



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to the consultation on the legal deposit of non-print works**

**December 2010**

# Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales and Scotland, and for postal consumers Northern Ireland. We operate across the whole of the UK economy, persuading Government, businesses and public services to put consumers at the heart of what they do.

Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. To do this it needs to balance the interests of creators, investors and consumers. We welcome the opportunity to respond to the **Consultation on the Legal Deposit of Non-Print Works** (the consultation document thereafter), led by the Department for Culture, Media and Sports (dcms) and supported by the Department for Business, Innovation and Skills (BIS).

As stated in the consultation document, ‘the purpose of legal deposit is to ensure that the nation’s published output (and thereby its intellectual record and future published heritage) is preserved as an archive for research purposes and the use of future generations.’<sup>1</sup> As such Consumer Focus welcomes the efforts by dcms and BIS to ensure the legal deposits of non-print works. Legal deposits of printed works to designated libraries are an integral part of copyright law since the first copyright statute, the Statute of Anne 1709. As technology advances and an increasing number of works are published digitally or online we believe that it is vital that effective legal provisions are made for the legal deposit of non-print work.

However, we are concerned that the legislative proposals consulted on are not designed to allow for non-print works to be preserved as an archive for research purposes and the use of future generation. The proposals severely restrict access to the non-print legal deposits to a point of meaninglessness. The draft statutory instrument would actively prevent users, be it consumers or organisations, from access to the non-print legal deposits, and it would do so in perpetuity. In particular, the draft statutory instrument would prevent users from exercising the user rights the Copyright, Designs and Patents Act 1988 grants them in relation to any other copyrighted work, including printed legal deposits.

The draft statutory instrument is so restrictive that Consumer Focus is not able to support the proposals. According to the consultation document the plan is to introduce affirmative secondary legislation before Parliament following the consultation. Given the nature of our concerns we will be unable to support the statutory instrument should it be introduced to parliament in its current form. Furthermore we believe it is inappropriate for the dcms to be introducing substantial changes to copyright law through statutory instruments without having established a credible impact assessment.

We are particularly concerned that the proposals limit the use of non-print legal deposits to one terminal in legal deposit libraries; that they would allow copyright owners to force legal deposit libraries to embargo, and so deny access to, non-print legal deposits indefinitely; that users are prevented from exercising their user rights in relation to non-print legal deposits as established in the Copyright, Designs and Patents Act 1988; and that the proposals extend copyright in the non-print legal deposits into perpetuity.

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<sup>1</sup> **Consultation on the Legal Deposit of Non-Print Works**, dcms & BIS, 29 September 2010, pg.4

Consumer Focus would also like dcms to note our strong concerns about the lack of evidence base underlying the proposal, with the Impact Assessment providing no economic analysis or rationale for limiting access to non-print legal deposits in the way proposed. Furthermore it is not clear why the dcms, in corporation with BIS, is consulting on non-print legal deposits. In our view the Intellectual Property Office (IPO), which is responsible for all intellectual property rights and has considerable expertise in the area, should be leading this consultation. It is also not clear how this consultation fits within the ongoing IP Review.

### **Summary of Consumer Focus recommendations:**

- clause 23 of the draft statutory instrument should be amended so that a legal deposit library can provide access to the same non-print legal deposit to multiple users through terminals on premises
- remove clause 24 to 28 of the draft statutory instrument on embargos
- remove clause 29 to 30 of the draft statutory instrument so that section 38 and 39 of the Copyright, Designs and Patents Act 1988 apply to non-print legal deposits
- all users rights granted under the Copyright, Designs and Patents Act 1988 should apply to non-print legal deposits
- 'Part 3 – Permitted Activities' should be removed from the draft statutory instrument so that the Copyright, Designs and Patents Act 1988 provision on duration of copyright and user rights fully apply to non-print legal deposits

## Permitted Activities: Providing access to the relevant material – one display terminal only

Clause 23 of the draft statutory instrument provides that ‘a deposit library must limit the number of readers who may use relevant material at any one time by only allowing the same relevant material to be accessed from one display terminal at any one time.’<sup>2</sup> The consultation document furthermore explains that:

‘Access to works that the Legal Deposit Libraries have received under Legal Deposit is restricted to the display terminals on premises controlled by the Legal Deposit Libraries.

