



Consultation on the Draft
Legal Deposit Libraries
(Non-Print Publications)
Regulations 2011

Response from

The British Library

20 December 2010

EXECUTIVE SUMMARY OF THE BRITISH LIBRARY'S RESPONSE

The British Library broadly welcomes the Government's draft Regulations for non-print legal deposit, which address an important challenge facing the United Kingdom as a leading knowledge economy, namely the vulnerability of the nation's digital heritage. With some justification this has been described as the UK's impending "digital black hole".

The British Library is fully committed to working in partnership with the UK Legal Deposit Libraries and publishers to implement the Regulations for non-print content, as we have for many years in respect of printed publications.

Whilst the Library broadly welcomes the Regulations we are concerned that a small number of critical features of the current draft Regulations do not fully support the public interest. Where we have concerns, we have suggested alternatives and solutions which we hope that DCMS/BIS will find helpful. The key issues of concern for the British Library are set out below.

The "sunset clause" [page 4]. The "sunset clause", designed to end the Regulations in 2018 unless formally extended, is in our view not appropriate for legislation designed expressly to establish an archive in perpetuity for the permanent benefit of future generations. One unintended potential consequence of the sunset clause would be permanently to close the digital archive to access by all users in 2018, whilst at the same time requiring the taxpayer to have to meet the costs of maintaining it as a 'dark archive' indefinitely. Instead, we would strongly urge that the Regulations place a duty on the Secretary of State to review the operation and effect of the Regulations in 2018, with the aim of taking a view as to whether the Regulations should be amended or removed as appropriate.

Perpetual restrictions on access to the national published memory [pages 4 and 15]. As currently drafted, the Regulations would have the effect of ensuring that copyright in the deposited publications would never run out, with the effect that future generations would have only restricted access to the national published memory in perpetuity. Given the substantial taxpayer investment in the collection, management and preservation of these publications over many decades, we believe there is very strong public interest in ensuring explicit harmonisation with copyright law. This would ensure that material deposited under the Regulations is not subject to a more disadvantageous copyright term than that granted under copyright law.

Restrictions on research and private study [page 19]. The Regulations as drafted are also more restrictive than current copyright law insofar as they prevent researchers from copying part of a deposited work digitally. This is highly restrictive, inequitable and, we believe, unnecessary given the technical safeguards the Legal Deposit Libraries can deploy in support of fair dealing. However, the British Library recognises the publishers' fears of digital piracy and it would be content - in the interest of achieving Regulations to fill the digital black hole - to leave this restriction to be reviewed in 2018. Other implications of the draft Regulations - for example prevention of copying for use in criminal trials and public enquiries - also appear to be inconsistent with the exceptions provided for in copyright law, and harmonisation with permitted activities (exceptions) in copyright law would resolve this anomaly.

Definition of "published in the UK" (territoriality) [page 21]. The British Library believes that non-print publications clearly intended for the UK, but published by a publisher who is not physically based in the country, should be included within the obligation to deposit under the Regulations; moreover the relevant definitions should be internally consistent across the

Regulations, copyright law and with the Legal Deposit Libraries Act 2003. In addition, we note that under the current draft there is a danger that the scope of publications for which publishers are obliged to deposit is wider than the scope for which there are legal protections for defamation and copyright infringement. This could open the Legal Deposit Libraries to substantial contingent liabilities.

Choosing the non-print format for preservation [page 10]. The British Library does not agree that publishers should have the final say in choosing which non-print format is best for deposit and preservation, if in exceptional circumstances agreement cannot be reached between them and the Legal Deposit Libraries. We believe it is the Legal Deposit Libraries, funded from the public purse, who have the larger stake in this issue since they will be making the large investment required to ensure the long-term preservation of this content. The Libraries also have expertise in preservation. Thus in the BL view it should be the Libraries that make this choice from a range of pre-existing non-print formats, with the additional 'safety valve' of an independent dispute resolution process. We would not expect publishers to incur additional costs as a result.

Embargos [page 18]. The British Library has in the past acceded to publisher requests for a temporary embargo on access to deposited printed works. In the Library's experience such embargos are very rarely needed and indeed they are not part of the primary legislation but they are provided for in the draft Regulations. We believe a statutory basis for embargos to be strictly unnecessary; however this would be workable if embargos are explicitly noted in the Guidance to the Regulations as only being appropriate in rare and exceptional circumstances.

Management and governance [page 27]. The Library welcomes the suggestion in the Guidance to this consultation that the management of non-print legal deposit should take place within a shared governance framework. In our view this should be representative of the interests of a range of publishers, rights holders and the Legal Deposit Libraries. We agree there should be an independent process for the resolution of disputes, which in our experience are likely to be rare.

Legal Deposit underpins the United Kingdom's digital future

The British Library very much supports the spirit and, in most cases, the letter of the present draft Regulations. The Library has been preparing with fellow Legal Deposit Libraries for this legislation and its implementation for many years and it is pleased to welcome now its imminent enactment. The Regulations will secure what the Library believes will be an immensely important investment in the United Kingdom's digital future: a statutory basis for a digital archive of the nation's publications in perpetuity.

The British Library's full, detailed response to the Consultation on the Legal Deposit of Non-Print Works follows. The Library stands ready to clarify or to expand upon any of the points made in this response.

The British Library
20 December 2010

Question 1 – Meaningful National Archive

Will these Regulations provide for a meaningful national archive of non-print publications to be deposited with the Legal Deposit Libraries? Please provide an answer for each category:

Off line publications,

On line publications which are free of charge and without access restrictions,

On line publications which are subject to a charge or access restrictions

If not why not? Please provide reasons and evidence.

The Public Benefit of Legal Deposit

The British Library welcomes the consultation on the draft Regulations for non-print legal deposit.

For the United Kingdom this legislation is an affirmation of the importance of the country's digital future. It attempts to provide for a continuity of heritage with those printed works held in the centuries-long care of the Legal Deposit Libraries and their predecessors, while recognising the national significance and vulnerability of the UK's digital heritage, and so the need to protect it for the enlightenment of generations to come.

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

- Ensure that the country's intellectual 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 UK creativity and competitiveness
- Enable a digital Britain and ensure digital inclusion.

The legislation is extremely important to the Legal Deposit Libraries, and to the British Library in particular in order to fulfil our mission of "Advancing the world's knowledge" and our vision for 2020, which is to "be a leading hub in the global information network, advancing knowledge through our collections, expertise and partnerships, for the benefit of the economy and society and the enrichment of cultural life". The legislation also offers the possibility of reduced unit costs for the tax-payer in the long term, reducing the Legal Deposit Libraries' need for the physical storage and handling which would otherwise be demanded by equivalent print publications in the ever-growing national collections.

The British Library has long been seeking non-print legal deposit and has been working with DCMS, BIS and publishers for many years in order to extend the legislation we already have for print, to non-print formats.

Many other countries recognise these benefits and already have non-print legal deposit. Non-print legal deposit is already widespread over Europe; a survey conducted by the British Library in 2009, focusing on all European countries, Australia, New Zealand and the G8 countries,

revealed that some 76% of respondents – twenty-six countries – had already passed and implemented legal deposit legislation for digital content.

The “Sunset Clause”

The Library agrees that regulations which place a burden on industry should not stay on the statute book if no longer necessary. However, the British Library is concerned that the use of a sunset clause in this case is not appropriate for a public benefit that is expressly designed to last in perpetuity.

As currently drafted, the sunset clause (draft Regulations 1(3)–1(5)), would – unless extended – put an end to the archive and any access to it upon expiry in 2018, whilst committing the public purse, through the Legal Deposit Libraries, to fund it forever as a ‘dark archive’. Such an archive would be illegal to access or even, under sub-section 7(2)(a) of the Legal Deposit Libraries Act 2003, to use.

