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Copyright and Related Rights Act, 2000

Submission by CONUL

To the

Department of Jobs, Enterprise and Innovation

On Extending Legal Deposit provisions to Digital Content

# What is Legal Deposit?

Legal deposit is a requirement under legislation that has enabled the National Library of Ireland and other designated libraries to collect Irish publications comprehensively since 1927.

The purpose of legal deposit is to ensure that the nation’s published output – and thereby its intellectual record and published heritage is collected and preserved as an archive for research purposes and the use of future generations. Such an archive should be comprehensive and deposit libraries attempt to collect all relevant publications in whatever form that they are published. To date the right to collect under legal deposit is restricted to print publications.

Innumerable websites have flowed from the invention of the World Wide Web and countless publications have undoubtedly already disappeared or changed beyond recognition. Although many of these publications may be seen as ephemeral or insignificant, their exclusion from our legal deposit systems means that any claim asserted during the last two decades on behalf of Irish legal deposit institutions that they mirror faithfully the intellectual record of the life of the nation is daily becoming less and less credible.

In 2013, the final [[1]](#footnote-1)Report of the Copyright Review Committee proposed the insertion of an additional section into the Copyright and Related Rights Act, 2000 to address the growing gap in the Irish digital record through the extension of the legal deposit privilege to digital publications and to capturing Ireland’s digital presence.

# Why should legal deposit obligations extend to digital publications?

Legal deposit legislation is of critical importance to the public good, in order to:

* Ensure that the country’s intellectual, social and cultural record is saved for the nation and future generations of researchers
* Prevent a digital ‘black hole’ in the archive of published output
* Build an archive which underpins Ireland’s creativity and competitiveness
* Enable a digital Ireland and ensure digital inclusion
* What is a nation without memory of its history, social and cultural heritage? The Internet has enabled an unprecedented era of knowledge-sharing, but it has also created new challenges. The diverse range of material that is now exchanged over the World Wide Web poses a challenge to our understanding of what comprises our intellectual, social and cultural heritage. How can we prevent the vast amount of content delivered through the medium of the Internet from disappearing? How many of the websites that we view today will exist a year or even a few months from now? Vinton ‘Vint’ Cerf, Vice-President of Google, and styled as one of the ‘fathers of the Internet’, warns that digital technology could turn the 21st century into a new dark age lost to history. He is quoted as saying “If we want people in the future to be able to recreate what we are doing now, we are going to have to build the concept of preservation into the Internet.”
* Blogs and online news media are now being created alongside traditional types of publication such as books, journals, newspapers. As time goes on our reliance on these new media platforms to provide a window into life in the early 21st century will only grow, but their utilisation as an historical source in the future necessitates their preservation in the present. As a nation we need to take on the social and intellectual responsibility to secure Ireland’s digital heritage and this responsibility extends to envisioning and preserving what will constitute our future intellectual, social and cultural patrimony.
* As [[2]](#footnote-2)Legal Deposit Libraries, we believe that the legal deposit system can contribute to the delivery of a digital future for our nation, through legislation to enable the acquisition of digital content, ensuring its sustainability, long-term preservation and continuing access. Without such effort and investment, future researchers and citizens will find a black hole in the knowledge base of the 21st century.
* The potential value of collection and preservation of this content is incalculable. The collection and archiving of digital content made available on the Web is a vital step towards ensuring that the intellectual, social and cultural record of Ireland is captured and preserved for future generations. We feel that it is crucial that our ambition as a nation should be to create a comprehensive, rather than a selective national archive. Legislation to enable archiving of the Irish Web presence should include publications that are made available to the public from behind a ‘technical barrier’ or pay barriers – exclusion of this category would undermine the aspiration to be comprehensive.

# The Legal Deposit Context

Legal deposit libraries think not in terms of years or decades, but of centuries. Such libraries are an invaluable resource of knowledge, preserving not just the mainstream but the ephemeral and the rare to provide inspiration to creative and innovative minds as well as providing a record of life, learning, thought, social issues, etc.

