

COPYRIGHT DEPOSIT, LEGAL DEPOSIT OR LIBRARY DEPOSIT? : THE GOVERNMENT'S ROLE AS PRESERVER OF COPYRIGHT MATERIAL

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The Australian *Copyright Act 1968* (Cth) contains what is commonly referred to as a library deposit provision. The provision is s 201. This requires the publisher of library material which is published in Australia to deliver a copy of the material at the publisher's own expense to the National Library, within one month after publication. The provision is restricted to material in which copyright subsists under the Act. There is a penalty for non-compliance of \$100.

Section 201 is expressed to be not intended to exclude or limit the operation of any law of a State or Territory of similar effect, and each State and one Territory of Australia similarly requires the deposit of library material published in its State/Territory to its prescribed library.¹

These library deposit provisions have been a part of Australian copyright laws since their inception as colonial laws. Their common law origins can be traced back beyond the first copyright statute in England (the Statute of Anne of 1709)² and into the licensing regimes that preceded that statute and then into a private agreement between the University of Oxford and the Stationers' Company, the London-based guild of printers, booksellers and publishers, in 1610.

There are similar compulsory deposit laws throughout the common law world. Over recent years the nexus between copyright laws and deposit provisions has become weaker by the increasing passage of specific laws outside copyright protection regimes called library deposit or legal deposit laws. One example is the United Kingdom *Legal Deposit Libraries Act 2003*. Nonetheless they are of similar effect.

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¹ A list of the current statutory provisions is set out in an Appendix at the end of this article. The law discussed in this article is that available to the author at 31 December 2005.

² Entitled '*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned*' 8 Anne c 19. The Act came into force on 10 April 1710.

What is the justification for these laws? Should these laws as a matter of policy be linked with copyright protection? If there is a justification, should the extent of material deposited under these laws be specific and limited in scope, or should it be all-embracing of everything disseminated to the public?

This article examines the historical and policy basis of these laws. It argues that the laws have at times been used for motives of scholarly endeavour and censorship, but in Australia and some other jurisdictions they have subsisted as an element of national copyright policy. Nonetheless the paper argues that the laws have their most convincing rationale in the preservation of national culture and heritage. This rationale embodies human values which ought to be respected and promoted.³

I ORIGINS OF LIBRARY DEPOSIT

Library deposit in the Anglo common law world commenced as a private agreement between the University of Oxford and the Stationers Company. This was almost a century before the first copyright statute, the Statute of Anne.

On 12 December, 1610 the Stationers Company made (by indenture sealed in Convocation at Oxford on 27 February, 1611) a grant of one perfect copy of every book printed by them, on condition that they should have liberty to borrow those books if needed for reprinting, and also to examine, collate, and copy the books which were given to others.⁴ The obligations were essentially one-sided. The deed contained no penalty for non-compliance.

The agreement was brought into effect by Sir Thomas Bodley, a former diplomat and fellow of Merton College, Oxford, with the Master of the Stationers Company. This formed an important part of Sir Thomas' great and costly personal quest to restore and improve the University's public library. Sir Thomas on 23 February 1597-98 wrote a letter to the Vice Chancellor offering that whereas 'there hath bin heretofore a publike library in Oxford, which, you know, is apparant by the roome itself remaying, and by

³ Those values are presently reflected nationally and internationally in policies and laws for the conservation and preservation of moveable cultural heritage which stress the importance to current and future generations of access to their own national heritage collections. In particular, refer AMOL, *National Conservation and Preservation Policy and Strategy* (2003) Policy Statements 4-6 <http://sector.amol.org.au/publications_archive/national_policies> at 16 December 2005, and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, to which Australia is a party. Article 5(c) of the Convention obliges contracting states to promote 'the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops...) required to ensure the preservation and presentation of cultural property'. 'Cultural property' includes manuscripts, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc), sound, photographic and cinematographic archives. Refer UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (2001) <<http://www.unesco.org/culture/laws/1970/html>> at 16 December 2005.

⁴ In Liber C of the *Court Books of the Stationers' Company* appears the following entry:
'14 March 1610-11. Received from Oxon by the Delivery of Mr Doctor Kinge Deane of Christ Church and Vicechauncellor of Oxon the Certificate, under the Universitie's Seale, of ane Indenture, before Sealed at Mr Leake's house in Paule's Churchyard, under the comon Seale. 15 Novbr ult. for one booke of every new Copy to be gyven to the publique library at Oxon, that they appoynt Sr. Thomas Bodley to receive the same'. RC Barrington Partridge, *The History of the Legal Deposit of Books Throughout the British Empire* (1938) 17, note 3.

your statute records, I will take the charge and cost upon me, to reduce it again to his former use', first by fitting it up with shelves and seats, next by procuring benefactions of books, and lastly by endowing it with an annual rent. This offer was extraordinarily generous and was accepted with great gratitude.⁵

However, the concept of legal deposit began earlier in France. This would have been known to Sir Thomas Bodley and his librarian, Thomas James, who is credited with conceiving the idea of the deposit agreement with the Stationers Company. Partridge records that the first system of legal deposit of books was established by the Montpellier Ordinance of 28 December 1537.

Every printer and publisher in France, without exception, was ordered to forward to the learned Abbe Melin de Saint Gelais, who had charge of the Royal Library at Blois, a copy of every newly published book, irrespective of author, subject, cost, size, date or language, whether illustrated or not.⁶ The penalty for non-compliance with the ordinance was the confiscation of the whole edition of a work not deposited, together with a heavy arbitrary fine.⁷

The lack of sanction or penalty underpinning the agreement between the Stationers Company and the University of Oxford weakened its effectiveness. Attempts were made to remedy this. First, the Company at the commencement of 1612 passed a by-law, which made it obligatory on every one of their members to forward their books to the Library. Subsequently, an order of the Star-Chamber was made on July 11, 1637 in confirmation of the grant.⁸ This contained a sanction of imprisonment or a heavy fine for non-compliance. But the Star Chamber was soon after abolished. The 1662 and 1665 Licensing Acts broadened the deposit requirement to add the Royal Library and the Library of the University of Cambridge to the Library at Oxford. This increased the hostility some printer members had to the deposit arrangements and the Acts themselves contained weaknesses which could be exploited by recalcitrant printers. Thus, the extent of compliance by printer members of the Stationers Company, varied over the 17th century.⁹

⁵ How this agreement was brought into effect is unclear. In 1695 the then University librarian Thomas Hyde stated: 'We have been told that Sir Thomas Bodley gave to the Company 50 pounds worth of plate when they entered into this Indenture. But it's not mentioned in our counter-part'. W D Macray, *Annals of the Bodleian Library*, (2nd ed, 1984) 15, 41 (a reprint of the second edition published in 1890 at the Clarendon Press, Oxford).

