Update from Australia: the copyright cloud hanging over our national collections

Ellen M. Broad
Australian Digital Alliance and Australian Libraries Copyright Committee Canberra, Australia

Abstract
Purpose – High-speed internet and digital technology offer new ways of accessing and interpreting collection material in our cultural institutions. The ability of cultural institutions to unlock access to their collections online is constrained by copyright law. This paper examines the push in Australia for cultural institutions to “set collections free” online, and copyright law reform developments that hinder or facilitate making comprehensive online experiences of collections a reality.

Design/methodology/approach – It considers constraints in Australian copyright law following the adoption of increased IP enforcement and protection standards under the Australia-US Free Trade Agreement, in light of internationalisation of these standards through recent multi-lateral trade agreements. Finally, it considers copyright law reform options to better “unlock” or “set free” collections in cyberspace.

Findings – It recommends the inclusion of safeguards for copyright exceptions and limitations in trade agreements, and reaffirmation of user and public institution rights of access to information. It warns against the adoption of onerous anti-circumvention provisions. It also recommends various domestic law reform options to free up access to cultural collections.

Originality/value – Australia was one of the early adopters of the US-IP model that is fast becoming the international standard for enforcement and protection of IP rights. As such, looking at current Australian copyright law may help us better understand the effect IP-maximalist chapters being promoted in multilateral trade agreements may have on similar net-IP importing countries.

Keywords Digital libraries, Copyright law, Digital rights management

Paper type Research paper

Introduction
Within the next decade, the Australian government intends to have high speed, affordable broadband and telephone services within reach of the entire Australian population. The National Broadband Network (NBN) is Australia’s new high-speed broadband network providing faster, more reliable broadband access to all Australian premises. The NBN has been heralded by the government as “game-changing” (Minister for Regional Australia, 2011), enabling Australia’s vision of becoming a “leading digital economy by 2020”.

As the NBN rolls out across Australia, the government has increased calls for Australian libraries, archives, museums and galleries to make more of their collections available online:

Making content and the national collection available to the nation – this is the direction all of our cultural institutions must head in. This is why continued investment in digitisation is important not just here, but in other institutions (Minister for Regional Australia, 2012a).

More than half of the Australian population in one way or another is a member of a public library. There is an enormous resource there and when you couple it with the opportunities of the National Broadband Network, the ability to disseminate this information in different ways, this is a must resource (Minister for Regional Australia, 2012a).

In the 2012 national budget, despite the funding freeze across multiple national portfolios in the government’s effort to return to surplus, $39.3 million funding was found for the national cultural institutions, “to open up their collections for community, education and research uses, including providing curriculum resources for the national school curriculum” (Minister for Regional Australia, 2012b).

An additional $2.4 million was also found in the national budget for mobile robots in Australia’s cultural institutions. “Using the high bandwidth capability of the NBN, visitors will be able to undertake virtual tours of these institutions via mobile robots”[1].

And Australia’s much-heralded National Cultural Policy, the first comprehensive cultural policy in 20 years (and one shelved temporarily with the announcement of the 2012-2013 budget) is explicitly linked to the opportunities provided by the National Broadband Network:

The National Broadband Network, with its high-speed broadband, will enable new opportunities for developing and delivering Australian content and applications reflecting our diverse culture and interests. It will also give business and community organisations in regional areas a historic opportunity to connect with national and international audiences and markets[2].

The government message to Australian cultural institutions has been clear – put your collections online.

In reality, though, there remains some distance between opportunities the NBN offers for cultural institutions, and what is achievable in the current economic, technological and
copyright law climate. Meeting the digitisation challenge requires increased funding for digitisation projects, updated digital infrastructure, recalibrated staff resources, and discussion at a government policy level of the limitations in copyright law that impede making collection items available online.

This essay focuses on Australian copyright law, but will hopefully be relevant at a broad level. Australia was one of the early adopters of the US-IP model that is fast becoming the international standard for enforcement and protection of IP rights. As such, looking at current Australian copyright law may help us better understand the effect IP-maximalist countries looking to inject greater flexibility into their copyright regimes. While this essay does not focus solely on the application of section 200AB in Australia, suffice to say it has not made the copyright issues for cultural institutions in Australia much clearer.