The Library therefore strongly favours the option raised in the Guidance document and covered by Regulations 1(4) and 1(5) (drafted in square brackets) which envisage an alternative review procedure. We feel that a review of the Regulations would be expedient in any case, as it would give the opportunity for stakeholders to analyse any issues with the legislation as enacted, the extent of the Regulations implementation; the resulting costs and benefits for the public, libraries and publishers; and make recommendations for improvement.

Alignment with Existing Copyright law

Some of the copyright and access implications of the draft Regulation are unclear and, in certain interpretations, there is the chance that they may be in conflict with existing UK and international law. The Library identifies particular instances where this may be the case and suggests possible solutions.

The British Library is firmly committed to protecting and respecting the rights of those whose work is contained in the Legal Deposit Libraries’ digital archive and it is keenly aware of the responsibility entrusted to it in this regard. (For example the Library agrees with the principle underlying the proposed access restriction in draft Regulation 23 to a single concurrent user in each deposit library: it understands the increased risks that publishers face in the digital environment). The Library has an excellent track record in this regard: printed legal deposit publications in the British Library’s care are read in its reading rooms under strict conditions of access and the Library has extensive experience of managing access rights and permissions in accordance with licensing agreements and copyright restrictions.

However, in our view, there are two key issues to be raised in relation to Part 3 of the draft Regulations:

1. *Restrictions beyond the expiry of copyright.* The Library is concerned that the restricted nature of permitted activities in the draft Regulations appear to last indefinitely and therefore do not allow for the expiry of copyright ((typically, seventy years after the death of the rights holder for text-based material). Future generations of researchers using the Legal Deposit Libraries would always be bound by restrictions usually reserved for works in copyright even when the works, in any other course of events, would have come out of copyright. The Library draws attention both to the inequity of this restriction which will impact the Legal Deposit Libraries indefinitely, and even though the public purse will bear

2. *Restrictions beyond the limited exceptions provided by copyright law.* Many normal exceptions enshrined within UK copyright law, for example the right to copy material which is in copyright for criminal prosecutions, public inquiries, and news reporting, would be disallowed by the current draft Regulations. The Library's view is that this may be unwise and that the Copyright, Designs and Patents Act 1988, carefully drawn up by Parliament in a largely technology-neutral way, should not be altered by subsidiary legislation. The Library does not necessarily seek inclusion of all the permitted exceptions, but raises this as an issue requiring further consideration.

The public interest and legal arguments around these issues are described in more detail in the general comments we make between questions 13 and 14, under our heading "Draft Regulations – Permitted Activities – Problems of Restriction and Copyright".

Specific response to Question 1

Subject to addressing the important points raised above and later in our response to this consultation, in each category of publication the British Library believes that the draft Regulations, broadly speaking, would provide for a meaningful national archive of non-print publications. We believe that the Regulations, when enacted, will represent a significant step forward for the archiving of UK non-print publications.

Offline publications

Yes. Although the British Library has worked with publishers of off line content within a voluntary scheme of deposit with some success, regulation within the framework of the Legal Deposit Libraries Act 2003 is likely to be more effective for a meaningful national archive, clarifying and simplifying the process for all parties. We believe this is especially the case in the content of deposit for other digital formats.

On line publications which are free of charge and without access restrictions

Yes. The UK Web Archiving Consortium, which has used a permissions-based approach for archiving websites over a period of five years, showed that Legal Deposit would be by far the most effective and efficient way of securing these non-print publications for the national memory. As the Impact Assessment suggests, only about 0.1% of UK websites would be preserved under permission-based harvesting, with a running cost in the region of £0.7million-£1.0million per annum. This sum excludes the cost of set-up and ongoing support and preservation which the Libraries would of course bear. Under statutory regulation, the picture is fundamentally improved: the potential exists to create regular snapshots of the entire UK domain at the only slightly higher cost of £0.9m-£1.3m, providing that an automated harvesting process is used.

On line publications which are subject to a charge or access restrictions

Yes. Previous work has demonstrated that regulation is likely to be the only effective means of successfully creating such a non-print archive: voluntary arrangements are unlikely to be effective or efficient. According to the Impact Assessment, after ten years of establishing a voluntary arrangement only between 40-55% of eligible items would have been deposited in this way.

Publications of this kind are the digital equivalent of many of the printed publications that have been secured and held in trust for the nation through the traditional Legal Deposit legislation. The British Library recognises the continuing investment it will have to make to maintain the highly technical systems, operational processes and expertise to effect the ingest and digital preservation of such a collection but believes addressing this area of non-print publication is key to sustaining the UK's digital heritage in times to come, and that the public benefit far outweighs the cost to the public purse.

Question 2 – Types of Non-Print Publication

Regulation 2(3) – The Regulations are intended to cover all types of non-print publications.

Do you agree with this approach? If not, why not? Please provide reasons and evidence.

Yes. The flexible approach of the Regulations to be inclusive of all types of non-print publications is a pragmatic form of future-proofing which the Library believes is the best way forward.

Question 3 – Examples of Non-Print Publication

Regulation 2(3) – The Regulations provide some illustrative examples of the types of non-print publication which are covered. Are there any other examples of non-print publication which should be that should be expressly included? Please list them. Do you foresee any difficulties with the definitions which we have used? If so, please give reasons and evidence. Please suggest an alternative.

The principle of covering all types of non-print publications is the key here and the Library welcomes this flexible approach which will save recourse to further regulation in the future.

Definition of non-print work

While “electronic publication” is defined in section 14 of the Act and footnote (c) to Regulation 2 (3) [i.e. 2 (4)], we agree it is helpful to provide illustrative examples of non-print publications. The examples should be explicitly stated as such, to ensure a future-proofed approach consistent with the Regulations themselves. Please note that there appears to be a typing error in that the number (4) has been omitted before the phrase ‘ “non-print work” means’.

Some of the examples mentioned do not have a precise non-print equivalent: “a sheet of letterpress” or a “book” is therefore not quite appropriate for this context. It would be more meaningful to mention contemporary non-print examples, e.g. “an e-book”, “a website”; and “an e-journal”.

The Library believes that the current definition perhaps could be improved as it might usefully indicate the nature of the content for non-print publications that are in scope, as well as for the sound recording and film publications which are out of scope. We propose the following form of words for this part of Regulation 2(4):

“non-print work” shall, for the purposes of these Regulations and the Act, have the same meaning as a work published in a medium other than print, and means —

(a) a publication in electronic form being, or including,—

(i) a version in electronic form of any of the works described in section 1(3) of the Act;

(ii) the whole or part of any other literary, artistic, dramatic or musical work, or a work containing such works;

(b) which is available free or for a charge; and

(c) which does not consist only of —

(i) a sound recording or film or both; or

(ii) such material and other material which is merely incidental to it; and

(d) which is published after the date on which these Regulations are made.

Definition of private work

The Library agrees with the stated policy objective that “private works” should be excluded from the scope of non-print legal deposit Regulations. For example, as stated in the draft Guidance, we agree with the intention to exclude the majority of the contents of social networking sites where they are clearly for private use only. . However, it would appear that the definition of “private work” in draft Regulation 2(3) [i.e. 2(4)] has an unintentionally wide scope that would exclude many works that should be included within the legal deposit obligation. We suggest below alternative drafting for the definition of private work, which we hope will ensure that private intranets are excluded from deposit, but ensure that important content published by membership organisations and commercial publishers is included.

In our interpretation, the reference to “a work [...] whose circulation is restricted to a defined group of persons” could readily accommodate any content where a user or subscriber needs to login or be recognised through cookies, such as a subscription-only newsletter, and so it needs further qualification.

In our view, an item is not private if it is offered for sale or subscription to the public (or a defined sub-set of the public); nor is membership private if anyone can join without meeting additional criteria such as being employed by a specified organisation.