⁶ Barrington Partridge, above n 4, 2.

⁷ Ibid 3.

⁸ Clause XXXIII of the famous Star Chamber decree of 11 July 1637 stated that one copy of every new book or reprint, with additions henceforth published had to be delivered to Stationer's Hall before any sale of the work took place, the copy afterwards being required to be sent to the Bodleian Library for preservation there. The penalty for non-compliance by any printer was to be imprisonment and a heavy fine. Three years later an act for the abolition of the Star Chamber was passed reluctantly by Charles I. Legal protection for the Agreement virtually ceased immediately. Barrington Partridge, above n 4, 22.

⁹ Ayliffe says that the agreement was very well observed until about 1640. He should rather have said 'about 1630' for in that year, in a paper of notes made by the Librarian for the use of Archbishop Laud, as Chancellor of the University, complaint is made that the Company were very negligent in sending their books, and it is suggested that a message from the Chancellor might quickly remedy that neglect. Infrequent mention of disputes with the London booksellers is made in speeches delivered by Dr Ralph Bathurst as Vice-Chancellor, sixty years afterwards, some of which were printed by T Wharton in 1761 at the end of his *Life*. Macray, above n 5, 40.

In 1709 the first copyright statute - the Statute of Anne - was doubly insulting for printers in that it imposed a reduced period of copyright protection for works and at the same time increased the number of deposit libraries to nine in England and Scotland.¹⁰ This number was increased upon the Union with Ireland to 11, but finally reduced to five (British Museum; Oxford; Cambridge; Advocates Library, Edinburgh; and Trinity College, Dublin) by 6&7 Will IV. c 110. Presently under United Kingdom law there are six deposit libraries, - the British Library Board, the University Library at Cambridge, the Bodleian Library at Oxford, the National Libraries of Scotland and Wales and Trinity College in Dublin.¹¹

II JUSTIFICATION/POLICY BASIS FOR LIBRARY DEPOSIT

A *What is the Justification for these Laws?*

The origins of library deposit lie in a mix of rationales. Certainly Sir Thomas Bodley sought to re-found the University Library at Oxford after it had become sadly denuded of works and fallen into disrepair, essentially for the purposes of scholarly endeavour, despite the fact it was and continues to be to this day a public library.

Evidence of this motivation lies in the selection of holdings Bodley and his 'Keeper' (librarian), James, made from donated as well as deposited works. This conscious selection is well documented in Bodley's correspondence with James. In a letter sent to James in Oxford in 1602, Bodley wrote from his London home:¹²

'Sir, For the increase of your stipend, I doe not doubt but to giue yow very good satisfaction, but till your trauels and troubles are seene to euery student, it will be best in my opinion, not to charge the spitte with too muche rostmeat. ...

...

In any wise take no riffe raffe bookes (for suche will but proue a descredit to our Librarie) but because I knowe not, whether he will be wonne, to pay for the binding of suche as may neede it, and for their cariage to Oxon (in bothe which pointes, yow may be bold to vrge him, as of your self) it will be requisit to take bookes, that we haue already, whereby those charges may the better be defraied. ...

....

Wherewith I commend yow to Gods good tuition.

your owne assured
Tho Bodley.

Marche 31. [1602]'.
(*he* refers to a donor)

¹⁰ 'Under the preceding Licensing Acts the registration of a work at Stationers' Hall, and the delivery of three copies, entitled a printer to what amounted to a perpetual copyright in that work, which privilege he could, of course, sell to another if he chose. On the old foundations, however, was built this new act whereby not only was the number of deposit copies increased from three to nine, but curiously enough, the period of copyright in a work was fixed at twenty-one years only for existing works, and at fourteen years for all works printed after 10 April 1710' (with the prospect of a further fourteen years if the author were alive at the end of the first fourteen years). Barrington Partridge, above n 4, 35.

¹¹ *Legal Deposit Libraries Act 2003* (UK) c 28, ss. 1, 14.

¹² G W Wheeler (ed), *Letters of Sir Thomas Bodley to Thomas James* (1926) 34-5 (letter no 26).

Similarly in 1612 he wrote:¹³

‘Sir, I would yow had foreborne, to catalogue our London bookes, till I had bin priue to your purpose. There are many idle bookes, & riffe raffes among them, which shall neuer com into the Librarie, and I feare me that the litle, which yow haue done alreadie, will raise scandal vpon it, when it shall be given out, by suche as would disgrace it, that I haue made vp a number, with Almanackes, plaies, & proclamations: of which I will haue none, but such as are singular. As yet Mr Norton hath not taken any order, for the bringing in of their bookes by reason of the sicknes of their Bedel: but he hath promised faithfully, to doe it with speede.

....

I thanke yow very muche, & continue as euer

your true assured frind
Tho. Bodley

Fulham. Ian. 1. [1612]’

Another letter written shortly after, expands on his outlook:

‘Sir’

...