There are no restrictions on how many display terminals a Legal Deposit Library may have. However, they must be situated on premises controlled by the Legal Deposit Libraries and only readers who are on premises controlled by the Legal Deposit Libraries can be allowed access to (ie can view) the work on a display terminal.

Access to the same non-print work is restricted to one display terminal at any one time in any premises controlled by 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.’<sup>3</sup>

Consumer Focus does not support the proposal to limit access to the non-print legal deposit to one user per legal deposit library at any one time. We do not agree with this approach and we are concerned that dcms and BIS have failed to provide any convincing rationale for this proposal. It appears that this provision is based on the idea that only one user at any one time would be able to view a printed legal deposit in a legal deposit library. We do not believe that this is a sufficient rationale for limiting access to non-print legal deposits to one user at any time in a legal deposit library.

The proposals made in the consultation document fail to harness the power of digital technologies and are far from being innovative. It is now technically possible for legal deposit libraries to provide users with secure access to work from other locations. Yet the proposals will require researchers and academics to travel to London, Edinburgh, Cardiff, Oxford, Cambridge or Dublin to view non-print legal deposits. The proposals which are consulted on do not even consider such secure remote access. This is a serious shortcoming, and even more worryingly, access to the non-print legal deposit is furthermore limited to one user per legal deposit library at any one time.

The six legal deposit libraries: the British Library; the National Libraries of Scotland and Wales; and the University libraries of Oxford, Cambridge; and Trinity College Dublin, serve thousands of researchers and users per day. It is absurd to only allow access to a non-print legal deposit to one user at any time in each of the legal deposit libraries.

We are greatly concerned that the impact assessment provides no justification of how this provision is to be for the benefit or copyright owners, libraries or users. It is inconceivable that a copyright owner would suffer economic damage from two researchers accessing the same non-print legal deposit at the same time while at the British Library, or any other legal deposit library. All this provision will achieve is additional administrative burden, and

<sup>2</sup> **Draft statutory instrument – 2011 No. Libraries – The Legal Deposit Libraries (Non-print Publications) Regulation 2011**, Part 3, clause 23

<sup>3</sup> **Consultation on the Legal Deposit of Non-Print Works**, dcms & BIS, 29 September 2010, pg.17

it will be a barrier to the use of non-legal deposits. The provision will result in no conceivable benefit to copyright owners, libraries or users.

Therefore we recommend that this access restriction provision should be removed from the draft statutory instrument. In order to ensure that non-print legal deposits are preserved as an archive for research purposes and the use of future generations, the draft statutory instrument should provide that legal deposit libraries can provide access to non-print legal deposits to any number of users at the same time through terminals on premises controlled by the legal deposit library.

**Consumer Focus recommendation:**

- clause 23 of the draft statutory instrument should be amended so that a legal deposit library can provide access to the same non-print legal deposit to multiple users through terminals on premises

## **Permitted Activities: Providing access to the relevant material – copyright owner request for embargo**

Consumer Focus is also greatly concerned that the draft statutory instrument makes provisions that would allow copyright owners to potentially force legal deposit libraries to prevent users from accessing the non-print legal deposit indefinitely, ie place the non-print legal deposit under permanent embargo. In ‘Part 3 – Permitted Activities’ the draft statutory instrument makes the following provisions:

### **Providing access to the relevant material**

24. In the case of relevant material comprising an on line publication, a deposit library may not allow a reader to view the relevant material pursuant to regulation 23 until seven days have elapsed since the delivery of that relevant material to the deposit library pursuant to regulations 14 and 17.

25. A deposit library may not within the period specified allow a reader to view the relevant material pursuant to regulation 23 if it has received a written request (whether sent by electronic or other means) from a publisher and the publisher has demonstrated that, on a balance of probabilities, viewing by a reader would—

- (a) conflict with the normal exploitation of the work; and
- (b) unreasonably prejudice the legitimate interests of the publisher.