In the Library’s view, it is also not clear what is meant by “a work which contains personal data”. This appears to mean that the work itself contains data relating to a living individual who can be identified from those data or from other data (see section 1(1) Data Protection Act 1998). Unfortunately this would cover almost every fact-based publication or content and indeed some fiction works if there were reference to any living person and associated personal data. Personal data may be included in many types of publication that are or could be subject to legal deposit. The Library will of course need to comply with the Data Protection Act in relation to any activities it is permitted to conduct under Part 3.

We recommend amending the definition to :

(e) "private work" means an online publication—

(i) which is made available using some form of private network, for example, an intranet or a virtual private network; and

(ii) access to which is restricted, other than by the requirement to pay a subscription or fee, to a defined group of persons.

The Regulations may also need to define the terms "private network" and "virtual private network".

Reference to "publisher" and "published in the UK"—

—in Regulations 2(3), 3, 35 and 36 (definition of territoriality)

Please see our response to Q.20 below.

Question 4 – Categories of Non-Print Publication

Regulation 2(3). Should we include the following in the Regulations:

Off line publications?

Yes, deposit for offline publications is likely to be more effective than other methods in establishing a digital archive. Please see our response to Q1.

On line publications which are not subject to any access restrictions and which are freely available?

Yes, the British Library has long sought to archive UK websites of this kind for the nation. Please see our response to Q1.

On line publications for which there is a charge or which are subject to public access restrictions?

Yes, publications of this kind are the digital equivalent of many of the printed publications that have been secured and held in trust for the nation through the traditional Legal Deposit legislation. Please see our response to Q1.

Electronic publications which comprise material packaged and filtered in response to an enquiry from a user?

Yes, the British Library believes this is a category of material that is entirely appropriate for Legal Deposit. Enquiry-led material, such as publicly-available electronic databases, is an under-recognised aspect of non-print publication. In many cases what appear to be conventional websites are in fact pre-filtered in response to user needs, and so constitute another form of

non-print publication that should not be lost to future generations. However, the Library believes that the way in which such material is described in the Regulations may need greater precision. For example, there would be little public benefit in ingesting a few examples of query results (for example, a page of results querying a given database). Nor is it the Library's view that this category of material should embrace results of queries put to search engines that search the entire internet. Rather, the focus should be on the databases themselves, which are published in the sense that they are made available to the public via query or search facilities. A good example of this is the National Rail timetable, which in its non-print form is not supplied in its entirety to any single person, but whose entire contents are available to query.

Question 5 – Choice of Print or Non-Print

Regulation 5(2) – When substantially the same work is published in both print and non-print, the Regulations must provide that the medium for delivery is print unless an alternative medium has been agreed between the publisher and the Legal Deposit Library.

Are there any consequences that make this impracticable? If so what are they? Please provide reasons and evidence.

Overall, we recognise that this approach is intended to smooth the transition from print to non-print deposit for both publisher and the Legal Deposit Libraries. For the Legal Deposit Libraries, we welcome the intention that the regulation has been designed to enable us to take in non-print material when we are technically and operationally ready to do so. It is the British Library's aim to migrate towards non-print Legal Deposit as far as is practical over the next few years. This mechanism will allow this to take place within budget constraints, building capacity in a way which minimises the impact on publishers and is not burdensome upon them.

In the pursuit of the smoothest possible transition for all parties, the British Library believes that in the situation where a publisher publishes substantially the same work in both print and non-print formats, it would be reasonable to include a 12-month period of dual running (from the point in time at which the British Library and the publisher start working together). During this period of parallel depositing, both print and non-print formats would be deposited before completing the transition to non-print in full. This would allow both publisher and library to iron out any teething problems with the non-print deposit process, without risk of losing the content. While this is not something that should actually be contained within the legislation – it would clearly be a voluntary arrangement – the British Library suggests that the Guidance should encourage this approach. In addition, we suggest that the Regulations should state that in the event of parallel publishing, the publisher's agreement to depositing non-print material must not be unreasonably withheld.

Increasingly, there may be different publishers for the hard copy and the non-print version of a work. Under section 1(1) of the 2003 Act, by way of the example the "publisher" could well be an internet retailer, a traditional publisher or a search engine - that is, the holder of the relevant electronic rights - rather than the traditional owner of the imprint for the hard copy publication.

Therefore we suggest that Regulation 5(2) be amended to:

Where substantially the same work is published in both print and non-print by the same publisher the medium of delivery is print unless an alternative medium has been agreed

between a publisher and a deposit library in which case the medium of delivery is the agreed medium.

By the same token, publishers can employ several channels at once for non-print works, sometimes using different formats for different channels (such as AZW for Kindle via Amazon and EPUB for the iPad). We suggest amending Regulation 5(3) as follows:

Where substantially the same non-print work is published in more than one medium by the same publisher or different publishers, the medium of delivery is the medium which has been agreed between the publisher, or the different publishers together, as the case may be and a deposit library, or, in the absence of agreement, the medium which each publisher chooses.

Note: it may also be necessary to amend Regulations 13 and 21 appropriately:

The quality most suitable for preservation purposes shall be as agreed between the publisher of the relevant publication and a deposit library, or, in the absence of agreement, the quality which such publisher chooses.

Please see also our substantive comments in relation to preservation format, in our response to Q7, Q9 and Q13.

Question 6 – “Substantially the Same” Print and Non-Print Works

Regulation 5(2) – The Regulations do not make provision as to the circumstances in which works are or are not to be regarded as substantially the same for these purposes as we think that this will depend on the nature of the work and will evolve over time. We also consider that this is an issue which the Legal Deposit Libraries and the publishers can and should agree between themselves.

Do you agree? If not, please provide reasons and suggest how: (a) the Regulations or (b) the Guidance should address this. Please provide evidence.

Yes, the British Library welcomes this approach. Please see our suggestion for an amendment to Regulation 5(2) as stated in our response to Q.5.

We are committed to working in partnership with both publishers and the other UK Legal Deposit Libraries in order to build a sustainable national digital archive. The Library believes that the Guidance should be updated to reflect a governance structure which seeks consensus among Publishers and Legal Deposit Libraries, but agrees that it would be inappropriate to state this in the Regulations themselves. Please see our comments around a suitable governance and management structure, with an independent dispute resolution procedure, at Q.32.

Question 7 – Choice of Non-Print Medium for Delivery

Regulation 5(3) – When substantially the same work is published in more than one medium e.g. a word document or a pdf, the Regulations provide that the medium of delivery shall be agreed between the publisher and the legal deposit library. However, the Legal Deposit Libraries Act 2003 stipulates that we must make it clear in the Regulations which medium prevails. Therefore, the Regulations provide that if the publisher and the legal deposit library

cannot reach agreement, it is up to the publisher to decide in which medium they should deposit the work.

Are there any consequences that make this impracticable? If so what are they? Please provide reasons and evidence.

This question is also relevant to Regulations 12, 13 and 21, which are concerned with the appropriate copy for preservation purposes. The Library sets out its approach to all these Regulations here. (Please note that Regulation 12 is not the subject of any consultation question but our response to this question refers to it).

The British Library recognises that it might occasionally be difficult to agree which medium is the most appropriate for deposit, although there is no evidence to suggest that this situation would be anything but exceptional. It is important that in such cases a stalemate does not arise. The Library believes that this can best be resolved through informal practical discussions with the publisher concerned, as indeed the Library resolves queries with publishers of print material. This approach would also observe the principle of a statutory instrument being as close to practice around the primary legislation.

In respect of printed publications the primary legislation obliges the publisher to send the best copy to the British Library. Because the responsibility for long-term preservation, and with it the necessary investment and expertise, is shouldered entirely by the Legal Deposit Libraries rather than resting with publishers, and therefore funded from the public purse, the British Library suggests that this principle should be maintained and so it should be the Legal Deposit Libraries who should have the final choice of the most appropriate format for deposit. This would, however, be in the recognition that the Library's choice should not cause the publisher to incur unreasonable extra cost. We would not, for example, consider it to be reasonable for publishers to incur additional costs to format shift from one file type to another to suit Library deposit processes; but where a publisher holds content in a number of pre-existing different formats, we would consider it reasonable to expect that a publisher would provide us with the most appropriate format for deposit processing and preservation, as chosen by the Library.

