separate legislative vehicle, and via secondary legislation (regulations) within a framework created by the 2003 Act as primary legislation. But this has also given rise to some unanticipated difficulties and opened the door to further negotiations and uncertainties in ways which were not expected eight years ago.

Addressing the concerns of publishers and other stakeholders

*A boy put his hand into a pitcher full of hazelnuts. He grasped as many as he could possibly hold, but when he tried to pull out his hand, he was prevented from doing so by the neck of the pitcher. Unwilling to lose the nuts, and yet unable to withdraw his hand, he burst into tears and bitterly lamented his disappointment. A bystander said to him, "Be satisfied with half the quantity, and you will readily draw out your hand."*¹⁰

Legal deposit is an extraordinary privilege which facilitates the development of a comprehensive and distinctive national collection that is of enormous value to the public. It is right that the benefits of this collection should be made available as widely as possible. But it is also important that the proper interests of publishers and other rights holders are properly respected. Their concerns and their legitimate interests must be reflected in the legislation.

Also, if the system is to work successfully in practice, the active support of publishers is essential; despite the legal framework, the operation of e-legal deposit depends upon day-to-day co-operation between the legal deposit libraries and publishers. Therefore it is

¹⁰ Aesop's Fables. 'The Boy and the Filberts'

essential that publishers have trust in the legislation and can be confident about how it will be implemented by the libraries. Equally, the legal deposit libraries all recognise their own responsibility for safeguarding deposited material and for ensuring that their activities do not unduly prejudice the publishers' commercial models, so they must not make too many demands or ask for too much.

Looking back over the work of the Legal Deposit Advisory Panel and the many discussions between legal deposit libraries and publishing representatives in the UK, a wide range of issues has been covered. However these have appeared to revolve around three main areas of concern, in ascending order of priority:

1. The technical and practical ways in which a legal deposit library will engage with individual publishers to collect (or take delivery of) digitally-published content, and the administrative cost to a publisher of depositing.
2. How the legal deposit libraries will manage the deposited material securely, to ensure that it is preserved safely and can only be used in the ways, and for the purposes, that are described by the terms of the scheme; legal deposit libraries want to give publishers confidence in their technical security, countering the risk of commercially sensitive material leaking into the open market.
3. The level and means of access that will be provided to deposited content, for reading, for copying or for other purposes; in satisfying the public interest in deposited material, libraries must also respect and protect the publishers' commercial models and interests as rights holders.

Sometimes we may not fully appreciate the nature of a publisher's commercial model, and how it can be affected by providing an alternate route for access. For example, in the UK, the legal deposit libraries have long accepted the principle of restricting access to deposited copies of publications for which the publisher normally levies a charge or subscription; if the deposited copy were allowed to be made freely accessible online to any user, then clearly it would have a material impact upon the publisher's sales income. In the case of other publishers who make their own content freely accessible online, some do so only because they wish it to be disseminated as widely as possible and would therefore have no objection to the deposited copies also being made openly accessible. But some publishers do so in order to support advertising, sales of connected products or other commercial models and, in such cases, the library's provision of access to an alternate copy could potentially represent a competitive threat.

In the UK, we have sought where possible to address these concerns through the regulations themselves. With regard to the engagement and delivery process, the legal deposit libraries proposed that regulations should contain a number of provisions:

- For material that is freely accessible online, in the UK web space, a legal deposit library would typically be able to harvest this directly, without needing to engage with a publisher directly. The publisher would be able to log the harvester's activity as an audit trail.
- Where some kind of interaction is necessary, typically because the material is protected by a pay wall and must either be delivered by the publisher or made accessible to the library's harvester, it was proposed that, despite the UK recognising six legal deposit libraries, the publisher would only need to interact with one of them. A single legal deposit library would harvest or take receipt of

deposited content and then share it or copy it to the other five, rather than each library approaching the publisher separately.