Legal deposit is sometimes characterised as a means of collecting ‘free books’, but for legal deposit libraries, the commitment of resources to collecting, physically processing, describing, storing, preserving and providing access is significant and perpetual.

Librarians, archivists, historians, commentators, creators, and researchers are very conscious of the reality of the ‘digital black hole’ in the published record – in fact vast quantities of information have already been lost irrevocably and continue to be lost daily. It is a matter of serious concern that Irish researchers and innovators are disadvantaged by the lack of a legislative framework to ensure that today’s ideas and information in digital formats are available to the creative and innovative processes of the future

It is of particular concern that the published record of Government, its departments and agencies are at particular risk of loss. Kieran Fagan’s 2012 article ‘When the server becomes the master’ in the Irish Times highlights the issues and scale of the problem that has opened up under the feet of official Ireland. Government and its agencies are the largest publishers in the nation and for many reasons - not least the economic climate - government bodies increasingly publish only electronically if possible. Most government publications are hosted on websites with no long-term guarantee of ongoing access, and as Kieran Fagan’s article points out there is no centralised government publications repository, though there are a small number of repositories, such as the Oireachtas eDocuments Laid, HSE LENUS, or Marine Institute OAR, but these are limited in scope. The experience of selective web-archiving by the National Library, and Trinity College Dublin’s edepositIreland (<https://www.tcd.ie/Library/edepositireland/>) repository for voluntary deposit of digital publications by government and its agencies highlight the limitations of digital collecting without legal mandate (e.g. Irish Water is not represented and NAMA only on a very limited basis). The repositories, while of value, cannot claim to capture the national output comprehensively as they are limited by the voluntary nature of deposit in the absence of legislation.

The drafters of S.198 of the Copyright and Related Rights Act, 2000 demonstrated forethought in recognising the potential importance of publishing in electronic formats, but could not have anticipated the absolute dominance that the Internet would come to have in communication, publishing, information exchange, and social interaction. This section of the Act did not commence until 2007 and the meaning of some of its clauses is felt by many to be so opaque as to be unworkable. Section 199 which provided for the National Library of Ireland and other designated Libraries, if the Minister so determined, to collect and preserve a wide range of non-print formats remains un-commenced to this day.

Provision for legal deposit for non-print formats is now widespread internationally with Ireland lagging behind much of Europe, Canada, New Zealand, most recently Australia, and other countries in collecting and preserving online material.

For Ireland, a proposal to bring forward legislation to extend legal deposit to non-print formats is an affirmation of the importance of the country’s digital future. Such legislation will provide for a continuity of heritage with those printed works held in the care of the National Library of Ireland and other legal deposit libraries, while recognising the national significance and vulnerability of the Ireland’s digital heritage, and so the need to protect it for the enlightenment of generations to come.

#### Legislative issues

Drafting legislation to provide a legal framework to ensure the collection, description, preservation and access to digital content presents challenges not met in the analogue world. In print publishing, terms such as *book, serial issue, published,* are well understood by authors, publishers and librarians, but such terms are either meaningless or so stretched as to have very different meanings in the online environment. The very concept of *‘place of publication*’ which is the cornerstone to determining whether a work is liable for legal deposit in one country as opposed to another has little relevance in the virtual environment.

Over the last decade a significant number of countries have introduced legislation to extend legal deposit provisions to digital and other non-print formats. Some countries have adopted the approach of bringing forward specific legislations dealing exclusively with national and legal deposit libraries including Germany, Canada, New Zealand and the UK and most recently commencing 2016, Australia. On occasion this has had unintended consequences such as putting legal deposit provisions in conflict with the provisions in copyright and equality legislation, or as happened in the UK creating perpetual copyright in digital works deposited under the Legal Deposit Libraries Act, 2003. Other countries such as France have retained legal deposit within the copyright legislative framework while extending legal deposit to cover non-print formats.