I can see no good reason to alter my opinion, for excluding suche bookes as almanackes, plaies, & an infinit number, that are daily printed, of very vnworthy maters & handling, suche as, me thinkes, both the keeper & the vnderkeeper should disdain to seeke out, to deliuer vnto any man. Happely some plaies may be worthy the keeping: but hardlie one in fortie. For it is not alike in Englishe plaies, & others of other nations: because they are most esteemed, for learning the languages & many of them compiled, by men of great fame, for wisdom & learning, which is seeldom or neuer seene among vs. Were it so againe, that some litle profit might be reaped (which God knows is very litle) out of some of our playbookes, the benefit thereof will nothing neere conteraile, the harme that the scandal will bring vnto the Librarie, when it shalbe giuen out, that we stufte it full of baggage bookes. And though they should be but a few, as they would be very many, if your course should take place, yet the hauing of those few (suche is the nature of malicious reporters) would be mightily multiplied by suche as purpose to speake in disgrace of the Librarie. This is my opinion, wherein if I erre, I thinke I shall erre with infinit others: & the more I thinke vpon it, the more it doth distast me, that suche kinde of bookes, should be vouchsafed a rowme, in so noble a Librarie. And thus at this time, with my kindest commendations.

your very assured frind
Tho. Bodley

London. Ian. 15. [1612]’

The motivation was not to obtain a complete bibliographic record of English printed works. Among the ‘riffe raffes’ and ‘baggage’ books excluded from the collection were first (quarto) editions of Shakespeare's plays. The first folio edition of Shakespeare's plays does appear in the Library's records in 1635 but appears later to have been discarded in favour of the third edition of 1664.¹⁴ The library has continued a selective retention strategy since that time.

¹³ Ibid 219, 221-2 (letter nos 220-1).

¹⁴ 'In the Bodleian Catalogues of 1603 and 1620 no entries whatever appear under the name of Shakespeare. In the supplemental Catalogue of 1635 the First Folio of 1623 is duly recorded; but in the catalogue of 1674 we find only the third edition, that of 1664. The inference is that the third edition seemed to the library keepers of those times vastly preferable to the first and second editions, and so the precious volumes supplied by the Company in 1623 and 1632 were doubtless regarded as little more than waste-paper and were discarded'. Barrington Partridge, above n 4, 21.

Later, much of the impetus behind the first statutory embodiment of library deposit under the Licensing Acts - and its expansion from the Bodleian Library to cover the Royal Library and the University of Cambridge Library - was that of censorship, that is to prevent blasphemous and seditious works being gradually and secretly put into general circulation.¹⁵ 'The Royal Library ... was under the inspection of Crown officials. Seditious publications and libels and satires on court morals would there be instantly detected, with dire consequences to their authors.'¹⁶

But by the time of the Statute of Anne and the enlargement of the deposit libraries to nine, something of the modern manifestation or policy basis of library deposit appears. That is, it was not a policy aimed at the enrichment of some public libraries at private expense but an instrument to gather a full and permanent record of the nation's printed works and of a record of all the branches of knowledge contained within those works.

The deposit laws were, and are, limited to publications within national boundaries.¹⁷ In the United Kingdom, more than one deposit library was mandated in order to better preserve these works and to provide access for the public from diverse areas. Attempts in the United Kingdom to restrict the number of deposit copies to one, have failed. Within Australia, which is geographically more diverse, there are at least two copies required to be deposited under the combined effect of Commonwealth and State/Territory deposit laws.

The deposit system has become so widespread that practically every civilised country in the world has some form of legal deposit of books.¹⁸

B *Should They as a Matter of Policy be Linked with Copyright Protection?*

In Anglo-Australian law, there has been a strong link between copyright law and library deposit provisions, which has been evident from the Statute of Anne to the end of the 20th century. In some countries like the United States of America, the deposit requirement was historically linked with the subsistence of copyright, but this is not the position in Australia or the United Kingdom (and more recently the United States of America) which are presently members of the Berne Union, where compliance with formalities under national laws as a condition of copyright protection, such as registration, is forbidden.¹⁹

¹⁵ Barrington Partridge, above n 4, 24.

¹⁶ Ibid.

¹⁷ One exception – based on historical grounds - is the reciprocal deposit of material first published in the United Kingdom in the Library of Trinity College, Dublin and the deposit of material first published in the Republic of Ireland in the British Library.

¹⁸ Barrington Partridge, above n 4, 3.

¹⁹ In Australia, under the *Copyright Act 1912* (Cth), there was an optional system of registration but this entitled the copyright owner to certain remedies, which were not otherwise available without registration, but registration did not go to the subsistence of copyright. The optional system of registration was abolished by the *Copyright Act 1968* (Cth).

Article 5(2) of the Paris Act of the Berne Convention, to which Australia is a party, provides that the enjoyment and the exercise of rights granted by the Convention and by national laws shall not be subject to any formality; 'such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work'.

In none of the surveyed common law countries does compulsory deposit conflict with this principle. Compulsory deposit is not a condition of copyright protection in any of those countries. Under s 201 of the Australian *Copyright Act 1968* (Cth) there is a separate penalty (\$100) for non-

Copyright law is concerned with the recognition and protection of creative material by the creation of quasi-monopolistic rights. While the rights of copyright owners are termed exclusive rights, they are balanced with those public interests in research, scholarship, criticism and review and in access to, and the encouragement of the free flow of, ideas, which are embodied in the defences contained in the law to the exclusive rights. These interests are recognised in the international copyright conventions. In essence, copyright law is a two-way street between owner and user and in the language of policy makers the law strikes a balance between the owners and the users of copyright material.