26. A written request made pursuant to regulation 25 must specify a period not exceeding three years from the date of the deposit of the relevant material during which no deposit library may allow a reader to view the relevant material.

27. The period during which a deposit library may not allow a reader to view specified relevant material pursuant to regulation 25 may be extended if it has received another request in accordance with that regulation.

28. A written request made pursuant to regulation 27 may be made within a period of six months of the date on which a deposit library would otherwise allow a reader to view the specified relevant material pursuant to regulation 23.<sup>4</sup>

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<sup>4</sup> **Draft statutory instrument – 2011 No. Libraries – The Legal Deposit Libraries (Non-print Publications) Regulation 2011**, Part 3, clause 24 to 28

The impact assessment to the draft statutory instruments fails to provide a convincing rationale for this extensive lock down provision, and the consultation document merely states that:

‘To ensure that the impact on Publishers’ business models is kept to a minimum, the draft Regulations include some general provisions about embargoes. These are intended to protect the commercial interests of those Publishers who may be unreasonably prejudiced if readers are allowed access to their works in a Legal Deposit Library, albeit on the limited basis prescribed under the draft Regulations and described in section 4 above.

Although the possibility of an embargo does not remove the obligation to deposit the publication with a Legal Deposit Library, an embargo means that readers will not be able to access the publication for a specified period of time.

There is no automatic provision for an embargo and the draft Regulations do not give specific time periods during which particular types of publication must be withheld from readers at a display terminal. We consider that the appropriate period will vary depending on the particular circumstances and the publication concerned. The draft Regulations provide that the Legal Deposit Library must impose an embargo if the Publisher submits a written request and demonstrates on a balance of probabilities that viewing by a reader would:

- conflict with the normal exploitation of the work; and
- unreasonably prejudice the legitimate interests of the Publisher.<sup>5</sup>

This means that clause 24 to 28 of the draft statutory instrument are meant to protect the commercial interest of the publisher. As such we would expect the impact assessment to set out in detail how the provisions are to achieve its stated purpose. As the consultation document states, in relation to printed legal deposits, legal deposit libraries in some cases negotiate embargoes, for various reasons, with the copyright owners. The consultation document also acknowledges that the embargo provision for non-print legal deposits in the draft statutory instrument “goes further than the position in relation to print publications for which embargoes are negotiated on an informal basis and without any statutory basis”<sup>6</sup>. It is not clear why legal deposit libraries and copyright owners have been able to negotiate embargoes on a non statutory basis for 300 years in relation to printed legal deposits, but in relation to non-print works it is necessary to make the proposed statutory provisions.

In any case, Consumer Focus does not agree with the approach taken in the draft statutory instrument. We are particularly concerned that the provisions allow copyright owners to make applications and it is then for the legal deposit library to disprove the assertions made by the copyright owner.

The draft statutory instrument states that an embargo must be given if the legal deposit library has “received a written request (whether sent by electronic or other means) from a publisher and the publisher has demonstrated 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.” Yet the draft statutory instrument, the consultation document and the impact assessment do not provide any explanation what kind of evidence would prove on the balance of probability that the viewing of a non-print

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<sup>5</sup> [Consultation on the Legal Deposit of Non-Print Works](#), dcms & BIS, 29 September 2010, pg.19

<sup>6</sup> *Ibid*, pg.19

legal deposit unreasonably prejudices the legitimate interest of the copyright owner or publisher. In fact, dcms and BIS have failed to provide any evidence that the viewing of print legal deposits has prejudiced the interest of copyright owners or publishers in the past 300 years. It is not clear what evidence they expect copyright owners to provide, and how legal deposit libraries are to ascertain the reliability of that evidence.