Having reviewed the legislative provisions of a number of countries, it is the opinion of CONUL that Ireland would be best served by retaining legal deposit within the framework of the Copyright legislation as it is

* Fit for purpose;
* Sustainable into the future;
* Balances the rights of different stakeholder groups.

In such a rapidly evolving situation the legal deposit libraries are conscious of the importance when drafting legislation of avoiding wording and definitions that will rapidly be outdated. In as far as it is possible legislation should be drafted to be flexible and future-proofed.

In considering legislation to extend legal deposit to non-print formats, including Ireland’s web presence, there are a number of issues that we consider critical.

#### Future Proofing

A major concern for the legal deposit libraries is the importance of avoiding wording and definitions that will rapidly date any new provisions. In order to provide future proofing, the definition of what an electronic/digital work might be should be broad, flexible and independent of any precise format (e.g. e-book, web-site). Definitions long familiar in print publishing are largely irrelevant in the digital environment; hence the terms, book, map, serial issue, published, etc. have little applicability in the online world.

The UK Legal Deposit Libraries Act, 200[[3]](#footnote-3) takes print as the starting point and distinguishes other formats from it

*“In the case of a work published in a medium other than print, this Act applies…*

As also does[[4]](#footnote-4)Canadian legislation

*“in order to make a publication and its contents that uses a medium other than paper accessible to the Librarian and Archivist, the publisher shall…”*

The French [[5]](#footnote-5)DADVSIAct focuses in its definition on content communicated by electronic means rather than format

*“ …also subject to legal deposit are signs, signals, writings, images, sounds or messages of any kind communicated to the public by electronic means”*

These definitions are phrased deliberately in general terms in order to avoid limiting the legislation to specific technologies which may become obsolete in the future.

[[6]](#footnote-6)New Zealand has developed the concept of ‘public documents’ encompassing both analogue and digital formats and provides pragmatic definitions and interpretations of meanings in relation to both.

CONUL recommends adoption of the UK approach as the distinction based on the difference between print and other means of communication offers the most clarity.

#### Territoriality

In the online environment the concept of *“first made available in the State*” is challenging to define in a way that captures the relationship to the Irish state.

The UK Legal Deposit Libraries (Non-print works) Regulations 2013 provides a clear and workable definition of when a work is to be treated as being published within a jurisdiction. The option of a work qualifying under either 18(1)a or 18(1)b of the Regulations provides flexibility which allows UK legal deposit libraries to implement efficient methods of copying from the internet by automating the web harvester process for a high proportion of works.

“On line work: published in the United Kingdom

*18.—(1) Subject to paragraph (2), a work published on line shall be treated as published in the United Kingdom if—*

*(a)it is made available to the public from a website with a domain name which relates to the United Kingdom or to a place within the United Kingdom; or*

*(b)it is made available to the public by a person and any of that person’s activities relating to the creation or the publication of the work take place within the United Kingdom.*

*(2) A work published on line shall not be treated as published in the United Kingdom if access to the work is only made available to persons outside the United Kingdom.*

*(3) Where work is published on the internet and the publication of that work or a person publishing it there is connected with the United Kingdom in the manner prescribed in paragraphs (1) and (2), that manner of connection with the United Kingdom is also prescribed for the purposes of section 10(5)(b) of the Act.*

German legislation provides another definition of territoriality from the S.14 clause 2 of [[7]](#footnote-7)DNBG which is the Act relating to the National Library

*“Depositors shall deposit single copies of media works of the kind specified in § 2(1)(b) in accordance with the first sentence of § 16, should any holder of the original right of distribution have their legal domicile, any business premises or their principle residence in Germany.”*

It should be noted that a major proportion of mainstream works by Irish authors are published on platforms hosted outside the Irish domain. This is a challenge to ensuring comprehensive coverage of the Irish digital (and print) record and should if possible be addressed legislatively.