In addition, within the limited access envisaged under Part 3 of the Regulations, Permitted Activities, the Library suggests that, in common with print, the user experience for permitted persons should be just as important as the format required for preservation (this is implicit in Regulation 22 and Section 7 of the Guidance). We suggest, therefore, that in common with print, and subject to overall practicability, the copy deposited should be no worse than the copy actually published.

The British Library wishes to work with publishers to establish pre-agreed options so that the choices are as transparent as possible. As suggested in our response to Q32, there should also be an independent dispute resolution process within a transparent and balanced governance framework for those rare cases where mutual agreement cannot be reached easily.

Once the Regulations have been enacted, the Library intends to publish guidelines for publishers explaining which formats are most suitable for deposit, as we have done already for the e-journals voluntary deposit scheme. Please see:

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

We have developed technical FAQs for publishers in order to support this consultation, about the technologies and procedures that the Legal Deposit Libraries envisage using in order to implement these Regulations. Please see:

www.bl.uk/aboutus/stratpolprog/legaldep/2010_technical_faq_for_publishers.pdf

Question 8 – “Substantially the Same” Non-Print Works

Regulation 5(3) – The Regulations do not make provision as to the circumstances in which works are or are not to be regarded as substantially the same for these purposes as we think that this will depend on the nature of the work and will evolve over time. We also consider that this is an issue which the Legal Deposit Libraries and the publishers can and should agree between themselves.

Do you agree? If not, please provide reasons and suggest how: (a) the Regulations or (b) the Guidance should address this. Please provide evidence.

Yes, the British Library agrees that this is the type of issue that the Legal Deposit Libraries and the publishers should agree between themselves. As with the question of potential disagreement over medium (Q.7 above), any difference of opinion over works being regarded substantially the same is best resolved informally at an operational level. In the rare event of a dispute, then a balanced governance framework with an independent appeals process would be the mechanism to resolve any issues. Please see our response to Q.32 below.

Question 9 – Quality of Offline Medium for Preservation

Regulation 13 – The quality of non-print work should be agreed between the Legal Deposit Libraries and the publisher and should be the most suitable for preservation purposes. If agreement cannot be reached the publisher will decide upon the quality of works to be deposited.

Do you consider this the most appropriate approach? If not what do you suggest and why? Please provide evidence.

The Library agrees that the quality of the work should be the most suitable for preservation purposes but questions whether the publisher is the most appropriate party to decide in the event of a disagreement. The Library’s more detailed response to this question is given at Question 7.

Question 10 – Depositing Free/Unrestricted Online Works

Regulation 14 – This covers on line publications which are available free of charge and which are not subject to any public access restrictions. These publications must be delivered as soon as reasonably practicable after a request from a legal deposit library.

Publishers will only have to deposit once with the requesting legal deposit library and will not have to send copies to the other Legal Deposit Libraries.

Do you agree with this approach? If not, please provide reasons and any suggestions you may have for an alternative approach. Please provide evidence.

Yes, the British Library welcomes this approach to this category of on line publication.

The Library has invested in a secure digital infrastructure so that, working with other Legal Deposit Libraries, on line publications which are available free of charge and which are not subject to any public access restrictions can be deposited via web harvesting, as envisaged in the 2003 Legal Deposit Libraries Act.

Typically the request would be initiated by the web harvester of a single Legal Deposit Library and the deposited material then shared securely between the Libraries via the Legal Deposit Libraries' shared technical infrastructure under the strict access conditions mandated by the Regulations.

As Chris Mole MP outlined in the House of Commons in 2003, "The point of web harvesting is not to require activity by the publisher, but to simplify the process of deposit whereby libraries gather what they feel to be appropriate through their collections policy." Lord Tope's introduction to the second reading of the Legal Deposit Libraries Act 2003 in the House of Lords explained this further: "Subsection (5) makes provision for deposit libraries collecting direct from the Internet, or "web-harvesting", as it is colloquially described in the context of the Bill. It states that where deposit libraries copy from the Internet, in accordance with the conditions set out in this clause, the restrictions and exemptions covered in Clauses 7 and 8 and subsection (6) of Clause 10, will apply. Regulations relating to web harvesting will describe which works can be copied and the conditions imposed upon copying. By that means the Bill provides options for acquiring works either by deposit or by harvesting."

The web harvesting infrastructure we have piloted uses exactly this approach and, as detailed in our response to Q.4 and in the Impact Assessment appended to this consultation, we consider it to be a highly cost effective method of deposit, for Libraries and publishers alike. Under a voluntary scheme, the estimated administration cost to a publisher would be £90 per website, with similar additional costs for every change in their rights position (for example, when a new author's work is represented on a website). With web harvesting no such costs exist. In addition to this, the process could deliver regular snapshots of the entire UK domain at a fraction of the cost per website to the public purse (while a voluntary scheme would only deliver some 0.1% of the UK domain). Indeed, we consider automated web harvesting to be the most cost-effective method for archiving the UK web domain at scale and therefore securing the UK's digital memory for the nation. This automated method underpins the cost estimates provided for the Regulatory Impact Assessment.

Question 11 – Depositing Charged / Restricted Access Online Publications

Regulation 17 – This covers on line publications for which there is a charge or which are subject to public access restrictions. These publications must be delivered within three months of a request from a deposit library unless the request specifies delivery within a period exceeding three months but within the period specified.

As indicated in the Guidance, we included the possibility of a period longer than three months in order to accommodate those publishers who may need more than three months in order to meet this obligation

Regulation 18- Publishers will only have to deposit once with the requesting legal deposit library and will not have to send copies to the other Legal Deposit Libraries.

Do you agree with this approach and are these timings practical? If not, please provide reasons and any suggestions you may have for an alternative approach? Please provide evidence.

Yes, the British Library agrees with this approach in principle: it gives the Legal Deposit Libraries and the publishers a measured way of dealing with the deposit of these works by enabling a single deposit and sharing of the content via the Legal Deposit Libraries shared technical architecture. It also means that publishers will not be burdened by multiple requests from different Legal Deposit Libraries.

Although print publications received under legal deposit must be received within 28 days of the date of publication extending this period to 3 months for non-print publications acknowledges the added complexity of non-print works (indeed the initial set-up process, in which Publisher and Library first establish an operational relationship, may take even longer).

We suggest that the length of time required to comply with a request for deposit might be reviewed at the point of a review in 2018.

Question 12 – Requests in Writing

Regulation 19 – A request for deposit must be made in writing (whether sent by web harvester or other means).

Are there any consequences that make this impracticable? If so what are they? Please provide evidence.

Yes, the Library recognises that a request must be made in writing. As stated in our response to Q10 above, we assume that an automated request by web harvester is one such form of valid request. For certain categories of non-print work the Library would like to make the request on a publisher by publisher basis, rather than on a publication-by-publication basis, as stated in the Guidance document accompanying this consultation (p. 16). We believe that a publisher-by-publisher approach to deposit, as opposed to supplying detailed lists of content (which would be a burden on both publishers and the Legal Deposit Libraries) will be more practical for this category of publications. For this reason, the Library believes that the Regulations should state that a publisher-by-publisher approach is a valid means of making such a request.

Question 13 Quality of Online Medium for Preservation

Regulation 21 – This covers both on line publications for which there is a charge or which are subject to a public access restriction and also on line publications which are available free and which are not subject to any public access restriction. The regulation provides that the quality of the deposited work should be agreed between the legal deposit library and the publisher and should be the quality most suitable for preservation purposes. The regulation also provides that

if agreement cannot be reached the publisher will decide upon the quality of the work to be deposited.

Do you consider this the most appropriate approach? If not what do you suggest and why? Please provide evidence.