We are concerned that the emphasis and wording of embargo provision puts legal deposit libraries at a disadvantage and that it will encourage publishers to make such written applications, which legal deposit libraries will then have to disprove at great cost. We object to the lack of evidence base for this provision, and we question why such a complicated statutory provision has to be made given that embargoes for print legal deposits have been negotiated between legal deposit libraries and copyright owners for 300 years without statutory provisions.

We are also concerned that the provision effectively allows the indefinite embargo of non-print legal deposits if the copyright owner chooses to resubmit an application every six months. We fear that this provision will be abused by copyright owners, such as News International. Earlier this year James Murdoch of News International criticised the British Library for digitising their public domain newspaper collection, which spans three centuries and 52,000 local, national and international titles. It appears that Murdoch sees this as conflicting with News International's plans to start charging for online access to the archives of the Times and Sunday Times.<sup>7</sup> We are concerned that News International would abuse the provisions in the draft statutory instrument to force long-term or indefinite embargoes of the non-print legal deposits.

We therefore recommend that Clause 24 to 28 are removed from the draft statutory instrument, and that legal deposit libraries are free to negotiate embargoes with copyright owners in the same way they are able to do so for printed legal deposits since 300 years.

#### **Consumer Focus recommendation:**

- remove clause 24 to 28 of the draft statutory instrument on embargos

## **Permitted Activities: Research and private study – limiting fair dealing and access**

Consumer Focus is greatly concerned that the draft statutory instrument places obligations on legal deposit libraries providing users with a copy of the non-print legal deposit for the purpose of non-commercial research and private study which would limit the equivalent provisions contained in the Copyright, Designs and Patents Act 1988. Again, no rationale for this limitation on legal deposit libraries ability to assist users in non-commercial research and private study is provided in the consultation document or the impact assessment. Instead the consultation document wrongly states that in relation to research and study 'the draft regulation largely mirrors the existing law which governs how and when a library may take a copy of part of a work and provide that copier to a reader'.<sup>8</sup>

Libraries are able to provide users with copies of copyrighted works in their collection without infringing copyright for the purpose of non-commercial research and private study under section 38 and 29 of the Copyright, Designs and Patents Act 1988. These provisions apply to any copyrighted work in the collection of a library, including printed

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<sup>7</sup> Richard Wray, [James Murdoch attacks British Library for digitising newspapers](https://www.theguardian.com/culture/2010/may/21/james-murdoch-attacks-british-library-for-digitising-newspapers), guardian.co.uk, 21 May 2010

<sup>8</sup> [Consultation on the Legal Deposit of Non-Print Works](#), dcms & BIS, 29 September 2010, pg.23

legal deposits. Yet the draft statutory instrument, instead of allowing section 38 and 39 of the Copyright, Designs and Patents Act 1988 to be applied as per usual, is significantly more restrictive.

Section 38 and 39 provide that libraries may make copies without infringing copyright under the following conditions:

- (a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of—
  - (i) research for a non-commercial purpose, or
  - (ii) private study,and will not use them for any other purpose;
- (b) that no person is furnished with more than one copy of the same article/in the same work or with copies of more than one article contained in the same issue of a periodical / with a copy of more than a reasonable proportion of any work; and
- (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.<sup>9</sup>

The draft statutory instrument mirrors these conditions, but imposes the following additional conditions on the legal deposit libraries:

- (a) no copy of an article or of any part of a work shall be supplied to the person requiring the same unless—
    - ...
    - (ii) that person has delivered to the deposit library a signed declaration in writing in relation to that article or part of a work substantially in accordance with Form A in the Schedule to these Regulations;
  - (b) the deposit library is satisfied that the requirement of the person requiring the copy is not related to any similar requirement of another person;
  - ....
  - (e) the copy is supplied in print unless the publisher has given permission for a deposit library to take the copy in another medium specified by the publisher.
- (2) For the purposes of paragraph (1)(b)—
- (a) requirements shall be regarded as similar if the requirements are for copies of substantially the same relevant material at substantially the same time and for substantially the same purpose; and
  - (b) requirements of persons shall be regarded as related if those persons receive instruction to which the relevant material is relevant at the same time and place.
- (3) Unless the deposit library is aware that the signed declaration delivered under paragraph (1)(a)(ii) is false in a material particular, the deposit library may rely on it in order to determine whether a copy is required for any of the purposes specified in paragraphs (1)(a)(i) and (1)(b).<sup>10</sup>