#### Deposit and Harvesting – The Push /Pull model

The model for legal deposit in the print world places responsibility for depositing or delivering relevant material to the legal deposit library on the publisher. While this is a suitable mechanism for collection for some digitally published materials, it is not efficient or possible for all. CONUL advises that future legislation should provide for delivery (push) of content by publishers, but should also clearly mandate the Legal Deposit Libraries to use active collection methods such as web harvesting (pull) of content.

While a huge volume of material is open to web crawlers to harvest, a significant percentage of material made available via the Web is held behind technical barriers such as pay walls or login/password barrier. CONUL recommends that legislation in these areas should include a clear statement of responsibility on publishers/producers to provide the libraries with the necessary mechanism (e.g. computer program or any information such as passwords or means of circumventing technical protection barriers) for acquiring and accessing this material either through collection (harvesting) or deposit (submission).

Implementation of collection and archiving of digital publications under legal deposit legislation in other countries demonstrates that collection of digital works involves a number of strands which may include but not be restricted to:

1. Whole domain harvesting where a snapshot of the web domain (e.g. “.ie”) is taken at a fixed point in time and repeated at regular intervals (e.g. annually). This gives a picture in time of the superficial or free web but does not allow for collection of data from the ‘deep’ or ‘protected’ web.
2. Harvesting of websites: Accepting that websites cannot be harvested comprehensively or frequently some national libraries identify sites of national importance and harvest them more regularly on a selective basis e.g. News sites; sites designated of particular importance. An extension of this approach is to harvest websites on a thematic basis e.g. General Election 2016.
3. Harvesting of publications on websites. Publications are harvested by the legal deposit library/ies or deposited by publishers, described in the libraries’ catalogues, stored and preserved in a digital archive (e.g. individual reports, e-journal parts etc.)
4. Any harvesting of web content should include access to the highest level of metadata possible as this metadata is critical for discovery and access.

#### Offline Digital Formats (e.g. DVD, USB etc.)

In defining digital publications it is necessary to distinguish between digital publications with a physical carrier (e.g. dvd, memory stick etc.) and those published online.

The [[8]](#footnote-8)Consultation paper on the extension of legal deposit from the Attorney General’s Department of Australia notes that “*A reason for making a distinction between the two classes of electronic format is that this recognises the difference between materials in a physical form and tailors the deposit requirements accordingly.”*

As offline digital formats are published via a physical carrier they more closely resemble the physical artefact of the print publication and therefore fit more comfortably into the conditions for print legal deposit. We think it critical in the case of off-line publications that it is made explicit in the legislation that they must be delivered [[9]](#footnote-9)TPM free (as also for online content) with metadata in order to ensure access and long-term preservation.

#### Access and Use of Content

It will require the cooperation of stakeholders such as publishers and creators in partnership with the legal deposit libraries to secure Ireland’s digital heritage. S.198 of the Copyright and Related Rights Act is silent on the responsibility of stakeholders in relation to the collection, preservation and use of the content collected. We advocate that in drafting new provisions in legislation or any resulting Regulations that the nature and extent of these responsibilities is specified.

It is in the interest of the public good that the benefits of the collection should be made as widely available as possible, but we also recognise the importance of ensuring that the interests of publishers and other rights holders are respected and their concerns reflected in the legislation and that legal deposit libraries will need to demonstrate systems for controlling digital copies, in order to give confidence to publishers that their rights will not be jeopardised.

#### Preservation - Formats in which Content is deposited

One of the key aims of legal deposit is to ensure the preservation of an archive of the nation’s published works and thus it is important that the copy of the work deposited must be of a quality most suitable for preservation purposes. It is vital that the legal deposit libraries should determine the quality and format of the work archived.

Preservation of digital materials requires copies to be made, either identical copies or modified copies to allow for changes in format. There may be a necessity to create an exception to intellectual property law to allow for the copying of copyrighted material for this purpose.