The Library agrees that the quality of the work should be the most suitable for preservation purposes but questions whether the publisher is the most appropriate party to decide in the event of a disagreement. The Library's more detailed response to this question is given at Question 7.

Draft Regulations: Permitted Activities – Problems of Restriction and Copyright

This section is a general introduction to our specific responses for Q14 – Q19. A summary of our detailed response provided within this section is given at Q1.

The Library recognises the need for an appropriate balance between the public interest and the interests of copyright holders. We agree with the principle underlying the proposed access restriction to a single concurrent user in each deposit library: we understand the increased risks that publishers face in a digital environment and we are firmly committed to protecting the rights of rights-holders whose work is contained in the Legal Deposit Libraries digital archive.

However, the Library considers that unfortunately the permitted activities under Part 3 of the Regulations, as currently drafted, are unduly restrictive. This may in part be a consequence of the complex interaction between Section 7 of the Legal Deposit Libraries Act 2003 (which states that deposited material may not be used, copied, adapted, lent to a third party, transferred to a third party, or disposed of unless the Regulations make particular provision for this), and copyright legislation. However we also understand these restrictions to be a stated policy objective of DCMS/ BIS implemented through the draft Regulations, in order to ensure that publishers' commercial interests are fairly represented vis-à-vis the public interest. Whilst we understand this policy objective, we consider that publisher commercial interests are fairly balanced with the public interest through existing copyright law.

The Library would like to seek a suitable rewording to the Regulations so as to avoid the serious consequences of these restrictions on the public interest. The British Library considers that the permitted activities under Part 3 of the Regulations are unduly restrictive in two respects:

(1) Restrictions beyond the expiry of copyright.

Firstly, and perhaps most seriously, the permitted activities take no account of copyright expiry, which means that once the copyright has expired in a non-print work, the Library and authorised readers remain restricted in their use of the work to only those activities which are expressly set out in Part 3. The Regulations should of course provide controls which ensure an appropriate balance between the public interest and the interests of a publisher as copyright holder during the term of copyright. However it seems that these restrictions, and by implication the rights of a publisher over their material, continue in perpetuity even after copyright has expired. This would mean that future generations of researchers using the Legal Deposit Libraries would be bound by the kind of restrictions usually reserved for works in copyright except that in this instance such restrictions would extend centuries into the future - in fact, forever.

In our view, this is clearly not in the public interest. We believe it is counter to the general exhaustion of rights doctrine which is well established by the European Court of Justice. A key principle of copyright law is that there should be, after a generous amount of time has lapsed, an exhaustion of individual rights, allowing such works to be shared more easily for the wider benefit of society. Given the public investment via the Library in the management, storage and preservation of these works, this would be to the public's benefit, and represent an equitable balance between the rights holders' and the public interest for the long term.

The Term Directive which states that "with the view to the smooth operation of the internal market, the laws of the member states should be harmonised so as to make terms of protection identical throughout the community". It is evident that harmonisation of the expiry of the term of copyright must equally mean that, following such expiry, the works are in the public domain and, therefore, not restricted by any further controls - whether they are called copyright or something else. Article 7(2) of the Term Directive confirms that "The term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rights holder is a national and may not exceed the term laid down in Article 3". This reinforces the idea that, following expiry of copyright, all rights in the nature of copyright then cease.

(2) Restrictions beyond the limited exceptions provided by copyright law.

Secondly, the Regulations as drafted are considerably more restrictive than the already limited set of exceptions provided under the Copyright, Designs and Patents Act 1988. This Act, so far as copyright works are concerned, expresses the will of Parliament consistently with the UK's obligations under European Union and international law.

By definition, the exceptions contained in UK copyright law do not conflict with the normal exploitation of the work or unreasonably prejudice the interests of publishers and copyright owners (including in respect of non-print works) because UK law is taken to be compliant with EU law in this respect Through the so-called "Three Step Test", which is incorporated in various international copyright treaties to which the UK is a party. The Library is concerned that more severe restrictions are proposed in the present draft Regulations. Because they are not mentioned explicitly in the draft regulations, by default Section 7 of the Legal Deposit Libraries Act 2003 prohibits many of the already limited set of exceptions provided under the Copyright, Designs and Patents Act 1988 including:

- S.28A Creation of a temporary/ incidental copy. This exception is required to provide on-premises access via a computer, and is the only mandated limitation and exception within the Information Society Directive 2001/29/EC which is mandatory for all member states to implement.
- S.30 Criticism, Review and News Reporting. This is important for education, research, and the freedom of the press.
- S.45 Copying for Parliamentary and Judicial Proceedings
- S.46 Copying for Royal Commissions and Statutory Inquiries
- S.50 Copying under Statutory Authority.

Given that much non-print material will come with a computer programme, which publishers must also deposit under Regulation 22, many important computer programme related

exceptions are missing such as: S.50A (making back-up copies of computer programmes), S.50B to decompile or test the computer programme and create an independent programme in order to run the original computer programme and S.50D which refers to *sui generis* rights. The Library does not necessarily seek inclusion of all permitted exceptions, but raises this issue as potentially an impediment to public benefit.

As a consequence of these two critical issues, the current drafting would mean that the regime relating to non-print works would not mirror the regime relating to print works, which seems inconsistent with the desire stated in paragraph 1.5 of the Guidance accompanying this consultation.

These restrictions would have the effect of placing the Legal Deposit Libraries in a significantly worse position than any other person lawfully using a non-print work. This would clearly be an anomalous, inequitable and unsatisfactory position to impose on the custodians of the national published memory and could have severe effect on research and private study. The deposit libraries should not be placed in a fundamentally disadvantaged position compared to any other library in the UK, or indeed any person or organisation who happens to have lawful possession of a non-print publication.

Proposed Solutions

The British Library therefore strongly urges that Part 3 of the draft Regulations should be amended to:

(1) Allow deposit libraries and readers to make such use of a non-print work delivered pursuant to the Regulations as could be made by any other person following expiry of copyright in that non-print work. Should the Regulations not be amended in this way, the British Library notes that restrictions related to copyright expiry will not be tested for at least one hundred years (the term of copyright for text-based works being at present the life of the rights-holder plus seventy years). In the interests of filling the digital 'black hole', we have no desire to prevent the Regulations being enacted as a consequence of this important public interest argument. However we respectfully suggest that the Secretary of State may wish to return to this point in reviewing the Regulations in 2018.

(2) Permit Legal Deposit Libraries to carry out or permit acts permitted under Chapter 3 of Part 1 of the Copyright, Designs and Patents Act 1988 (as amended), to the extent relevant to non-print works as defined in the Regulations (and in particular, but without limitation, those allowed under section 50 of the 1988 Act). In our view, inclusion of these copyright exceptions would not affect the validity of the Regulatory Impact Assessment appended to this consultation.

Question 14 – Access to Non-Print Works

Regulation 23 - This provides that access to the same non-print work is restricted to one display terminal at any one time in each of the Legal Deposit Libraries. Therefore the same non-print work can only be viewed on a maximum of six display terminals at the same time as there are only six Legal Deposit Libraries (including Trinity College Dublin). This mirrors the system for printed publications whereby a maximum of six copies of the same work are available for readers across the six Legal Deposit Libraries.

Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.

Yes. The Library agrees with the principle underlying the proposed access restriction to a single concurrent user in each deposit library: it understands the increased risks that publishers face in the digital environment and is firmly committed to protecting the rights of those whose work is contained in the Legal Deposit Libraries' digital archive. The British Library has long experience of managing access rights and permissions in accordance with licensing agreements and copyright restrictions. Trust in the security of its collections and giving permissible access to them is extremely important to the British Library. As it has invested in access restrictions for its printed collections and for its licensed digital content, so the Library is investing in a secure system for non-print Legal Deposit, which includes access management under the prescribed conditions.

To help future-proof the Regulations, the Library suggests that the phrase "display terminal" be replaced with "device", with reference to the means of displaying material.

