

Annex 1

The INA's performance of its legal deposit role

Below, you will find a description of the articles of the French law dated August 1, 2006 which implements the requirements of directive number 2001/29/CE from the European Parliament and the Council dated May 22, 2001 concerning the harmonisation of certain aspects of copyright and related law in the information society. These were not contested during the debates held at the National Assembly and the Senate, and consequently any examination of alternatives would be a futile exercise here. The articles in question concern the legal deposit system.

In order to draw up an overview of the legal deposit as it currently exists, enshrined by the law dated August 1, 2006 and based on the INA's experience in this area, the following aspects will be examined in turn:

- The legal framework underpinning the legal deposit;
- The INA's current performance of its legal deposit role;
- The contributions brought about by the law dated August 1, 2006 concerning the legal deposit activities carried out by the INA.

I – A reminder of the legal framework underpinning the legal deposit system

Under French law, the legal deposit is an obligation incumbent upon all publishers, printers, producers, distributors and importers of documents (i.e. those who bring into France any documents published or produced outside French territory under the terms of article L. 132-2 of the heritage code) to submit a copy of the said document to those bodies specified under the law. Initially introduced for printed material (with the creation of the Royal Library by Francis 1st in 1537), it has gradually been extended to cover all types of creative material and forms of expression.

The legal deposit (a generic term) of audiovisual documents and sound recordings was established by law number 92-546 dated June 20, 1992, and its application decree number 93-1429 of December 31, 1993. This is an important public service activity for the INA, as it makes it possible to collect the nation's audiovisual and sound recording heritage, and to make this available to researchers in the widest sense of the term (academics: including professors, students and researchers; professionals: including journalists, document and research officers, and authors etc., in addition to private individuals pursuing a personal research project) who are authorized (following accreditation) to consult these documents at the *Inathèque de France*, a consultation centre located at the BNF site (the *Bibliothèque Nationale de France* or French National Library).

The purpose of this legal deposit is twofold: firstly to preserve records for the future and secondly to enable duly accredited researchers to have access to this content through the French television and radio archives.

The programmes stored by the INA as part of its legal deposit activities may only be consulted following the granting of an authorisation, and exclusively for research purposes, unlike those archives for which the INA has been granted ownership or joint ownership under the law, and for which it has a public service role regarding the storage and commercial or non-commercial use of such material.

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The INA may only exploit (including commercially) programmes covered by a legal deposit when it possesses an express authorisation to do so, granted by the owners of the exploitation rights for these programmes.

The legal deposit role conferred upon the INA was reaffirmed by law number 2000-179 dated August 1, 2000, which modifies law number 86-1067 of September 30, 1986 concerning the freedom of communication, article 49 of which describes the Institute's missions.

Following the order dated February 20, 2004 repealing the law dated June 20, 1992 and its application texts, the rules governing the legal deposit have been enshrined in articles L. 131-1 to L. 133-1 of the heritage code, with a number of these articles being wholly or partially added to, modified, replaced or created via the law dated August 1, 2006 (please see below regarding the legal deposit requirements for websites).

Under the terms of these laws, the following have responsibility for the legal deposit, which they manage on behalf of the state, as per the terms set down in the decrees issued by the Conseil d'Etat (Council of State): the *Bibliothèque Nationale de France* (for graphical or photographic printed documents, software packages, databases and expert systems, and certain sound and picture recordings and multimedia documents); the *Centre National de la Cinématographie* (for certain picture recordings and cinematographic documents), the INA (for audiovisual documents and sound recordings) and the Ministry of the Interior's legal deposit department (for certain periodicals).

This decree may also assign the responsibility for carrying out legal deposit activities to other national or local establishments or public departments, on condition that these are able to provide the statutory guarantees and possess the resources (particularly those of a scientific nature) needed to meet the objectives described in article L. 131-1.

Under the terms of article L.131-1 of the heritage code, the legal deposit is organised in order to provide for:

- a) The collection and conservation of the documents mentioned in article L. 131-2;
- b) The constitution and circulation of national bibliographies;
- c) The consultation of the documents mentioned in article 131-2, with the exception of secrets protected by the law in accordance with conditions compatible with intellectual property legislation and with their conservation.