<sup>9</sup> Copyright, Designs and Patents Act 1988 section 38 and 39

<sup>10</sup> Draft statutory instrument – 2011 No. Libraries – The Legal Deposit Libraries (Non-print Publications) Regulation 2011, Part 3, clause 30

No rationale for these additional requirements in the case of copies of non-print legal deposits for research and private study are provided in the consultation document or the impact assessment. Legal deposit libraries are currently making copies of printed legal deposits, and any other copyrighted work in their collection, under section 28 and 29. We do not understand why dcms and BIS believe it is necessary to make a different provision for non-print legal deposits.

We are particularly concerned that the impact assessment does not quantify the additional cost that will arise for legal deposit libraries from implementing this additional process for non-print legal deposits. And whether this implementation cost is in relation to any benefit that would arise to copyright owners, libraries or users.

In particular, we are concerned that the provision that the deposit library must be 'satisfied that the requirement of the person requiring the copy is not related to any similar requirement of another person' is in practice unworkable, and is so irrational to the point of paranoia. It essentially means that a legal deposit library has to deny a request for a copy of a non-print legal deposit for the purpose of non-commercial research and private study, if another person requests a copy of the non-print legal deposit at the same time for the purpose of non-commercial research and private study.

Given the high number of users in the six legal deposit libraries it is conceivable that two people will approach the library for a copy of the same work for the purpose of non-commercial research and private study, essentially at the same time. It is not clear what is wrong with that, and why libraries should deny both individuals this copy. Form A, which is part of the draft statutory instrument and which the user requesting the copy is suppose to sign, requires the user to make the following declaration:

2. I declare that—

(a) I will not use the copy except for [research for a non-commercial purpose] [private study] (delete whichever is inappropriate) and will not supply a copy of it to another person;

(b) I have not previously been supplied with a copy of the same material by you or by another deposit library; and

(c) to the best of my knowledge, no person with whom I work or study has made or intends to make, at or about the same time as this request, a request for substantially the same material for substantially the same purpose.<sup>11</sup>

Suppose two first semester MA students at the University College London are each tasked with writing an essay on the online media coverage of the 7/7 bombing in London. Presumably both students would head to the nearest legal deposit library, the British Library. Though according to the draft statutory instrument the British Library would have to refuse both students a copy of the relevant websites for the purpose of non-commercial research and private study, because both are requesting substantially the same material for substantially the same purpose. Neither of the students would be allowed to provide the other student with a copy of the material, and it would only be possible for both students to obtain a copy of the material for research and private study if one of them goes to another legal deposit library, let's say Cambridge or Oxford. This is absurd. It negates the point of non-print legal deposits, which is to preserved an archive for research purposes and the use of future generations.

Therefore Consumer Focus categorically opposes the provisions in clause 30 1 a)(ii), b) and e), 2a) and b) and 3. Section 38 and 39 of the Copyright, Designs and Patents Act

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<sup>11</sup> **Draft statutory instrument – 2011 No. Libraries – The Legal Deposit Libraries (Non-print Publications) Regulation 2011**, Schedule Form A

1988 should apply to non-print legal deposits in the same way they apply to printed legal deposits and any other copyrighted work in the collection of a legal deposit library.