Finally, we make a general comment on Regulations 24, 25, 26, 27 and 28:

All of these Regulations refer to limits on how a reader may "view" relevant material. This does not follow the careful wording of the 2003 Act. There, the possible restrictions contemplated by the intended regulations relate to how a reader might "use" relevant material. We suggest the draft Regulations be re-worded in alignment with the Act, to "use" of relevant material.

Question 15 - Embargos

Regulation 24 [*in fact Regulation 25*] - This provides that a legal deposit library may not allow access to a deposited work if a publisher has requested an embargo for a period not exceeding three years from the date of the request. The deposit library may not refuse the request if the publisher has shown that on a balance of probabilities, viewing by a reader would conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the publisher.

Regulation 27-This provides that an embargo may be extended. Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.

The Library agrees with the statements made in the Guidance document accompanying this consultation, that it is probably more effective to set out a general principle within the Regulations but leave it to the publishers and deposit libraries to agree, maintain and abide by separate practical guidelines which define how to interpret the regulations in different circumstances.

In the British Library's experience, the need for embargos is very rare, with only some 20 publishers having print embargos agreed with the British Library. These tend to be market research publishers which produce very highly-priced current works, for a limited number of purchasers, with a relatively short commercial shelf-life. The Library accepts that in such unusual instances it is appropriate to protect the interests of publishers by imposing an embargo on their access. In the print environment embargos are dealt with successfully at an operational level through informal arrangements between library and the publisher, with no statutory basis.

As long as the exceptional nature of embargos is acknowledged in the Regulations, a statutory basis for embargos in the non-print environment could provide transparency to this process.

The Library would be concerned, however, if the legislation provided for an indefinite embargoing of material to take place by means of the publisher simply requesting a further embargo within six months of the original embargo's expiry date. This would be a clear impediment to research and introduce unpredictability into the management of the national collections. The Regulations and the Guidance should emphasise the requirement for a publisher to demonstrate the need for an embargo in exceptional circumstances.

Where on line publications are available free and are not subject to public access restrictions, then there is no reason for an embargo period to extend beyond the date of publication, since these publications are widely available on the internet: the Library would suggest that this difference should be reflected in the legislation, or at least the Guidance, so that such works are understood to be excluded from an embargo process.

Ideally the practical management of embargos would be dealt with within the governance framework proposed in Q.32 to our response. This would give the Legal Deposit Libraries the authority to determine individual cases, but with the "safety valve" of an independent appeals process in the event of a disagreement between Libraries and publishers.

Question 16 – Copying for Research

Regulations 29 and 30 - A legal deposit library may only provide a print copy of an article or part of a work unless permission has been given by the publisher for the legal deposit library to make a copy in another medium.

Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.

As stated in our response to Q.14, the British Library understands the increased risks that publishers face in a digital environment and we are firmly committed to protecting the rights of rights-holders whose work is contained in the Legal Deposit digital archive. We are, however, surprised by the notion that publishers are particularly concerned by the prospect of digital copying (under copyright restrictions) within Legal Deposit Library premises. Many publishers allow digital copying for licensed work and the Library has long experience of managing access rights and permissions in accordance with licensing agreements and copyright restrictions for the digital content it purchases. Trust in the security of its digital collections and giving permissible access to them is extremely important to the British Library and the Library believes it has an excellent record in this respect.

The draft Regulations also appear to be inconsistent with the key primary and secondary legislation relating to fair dealing for non-commercial research and private study, namely the Copyright, Patents and Designs Act 1988 as amended, and the Copyright (Librarians and Archivists) (Copying, etc) Regulations 1989 [SI 1989/1212].

Restricting copying to print copying will mean that the complexities and dynamic nature of digital media cannot be rendered faithfully and this is another avoidable loss under the proposed restrictions. For example, embedded audio and video within and incidental to a web site could not be faithfully represented in a print copy.

The British Library therefore regrets that digital copying under the widely accepted fair dealing restrictions would not be permitted under the draft Regulations. However, in the interests of achieving the greater goal of non-print legal deposit through these Regulations, the Library proposes that digital copying is revisited as a key topic for review when we hope that the Regulations will be re-assessed in 2018. Because it is likely that some publishers will in fact give permission to the Library to grant digital copying before then, as allowed in the Regulations, the Library should have a greater body of experience to draw from and would therefore hope to be able to offer further reassurances at that time.

Question 17 – Visual Impairment

Regulation 31 - This regulation sets out the circumstances in which a legal deposit library may make an accessible copy of a deposited work and the conditions which apply.

Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.

The Library supports the spirit of this copyright exception but is concerned that it appears to be more restrictive than the current legislation in this field, namely as set out in the Copyright, Patents and Designs Act 1988. Please see the Library's detailed response on this topic in the section between Q.13 and Q.14, and our general statement at Q.1

The Library is also uncertain of what is meant by 'an intermediate copy of the master copy' in 31(4), and whether this might have any unintended consequences, such as affecting the Legal Deposit Libraries' permission in other Regulations to make copies, and suggests that this might be clarified in the Regulations.

Question 18 – Copying and Adapting Works for Preservation

Regulations 32 and 33 – These regulations set out the circumstances in which a legal deposit library may copy or adapt copies of deposited works for preservation purposes and the conditions which apply.

Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.

The Library supports the spirit of these exceptions, but please see the Library's detailed response on this topic in the section between Q.13 and Q.14, and our general statement at Q.1.

Question 19 – Disposing of Copies

Regulation 34 - This provides that a deposit library may dispose of duplicate works by destroying them but may not destroy all copies of the deposited works. This regulation also provides that the deposit library must retain the copy or copies of the deposited works which it considers most suitable for preservation purposes.

Do you agree with this approach? If not, please give reasons and suggest an alternative. Please provide evidence.

Yes, the Library broadly supports this approach.

Question 20 – Territoriality and Exemptions from Liability

Regulation 35 - This regulation sets out the circumstances in which exemptions from liability apply and thereby define the geographic scope of the works and publishers covered by the regulations.

Do you agree that the regulations should only cover publications which are from publishers based in the United Kingdom and also published in the United Kingdom?

If not, please give reasons and suggest an alternative. Please provide evidence.

Reference to “publisher” and “published in the UK” in Regulations 2(3), 3, 35 and 36

Our response below covers Q.3, Q.21 and Q.22. Our response to this question therefore covers draft Regulations 2(3), 3, 35 and 36.

The Library has several observations on the question of territoriality. These break down into three areas:

(1) Definition of scope of duty to deposit

The question of whether a non-print work is published in the United Kingdom for the purposes of section 1(4) of the 2003 Act is not further elucidated by Regulations 2 or 3. Section 1(1) of the 2003 Act sets the scope of deposit obligations as a “person who publishes in the United Kingdom a work ...”. At present, the deposit obligation extends to any person who publishes a non-print work in the UK, wherever they are based (although if they are based outside the UK there may be issues of enforceability if the publisher fails to deposit a non-print work). The Library broadly supports this approach. As explained below, it reflects the reality that, both in the print and non-print worlds, material may be distributed or made available in the UK by a publisher based outside the UK.

However, in light of the comments made below on the closely related question of who is “connected with the United Kingdom” for the purposes of Regulations 35 and 36 (which is concerned with the scope of the publishers’ and Legal Deposit Libraries’ exemption from liability), the Library believes that it may be helpful for the Regulations to clarify that a work of a prescribed description for the purposes of Section 10(5)(b) of the Act is to be regarded as published in the UK for the purposes of section 1(1) of the Act.

The Library recognises that Parliament cannot pass or approve legislation that extends to places for which Parliament has no power to legislate. However, the rule in relation to the applicability of UK legislation is that Parliament is concerned with conduct taking place within the UK (regardless, for example, of the nationality of the person to whom the legislation applies). This is consistent with the presumption that UK legislation does not apply to foreign persons or corporations outside the UK whose acts are performed outside the UK, although this presumption only applies in the absence of contrary intention.