The deposit provision in the Australian *Copyright Act 1968* (Cth) is restricted to library material that is published in Australia and in which copyright subsists. It could be argued that there is a copyright rationale for the deposit provision which includes the provision of best copies by the publisher for the protection of rights granted by the state. In Australia under the preceding *Copyright Act 1912* (Cth), copyright registration of works, though not a condition of protection, was encouraged by giving the copyright owner certain additional remedies in the event of infringement.²⁰ Registration involved submitting a copy of the work to the Registrar of Copyrights.²¹ Under its predecessor enactment, the *Copyright Act 1905* (Cth), copyright registration was required before the owner of copyright was entitled to institute any proceedings for infringement.²²

The Spicer Committee which reported to the Australian Attorney-General in 1959, suggested that 'it seems to us that the main purpose of such a provision should be to build up a complete collection of Australian literature'.²³ The Whitford Committee, which reviewed the law in the United Kingdom in 1977, stated:

The fact that in this country all copyright legislation since the early eighteenth century has also concerned itself with legal deposit indicates that a link originally existed between the establishment of an author's property right and the obligation to deposit. The link is to be found, in sixteenth century England and in France up till the Revolution, in royal attempts to control the printed word by making all publications illegal except under licence (in England through a member of the Stationers' Company) or unless a 'privilege' had first been obtained. This latter took the form, in both countries, of letters patent conferring monopoly rights on the author or printer for a fixed

compliance. The section operates independently and does not call up any of the specific copyright remedies under the Act, simply because failure to deposit does not breach an act comprised within the copyright of the library material described in the section.

²⁰ Section 26 of the *Copyright Act 1912* (Cth) provided that: 'Registration of Copyright shall be optional, but the special remedies provided for by sections fifteen, sixteen, and seventeen of this Act can only be taken advantage of by registered owners'. (Those provisions deal with unauthorised public performance of musical and dramatic works, seizure of pirated copies of works and forbidding performance of musical and dramatic works in infringement of the public performance right in those works).

²¹ Section 38(1) of the *Copyright Act 1912* (Cth) provided 'Every person who makes an application for the registration of the copyright in a book shall deliver to the Registrar one copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and bound, sewed, or stitched together, and on the best paper on which the book is printed'. Section 40(1) of the Act also required the deposit of best copy of the book with the Librarian of the Parliament.

²² Section 74, *Copyright Act 1905* (Cth). An exception to this requirement existed in relation to the infringement of lecturing rights.

²³ The Spicer Committee, Parliament of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in The Copyright Law of the Commonwealth* (1959) 87, para 468.

term: the requirement for the deposit of one or more copies of the work served to ensure that the text had been printed as authorised and no doubt was also regarded as part of the fee exacted for the grant of the monopoly. The Copyright Act of 1709, chiefly directed towards giving statutory form to an acknowledged common law right which had become difficult to enforce, required registration of the work at Stationers' Hall as a prerequisite for any claim and also re-enacted and extended the deposit liability: in an "Act for the encouragement of Learning" the interests of authors and scholars were both to be protected. Later Acts dropped the registration requirement but maintained that of deposit. Deposit has thus, in the past, fulfilled a dual function, facilitating claims to copyright (and, initially, official control over content) and establishing public archival collections for scholars. The first function is now of diminished importance, though the record of deposit of a copy of a book can still serve as evidence in a copyright action where date of publication is at issue; the second function continues to be of major significance in the preservation and advancement of knowledge. There no longer seems to be any good reason, however, why legislation for the maintenance of libraries of deposit should form part of the law of copyright.²⁴

The Committee concluded that '[t]he link between the legal recognition of property rights in published literary matter and its deposit in one or more designated libraries ceased to exist at a date now remote'.²⁵

With respect to that Committee, copyright has not, through the grant of exclusive rights to the authors of literary and other works, divorced itself from the goal of the encouragement of learning and knowledge even if that relationship may now be merely one of a number of goals in the protection granted by the law. Nevertheless it must be recognised that various national parliaments have broken the nexus between copyright law and legal deposit by the passage of separate legal deposit enactments. These laws are expressed to rest on the preservation of a national documentary heritage. If that concept is distinct, then the encouragement of learning and knowledge is complementary to it.

The importance of the copyright link at the Australian federal level is of significance because the deposit law must rely on a constitutional head of power to be a valid law.

The Australian Parliament has power to pass laws with respect to copyrights, patents of inventions, designs and trade marks under s 51 (xviii) of the *Australian Constitution*. Given the broad interpretation given to this power by the High Court of Australia, it is likely a law purporting to be a law with respect to copyright, which requires the compulsory deposit of copyright material in the National Library of the Commonwealth, would be a valid exercise of legislative power under s 51(xviii).²⁶

It may be argued from an historical perspective and in the light of present policy that library deposit provisions are part of the balance of interests between owners and users of copyright material regulated by the law and that they promote the public interests in the encouragement of learning and other forms of creativity recognised by that law for

²⁴ The Whitford Committee, United Kingdom, *Report of the Committee to Consider the Law on Copyright and Designs* (1977) 204, para 807.

²⁵ *Ibid* 210, para 831.

²⁶ The general principles of interpretation of heads of power have been established in such cases as *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 332-3; *Lansell v Lansell* (1964) 110 CLR 353, 366-7, 370; *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.)* (1964) 113 CLR 207, 225; *Western Australia v The Commonwealth* (1975) 134 CLR 201, 245-6; *Nintendo Company Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160; and *The Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479, 492-5, 501.

the benefit of present and future generations.²⁷ That is, there is a sufficient connection between the provisions and the head of power.²⁸ On that basis s 201 of the *Copyright Act 1968* (Cth) therefore is a copyright law within the meaning of s 51(xviii).

Alternatively, if that view is wrong, reliance may be placed on s 51(xxxix) which enables the Parliament to make laws with respect to matters incidental to the execution of any power vested by the *Australian Constitution* in the Parliament, such as the copyright power s 51(xviii).²⁹

Assuming the deposit provision is a valid exercise of power of the Australian Parliament under s 51(xviii) or s 51(xxxix) then a further question arises. Should the compulsory deposit provision require compensation or other just terms by virtue of s 51(xxxi) of the *Constitution*? Publishers, printers and others have argued at various times almost from their inception against deposit provisions as an inequitable impost upon their property rights. The level of observance of them has varied over time. In general, deposit copies are supplied at the cost of the paper, printing and binding (the marginal cost) of the material and the cost of doing so is normally passed on to and borne by the purchasers of the publication. Publishers in present day practice also make allowance for author's presentation copies and review copies when setting the price of a book. They also distribute free desk copies to academics to encourage sales of some books. However deposit copies are delivered through an imposed statutory arrangement. The others are delivered through voluntary arrangements.