CONUL recommends that in future legislation the legal deposit libraries be mandated to determine, in cases where a work is made available in multiple formats,the most appropriate format from a preservation perspective which should be included in the national digital archive.

**CONUL would like to make the following points:-**

**Freely Available Web-Content**

* In the interest of the public good we strongly endorse the principle that freely available websites archived under legal deposit legislation be made available online on an open access basis, as the US-based Internet Archive already is.
* For freely available content, the conditions of use to which such content can be put should not be so constrained that it becomes useless to the end-user. The end-user should be mandated to use data mining and analysis tools and to carry out the usual actions of working in an online environment (e.g. copy, paste, download).

**Protected Web Content**

For content that is protected, we would point to exemplars from other jurisdictions where different levels of access and use are mandated.

* Under German legal deposit law, when a depositor submits an object (publication) the depositor can indicate which distribution rights are granted to the legal deposit library. The rights range from: end-user access only in the library’s reading-room; access over the internet for registered users to worldwide unlimited access for any user. This model offers protection to the interests of commercial publishers but allows flexibility to widen access if permission is given by the rights holder.
* Similarly the National Library of Canada offers publishers a choice of two types of access level for their online publications: open access and restricted access. Publishers are required to select one of these access levels. With open access anyone can view and download the publication through the Internet. The Library encourages publishers to select the open access option. In cases of restricted access (usually for commercial publications) publications are viewable by the public in the National Library in Ottawa.
* The use of ‘stays’ or embargoes on access to a publication for a fixed period of time agreed with the publisher (e.g. up to 5 years) is well established for print legal deposit and could also be a feature of digital legal deposit.

#### Discovery

Core metadata is needed for bibliographic records in order to find, identify, select and access content. However, functionally rich metadata has an intrinsic value of its own and may also be subject to separate, and potentially different, intellectual property rights from the content it describes. Legal deposit libraries would wish to ensure that basic descriptive metadata can be published online so that users may discover the content of the archive even if access is restricted; we would therefore recommend that metadata however rich is not considered relevant material in its own right and is therefore bound by the Act in its association with the material being deposited.

#### Exclusion of certain types of Content from Legal Deposit Provisions

While the articulated objective of extending legal deposit legislation to cover digitally published content is to secure preservation of the Irish national published heritage – intellectual, cultural and social - it is also important to recognise that there may be ‘works’ that it might not be appropriate to collect, such as

* a private work that has not been published or made available to the public (even if stored on the Internet);
* a work that is shared by means of the internet via private network such as an intranet( e.g. Google Drive; Virtual Learning Environments)
* a work which contains personal data and is restricted to a defined group of people (e.g. Flickr, What’s App).

#### Audio Visual Formats

In the 1990s, when the Copyright and Related Rights Act was being formulated, few people could have foreseen 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 in the past between text- and image- based publications or an audio and video publication is now more blurred. We advocate that the new legislation includes all material published digitally rather than creating an artificial distinction.

Many countries have incrementally extended legal deposit to new formats as they emerged ― photographic, audio, film ― but this has not been the case in Ireland, nor are robust voluntary schemes to collect and preserve this content in place. With the exception of the provisions of S.199 of the Copyright and Related Rights Act, 2000 (not commenced), legal deposit of audio-visual content either as part of a larger work or as primarily an audio-visual work is not addressed in current legislation.

S.199 of the 2000 Act significantly broadened the range of formats liable for deposit with the National Library of Ireland and we strongly recommend that the terms of this section should be reviewed and updated with a view to early commencement or incorporation into future legislation.

#### 10. Limits of Publisher Responsibility - Formats in which Content is deposited

It is reasonable and equitable that a work be delivered in either print or another format where content is identical. However we recommend that the legal deposit libraries should determine the form or format for delivery and consider that this provision will underpin practical transition from print to digital deposit.