- To this end, the UK legal deposit libraries have set up a single, shared technical infrastructure for e-legal deposit, based upon the British Library's Digital Library System with additional nodes in the National Library of Scotland and National Library of Wales and with access links for the Bodleian Library, Cambridge University Library and, subject to the terms of regulation, the Library of Trinity College in Dublin. This is more cost effective for the libraries than each library developing their own separate solutions, but it also reduces the transaction costs for a publisher because the publisher need only deposit once instead of up to six times.
- Furthermore a publisher's obligation to deposit such protected material would only be triggered by this interaction; there would be no blanket obligation on all publishers to commence depositing as soon as regulations commence, thus allowing for a gradual implementation and reassuring individual publishers that any demand for deposit of their digital content must be preceded by a request and some kind of discussion with the relevant library about the most suitable means of delivery.
- Finally the regulations will also confirm that, where substantially the same publication is available in both printed and digital forms, only one version need be deposited; and migration from the printed to the digital version will only be by mutual agreement. Until the publisher agrees with the relevant library that they are ready to begin depositing the digital version, the default obligation remains with print.

With regard to security and the uses of deposited material, the UK legal deposit libraries have provided detailed information about the shared technical infrastructure and their technical security policies in order to reassure the representatives of publishing associations and to build mutual trust. But, again, further safeguards will be built into the regulations themselves:

- The 2003 Act defines a reader as "a person who, for the purposes of research or study and with the permission of a deposit library, is on library premises controlled by it". This is interpreted as meaning that access to legal deposit material for reading may only be provided on-site, not remotely.
- In early 2010 the British Library did express a hope that, at some future date, new legislation or an amendment to the 2003 Act might allow its archive of free websites to be made freely available online, as the US-based Internet Archive already is. However the British Library has also subsequently confirmed that any widening of access must be on the proviso of including and implementing an appropriate means of safeguarding the interests of commercial publishers and other relevant rights holders.
- Regulations will specify that access must be further restricted, so that only one user in each legal deposit library may access the same 'work' at the same time. This is a *de jure* equivalent of the *de facto* situation for printed publications, in which the physical properties of a book or journal limit how it can be used.
- The legal deposit libraries may copy deposited works for preservation, but users will only be permitted to copy a limited portion, equivalent to what is allowed under 'fair

dealing', for specific purposes. Furthermore, users will only be permitted to make these copies in printed, analogue form; it was proposed that no digital copying should be allowed. The legal deposit libraries hope that it will be possible to amend the regulations at a later date, in order to permit digital copying, but recognise that they will need to demonstrate systems for controlling digital copies, in order to give confidence to publishers that such digital copying would not become a point of weakness in the security for deposited material.

- An informal practice has been established over the years in which the UK legal deposit libraries have been willing to negotiate and implement a period of embargo for access to certain items under special circumstances. These are rare because, in most cases, the limited nature of legal deposit access already provides a more than adequate safeguard against any unreasonable loss of income to the publisher. However there is a very small number of cases in which the publisher's business model depends upon a small number of high value sales or upon generating income over a short initial period of a few months; in such cases, and although not required to do so by the legislation, the UK legal deposit libraries have agreed to embargo access to the deposited copies for a period of, typically, two to three years. Ideally the libraries would prefer for this to remain an informal practice, for exceptional cases only, but we do expect some provision of this kind to be included in the forthcoming regulations for e-legal deposit.

A peculiarity, perhaps, of UK politics is that the current Coalition Government has directed that all new regulations and legislation affecting business and industry must be time-limited, and so it is expected that the e-legal deposit regulations now being drafted will include a 'sunset clause' which will cause them to be reviewed after five years and, unless a positive decision is made to extend their term, to expire two years after that. This might appear to be counter-intuitive and inappropriate for legislation whose purpose is to ensure that material is preserved in perpetuity. However in some respects it also presents a guaranteed second opportunity for the legal deposit libraries to address any shortcomings in the regulations as they are first enacted, to use the intervening period for developing further mutual trust with publishers, and potentially to seek additional provisions or new regulations. Therefore the British Library and other UK legal deposit libraries are ready to accept these regulations and begin the process of collecting and archiving digital content on the scale envisaged under legal deposit; this is preferable to attempting to obtain everything at once, which then runs the risk of failing to achieve anything.