Under s 51(xxxi) the Commonwealth Parliament is empowered to make laws for the peace, order and good government of the Commonwealth with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws'. 'Property' in this provision has been broadly defined by the High Court of Australia, to include interests in tangible and intangible property.³⁰

It is difficult to characterize compulsory deposit as a law dealing with the acquisition of the intangible property (copyright) because the delivery of a copy does not amount to

²⁷ The preamble to the *Library and Archives of Canada Act*, SC 2004, c 11, which incorporates the legal deposit provision under Canadian law cites two of its objectives that-
(a) the documentary heritage of Canada be preserved for the benefit of present and future generations;
(b) Canada be served by an institution that is a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada as a free and democratic society.

²⁸ *The Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479, 492.

²⁹ Sir Robert Garran was of the view that an earlier deposit provision (s 75(4) of the *Copyright Act 1905* (Cth)) was incidental to copyright: 'it is an obligation of a kind which is commonly dealt with in Copyright Acts, and it can fairly be said to have some relation to copyright, as being a duty imposed in consideration of a right conferred'. Australia, Attorney-Generals Department, *Opinions of the Attorneys-General of the Commonwealth of Australia, Vol 1:1901-1914* (1981) 562-3 (opinion no. 430).

³⁰ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, 145, 246-7, 282-3; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 201-2; *Australian Capital Television Pty Limited v Commonwealth of Australia* (1992) 177 CLR 106, 165-6; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303-4 (Mason CJ, Deane and Gaudron JJ).

any act comprised in the copyright. That is, the National Library does not acquire a proprietary copyright under the law. Even if it could be said that the Act authorises the publisher to make the copy for a purpose which would otherwise be an infringement of copyright, this does not amount to acquiring an interest in the property and thus attract s 51(xxxi) of the *Australian Constitution*.³¹

Similarly it would be difficult to characterise the deposit of the tangible property (for example, the bound paper on which the intangible property is printed) as an acquisition of property without just terms since copyright itself is intrinsically concerned with the material expression of ideas. A work is made under s 22 of the Act when the work is first reduced to writing or to some other material form and a work is published by virtue of s 29 of the Act if reproductions of the work have been supplied (whether by sale or otherwise) to the public. Even if the delivery of the tangible property is not implicitly sanctioned in this way, to the extent that a law passed under s 51(xviii) or s 51(xxxix) of the *Australian Constitution* conferring rights on authors and other originators of copyright material is concerned with the adjustment of competing rights or obligations of other persons, that impact is unlikely to be characterised as a law with respect to the acquisition of property for the purposes of s 51.³²

Whether the nexus between copyright law and legal deposit will be broken in Australia at the federal level remains to be seen, but the powers discussed provide a basis for constitutional validity. At the State level, the position is quite distinct. State parliaments have plenary power to enact laws in any field (subject to valid federal laws) and may acquire property without just terms.³³ State deposit laws, which are expressly preserved by s 201(4) of the *Copyright Act 1968* (Cth), are thus not subject to those federal constitutional constraints.

Be that as it may, the common law countries of Canada, New Zealand and the United Kingdom, under different constitutional regimes, have over the past eight years passed specific legal deposit laws which are independent of copyright law. In New Zealand, for instance, the *National Library of New Zealand Act 2003* (NZ) was passed with the purpose of:

the preservation, protection, development, and accessibility, as appropriate, for all the people of New Zealand, of the collections of the National Library ... and, to this end, to-

...

(g) enable the Minister to notify requirements that copies of public documents be provided to the National Library, for the purposes of assisting in preserving New Zealand's documentary heritage; and

(h) ensure that the power to require public documents referred to in (g) extends to internet documents and authorises the National Librarian to copy such documents.³⁴

It is a rationale which has existed since the beginnings of the laws. As Partridge states:

³¹ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 304, 306; *Commonwealth of Australia v WMC Resources* (1998) 194 CLR 1, 15, 50-1.

³² *Nintendo Company Limited v Centronics Systems Pty Limited* (1994) 181 CLR 134, 160-1 (Mason CJ, Brennan, Deane, Toohey, Gaudron, and Mc Hugh JJ).

³³ *Durham Holdings Pty Ltd v The State of New South Wales* (2001) 205 CLR 399, 425-6.

³⁴ Section 3, *National Library of New Zealand Act 2003* (NZ).

Legal deposit, the copy-tax, or the delivery of printed copies, as it is severally termed, thus acts as a mirror wherein all the glory of a nation's literature is faithfully reflected. More than this, it stands as a permanent record of the thoughts, aspirations, and discoveries of each successive age.³⁵

Compulsory deposit preserves these works for their use in certain libraries privileged to receive and store them. Here is, then, an unfailing guide to authors and research workers in all branches of knowledge of the past, present, and future; and it is not surprising, therefore, that the system merits and earns their deepest gratitude, considering what weary searches and endless expense are saved thereby.³⁶

It has the practical additional benefit of limiting the costs borne by the taxpayer of maintaining a national collection. This is effected by reducing the costs burden on the library of searching for and purchasing copies of everything that is published within the country. In essence the purchase costs are moved from the public purse to private expense.

III SCOPE TODAY

If there is a justification for library deposit laws, should the extent of material deposited under these laws be specific and limited in scope or all-embracing of everything disseminated to the public?

In essence, the library deposit s 201 of the *Copyright Act 1968* (Cth) is limited to library material which is defined in sub-s 5:

Delivery of library material to the National Library

(1)

The publisher of any library material that is published in Australia and in which copyright subsists under this Act shall, within one month after the publication, cause a copy of the material to be delivered at his or her own expense to the National Library.

Penalty: \$100.

...

(5)

In this section:

...

library material means a book, periodical, newspaper, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of such a work, but does not include a second or later edition of any material unless that edition contains additions or alterations in the letter-press or in the illustrations.

There is a requirement for the 'best copy' of the library material to be deposited. This is in the interests of the preservation of that material.

(2)

The copy of any library material delivered to the National Library in accordance with this section shall be a copy of the whole material (including any illustrations), be 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 be on the best paper on which that material is printed.

