



Country Report - Australia

Annual report to the IFLA CLM committee
Helsinki Finland 2012

Copyright

Australian Law Reform Commission Copyright Review:

- Australian Government has directed the ALRC to consider whether exceptions in the *Copyright Act 1968 (Cth)* are “adequate and appropriate in the digital environment”.
- Draft terms of reference:
<http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Final%20-%20Revised%20draft%20terms%20of%20reference%20ALRC%20review.pdf>
- Final terms of reference anticipated in mid-late June
- Commissioner leading the review: Professor Jill McKeough
- Timetable for review:
 - Issues paper – open for comment approximately 17 August. Comments invited until mid October 2012
 - Discussion paper – delivery approx. April/May 2013
 - Report due – November 2013
- Library/cultural institution issues for discussion:
 - Section 200AB, Australia’s ‘flexible dealing’ exception (directly incorporating Article 13 TRIPS Agreement ‘three-step test’) is not working
 - Updating preservation copying, document supply and interlibrary loan provisions
 - Introducing a copyright term duration for unpublished works
 - Promoting a free exception for use of orphan works
 - Contract overriding copyright exceptions
 - Does Australia need a fair use exception?

Extending Legal Deposit Consultation Paper

- Extending existing legal deposit mechanism in *Copyright Act 1968 (Cth)* to enable the delivery of digital borne material of Australian cultural significance to the National Library of Australia.
- Consultation paper:
<http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Legal%20Deposit%20Consultation%20Paper%20CLIENT%20COPY.PDF>
- 22 submissions received – close of submissions 14 April 2012
- Proposed model for extended legal deposit:
 - Mandatory delivery of ‘offline’ physical format electronic publications
 - Mandatory delivery of ‘online’ publications on demand
- Issues:
 - Definition of ‘library material’ – should it be retained in an extended scheme?
 - TPMs – the Attorney-General’s Department has proposed the removal of TPMs by publishers before delivery. We understand this has met considerable opposition
 - Administration and compliance costs
 - Public access to and use of deposited material – proposed that it be made available within the existing copyright framework for libraries and archives

Anticipated – review of Technological Protection Measures regime

- Under terms of the Australia-US Free Trade Agreement, Australia adopted a US-style technological protection measures (TPM) regime. Characteristics of this regime include:

- Criminal liability for circumvention of TPM, and manufacture of circumvention device
 - Narrow list of permitted uses (Schedule 10A, *Copyright Regulations 1969 (Cth)*) for which TPMs may be circumvented.
- List of permitted uses for which TPMs may be circumvented has not been updated since 2006. Permitted uses include:
 - Interoperability with computer programs
 - For education institutions, to make use of content under terms of statutory license
 - Assisting people with print disabilities
 - Library and archival copying, preservation
- **Not** included:
 - Use of content under section 200AB ('flexible dealing') by libraries and archives
 - Fair dealing exceptions – circumvention of TPMs for parody or satire, research and study, criticism and review
 - Circumvention for format shifting, space shifting, time shifting
- Anticipated review based on US triennial review of anti-circumvention exceptions. Submissions will require:
 - Demonstrated legal and practical need for new permitted use
 - High evidence burden on institutions/users seeking new permitted uses
- Anticipated release in second half of 2012.

Legal matters

Revision/changes in existing law or regulations

New legislation

Anti-Counterfeiting Trade Agreement

- Australia has signed but not ratified ACTA
- Treaty is currently under review by Australia's Joint Standing Committee on Treaties (JSCOT), Parliamentary Committee tasked with inquiry into and report on matters arising from treaties presented to Parliament:
http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21november2011/index.htm
- JSCOT received 22 submissions to their inquiry into ACTA, and held 3 public hearings. We appeared before JSCOT in mid March, as did a number of ADA Board Directors offering concerns and criticism of treaty.
- The Department of Foreign Affairs & Trade continues to downplay controversies surrounding ACTA in the EU, and promoting the treaty as an effective means to protect and enforce rights for Australian IP owners.