**Do existing Australian exceptions unlock access to our collections online?**

They push the door open slightly. Exceptions to copyright protection in Australia are primarily purpose-based, or closed, exceptions. Like its European and UK counterparts, the Australian copyright regime contains exceptions for specific uses of copyright material including (but not limited to): fair dealing for research and study, criticism or review, library and archival copying, and private consumer copying.

Purpose-based exceptions provide certainty to users, setting out the precise circumstances in which a particular use will be permitted. They also make clear that any use of copyright works outside of the specific exceptions will be an infringement of copyright. Certainty negates any flexibility, unfortunately, so existing purpose-based exceptions in Australia have not found a smooth fit with activities undertaken by institutions in the digital environment.

That said, in 2006 the Australian government introduced a “flexible dealing” exception into the Australian Copyright Act, section 200AB, intended to operate like the US fair use defence. This was in response to criticism that the Australia-US Free Trade Agreement in 2006 resulted in a much stronger and more restrictive US-style IP regime without importing any of the US regime’s flexibility.

Section 200AB is a “flexible exception to enable copyright material to be used for certain socially beneficial purposes, while remaining consistent with Australia’s obligations under international copyright treaties”[8]. At the time of drafting of section 200AB, there was vigorous debate as to whether the US fair use defence was compatible with the “three-step test”, which applies to a “use” rather than an “exception”, has proven particularly problematic. It is clear that mass digitisation of a library collection would not satisfy the “special case” requirement of section 200AB. Whether it permits making available online a “special” (limited) collection of works may be dependent on the nature and commercial value of the collection[9]. Some existing guidelines on use of section 200AB question whether any online publication of copyright material satisfies the “special case requirement”. The Australian Copyright Council, the independent, non-profit organisation promoting the value of copyright for the arts and creative industries in Australia, considers section 200AB more likely to apply if the number of people the use is for is small, and the time frame of the use is short (Australian Copyright Council, 2012). This interpretation is ill suited to the publication of collection items online – to the world at large – as part of an institution’s permanent collection. In contrast, the Flexible Dealing Handbook published by the Australian Libraries Copyright Committee and Australian Digital Alliance in 2008 includes online publication as a permitted use under section 200AB, dependent on the circumstances of the publication (Australian Libraries Copyright Committee, 2008).

The level of uncertainty as to whether section 200AB even allows use of collection items online indicates that Australia’s “flexible dealing” provision is not a great model for other countries looking to inject greater flexibility into their copyright regimes. While this essay does not focus solely on the application of section 200AB in Australia, suffice to say it has not made the copyright issues for cultural institutions in Australia much clearer.

**Section 200AB, the “open . . . ish” open-ended exception**

Under section 200AB of the Australian Copyright Act 1968 (Cth), libraries may make use of copyright material where that use is for the purposes of maintaining the library, is not made for profit, and the use:

- Does not conflict with a normal exploitation of the work.
- Does not unreasonably prejudice the legitimate interests of the copyright owner.
- Is a special case.

As it turned out, copying the “three-step test” into domestic law has not quite freed up access to cultural institutions’ collections online. The “three-step test”, intended to assess the drafting of exceptions, has been downloaded into section 200AB to assess an institution’s use (Hudson, 2010) of a copyright work, with uneven results.

It should be noted from the outset that section 200AB was not intended to facilitate general, blanket digitisation of collections, in the same way that fair use does not. The extent to which institutions are able to rely on section 200AB in the online environment, as with fair use, will be dependent on the nature of the works in a collection, commercial market for the works and relationship management with creators and other stakeholders.

One thing is clear, however. In practice, the scope of use permitted under section 200AB appears to be much more limited than under fair use in the US.

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**So how can we unlock access to our collections online? And what international law trends need to be taken into account?**

Copyright law is in a state of flux, both with regards adequate protections for creators in the digital environment, and making sure exceptions reflect community expectations and sufficiently enable access to information and cultural expression. Various countries are currently undertaking
reviews of their domestic copyright laws to determine their relevance in the digital age[10]. In Australia, the Australian Law Reform Commission (ALRC) has been tasked with an inquiry into current copyright exceptions in the Act to determine whether they are adequate and appropriate in the digital environment, and are due to deliver their findings in November 2013.