³⁵ Barrington Partridge, above n 4, 5-6.

³⁶ Ibid 6.

The best copy requirement has been a common feature of all library deposit provisions since the Bodleian agreement's 'perfect copy'.³⁷ It is inevitably linked with print media. The Australian *Copyright Act* deposit provision does not extend beyond print media to electronic media as, for example, does the present United Kingdom deposit law. This is a serious omission in the light of the comparatively increasing importance of electronic dissemination of information vis-à-vis print means of doing so. While the need for reform of the deposit law has been pressed for some time,³⁸ the National Library of Australia has not waited for the slow pace of law reform and has embarked on a program of its own initiative with the cooperation of State libraries, to skim websites and copy selected material from them, with publishers consent. The program is entitled PANDORA³⁹ and the National Library effort has focused on archiving Commonwealth and ACT Government websites, tertiary institution sites, conference proceedings, e-journals, titles referred by indexing and abstracting agencies and topical sites (eg the 2003 Canberra bushfires, elections, Bali bombing and the Sydney Olympic Games).⁴⁰ In November 2005 this display archive held about 1 terabyte of data.⁴¹ Nonetheless this is only a tiny proportion of all material published online in Australia.⁴²

This is at best a stop-gap solution to what is becoming a chasm of rapidly expanding dimensions.

³⁷ Section 37 of the *National Library of New Zealand Act 2003* (NZ); reg 2 of the *Library and Archives of Canada Book Deposit Regulations 1995* (other copy may be equal in quality to the quality of the largest number of copies produced); s 4(3) of the *Legal Deposit Libraries Act 2003* (UK) c 28 (s 5(6) - for the British Library Board - the copy is to be of the same quality as the best copies which, at the time of delivery, have been produced for publication in the United Kingdom. For other than the British Library Board - the copy is to be of the same quality as the largest number of copies which, at the time of delivery, have been produced for publication in the United Kingdom); *Copyright Act*, 17 USC s 407(a)(2005) (USA); s 201(2) *Copyright Act 1968* (Cth).

³⁸ In 1995, the National Library of Australia joined with the National Film and Sound Archive in making a joint submission on deposit law reform (refer National Library of Australia (1995) <<http://www.nla.gov.au/policy/clrclld.html>> at 10 August 2005) and from time to time since 2001, the two agencies have also raised with the Department of Communications, Information Technology and the Arts, the desirability of legal deposit provisions for electronic resources to ensure their collection and preservation. (Interview with Margaret Phillips, Director, Digital Archiving, National Library of Australia (Telephone interview, 10 August 2005) and comments via email from Margaret Phillips to John Gilchrist, 11 November 2005).

³⁹ M Phillips, *Collecting Australian Online Publications*, version 6 (2003) National Library of Australia <<http://pandora.nla.gov.au/index.html>> at 12 April 2004.

⁴⁰ Ibid.

⁴¹ Email from Margaret Phillips, Director, Digital Archiving, National Library of Australia, to John Gilchrist, 11 November 2005. In June and July 2005 the NLA undertook a harvest of the Australian web domain through the Internet Archive, a not-for-profit company in the United States if America. Approximately 185 million documents, or files, were captured, the equivalent of 6.59 terabytes of data. The NLA estimate that that is approximately 95% of the Australia web domain. However without legal deposit the access which the NLA can give to this material will be very limited. See also S Grose, 'Staff Harvest Web for History', 28 March 2005, *The Canberra Times* (Canberra), 17, column 4.

⁴² The harvesting of websites does not encompass all government publications and up to 2003 excluded online daily newspapers, news sites, data bases and the 'deep web', music, maps, E-prints, CAMS, weblogs and various other sites: Phillips, above n 39. Following reviews, by 2005, music, weblogs, maps and publications in database format were added to the publications harvested <<http://pandora.nla.gov.au/archived/selectionguidelines.html>>. The total number of au domains in 2005 was above 500,000 (Grose, above n 41, 17, column 3).

A number of countries have already undertaken legal change to bring communicators of electronic information under equivalent deposit obligations as those born by traditional print publishers. In the United Kingdom, the *Legal Deposit Libraries Act 2003*⁴³ provides a statutory regime of deposit for print publications but leaves much of the scheme of deposit of electronic material to regulatory laws under that Act.

Section 1 of the *Legal Deposit Libraries Act 2003* (UK) provides:

(1) A person who publishes in the United Kingdom a work to which this Act applies must at his own expense deliver a copy of it to an address specified (generally or in a particular case) by any deposit library entitled to delivery under this section.

...

(3) In the case of a work published in print, this Act applies to-

- (a) a book (including a pamphlet, magazine or newspaper),
- (b) a sheet of letterpress or music,
- (c) a map, plan, chart or table, and
- (d) a part of any such work;

but that is subject to any prescribed exception.

(4) In the case of a work published in a medium other than print, this Act applies to a work of a prescribed description.

(5) A prescribed description may not include works consisting only of-

- (a) a sound recording or film or both, or
- (b) such material and other material which is merely incidental to it.

(6) Subject to section 6(2)(h), the obligation under subsection (1) is to deliver a copy of the work in the medium in which it is published.

(7) In this section, "address" means an address in the United Kingdom or an electronic address.

The *Legal Deposit Libraries Act* is the first legislative measure in the United Kingdom to address the deposit of non-print media.

In Canada, under the *Library and Archives of Canada Act 2004*, the scheme for legal deposit applies simply to publishers who make publications available in Canada.⁴⁴ While compulsory deposit has its origins in Canadian copyright law, this Act also separates compulsory deposit from the subsistence of copyright. Some of the detail of implementation is left to regulations made under the Act, including the definition of 'publisher' and the classes of publications in respect of which the obligation of deposit subsists. However the regulations extend the obligation to non-print media.⁴⁵

In New Zealand, under s 31(1) of the *National Library of New Zealand Act 2003* (NZ) the Minister by notice in the Gazette may require a publisher of a public document (other than an internet document) to give to the National Librarian, at the publisher's own expense, a specified number of copies (not exceeding 3) of:

- (a) the public document in printed form;
- (b) if the document is an electronic document, the medium that contains the document.

