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Depository, copyright and the notion of a "document"

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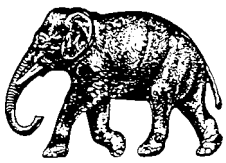
***Abstract*:**
The paper addresses the relation between the duty to deposit copies of a document and the copyright legislation, and make an attempt of discussing the challenges in transposing this obligation to the environment of electronic publishing, typically by making web sites available to the public. As law is fused to the territorial authority of the nation, it is difficult to escape the national reference, and therefore the Norwegian system will be highlighted as an example of a legislation imposing the duty of depositing documents neutral to the storage medium.



1 Introduction

Depositing documents is traditionally imposed on certain parties – printers or publishers – for making one or a small number of copies available for archival purposes to an institution, a depository library. The object is to preserve the history embedded in the documents for the future; the depository represents the "memory of a nation". In this archive, scholars will be able to consult the

original documents long after they have become unavailable in the market. As contemporary reviewers may not be able to decide which documents will become important in the hindsight from the future, it is deemed important that the documents to be deposited are *not* qualified by criteria based on assessments like "important" or "valuable". One therefore tries to base the legal rules governing depository on more objective criteria.

One such objective criterion is the notion of "publishing". In copyright terms this denotes that a document is made available to the public through the distribution of copies. This is what takes place when a book is published, a leaflet is handed out, a public notice is distributed among the citizens, or posters are stuck to walls. It is obvious that in the view of contemporary society, some of these documents may be deemed of less interest to the future, as it is marginal to the social policies at the time. Therefore, the criterion may be qualified by different subsidiary criteria, like the number of pages.

When printed material was only produced by professional printing shops, the subject to the obligation to deposit the copies produced had a limited number of addressees. As printing methods were supplemented by more causal means of reproduction, the possibilities in practise to secure copies of all the matter distributed among the public become correspondingly limited: School newspapers, bills, programs for cultural or sportive events were reprographed by persons having no knowledge of the duty to deposit copies, and the material was often lost to posterity. And many would say that this did not represent a real problem, the material missed was marginal, the possible value not matching the resources necessary to maintain a complete archive.

The notion of a national depository is clearly linked with the notion of maintaining a national bibliography. In this paper, the legal issues related to such a bibliography will not be discussed.

Development has left the printing of copies as only one of several means of making material available to the public. In principle, texts were made available to the public by reading or dramatic performances before the printing press was developed. A play performed on stage require only a very limited number of copies to be produced – sufficient for distribution among the members of the company, the director and others necessary to realise the play. But the play may be important for the "memory of the nation".

This has been aggravated by modern technology. Radio and television broadcasts have traditionally been offered to the public – at least in Europe – by one or a small number of producers within the country. Movies have required budgets which secured that the producers also rather easily could be identified within the country. Music was made available on records, and the recording industry worked more or less along the same principles as the book publishers: Making the material available through the distribution of copies.

In spite of these developments, the rules on depository have remained related to the traditional printed copies within many jurisdictions. There were sufficient challenges in securing a high coverage in this respect, and the depository of material made available to the public by other media, were not addressed.

Information technology has added another layer of challenging problems to the ones sketched above. It started with what was known as "data base publishing", but after the World-Wide Web has become a mass medium, anyone may make his or her material available to the public through web sites. And the sites include not only texts, but still and moving pictures as well as sound in the form of speech or music.

The policy challenges of this situation is staggering for an depository institution having as its objective to secure for the future the whole wealth and complexity of the material made available to the public. This paper will not address this challenge, but rather look at two aspects through the focus offered by the blinkers of law: The notion of a "document", and the relation to the copyright legislation.

2 The notion of a document

”Document” is a term derived from Latin *documentum,* related to the verb *docere,* “to learn”. The original meaning is “evidence”, but during the Middle Ages it started to be used for *instrumentum,* a written declaration. Today, it will be used as a synonym to any written record of some kind, though probably still carrying a notion of some solemnity; a post card or a post-it note would probably not be qualified as a “document” in everyday language.

The term has migrated into the language used for information technology, a file in a word processing system or the unit for retrieval in an information retrieval system is both commonly known as “documents”.

For a modern legislation on depository, an obvious objective is to formulate the rules in such a way that they are neutral with respect to the media on which the data is stored. On the other hand, the legislation has to qualify what has to be deposited – one must be able to identify the material subject to such a duty. A possible strategy would be to develop the notion of a “document” in such a way that it is independent of the storage medium. This is a strategy not only used for the law on depository, but also for the law on the freedom of information, the law giving parties access to the material on which a decision is made by public authorities, to the law of archiving for public bodies, *etc*.

As an example for such an attempt, the notion of a “document” in the Norwegian law on legal depository will be discussed. This is a notion made up of several related concepts. It is based on the notion of a “medium”, and several types of media may be involved: Paper, machine readable media, photographic film, sound recordings *etc*. Fused with certain “information”, the combination becomes a document. Consequently, the text on a printed page is a “document”, if the same text is converted into machine readable form stored on a magnetic disc, this become a new “document”. Any document may be subject to “reproduction”, and therefore may be present in several “copies”.