Article L.131-2 states that the following works are subject to the legal deposit requirement:

- Printed, graphical, photographic, sound, audiovisual and multimedia documents regardless of the production, publishing, broadcasting or circulation methods used, at such a time as such documents are made available to the public.

The law dated August 1, 2006 added the following to this list:

- Software and databases at such a time as these are made available to the public via the distribution of a physical medium, regardless of the nature of this medium;

- Signs, signals, written material, images, sounds or messages of any kind communicated to the public by electronic means.

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Finally, it should be remembered that the legal deposit involves the submission of a limited number of copies of the document to the custodian organisation, (these can also be sent by free post), with it being stipulated that the legal deposit requirements can be fulfilled by other means, including by recording those programmes broadcast by television or radio (art. L.132-1).

II - The INA's current performance of its legal deposit role

When the legal deposit system was created in France in 1992, the audiovisual sector chiefly comprised the major national terrestrial broadcasting channels.

As a result, under the above-mentioned application decree dated December 31, 1993, only audiovisual and sound recordings of French origin needed to be collected, the first time that these were broadcast by these national terrestrial broadcasters, with it being borne in mind that according to their nature the documents were collected either integrally or selectively (based on sampling for news programmes, game shows and broadcast of sports programmes).

Consequently, legal deposit requirements initially only concerned the programmes of TF1, France 2, France 3, Canal +, La Cinquième, M6 and Arte, in addition to those of the five national stations belonging to Radio France; France Inter, France Info, France Culture, France Musique and Radio Bleue.

The expansion of radio broadcasting by national networks, the growth in the number of channels broadcast by cable and satellite and the advent of digital terrestrial television have resulted in changes to the collection and deposit perimeter.

In order to be able to offer a collection of programmes for consultation purposes which accurately represent the entire French audiovisual spectrum, since 2002 the INA has entered into agreements with the cable or satellite channels and the private radio stations in order to have them voluntarily submit their programmes for deposit. In 2005, the collections were further expanded with the addition of the programmes from the free DTT television broadcasters.

It should also be stressed that the fast pace of technological progress has made it possible to expand the direct digital captation of broadcast signals at a low cost.

Consequently, in order to facilitate collection, since January 1, 1995 the INA has carried out the direct digital reception of radio programmes, with this being extended to cover televised programmes since July 1, 2001 (with no further need for the television channels to supply hard copies).

This complete reception service (which is carried out 7 days a week and 24 hours a day using a special fibre-optic link or a satellite link) makes use of digital recording techniques. The collection of the supporting documentation for the programmes and the programme scheduling documentation needed for indexing purposes is chiefly carried out by the transmission of digital files and the sending of a small number of paper documents by the channels concerned.

In this way, the INA fulfils its mission of storing the programmes from the terrestrial, cable and satellite television channels, in addition to those of the public radio stations and a number of private stations. As a result, the INA has preserved a record of the programmes produced by the main French television and radio stations since 1995, the year in which the legal deposit laws came into effect. This already amounts to almost 680,000 hours of television and 950,000 hours of radio up to December 31, 2005.

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The INA has gone from the legal deposit of programmes for 7 television channels and 5 radio stations in 1999 to 48 television channels and 17 radio stations today (involving no fewer than 65 audiovisual communication companies). With the extension of the second “objectives and resources” contract which it recently concluded with the state, its target for 2009 is to become the legal custodian for programmes from 100 television channels and 20 radio stations.

Almost 300,000 hours of new programmes are collected each year by the INA. In 2009, 268,000 hours of television and 175,000 hours of radio should be deposited with the Institute.

In practice, the legal deposit collection currently chiefly concerns programmes broadcast by:

- National Terrestrial television: TF1, France 2, France 3, Canal +, M6, Arte, France 5.
- Cable and satellite television: 34 channels including Paris Première, Canal J, Canal Jimmy, Euronews, Eurosport, Planète, RTL 9, TMC, TV5, Histoire, La chaîne parlementaire and Public Sénat, etc.;
- Digital terrestrial television (DTT): 10 channels including Direct 8, NT1, France 4, BFM TV, I-Télé, Gulli, etc.;
- A radio collection: The programmes broadcast by the five stations belonging to Radio France (France-Inter, France-Musique, France-Culture, France-Info and France-Bleue), with the collection perimeter now extended to RFI and to 11 general entertainment private radio stations including Europe 1, RTL, RMC, NRJ, RTL2, RFM, etc.