However, publishing is a special case because a work may be published in the UK even though the publisher is present outside the UK. Indeed, this is reflected in the definition of “publication” in section 14 of the 2003 Act, which acknowledges, for example, that a work distributed in the UK (i.e. copies issued to the public) is nevertheless to be regarded as published in the UK. This would apply to offline publications as much as to works published in print.

In clarifying the scope of obligation to deposit online publications, the Library suggests that account must be taken of the following factors:

- (a) As stated in paragraph 1.5 of the draft Guidance, the Regulations seek for the regime for non-print publications to mirror as closely as possible the existing regime for printed publications. Currently, approximately 16% of printed material subject to legal deposit collected by the British Library is material distributed in the UK but where the publisher is located overseas. This situation is bound to be replicated in the non-print world, with pertinent examples provided by a number of large publishers, whose servers are in a number of countries (other than in the UK), but which make their non-print publications available in the UK.
- (b) For copyright purposes, an infringing act occurring in the UK may have been authorised by a person outside the UK, and such “authorising” may be actionable in the UK¹; and for libel purposes, “publication” may occur in the UK if this is the place where the words are read or heard by the reader even if the material has been uploaded outside the UK.
- (c) Territorial effect (which applies to Acts of Parliament) and jurisdiction (which applies to the question of enforcement) are different concepts that, we believe, should be distinguished. Enforcement against a person or corporate body based overseas presents jurisdictional issues, but does not mean that UK legislation cannot cover the conduct in the UK of such persons or bodies using digital technology. That is already the position under copyright and libel law.

(2) Definition of scope of exemption from liability

Draft Regulations 35 and 36 are intended to protect publishers and Legal Deposit Libraries from defamation and copyright infringement claims relating to works deposited with the libraries concerned. This is an important aspect of legal deposit and the broad intention of draft Regulations 35 and 36 is welcomed by the British Library.

The Library recognises both the difficulty of defining territoriality in a digital age and yet the continuing need to offer the protections of legal deposit for publishers and Legal Deposit Libraries alike from claims of defamation and copyright infringement). Unfortunately, in our view, there appear to be some problems in the scope of exemption from liability as drafted within Regulations 35 and 36, and which appear to allow a statutory instrument to alter primary legislation.

We are concerned by a change in wording from the key legislation, namely Section 10(5) of the Legal Deposit Libraries Act 2003 and section 44A of the Copyright, Patents and Designs Act 1988, which provide that the exemption applies if the publication of the work on the internet,

¹ ABKCO Music v Music Collection International Ltd [1995] RPC 657

or a person publishing it there, is connected with the United Kingdom. In other words, either 'limb' can apply, and the test is disjunctive.

The Library does not follow the rationale for converting this into a conjunctive test whereby the exemption is limited to circumstances in which an on line publication is connected with the United Kingdom and is published by a person connected with the United Kingdom. It is not clear whether a statutory instrument can change primary legislation in this way. Its net effect would be to remove from the exemption works published in the UK (and therefore subject to the duty to deposit) by a publisher who does not use a fixed establishment in the UK. For instance there may, as explained in (i) above, be works published on the internet that ought to fall within the scope of legal deposit (i.e. they are published in the United Kingdom for the purposes of section 1 of the 2003 Act), notwithstanding that the publisher's operation is housed outside the United Kingdom. The Library's proposed solution is to revert from "and" to "or" to maintain consistency with the primary legislation.

The second limb of the test ("a person ... publishing [the work] ... is connected with the United Kingdom") is however required because of the language of section 10(5) of the 2003 Act. In keeping with the remarks made above, the Library's preference would be to dispense with the concept of "fixed establishment", which is of uncertain scope (it is not clear if it refers to the publisher's principal place of business, the location where authorial or editorial decisions are taken, or the server from which material can be downloaded).

The Library suggests that a more appropriate alternative might be simply to say that a publisher is the person who is responsible for "publication", as defined in section 14 of the 2003 Act, and such a publisher is "connected" with the UK if the work is published in the UK. If it is felt that further guidance should be provided, then the Library submits that the focus should instead be on whether (taking into account all the circumstances) the publisher in question is making material available specifically for download in the UK, or is specifically authorising such download in the UK. The circumstances to be taken into account might be the extent of publication in the UK (i.e. the number of readers in the UK), and any other factors that reasonably disclose an intent to publish in the UK (such as the language of publication and other indications that the target audience is in the UK).

(3) Difference in scope of obligation to deposit and exemption from liability

Sections 1(1) and 1(4) of the 2003 Act define the situation in which a non-print work is published in the United Kingdom, and therefore subject to deposit. As indicated in (i) above the deposit obligation appears to extend to any person who publishes a non-print work in the UK, wherever they are based, i.e. whether or not they are "connected with the United Kingdom" for the purposes of Regulations 35 and 36.

While Regulations 35 and 36 are of course concerned with the scope of the publishers' and Legal Deposit Libraries' liability, it would be preferable in the Library's view if the test for whether a work is subject to the duty to deposit (section (i) above) and the test for application of the exemption from liability (section (ii) above) were consistent. Otherwise, the net effect of the Regulations as currently drafted is that the category of non-print works which are to be deposited is wider than the category of works for which the Library (and publishers) can claim exemption from liability. This would mean that deposit libraries and publishers could have unforeseen contingent liabilities arising from copyright infringement or defamation claims in respect of material properly deposited but to which the liability exemptions might not apply.

The Library suggests the following amendments.

In the section headed "Interpretation" insert a new regulation:

For the purposes of sections 1(4) and 6(2)(g) of the Act, an on line publication is to be treated as published in the United Kingdom if it is a work of a prescribed description for the purposes of Section 10(5)(b) of the Act.

and, in the section headed "Activities in relation to publications":

35. For the purposes of section 10(5)(a) of the Act an on line publication which is connected with the United Kingdom or published by a person connected with the United Kingdom is a work of a prescribed description.

36. For the purposes of Section 10(5)(b) of the Act—

(a) An on line publication is connected with the United Kingdom if it is published in the United Kingdom;

(b) A publisher of an on line publication is connected with the United Kingdom if (taking into account all the circumstances) that person makes that on line publication available specifically for download in the United Kingdom, or specifically authorises the download of that on line publication in the United Kingdom.

Question 21 – Territoriality (Exclusions from Scope)

Regulation 36 - Do you agree that the regulations should NOT cover works which are accessible to readers based in the United Kingdom unless they are published in the United Kingdom by publishers based in the United Kingdom?

If not, please give reasons and suggest an alternative. Please explain your position.

Please see our response to Q.20 above. The Library is puzzled by the linking of this Regulation to the more general concept of publication in the rest of the Statutory Instrument. Our understanding is that Regulation 36 (and Regulation 35), which form Part 4 Exemptions from Liability, can only be concerned with the scope of the exemption from liability under sections 8 and 10 of the Legal Deposit Libraries Act 2003. This means that they do not affect the definition of the non-print work generally, including the definition of territoriality and the scope of obligation to deposit.

Question 22 – Territoriality (Recommended Assumptions)

Guidance: section 8

We have suggested that for on line works which are free of charge and without access restrictions (which will normally be requested via a web harvester), the Legal Deposit Libraries should assume (unless told otherwise) that a Publisher :

- is based in the United Kingdom; and
- is publishing from the United Kingdom;

If:

- the publisher has made it clear on its website that it is based in the United Kingdom, has provided its trading location in the United Kingdom and is based in the United Kingdom for the purposes of the e-Commerce Directive; or
- the publication is available from a website with a top level UK domain name.

In the event that these assumptions prove incorrect, the Publisher could refuse the deposit request by blocking the web harvester.

Other websites may be within scope but will need to be asked directly.

Do you agree with this approach?