Additional legal and practical considerations

*The Dog, used to eating eggs, saw an Oyster. Opening his mouth to its widest extent, he swallowed it down with the utmost relish, supposing it to be an egg. Soon afterwards, suffering great pain in his stomach, he said, "I deserve all this torment, for my folly in thinking that everything round must be an egg. They who act without sufficient thought, will often fall into unsuspected danger."*¹¹

We know from our work with other libraries, especially members of the Conference of Directors of National Libraries, that legal deposit legislation is only part of the solution, and a great number of other factors must be taken into consideration. These may include other

¹¹ Aesop's Fables. 'The Dog and the Oyster'

legal requirements or policies which affect the acquisition, stewardship and provision of access to digitally published material, plus many practical considerations. Such factors can affect a library's strategies for collection, preservation, discovery and access, and may therefore influence the approach to legal deposit and the requirements that might need to be addressed in legislation. Some may be unique to the UK paradigm, but others may be recognisable to national libraries throughout the world.

Many countries, for example, have legislation for privacy or personal data, which is designed to ensure that a citizen has some measure of control over what is recorded about them, its accuracy and how it may be used. This is entirely separate from legal deposit and is in many ways unconnected. But, with the explosion of self-publishing and social networking online, any library archiving large volumes of web content is almost certain to be capturing a degree of personal information about individuals, and over an extended period of time, which could potentially be used as a resource for data mining and profiling individual members of the public. Clearly, therefore, there may be personal data and privacy issues which need to be addressed, and the regulatory framework in each country may impose additional requirements.

For example the National Library of Norway informed us that it is required to obtain a licence from the Norwegian Data Inspectorate and that, due to the Inspectorate making extra demands for the current licence in 2009, the Library was forced to halt its domain-wide harvesting activities until such time as these can be addressed through amended legal deposit legislation expected in the near future. In the UK we have taken the precaution of consulting in advance with the Data Commissioner's Office.

At the time of writing, the UK's defamation law is somewhat unusual in that it considers each occasion on which a digital work is viewed on screen to be a new act of publication. Therefore, by providing access to a deposited work, a legal deposit library is effectively republishing it every time that it is used. This may potentially mean that the library is at risk, both of perpetuating a defamation, perhaps indefinitely and without any means of limiting the period of liability, and of becoming liable to claim as a re-publisher of the defamation. This peculiarity was partly addressed by the 2003 Act itself, which gives certain legal protections to the UK legal deposit libraries for relevant material. But these legal protections also impose certain requirements of their own and the libraries will need to implement Notice & Takedown provisions and other procedures.

Another consideration in the UK's 2003 Act, which was perhaps not foreseen at the time of its drafting, relates to audio-visual content. The 2003 Act excludes from legal deposit all works that consist only of "(a) a sound recording or film or both, or (b) such material and other material which is merely incidental to it". This is interpreted as meaning that audio-visual content is covered by legal deposit if it is part of a larger text- or image-based work. Thus, for example, video clips within a journal article would be covered. However content that primarily consists of audio-visual elements is not covered by legal deposit, so streamed music or cinema films and suchlike are excluded. This was mainly because, at the time of the 2003 Act, successful voluntary deposit schemes with other institutions were already in place for music CDs, video recordings and film DVDs. However few people foresaw the explosion of mixed media content and the widespread inclusion of video clips and other recordings within web pages and other online content. The clear distinction that may have existed ten years ago between text- or image-based publications and audio or video publications is now more blurred; it will be an interesting practical challenge for the UK legal deposit libraries to find automated ways of determining whether a particular collection of material should be included or excluded from the legal deposit archive.

Other issues which may be more recognisable to most libraries include the consideration of how to ensure that digitally published content is deposited in a format that is suitable for preservation and how to deal with metadata.

Clearly, from the perspective of a legal deposit library charged with preserving material in perpetuity, an aspiration might be the ability to exercise control over the precise file formats and technical standards in which relevant material is deposited. The need to deal with material which can be deposited in any format adds huge complexity and cost for the library. On the other hand, specifying a limited number of formats and methods in which material must be deposited would add to a publisher's costs of depositing, by necessitating the conversion of material, and might also fail to capture a sufficient representation of what today's purchasers of the material actually receive.