III - The new aspects introduced by the law dated August 1, 2006 concerning the legal deposit role played by the INA

These changes firstly concern the INA’s current legal deposit role, and secondly the new perspectives in view where the legal deposit of websites is concerned.

A) Aspects concerning the INA’s current role as custodian of the legal deposit.

Naturally, the performance of the legal deposit role involves the use of literary and artistic property rights including reproduction and performance rights (or the right of communication to the public) for the holders of copyrights and related rights (including among others actors and performers) for the collected works (and where applicable the collected documents) concerned by the legal deposit.

The digital recordings made by the INA naturally concern performance rights belonging to the authors and holders of related rights (as the need to store the documents means that it is necessary to be able to reproduce them, in this case by digital means) while the consultation and viewing of the material both involve the performance rights (or the right of communication to the public) belonging to the said owners, as the researchers concerned may be considered as an audience (with these documents being broadcast on individual players belonging to the custodian organisations).

Where the legal deposit is concerned, the law of 1992 and the subsequent texts included in the heritage code do not in any way establish any special reproduction and performance rights for the legal deposit without obtaining the authorisation of the beneficiaries concerned, with the result being that the performance of legal deposit activities generates *de facto* exceptions to the said rights.

It is certainly true that the provision of individual access for researchers to the various media on which the collected documents are stored has never been challenged by the holders of copyrights or related rights for these documents.

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Keen to see the legal deposit activities conferred upon it being carried out in conditions which do not infringe intellectual property laws, the INA has obtained the authorisation to reproduce and/or to totally or partially represent the works which it receives under the terms of the legal deposit, for professional consultation and research purposes. This authorisation has been obtained from the authors societies managing copyright issues for audiovisual documents and sound recordings, operating in the audiovisual and sound communication field (SACD, SACEM, SCAM, SDRM, SESAM), under the terms of the general agreement dated November 22, 1996, and its two amendments dated June 21, 2000 and June 16, 2005.

However, these agreements only concern the holders of copyrights having contributed their copyrights to one of the above-mentioned copyright companies, and as a result they only partially enshrine the waivers to copyrights and related rights arising from the performance of legal deposit activities.

In order to clarify the conditions for this use of the legal deposit vis-à-vis intellectual property legislation, it is therefore vital that the law be modified.

These major modifications were introduced by law number 2006-961 dated August 1, 2006, concerning copyright and related rights in the information society, part IV of which concerns the legal deposit (articles 39 to 47 of the 2006 law).

These modifications draw upon two articles from directive number 2001/29/CE issued by the European Parliament and the Council dated May 22, 2001 regarding the harmonisation of certain aspects of copyright law and related rights in the information society: article 5. 2 c) (which envisages the entitlement for public libraries, educational establishments, museums or archives deriving no direct or indirect commercial or economic benefit from this to carry out specific reproduction activities) and article 5. 3 n) (which envisages the possibility for these various bodies to use the protected works and other items included in their collection by communicating them to, or providing access to them for private individuals for research purposes only, by means of specialised terminals).

The law dated August 1, 2006 introduced specific exceptions to copyrights and related rights in order to facilitate the performance of legal deposit activities.

Indeed, article L.131-1 of the heritage code (modified by the 2006 law) now states that the custodian organisations (including the INA) must now conform to intellectual property legislation, but are subject to the special terms provided for in the heritage code where the legal deposit is concerned. And in application of the 2006 law (article 42) three new articles have been created in this section of the heritage code (articles L.132-4, L.132-5 and L.132-6) which establish a genuine exception to copyright laws, and to the entitlements of holders of related rights and of database producers, (legally governed by conditions stipulating the terms under which audiovisual and sound collections of the legal deposit may be used).