Reform of our copyright regimes is the only way to free up some of the obstacles impeding access to collections online, but it can be slow and vulnerable to compromises made by policy makers to placate competing interests that result in superficially updated, but nonetheless rigidly defined exceptions.

The problem is, only copyright exceptions may be suffering. We have seen reform of IP enforcement and protection standards fast tracked outside of the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) over the last decade, through closed-door trade negotiations that forego involving competing interests so as to progress particular standards more efficiently.

The introduction of detailed, restrictive IP chapters in bilateral and regional trade agreements has largely been pushed by the US, the biggest net exporter of intellectual property goods and licenses in the world. And our ability to reform our own copyright laws will be defined by the enforcement and protection standards we agree to in trade negotiations.

Stronger enforcement measures erode access to and use of copyright works in the public interest. Australia adopted an IP-maximalist model as a result of the Australia US Free Trade Agreement in 2004, and it is this model, albeit more extreme with each new agreement being negotiated, that is being promoted through multilateral avenues like the Anti-Counterfeiting Trade Agreement (ACTA) and Trans-Pacific Partnership Agreement (TPPA).

Lessons to be learned from Australia’s adoption of an IP-maximalist model

On the 8 February 2004 Australia concluded the Australia US Free Trade Agreement, an agreement that would require significant changes to Australian IP laws, and shape the direction and scope of future domestic copyright law reform.

The AUSFTA imported wholesale into the Australian copyright regime aspects of the US IP model, but only where US standards broadened rather than narrowed the scope of IP protection:

The US has a much more generous definition of “fair use” than Australia, affecting access by libraries and researchers, but Australia has not been required to adopt the US definition. Similarly, the US has a much higher standard of originality for copyright protection than Australia, requiring “creative spark” not just “skill and labour”. Australia has not been required to adopt the US standard. Thus Australia has been required to adopt US standards, but only when it broadens rather than narrows the scope of IP protection (Dec, 2004).

Under AUSFTA, Australia adopted a prescriptive technological protection measures regime (TPMs) with increased criminal penalties and a limited list of uses for which TPMs could be circumvented – which excluded some existing copyright exceptions. Australian cultural institutions, for example, cannot provide access to collection items online if format shifting requires circumvention of a TPM. AUSFTA entrenched parallel importation restrictions (PIRs), despite recommendations from several independent expert bodies that PIRs imposed significant costs on Australian consumers. And AUSFTA required Australia to further extend the copyright term of protection to 70 years after the creator’s death is estimated to cost Australia up to $88 million per year[11].

Conclusion of the AUSFTA in 2004 caused significant controversy in Australia, with respect both to the extensive changes it required to Australian copyright law, and the attitude with which the US approached the negotiations. The US’s apparent disdain for Australian copyright traditions and bullying influence over Australia’s domestic implementation of AUSFTA generated a perception of US unilateralism, double standards and high-handed ignorance (Weatherall and Burrell, 2007).

Nonetheless, in AUSFTA’s wake Australia has shown itself to be a solid supporter of US IP standards, at least in line with its own obligations arising AUSFTA. The Department of Foreign Affairs and Trade, responsible for Australia’s negotiation of the agreement, has consistently promoted ACTA as an “effective mechanism to internationalise existing Australian IP standards of enforcement”[12]. In direct counter to this, in June 2012 the Australian Joint Standing Committee on Treaties, Parliamentary committee comprising members from both houses of Parliament and all parties, delivered a report unanimously recommending against ratification of ACTA in Australia. At the time, JSCOT pondered whether ACTA would even be ratified by enough countries to come into force:

Despite DFAT’s optimistic outlook, there appears a very real possibility that ACTA will not be ratified by sufficient countries in order to come into existence (Joint Standing Committee on Treaties, 2011).

Barely a week later the European Union emphatically rejected ACTA, with the European Parliament voting against ACTA, 478 to 39. This followed recommendations from five European Parliamentary Committees against ratification of the treaty.