Section 31(2) then makes provision for the time period after first publication for the giving of copies - (20 working days or longer notified period) - and format, public access or other matters.

⁴³ *Legal Deposit Libraries Act 2003* (UK) c 28.

⁴⁴ Section 10, *Library and Archives of Canada Act*, SC 2004, c 11.

⁴⁵ Regulations 3 and 4, *Library and Archives of Canada Deposit Regulations 1995*.

Section 31(3) of the Act also empowers the Minister, by Gazette notice, to authorise the National Librarian to make a copy, at any time or times and at his or her discretion, of public documents that are internet documents in accordance with any terms and conditions as to format, public access, or other matters that are specified in the notice.

The Act also requires the Minister,⁴⁶ before notifying a requirement, to consult the publishers or representatives of the publishers likely to be affected by the proposed requirement about the terms and conditions referred to in s 31(2).

In Australia, some States extend their deposit requirements from print media to records, disks, film and audio and video tape. Tasmania and the Northern Territory are the only jurisdictions requiring the statutory deposit of a comprehensive range of electronic as well as print material. In Tasmania, the definition of ‘book’ under the *Libraries Act 1984* (Tas) is so broad that it has been construed to cover both print and all forms of electronic media. Electronic holdings are obtained by electronic deposit of digital publications and by the State Library of Tasmania itself undertaking its own electronic capture of Tasmanian web pages.⁴⁷ In the Northern Territory, the deposit requirement under the *Publications (Legal Deposit) Act 2004* (NT) which came into force in 2005, also covers all electronic media, including documents made available to the public on the internet. Nevertheless, where no printed version of an internet publication is published, the Act envisages the copying by government of the internet publication, rather than deposit.⁴⁸

Another gap in Australian laws, at least, is that they generally do not apply to government produced works, although governments have observed their terms. At the federal level, the obligation of deposit for government produced works is not imposed by s 201 but is the subject of ministerial directions. Similar ministerial directions exist under most State laws. For example, the deposit of Western Australia government material with the State Library of Western Australia and the National Library of Australia is subject to a Premier’s Directive, set out in Premier’s Circular 2003/17.⁴⁹ The reason for this is that the relevant deposit enactments impose penalties.⁵⁰ Nothing in the enactments renders the Crown liable for an offence, either expressly or by necessary implication, and rebuts the general statutory presumption that the Crown is not liable to be sued criminally for a wrong.⁵¹ Nonetheless compliance by government has historically been strong, although over more recent years the trend of devolution in government publishing to individual agencies coupled with proportionately more online publication has brought with it clear diminution in coverage.⁵² In the Northern Territory, statutory deposit obligations are imposed on all publishers including the

⁴⁶ Under s 36 of the *National Library of New Zealand Act 2003* (NZ).

⁴⁷ Interview with Tony Marshall, Senior Librarian, Heritage Collections, State Library of Tasmania (Telephone interview, 1 December 2005), and refer State Library of Tasmania, *Legal Deposit* (2004) <<http://www.statelibrary.tas.gov.au/about/legaldep.htm>> at 1 December 2005.

⁴⁸ Section 13, *Publications (Legal Deposit) Act 2004* (NT).

⁴⁹ Western Australia, Department of Premier and Cabinet, *DPC Functions: Premier’s Circulars* 2003/17 (2003) <<http://www.dpc.wa.gov.au>> at 23 August 2005.

⁵⁰ Eg s 7 *Copyright Act 1879* (NSW).

⁵¹ And the presumption against such a legislative intent would have to be ‘extraordinarily strong’: *Bropho v Western Australia* (1990) 171 CLR 1, 23, 26.

⁵² Interview with Margaret Phillips, Director, Digital Archiving, National Library of Australia (Telephone interview, 10 August 2005).

Northern Territory government.⁵³ However no sanction is provided for non-compliance.

At the federal level there are both Commonwealth-instituted Library and Free Issues Schemes which enhance legal deposit beyond the National Library to provide copies to libraries of institutions having publicly funded principal University status as well as to State Libraries. The intention is to create collections of Commonwealth government publications which are freely available to library users and the public. This accords with the federal government's access and equity strategy to facilitate access to government published information.⁵⁴

While there are gaps in the scope of the deposit laws, nearly all deposit libraries have developed selective retention strategies. These have been conscious decisions due from factors such as desire to eschew 'riff-raff' or matters of transitory or titillating moment from more serious literature, national goals and priorities, limited library holdings space, staff and other resources. Typically, libraries are not substantial repositories of 'grey literature'.⁵⁵ In the National Library of Australia individual ephemera is selectively collected (for example that relating to a specific event) but is not separately catalogued. Selection strategies are also determined by resources and role. For example, the National Library of Australia's selection strategy for Australian print and electronic materials is consistent with its position of the national library in a federation of States. It reads:

3.9 The Library's broad collecting intention is to continue to collect most of the printed material covered by the legal deposit provisions of the *Copyright Act 1968* or by the various arrangements applying to government publications and arrangements with publishers and producers of electronic publications.

3.10 The sheer volume of material published in the country makes it too costly for the Library alone to attempt to collect and preserve everything. The Library will, therefore, concentrate on collecting publications that are relevant to an understanding of the history and development of Australia as a nation, and it will cooperate with other institutions to ensure material it does not collect is collected elsewhere in the country.

⁵³ Section 6 of the *Publications (Legal Deposit) Act 2004* (NT).

⁵⁴ AusInfo, *Guidelines for Commonwealth Information Published in Electronic Format*, version 1.1 (2000) Department of Finance and Administration, [para 4.5.1], <<http://www.agimo.gov.au/information/publishing/formats>> at 29 November 2005.

The Guidelines are currently subject to review. Refer also: Australia, Office of Government Information Technology, *Management of Government Information as a National Strategic Resource - Report of the Information Management Steering Committee on Information Management in the Commonwealth Government: August 1997* (1997) 12, 15-16, 107-9.