Under the terms of article L.132-4, the author may not prevent the legal deposit custodians from carrying out any of the following activities:

1° The consultation of the work in question on-site by researchers who are duly credited by each custodian organisation, this consultation taking place via individual consultation terminals, dedicated exclusively to use by the said (accredited) researchers, on the custodian organisation's site;

2° The copying of a work on any medium and via any process required, when such reproduction is necessary to the collection, conservation and on-site consultation of the work as per the conditions described in 1°.

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Additionally, under the terms of article L.132-5, the performing artist, the producer of sound recordings or videographs and the audiovisual communication company may not forbid the reproduction and communication to the public of the documents mentioned in article L.131-2 (those covered by the legal deposit) under the conditions described in article L.132-4.

Finally, under the terms of article L.132-6, the producer of a database may not forbid the extraction and reuse (by the provision of access) of all or part of the database under the conditions provided for in article L.132-4.

The INA and any other custodian body may now safely collect, reproduce for conservation purposes and communicate to researchers those documents of which it is the legal custodian.

B) New perspectives offered by the law of 2006 concerning the legal deposit of websites

It became necessary to include measures in this new legislation to take account of the spread of digitised content and its communication by digital networks such as the Internet. The law dated August 1, 2006 extended the scope of the legal deposit to cover French websites.

The decision by the lawmakers to include the archiving of websites within the legal framework underpinning the legal deposit system is in line with French tradition, and further extends the twofold legal deposit role: i.e. ensuring the continuity and thoroughness of the collections by including all new media, in addition to collecting documents and other items which bear witness to a given period in history and its accompanying changes.

Regarding the extension of the legal deposit's scope, the law dated August 1, 2006 adds the following paragraph to article L.131-2 of the heritage code: "Signs, signals, written material, images, sounds or messages of any kind communicated to the public by electronic means are also subject to legal deposit requirements".

As a result, the legal deposit obligations described in the new article L.132-2 are now also incumbent upon anyone publishing or producing signs, signals, written material, images, sounds or messages of any form with a view to communicating these to the public via electronic means, with this definition covering the notions of audiovisual communication and communication to an online audience.

A new article (article L.132-2-1 which describes the implementation of this legal deposit requirement for data transmitted by electronic means) has been incorporated into the heritage code. Among other things, this stipulates that custodian bodies must inform the depositor of the collection procedures which they use in order to meet the various legal deposit obligations, and that the custodian bodies may themselves carry out this collection using automated procedures or determine the methods to be used in agreement with these persons, should automatic collection prove to be impossible from a technical viewpoint (including in this case the hypothesis of the provision of physical media or the sending of files).

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Under the terms of the current article 49-IV of the law dated August 1, 2000 which modifies the law of September 30, 1986 regarding the freedom of communication, modified by the law dated August 1, 2006, the INA has sole responsibility for the collection for legal deposit purposes of sound or audiovisual documents broadcast by radio or television, in application of articles L.131-2 (concerning the deposited material) and L.132-3 (concerning the custodian organisations) of the heritage code. Along with the *Bibliothèque Nationale de France* it participates in the collection of signs, signals, written material, images, sounds or messages of all kinds publicly communicated online, for legal deposit purposes. It manages the legal deposit collections, for which it has responsibility in line with the objectives and conditions laid down in article L.131-1 of this same legal code (concerning the observance of intellectual property legislation subject to the above-mentioned exceptions introduced by the law dated August 1, 2006).

As the exact division of activities between the INA and the BNF has never been formally defined by law, these two organisations have agreed their own areas of involvement concerning the legal deposit of websites and the technical means and methods needed to achieve this. This breakdown now needs to be formally enshrined in statutory texts.

An opportunity existed to formally define the dividing line between the activities carried out by the INA and the BNF where the legal deposit of websites is concerned in the law dated June 21, 2004 concerning “trust in the digital economy”.

This law modified the scope of the 1986 law concerning the freedom of communication, by organising the scope of communication activities as follows:

- Electronic communication, which can be subdivided into private electronic communication (e-mail and telephony, etc.), covered by the code governing telecommunications and communication to the public by electronic means;
- Communication to public via electronic means, which can be subdivided into audiovisual communication on the one hand and communication to an online audience on the other hand.