In the report of Australia’s JSCOT, the Committee highlighted the lack of economic evidence put forward by the Department of Foreign Affairs and Trade to justify internationalisation of Australia’s domestic IP standards, and questioned whether our existing IP standards were even appropriate:

Australia’s ability to make legislative changes based on recommendations by bodies like the Australian Law Reform Commission, with due consideration of the benefits and costs inherent in Australia’s existing IP regime, may be diminished by a negotiating stance that assumes existing IP standards in Australia are suitable (Joint Standing Committee on Treaties, 2011).

Whether IP standards in Australia post-AUSFTA are balanced and appropriate has been the subject of rigorous debate[13]. And yet, existing Australian IP standards are also being promoted by Australia as an acceptable minimum international standard as part of Trans-Pacific Partnership Agreement negotiations, a comprehensive free trade agreement being negotiated between nine countries in the Asia-Pacific region[14].

The only leaked text of the US proposal for the TPPA indicate the US are pushing highly detailed, more extensive protections for copyright works than they were able to achieve through ACTA.
The leaked US proposal for the IP chapter of the TPPA entrenches criminal liability provisions for copyright infringement, broadens parallel importation restrictions and contains an exhaustive, narrow list of circumstances in which TPMs may be circumvented to access a work.

In addition, the United States Trade Representative (USTR) announced in July that they would be introducing language on limitations and exceptions in the TPPA, in line with the three-step test. The three-step test, discussed earlier in the context of Australia’s “flexible dealing exception”, has previously been defined narrowly, and held out as an obstacle to the adoption of open-ended exceptions like fair use. As it turns out, following the leak of further draft text (if legitimate) on 3 August 2012 (Love, 2012), the language on exceptions and limitations incorporating the three-step test would be more restrictive for ratifying parties than even TRIPS or the WCT.

Proposed Article QQ.G.16 of the leaked text confines exceptions for the digital environment, as well as for established purposes like research, criticism and news reporting, to those “subject to and consistent with […] [the three-step test]” (Love, 2012). This is no doubt that this language would limit the scope for domestic reform of copyright exceptions. It seems to exclude consideration of whether Australia should adopt a fair use style exception, as explicitly directed in the terms of reference of the Australian Law Reform Commission’s inquiry into copyright exceptions.

Proposed copyright reforms that could run counter to obligations under trade agreements like ACTA and the TPPA are unlikely to be picked up by government. And most concerning, the IP chapters in these agreements reflect a clear prioritisation of copyright enforcement and protection in law reform, over exceptions to facilitate access to knowledge, education and culture.

How can we preserve our capacity to provide adequate access to, and use of copyright content in line with community expectations, in an enforcement environment?

In trade agreements
Reject proposals for onerous anti-circumvention measures
Provisions in trade agreements that limit circumstances in which TPMs can be circumvented pose the greatest restriction on our ability to reform or introduce new copyright exceptions. Rigid anti-circumvention laws will increasingly constrain the way in which libraries and archives are able to preserve and provide access to digital born material. I know that recent history suggests that in trade negotiations we may never be sure of what is being negotiated in the IP chapter, it is worth encouraging policy makers to take special care in this area. It would be preferable, at an international treaty level, to keep the approach to anti-circumvention as broad as possible. One solution may be to simply adopt the phrasing of Article 10 of the WIPO Copyright Treaty, which is to allow for “limitations or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

In domestic law reform
Introduce purpose-based exceptions for digitisation of and online access to collection items
We can advocate for a purpose-based exception to facilitate online access to collection items. Policy makers have historically recognised the special “status” of cultural institutions, awarding them specific exceptions to carry out activities for the benefit of the broader community. In the digital environment, making collections available online has become a policy priority in arts portfolios, whether cognisant of the copyright limitations or not.

It will most probably not be possible to achieve an unremunerated exception for digitisation of copyright works generally, in circumstances where right holders fear losing revenue, but perhaps an exception could be limited to online access to works where this would not be interfering with the
commercial market for that work. This essay does not want to pre-empt the kind of drafting compromises and clarifications that inevitably a part of copyright reform, but believes the conversation is worth progressing.