### **Consumer Focus recommendation:**

- remove clause 29 to 30 of the draft statutory instrument so that section 38 and 39 of the Copyright, Designs and Patents Act 1988 apply to non-print legal deposits

## **Permitted Activities: preventing users from exercising their rights under the Copyright, design and Patents Act 1988**

Consumer Focus is greatly concerned that by providing an exhaustive list of permitted activities in relation to non-print legal deposits, the draft statutory instruments deprives users, which may be consumers or organisational users, from exercising their right to copy and use copyrighted works under the Copyright, Designs and Patents Act 1988. In particular, users may not make copies of non-print legal deposits for the purpose of:

- non-commercial research and private study (s.29 CDPA)
- criticism, review and news reporting (s.30 CDPA)
- instruction or examination (s.32 CDPA)
- anthologies for educational use (s.33 CDPA)
- parliamentary and judicial proceedings (s.45 CDPA)
- and royal commissions and statutory inquiries (s.46 CDPA)<sup>12</sup>

The consultation document and the impact assessment provide no rationale for not permitting the usual fair dealing and exceptions in relation to non-print legal deposits. By excluding the application of the existing fair dealing and exceptions to non-print legal deposits the draft statutory instrument severely restricts user rights in relation to important historical records. The draft statutory instrument therefore does not ensure that the nation's published output is preserved as an archive for research purposes and the use of future generations. Consumer Focus therefore urges dcms and BIS to ensure that non-print legal deposits are subject to the same users rights as all other copyrighted works held by libraries, and printed legal deposits held by legal deposit libraries.

### **Consumer Focus recommendation:**

- all users rights granted under the Copyright, Designs and Patents Act 1988 should apply to non-print legal deposits

## **Permitted Activities: perpetual copyright and access restriction**

Consumer Focus is greatly concerned that the 'Part 3 – Permitted Activities' of the draft statutory instrument applies indefinitely to all non-print legal deposits given to the six legal deposit libraries. What this means in practice is that the draft statutory instrument effectively places non-print legal deposits under perpetual copyright; ie even when the non-print legal deposit, along with the original work, has fallen into the public domain as the statutory copyright term has expired, the non-print legal deposit will still be subject to the restrictions of the draft statutory instrument. This means that copyright owners will be able to ask for the non-print legal deposits to be embargoed, even though the original

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<sup>12</sup> See **Copyright, Designs and Patents Act 1988**

work has fallen into the public domain and copyright owners would not be able to restrict anybody else's use of the original work.

It also means that legal deposit libraries can only use the non-print legal deposit as prescribed in the draft statutory instrument, even though public domain copies of the work can be used by anybody for any purpose.

Consumer Focus strongly opposes any attempt to impose a perpetual copyright on non-print legal deposits, and to restrict access to these works indefinitely. Once again, the draft statutory instrument fails comprehensively in ensuring that the nation's published output is preserved as an archive for research purposes and the use of future generations.

The expiration of copyright is a key mechanism for ensuring that copyright strikes the right balance between the commercial interest of copyright owners and the interest of the general public to access to the works. Copyright is a creature of statute, and the duration of copyright is specified in section 12 to 15 of the Copyright, Designs and Patents Act 1988. Copyright terms ensure that copyright owners have exclusive rights in their works for a limited time after publication, so that they are able to commercially exploit the work and receive a return on their investment. Eventually all copyrighted works fall into the public domain, and can then be used by anybody without the permission of the copyright owners. We see no reason why the draft statutory instrument should extend copyright in non-printed legal deposits beyond the statutory provisions of the Copyright, Designs and Patents Act 1988.

We therefore recommend that all of 'Part 3 – Permitted Activities' of the draft statutory instrument is removed from the statutory instrument, so that section 12 to 15 on duration of copyright, as well as all the fair dealing and exceptions provided for in the Copyright, Designs and Patents Act 1988, apply to non-print legal deposits.

**Consumer Focus recommendation:**

- 'Part 3 – Permitted Activities' should be removed from the draft statutory instrument so that the Copyright, Designs and Patents Act 1988 provision on duration of copyright and user rights fully apply to non-print legal deposits



## **Consumer Focus response to the Consultation on the Legal Deposit of Non-Print Works**

If you have any questions or would like further information about our response please contact Saskia Walzel, Policy Advocate, by telephone on 020 7799 7977 or via email: [saskia.walzel@consumerfocus.org.uk](mailto:saskia.walzel@consumerfocus.org.uk)

[www.consumerfocus.org.uk/campaigns/copyright](http://www.consumerfocus.org.uk/campaigns/copyright)

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