This makes “document” a rather sophisticated concept. It makes it possible to require deposit of a “document” even when the same “information” is lifted from one medium onto another. But there are basic difficulties with this concept. For instance, what are different media: Is a microfilm a different medium from a microfiche? Is a text stored in one machine readable format different from the same text stored in another format? The legislation has to revert to regulations (secondary legal instruments) to resolve these complexities, and in the process, the elegance of the original concept is lost. Also, convergence makes it difficult to distinguish between, for instance, the medium of a “sound recording” or a “video tape” on one side and a “machine readable medium” on the other side, as the latter may be a “multi-media” document.

Without dwelling on the details of the Norwegian legislation, the paper will endeavor to use this example for demonstrating the difficulties of this strategy, and sketch at least one alternative strategy for qualifying the “documents” subject to deposit.

3 Copyright

In the traditional environment, the publishing of material presumed the reproduction of an edition, a rather large number of identical copies. The duty to deposit copies of the document required a few of these copies to be deposited. These were skimmed off the top of the edition, so to say – a printer ordered to reproduce a edition of a specified number, would in fact reproduce a slightly larger number in order to compensate for flawed copies. The traditional publishing contract between an author and a publishing house would specify the number of copies in an edition (as the remuneration of the author typically was related to the volume), but include a certain leeway of additional copies to be produced, which should be

used to replace damaged copies, also for publicity, and including the few copies necessary for the statutory deposit.

In several situations, however, the presumption of a large edition did not hold. And the legislation requiring copies to be deposited does not necessarily rely on the criterion of a certain number of copies to be produced, to trigger the duty to deposit the material.

This will obviously be relative to the legislation in question, and what criterion this legislation has made critical for the duty to arise.

If the criterion is "publication", this generally implies that the material is made available to the public through the reproduction of copies, and – in traditional circumstances – the presumption of skimming off a few copies from the top of the edition will hold. With respect to computerised material typically made available through the Web, and which is qualified as "publishing", this presumption does not, however, hold – the "publisher" only makes one copy (not going into the issue of the caching taking place by servers throughout the Net for optimising traffic) – the copies distributed among the public are made by the users themselves in accessing the offered material. If the material is to be deposited, the "publisher" therefore has to reproduce the necessary number of copies for this purpose.

This situation will be even more critical if the criterion is "making the material available to the public". This may be realised without reproduction of an edition of copies, the traditional example being the performance of a work from a stage, but including radio and television broadcasts.

In such a situation, the legislation on depository actually imposes a statutory compulsory license of reproduction in copyright terms. And compulsory licenses are not favoured in international copyright instruments. One should make sure that there is sufficient co-ordination between copyright law and the law on compulsory deposit for the necessary production of copies to be authorised. One also has the issue of cost: In the traditional situation in skimming copies from the top a large edition, the costs could be ignored as marginal. But if the legislation on deposit requires the publisher (or another subject) to produce copies especially for the deposit, the cost may not be substantial: One may only take a large data base as an example.

In the digital environment, one also will have to address the problem that the "documents" are less stable, a data base, for instance of legislation, will be updated regularly, typically once a week. And as old legislation is replaced by amending regulations, the data bases are not only "add-to-the-end-of-the-file" amendments. This is even more true for operational data bases of air lines *etc,* not to mention the ever-changing web sites. If the duty to deposit is applied to such "documents", one hardly can require a new deposit to be made each time the data base or web site is updated – one has to base the duty on time slices, and devise a principle to decide when a new time slice of the data base or web site is to be deposited. Brief mention of the solution in the Norwegian legislation will be made to illustrate the point.

Finally, the principle of exhaustion of copyright will be mentioned. The exclusive right to control distribution of a copy will in Europe be exhausted when this copy is *sold* within the community – the purchaser may then re-sell the copy, or offer the copy for lending to the public. In this way, the books purchased by a library may freely be offered for lending. But not so with respect to the copies deposited on the basis of a legal duty: These copies are *not* sold, and therefore copyright is *not* exhausted in these copies in the same way. This strongly limits the use that can be made of the copies making up the "national memory", and a brief discussion of this issue concludes the paper.

***Biographical note**:* Jon Bing (1944), professor dr juris Norwegian Research Center for Computers and Law, a department of the Faculty of Law, University of Oslo. Dr juris hon (Copenhagen and Stockholm), visiting professor King's College, University of London (1998-2000), former chair of

the Norwegian Council of Cultural Affairs, current chair of the national organizing committee for IFLA 2005, Oslo. Also writer of novels, short-stories, plays for stage, radio and television, the opera *Circus Terra* of which he has written the libretto, opened in Prague May 2002.