Trans-Pacific Partnership Agreement (TPP) Negotiations

- A comprehensive multilateral free trade agreement incorporating a comprehensive IP chapter with focus on enforcement and protection of IP rights
- Unlike ACTA, there has only been one leak of negotiating text for the IP chapter of the TPP – the draft US proposal, February 2011. <http://keionline.org/node/1091>
- This leaked text has "TRIPS + +" standards for enforcement and protection of IP, building on already restrictive anti-circumvention laws, entrenching criminal liability, and extending copyright protection to 95 years for film and music.
- At March 2012 negotiations in Melbourne, Australia, we presented on issues affecting access to information and knowledge contained in the draft TPP chapter. Notes available: <http://www.digital.org.au/our-work/publication/how-access-knowledge-may-be-restricted-under-tpp>

- Australia's negotiating position in the TPP, as per ACTA, is to promote Australian standards for IP protection within existing copyright framework. DFAT continues to pursue final text that will not require changes to Australian law
- At Budget estimates in May 2012, the Department of Foreign Affairs & Trade fielded questions from Greens Senator Scott Ludlam on TPP negotiations. The transcript, and our analysis of DFAT's responses, available here: <http://www.digital.org.au/content/shedding-light-tpa-questions-budget-estimates>
- Week commencing 18 June 2012, Mexico was formally invited to join TPP negotiations. Canada and Japan are also seeking entry to the negotiations.

Law cases

Singtel Optus v National Rugby League Investments (No 2) [2012] FCA 34

- Case concerning Optus mobile carrier and a new cloud-based personal video recorder, "TV Now", and Australian football codes.
- Full Federal Court held that with respect to cloud-based personal video recorders, it is the service provider who makes a recording, even if it is the consumer who presses record. As such, the service provider (Optus), cannot rely on the consumer time shifting exception. "TV Now" infringed the reproduction right of the copyright holder and no exception applied.
- Implications for libraries and archives – Full Federal Court's findings placed emphasis on making copies of content to store in digital memory. All cloud services, for educational instruction, preservation, storage, etc, involve the making of digital copies. Libraries providing cloud-based services may be exposed to greater liability for copyright infringement following the Full Federal Court's decision.
- Current status – Optus seeking leave to appeal decision to High Court of Australia.

Lobby activities

- Trans-Pacific Partnership negotiations – providing questions to members of Parliament to ask of DFAT during Senate and Budget estimates
- September 12 2012 – Parliamentary Library seminar for Parliamentarians and advisers. Topic and speaker TBC, although may have an innovation focus.
- WIPO discussions on exceptions for libraries and archives – continuing to communicate with Attorney-General's Department on issues affecting Australian libraries and archives. However, there has been more internal restructuring at the Department and Assistant Secretary Matt Minogue is currently acting as Australia's representative at WIPO. He replaces Toni Pirani.

Educational activities

- Australian Libraries Copyright Committee library training – free copyright training for library sector staff across Australia (10 destinations per year). So far in 2012, training has been completed in Canberra, Perth and Hobart, with visits to Melbourne, Brisbane and Townsville scheduled for the second half of 2012.
- Cultural sector and cross-sector round tables in preparation for ALRC review – we have taken a lead role in preparation for the ALRC copyright review, hosting a number of round tables seeking sector input into submissions. We have also held a "copyright leadership in libraries" workshop in Canberra, for senior staff in the library sector. It raised awareness of topical copyright issues, and encouraged staff to take a more active role in copyright advocacy.

Strategic plans for future

- Priority – participation in ALRC review. Evidence gathering re issues affecting our library and archive sector, to construct a persuasive narrative for copyright law reform.
- Increase direct engagement with Parliament – information session in Parliamentary Library on September 2012 will provide roadmap for future information sharing with Members and their advisors. There are opportunities for corporate sponsorship of international speakers on copyright issues, at events during Parliamentary sitting weeks.
- Raise political awareness of TPP negotiations
- Target contracting out of copyright exceptions as issue needing serious attention. In 2002, the Copyright Law Reform Committee delivered a report to Government recommending that publishers be prevented from contracting libraries out of exceptions available to them under the Act. This was never picked up by Government, but is significant work to reflag with them throughout ALRC copyright review.

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19 June 2012