Purpose-based exceptions have traditionally recognised special activities of public institutions, and the need to keep pace with evolving community expectations and activities. Nonetheless, a specific exception for online access to works runs the risk of being overly rigid and restrictive, and in the present technological environment may become quickly outdated.

A flexible, open-ended exception akin to “fair use” to facilitate necessary use of works in cultural institutions

This essay has touched on some of the issues Australian institutions have faced in our own experiment with an open-ended exception, section 200AB, which directly incorporates the “three step test”. Section 200AB is a cautionary tale, perhaps, in how not to draft an open-ended exception, where something akin to the US defence of “fair use” may be more flexible.

While the US Copyright Act of 1976 primarily contains detailed, purpose-based exceptions, it includes a defence of “fair use”, “enabling (and requiring) courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster” (Campbell v. Acuff-Rose Music, Inc., 1994, p. 577). Section 107 of the US Act sets out four factors for judges to consider in deciding whether a use is a fair use: the purpose and character of the use; the nature of the copyrighted work; the amount taken; and any current or potential market effect arising from the use. The “fair use” defence has been invoked successfully in the US to protect a range of innovative dealings with copyright content, and to recognise the legitimacy of educational and cultural activities for socially beneficial purposes.

Despite uncertainties inherent in fair use, cultural institutions in the US have embraced the defence as a central element of copyright management, relying on licensing (where appropriate, for legal and relationship management reasons) and fair use as a two-pronged approach to copyright compliance (Hudson, 2010). Some right holders have challenged the online activities of institutions relying on fair use (Hudson, 2010), but this has not necessarily led to litigation. Where a licence is not appropriate or present, fair use may provide a flexible mechanism by which to enable online access to collection material.

Conclusion

There are several other areas of copyright reform that would better enable cultural institutions to provide access to content online, which have not been touched on in this essay. A solution for orphan works. (In Australia, at least) a date of creation is taken; and any current or potential market effect arising from the use. This essay has focussed on the “copyright cloud” hanging over future law reform in Australia, the result of our obligations under the Australia-US Free Trade Agreement, and reflected in multilateral trade negotiations like the Anti-Counterfeiting Trade Agreement and Trans-Pacific Partnership Agreement. It is imperative in an era of globalisation that we share our experiences and present an informed, cohesive position against initiatives that distort the balance in copyright law between protections for creators and the public interest in access to information and cultural expression.

Notes

2. Department of Prime Minister & Cabinet, Office of the Arts, National Cultural Policy discussion paper, p. 3.
3. The Copyright Act 1968 (Cth), section 40, “Fair dealing for purpose of research and study”.
4. The Copyright Act 1968 (Cth) section 41A and section 103AA, "Fair dealing for purpose of parody or satire".
5. The Copyright Act 1968 (Cth) section 41 and section 103C, “Fair dealing for purpose of criticism or review”.
6. The Copyright Act 1968 (Cth) Division 5, sections 48 – 53, “Copying of works in libraries or archives”.
7. The Copyright Act 1968 (Cth) section 110A, “Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives” (format shifting) and section 111, “Recording broadcasts for replaying at more convenient time” (time shifting).
8. See Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 108.
10. UK, Ireland, Canada and New Zealand are all in the process of, or planning to announce consultations on updated copyright exceptions.
11. The most recent PC report to recommend repeal was a 2009 study into the parallel importation of books. The same conclusion has previously been reached in the 1995 Inquiry into book prices and parallel imports by the Prices Surveillance Authority; the Ergas Review, commissioned by the Federal Government in 1999 to consider IP rights and competition principles; and the Australian Competition and Consumer Commission in 2000.
US Senator Ron Wyden has filed two amendments to US bill H.R. 3606 known shorthand as the JOBS Act, relating to ACTA and the TPPA. One, no. 1868 prevents Presidential sign off of legally binding trade agreements without the express approval of Congress; the other, no. 1869, promotes transparency in the TPPA. See http://keionline.org/node/1391

References


Corresponding author
Ellen M. Broad can be contacted at: ellenbroad@gmail.com