In the UK we have sought to address this separately from the legal deposit legislation, by working together in dialogue with publishers and by setting up joint governance arrangements. We expect the legal deposit regulations to say that the choice of format for deposit will be a matter for agreement between each individual publisher and the legal deposit libraries. However the legal deposit libraries, in consultation with publishing representatives, may advocate certain formats, standards or methods as being preferred for the purpose of deposit. An early example of such a statement of preferences for scholarly e-journals, and including recommendations for the removal before depositing of any Technical Protection Measures designed to enforce digital rights, has already been agreed and is available for consideration by any publisher via the British Library's website¹².

A similar approach, of ensuring that formal legislation says as little as possible but dealing with the issue via dialogue with publishers and informal joint governance arrangements, has been recommended for the difficult question of metadata. Naturally, in its most basic descriptive form, core metadata is needed for bibliographic records in order to Find, Identify, Select and Obtain content¹³. However, functionally rich metadata has an intrinsic value of its own and may also be subject to separate, and potentially different, intellectual property right from the content it describes. Furthermore, although the UK legal deposit libraries readily acknowledge the need for restricting access to deposited content, as a safeguard for publishers, we wish to ensure that basic descriptive metadata can be published online so that library users may discover the content and decide to visit the library in order to view it. But explicit reference to metadata as "relevant material" within regulations might entail additional consequences for how it may be used.

Overall, the UK experience serves to illustrate some of the additional complexities which may not at first be apparent but which must be taken into consideration for any implementation of legal deposit legislation.

¹² <http://www.bl.uk/aboutus/stratpolprog/legaldep/depositingelectronicjournals/depositing.html>

¹³ http://www.ifla.org/files/cataloguing/frbr/frbr_2008.pdf

Summary and conclusion

The Lion, the Fox and the Ass agreed to assist each other in a hunt. On their return, having successfully secured a large prize, the Lion asked the Ass to allot due portions to each of the three partners. The Ass carefully divided the spoil into three equal shares and modestly requested the two others to make the first choice. The Lion, bursting out into a great rage, devoured the Ass. Then the Lion asked the Fox to allot portions. The Fox accumulated all that they had killed into one large heap for the Lion, but left to himself the smallest possible morsel. The Lion said, "Who has taught you, my very excellent fellow, the art of division? You are perfect to a fraction." He replied, "I learned it from the Ass, by witnessing his fate. Happy is he who learns from the mistakes of others." ¹⁴

In the UK, developing e-legal deposit legislation has been a slow but extensive process, covering a wide range of issues and detailed discussions and negotiations with publishers and a wide variety of other stakeholders. It is not over yet. The first set of regulations, due this year, will include the deposit of offline publications and the harvesting of web-based content and other publications, both freely available and behind pay walls. They will also cover mutual deposit agreements between individual publishers and the legal deposit libraries for other methods of delivering material for deposit and for other kinds of material. But the regulations will need to be reviewed again after five years, at which point recommendations may be made for amendments or additional regulations.

The UK experience over the last eight years has taught us a number of lessons about approaching the development of legislation for e-legal deposit. The political, economic and cultural contexts all influence the potential ways in which to approach the process for different circumstances. The specific legislative vehicle chosen for implementing e-legal deposit is critical and, with the benefit of hindsight in the UK experience, has perhaps had some additional and unforeseen consequences. We have invested a great deal of time and effort in discussion and negotiation with stakeholders, in order to ensure that their interests and concerns will be properly addressed and respected. And we have also sought to identify and resolve all the other potential issues that might affect the successful implementation of an e-legal deposit system.

It may seem, eight years after the passage through Parliament of the Legal Deposit Libraries Act 2003, and some fifteen or more years since the British Library began lobbying for new legislation for e-legal deposit, that progress has been disappointingly slow. Certainly the UK's legislation for e-legal deposit now lags behind that of some other countries. However we do now expect to achieve regulations before the end of this financial year and are well advanced in planning for its implementation. Other librarians may decide, with reference to Aesop's famous story, whether the UK experience is more representative of the Tortoise or the Hare.

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¹⁴ Aesop's Fables. 'The Lion, the Fox and the Ass'