#### 11. Reciprocity

Since 1927 there has been a legislative commitment to reciprocity of legal deposit provisions between the UK and Ireland in ensuring that the intellectual, cultural and social records are preserved and made available to the benefit of both nations. We suggest that the Department consider wording that would mandate the legal deposit libraries benefitting under Irish legislation but located in the UK to harvest or have submitted to them digital content falling within the terms of Irish legal deposit legislation. We further suggest that the wording of this clause makes it clear that notification by a web-harvester is construed as fulfilling the requirement of a written request.

**For noting**: In relation to the UK legal deposit libraries the specific requirement to deliver content to an address in Dublin is an anachronism in the online world.

**Stakeholder Concerns**

CONUL recognises that publishers and other rights holders may have concerns about the implications of extending legal deposit to digital and other formats.

These concerns may relate to potential impact on commercial interests of publishers and other rights holders if restrictions are not placed on the use that may made of the archived content. Legislation in countries such as New Zealand and Germany have balanced the interests of the rights holders and the public good by providing for different levels of access dependent on the publisher’s permission. Rights holders may also have concerns about the potential cost of compliance if legal deposit is extended to digital publications. If legislation is framed to mandate the legal deposit libraries to collect (i.e. copy or harvest) content as appropriate to the format in addition to placing the obligation on the publisher to submit content then archiving can be carried out in the most cost-effective way for both libraries and content creators.

# Conclusion

The National Library of Ireland as the national cultural institution charged with safeguarding the intellectual, cultural and social record on behalf of the State has a preeminent role in legal deposit; its collections are permanent and it is expressly charged with collecting for the public and making its collections available to the public.   The National Library of Ireland has already responded directly to the Department of Arts Culture and the Gaeltacht on this issue.

The extension of the legal deposit provisions will present significant challenges to the National Library of Ireland and other legal deposit libraries in addressing digital collection, preservation and access responsibilities. Significant investment and infrastructure will be required to develop a digital archive and preservation management solution to enable expansion of capacity in digital archiving and digital preservation, for not only legal deposit content but also the collection of unpublished born-digital content and the outputs of digitisation programmes of unpublished and published materials.

**Ireland’s documentary heritage is not merely at risk of loss but already a significant gap has appeared in the national digital record which we are unlikely to recover.**

**We welcome progress being made by the Department of Jobs, Enterprise and Innovation on this issue and feel it is important that legal deposit is retained within the framework of copyright legislation.**

1. *Modernising Copyright*, the Report of the Copyright Review Committee, 2013 [↑](#footnote-ref-1)
2. The Irish Legal Deposit Libraries are the National Library of Ireland, the libraries of Trinity College Dublin, University of Dublin; University College Dublin; Dublin City University; Maynooth University; University College Cork; University of Limerick; NUI Galway. All Irish Legal Deposit Libraries are members of CONUL. UK Libraries benefitting under S.198 of the Copyright and Related Rights Act, 2000 are the British Library; National Libraries of Scotland and Wales; and the universities of Oxford & Cambridge [↑](#footnote-ref-2)
3. UK Legal Deposit Libraries Act, 2003 [↑](#footnote-ref-3)
4. DEPOSIT - NON-PAPER PUBLICATIONS REMISE DE PUBLICATIONS NON DISPONIBLES SUR SUPPORT PAPIER. “Canada – S2, Legal Deposit of Publications Regulations, SOR/2006-337 [↑](#footnote-ref-4)
5. Droits d’auteur et droits voisins dans la société de l’information,, 1st August ,2006 [↑](#footnote-ref-5)
6. National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, Part 4; S29 [↑](#footnote-ref-6)
7. Gesetz über die Deutsche Nationalbibliothek (DNBG), 2006 ammended 2009 [↑](#footnote-ref-7)
8. Consultation Paper, Extending Legal Deposit,p6, Attorney-General’s Department, Commonwealth of Australia, 2012, ISBN 978-1-922032-02-7 [↑](#footnote-ref-8)
9. TPM= Technical Protection Measure [↑](#footnote-ref-9)