⁵⁵ CP Auger, *Information Sources in Grey Literature*, (4th ed, 1998) 3-7, cites various definitions of grey literature - 'literature which is not readily available through normal book-selling channels, and therefore difficult to identify and obtain' (Chillag (1985) 'non-conventional', 'informal', 'informally published', 'fugitive' and even 'invisible' (Van der Heij (1985)). Auger states that uncertain availability, poor bibliographic information and control, non-professional layout and format, and low print runs are characteristics of grey literature: at 3. He includes within the categories of grey literature 'ephemera' - works produced for short term purposes: at 6, such as leaflets and posters. [Examples of grey literature include reports, technical notes, and specifications, conference proceedings and preprints, supplementary publications and data compilations and trade literature: at 3].

3.11 The overriding consideration for the inclusion of an item in the Library's collection is always the information content of a publication.⁵⁶

The National Library in its collecting guidelines lists a number of categories which is selectively collects or omits. It states it:

3.20 will not generally collect primary and secondary educational material published by State government bodies or by non-government educational authorities, or material from local organisations and associations. ...

3.21 Educational material from any source dealing with a national issue in education, or of a topical interest to the Library will be selectively acquired if it is considered to contribute to an understanding of the history and development of Australian education and society. For example, educational and curriculum materials will be collected on topics such as AIDS, indigenous people of Australia and the debate on the republic.⁵⁷

The Canadian Library and Archives has a collection management policy which states that the mission of the Library 'is dedicated to building a world-class national resource enabling Canadians to know their country and themselves through their published heritage and to providing an effective gateway to national and international sources of information. Fundamental to the achievement of the National Library's mission is its collection, at whose core must be the foremost collection of published Canadiana in the world'.⁵⁸ Canadiana is material published in Canada, and material published in another country if the creator is Canadian or the publication has a Canadian subject. The library however excludes a number of publications including mass market paperbacks, sound recordings and videos merely printed or produced or pressed in Canada with no Canadian creator, publisher or subject.⁵⁹ The New Zealand National Library collections policy also selectively addresses its identified user groups and the variant ownership and needs of its collections.⁶⁰ The British Library, by far the largest, 'collects widely and in depth in its areas of traditional strength', and at its core seeks to represent 'the collective memory of the nation by retaining for posterity the intellectual output of British publishing'.⁶¹

IV CONCLUSION

If library deposit laws seek to preserve our published literary and cultural heritage, then one feature of their practice is that they have never been completely comprehensive.

Some selection of material received under deposit laws has been characteristic of library policies in the United Kingdom and other countries. Further the scope of the deposit laws themselves has hardly been completely comprehensive. Australian law in

⁵⁶ National Library of Australia, *Collection Development Policy, Australian Printed and Electronic Materials* (2005) [paras 3.9-3.11] <<http://www.nla.gov.au/policy/cdp>> at 15 August 2005.

⁵⁷ Ibid paras 3.20-3.21.

⁵⁸ Library and Archives of Canada, *Collection Management Policy of the National Library of Canada: A Summary* (1999) <<http://www.collectionscanada.ca/9/9/index-e.html>> at 15 August 2005.

⁵⁹ Ibid.

⁶⁰ National Library of New Zealand, *Collections Policy* (2005) <<http://www.natlib.govt.nz/en/about/1keypolcollections.html>> at 15 August 2005.

⁶¹ British Library Board, *The British Library - Collection Development Policy* (2005) <<http://www.bl.uk/about/policies/collections.html>> at 16 August 2005.

particular has not kept up to date with technological change and at present a vast amount of electronic publication is subject to selective voluntary arrangements. And throughout Anglo-Australian history, the laws themselves have not been perfectly observed. The history of deposit observance in the United Kingdom evidences this. The National Library estimate in 2005 is of an 85% to 90% compliance for all publishing required to be deposited under s 201.⁶²

Deposit laws are an instrument to gather a permanent record of the nation's published works and of a record of all the branches of knowledge contained within those works. While those laws in the Australian States and in the other common law countries cited are now more commonly laws called library deposit or legal deposit laws, Australian national deposit laws are likely to remain within the *Copyright Act 1968* (Cth) for federal constitutional reasons. To that extent, as a manifestation of national copyright policy, deposit laws are consistent with the goal of the encouragement of learning embodied in the first copyright statute in England – the Statute of Anne of 1709. It is consistent with Australia's longstanding membership of the Berne Union – to which almost all developed countries are members - that the deposit laws should not be a formality or condition of obtaining copyright protection. What is important is that the laws be made current to take into account all forms of publication and dissemination.

In essence the deposit laws are an important part of the preservation of national cultural life and heritage. They are manifestations of a human value - the value of human identity: an understanding and respect for who we are. The past is part of us. It is inherent in all artistic, social, economic, scientific and intellectual development. It is important that future generations have access to, and understand, the past, to better understand themselves and to better deal with the future. In cultures based on written records, the greater proportion of material which is not preserved, the less likely that value will be respected and promoted.

⁶² Interview with Ann Triffett, Curator, Monographs, National Library of Australia (Telephone interview, 11 August 2005).

*Appendix 1**State and Territory Library Deposit provisions*

New South Wales	<i>Copyright Act 1879 s 5</i>	Fisher Library
		State Library
		Parliamentary Library
Victoria	<i>Libraries Act 1988 s 49</i>	State Library
Queensland	<i>Libraries Act 1988 s 68</i>	State Library
		Parliamentary Library
South Australia	<i>Libraries Act 1982 s 35</i>	Libraries Board
		Parliamentary Library
Western Australia	<i>Copyright Act 1895 s 7</i> <i>This Act was repealed in 1994 and subsequent deposit with the State Library has been voluntary</i>	State Library
Tasmania	<i>Libraries Act 1984 s 22</i>	State Library
Northern Territory	<i>Publications (Legal Deposit) Act 2004 ss 7, 13</i>	Northern Territory Library