Please see our response to Q.20 above. The Library draws attention to the very specific use that the draft Regulations make of these definitions of a work published in the United Kingdom, namely to provide exemption from liability as per Part 4 of the Regulations. The Regulations as a whole are broader than this, as they cover both the scope of a publisher's obligation to deposit, as well as the scope of publishers' and libraries exemption from liability.

The Library submits that the test of whether material is "published in the UK", and therefore subject to deposit (and ideally exemption from liability) should not be a rigid one. The test should allow reference to be made to the extent of publication in the UK (i.e. the number of readers in the UK), and any other factors that reasonably disclose an intent to publish in the UK (such as the language of publication and other indications that the target audience is in the UK).

The Library will of course work in partnership with publishers through a transparent governance mechanism with an independent appeals process to ensure that UK legal deposit is implemented fairly in the digital domain.

We have suggested that for an on line publication for which there is a charge or which is subject to a public access restriction, the test for what amounts to a UK publisher should be based upon the location of who decides to publish the work. How do you think this approach can work in practice?

Please see our response to Q.20 above, and our further response to Q.22 in this section.

Do you agree that for on line publications from UK based individuals who do not have a trading address, the Legal Deposit Libraries should find a way of directly asking the Publisher whether they are based in the United Kingdom? If not, please give reasons and suggest an alternative Please provide evidence.

Please see our response to Q.20 above, and our further response to Q.22 in this section.

Question 23 – Impact Assessments for Deposit Libraries

Do you agree with the impact, as set out in the impact assessments, for the Deposit Libraries? If not why not? Please provide evidence and a breakdown of your calculations.

Yes. The British Library believes that the Impact Assessments strongly support that regulation is the best option for publishers and Legal Deposit Libraries alike and, most importantly, since the Legal Deposit Libraries act on behalf of the public interest, that regulation will benefit future generations of researchers and educators, business and science, and so the UK public in general. This assumes that a web harvesting approach is employed for freely-available online publications not subject to access restrictions; and that a publisher-by-publisher deposit approach is employed for online publications subject to a charge or access restrictions.

The public benefit is not quantified in the Impact Assessments but the British Library believes it would be significant. A study commissioned by the Library in 2005 suggested that for every £1 invested in the British Library over £4 was generated for the economy: the securing of non-print legal deposit would be a major contribution to maintaining and extending this public good.

Questions 24 to 30 – Impact Assessments for Publishers

Not applicable to the British Library

Question 31 – Trinity College Dublin

The 2003 Act allows for non-print works to be deposited with Trinity College Dublin (TCD). The 2003 Act is clear that we should not extend legal deposit to TCD unless the Secretary of State is satisfied that restrictions on use of the material under Irish law are not substantially less than in the UK. We are still awaiting information from Ireland on this issue and we do not propose to extend the Regulations to cover Ireland until we have this comfort. However, for the purposes of the consultation, we consider that the most prudent course is to include TCD as a legal deposit library in the draft regulations.

Are there any points which you would like make on this issue? Please include, if possible, any evidence with your answer.

The British Library believes that the Statutory Instrument should be in keeping with the primary legislation and support the historic links between the UK and Ireland through the inclusion of Trinity College Dublin in UK legal deposit arrangements. For print publishers there are reciprocal provisions in the Republic of Ireland through which Irish publications are deposited in the British Library (and other Legal Deposit Libraries); this is a benefit for the UK public which the British Library believes should continue for non-print publications. We very much hope that the

Secretary of State will be satisfied that the appropriate restrictions under Irish law are not substantially less than in the UK, and that it will be possible to extend legal deposit to Trinity College Dublin so that similar reciprocal arrangements as exist for print may also be established for non-print material.

Question 32 – Other Comments

Do you have any other comments, issues, concerns or questions? If so please can you clearly label what it is and then set it out, providing any relevant evidence.

Costs: Draft Regulation 37(a)

The Library does not know how this Regulation as drafted could be enforced or how the matters referred to could be measured in practice. The Regulation as currently drafted, gives no indication of how, or by whom, the publishers' costs are to be assessed in comparison to the benefit to the public, nor how 'disproportionate' should be interpreted. It would be wholly impracticable (and prohibitively expensive) for the Legal Deposit Libraries to conduct a cost benefit analysis each time a request for deposit is made. The Library respectfully submits that the issue of cost is a matter for the Secretary of State to weigh up, in accordance with section 11(4) of the 2003 Act, in making the Regulations, but that once the Regulations are made, it is reasonable to assume that the Secretary of State has concluded that the costs falling on publishers are not disproportionate to the public benefit. The cost benefit analysis, in other words, relates to the making of the Regulations, not to the activities of the parties seeking to comply with them. This matter can, of course, be submitted to further scrutiny when the Regulations are reviewed in 2018.

Legal precedence: Draft Regulation 37(b)

The British Library would like to draw attention to the final section of the draft Statutory Instrument, Part 5, Regulation 37 (b). This provides that draft Regulations 6, 7, 14 and 17, concerning the delivery of non-print publications to the British Library and other Legal Deposit Libraries, would not apply if they were to 'give rise to any contravention of or failure to comply with the law'. This seems to contradict the provisions relating to exemption from liability. The Library queries the circumstance in which another law would invalidate the Legal Deposit provisions and seeks clarification on this point.

The concern is that, without clarification, arrangements could be made to contract out of the obligations arising under the 2003 Act and the Regulations. "The law" could be interpreted in multiple ways and the effect of this draft Regulation could be that any interpretation of "the law", including software terms and conditions or an exclusive contractual arrangement, could be used to defeat the purpose of these Regulations. The Library queries the circumstance in which another law would invalidate the Legal Deposit provisions and questions whether this draft Regulation is necessary at all.

Working in partnership, publisher agreement and dispute resolution

The British Library welcomes the principles set out in the Guidance to the consultation relating to the management of legal deposit arrangements and the governance of relationships between the Legal Deposit Libraries and publishers. The British Library has a long history of working in successful partnerships with publishers both in the context of legal deposit and also in relation

to supply of services for research and private study. The British Library intends to work in close partnership and collaboration with publishers and the UK Legal Deposit Libraries in order to implement these Regulations. In developing management and governance arrangements, the Library believes that:

1. it will be important to ensure representation from the range of Legal Deposit Libraries and publishers, for example a mix of large and small publishers, trade bodies, and home countries' interests;
2. it will also be critical that the public interest and voice of creators should be represented fairly;
3. any governance mechanism should be open and transparent, and could be responsible for jointly deciding issues such as:
 - High level collecting priorities on an annual basis
 - Operational matters such as a description of harvesting, requesting processes, publisher-by-publisher liaison
 - Preferred formats and deposit methods
 - Guidance and interpretations around issues such as territoriality, embargos, metadata/software requirements and so on.
4. We welcome the suggestions made in the Guidance around an independent dispute resolution procedure. We suggest there should be scope for building in a tiered dispute resolution process, involving independent third parties, to allow scope for mediated resolution of disputes. At the same time the mechanism could allow a process for making binding decisions (for example, a form of arbitration) where this is required in order to achieve clarity, or to set a precedent for the broader operation of legal deposit. This would enable the Legal Deposit Libraries and publishers to limit recourse to the courts in the event of stalemate to strictly legal matters (as opposed to practical matters such as the quality of copies subject to legal deposit).

We will work collaboratively with all parties following this consultation to establish such a governance structure.

Minor drafting suggestions

Under Regulation 6, we believe reference to “the day of publication” is confusing, because “publication” covers both traditional hard-copy publication as well as electronic delivery (as per the definition in the 2003 Act). We suggest that the Regulation should state “the date of publication in the medium of such off-line publication.” A similar problem is encountered in Regulation 11, which also refers to “the day of publication”.

Reference to “the day on which the request is received” also gives rise to uncertainty: under Regulation 9, a request can be made in advance for publication but the obligation to deliver here under Regulation 11 is for delivery within one month beginning on the date that the request is received.

Under Regulation 22, reference to “a reader” should be replaced by “relevant person”.

— END —