Audiovisual communication includes services (television services, radio services, and other services). A television (or radio) service is characterised by the simultaneous nature of the broadcast to the public, an organised series of programmes and a composition of images and/or sounds. It is defined regardless of the broadcasting method used (terrestrial, cable, satellite, ADSL, digital terrestrial television, Web TV or Web radio).

Communication to an online audience is characterised by the individual nature of the access provided (via websites, electronic libraries, VOD, etc.).

The INA’s core business where the legal deposit is concerned is clearly situated in the first of these two fields, i.e. audiovisual communication. Accordingly, the INA has been set the task by the legislator of handling the conservation of France’s radio and television heritage regardless of the broadcasting technology involved (terrestrial - whether encrypted or otherwise - cable, satellite or ADSL). It goes without saying that radio and television programmes broadcast via the Internet or digital terrestrial television should also naturally be included in within the scope of this heritage conservation mission.

Consequently, the INA collects the content from websites falling within the scope of “audiovisual communication” under the terms of the law dated September 30, 1986, modified by the law dated June 21, 2004 concerning trust in the digital economy.

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The conservation of web content at the INA is therefore intended to guarantee long-term content collection in addition to the indexing and the provision of access for duly authorized viewers of websites in the “audiovisual communication” category.

The INA needs to have overall responsibility for the collection of all radio and television services broadcast via the Internet.

The scope of its activities should also concern support sites and peripheral sites (the so called “associated” sites) for these media sites, in addition to those falling within the category of “online communication to the public” in order to maintain overall coherence concerning the INA’s collections (in keeping with the spirit of the current legal deposit scheme for support documents).

With this in mind, the INA needs to collect website content from the CSA (the French broadcasting authority) by electronic means, in addition to content from websites representative of a given professional or institutional environment, related to radio and television activity on the web, or the content of Skyblogs, alongside the collection of content from the Skyrock site for example.

Where the INA is concerned, we can quickly see that in order to archive the web, the obvious unit to be used for archiving purposes is the website (which covers all of the documentary sub-units possessing variable volumes and technical characteristics, particularly concerning audiovisual communication falling within the scope of the INA’s activities) including links between the pages of a site and between the sites themselves.

Media websites in the widest sense of the word are relatively restricted in number, despite the fact that they continually publish a great deal of extremely varied content even if there is a certain degree of uniformity where content themes are concerned.

The INA should be assigned the task of collecting content from four main website categories:

- Among the websites concerned with audiovisual communication, the radio and television websites offer content organised based on an editorial system very similar to that of TV and radio programme schedules, including a front page, regular columns and sections, in addition to a feature schedule similar to that found in traditional terrestrial, cable or satellite broadcasting systems. These sites are usually backed up by a pre-existing communication service, whether this is a television or radio station (i.e. LCI.fr). We should also mention the WebTV outlets which today can take full advantage of the increasing prevalence of broadband networks, and which offer an ever-increasing range of themed content.

- Sites related to programmes broadcast on a particular channel, which account for more than half of the websites on the domain including: sites for TV programmes (Planète Thalassa) or for series (the French ER website) or devoted to the heroes of various series (Columbo) or those devoted to media personalities, artists or presenters (Planète Arthur). We should also mention “event” sites related to the latest news (i.e. the Canal + website for the Cannes Festival). Most of these sites host or offer blogs;

- Websites directly or indirectly related to the activities of radio and television stations including: institutional sites (the CSA broadcasting authority), and the websites of companies (Vivendi) or service providers;

- Documentary websites offering specialised directories, web guides, portals for television packages or radio frequency guides (i.e. Series-onair.com for television series).

To conclude, we should add that over above the performance of its legal deposit activities, via its current and future aspects the law has set the INA another, far older task: that of conserving and exploiting the many programmes inherited from the RTF, the ORTF and the national programming
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companies derived from these, for which the Institute is the owner of both the corporeal and incorporeal property rights.

To this end, in 1999 the INA launched a huge backup and digitisation plan spanning some 15 years for the collections concerned, and costing a total of 200 million euros.