
3 Copyright law and the broader policy environment

Key Points

- The primary objective of copyright law is to balance incentives to create new works against the costs of restricting access to copyright material.
 - Authors and publishers are protected against ‘unauthorised’ publication and reproduction of their works.
 - Copyright provides the basis for the trade in ‘rights’ of copyright material.
- There is a general prohibition on the parallel importation of books into Australia.
 - However, booksellers can parallel import books that do not comply with the 30 day release and 90 day resupply rules.
 - Booksellers can parallel import books to fill a single customer order.
 - Customers can import books directly for personal use.
- In addition to legislative protections, the Australian Government supports the books sector in other ways.
 - It provides direct financial assistance through grants, literary prizes and tax concessions for registered cultural organisations.
 - Demand for books is increased through literacy and reading programs.
- Copyright law, including the parallel import restrictions, sits within a broader policy framework germane to the specific issues raised in this study. Relevant broader policies include:
 - Those directed at promoting Australian cultural values (which underlie much of the direct financial assistance currently provided to the books sector).
 - Competition, trade and industry policies.

The provisions restricting the parallel importation of books that are the focus of this study are contained in the *Copyright Act 1968*. In this chapter, the Commission first outlines the relevant legal provisions and then discusses the objectives of both the Act and the Parallel Import Restrictions (PIRs). Other government policies and objectives that may bear on an assessment of the PIRs are discussed in the final section.

3.1 Copyright Act provisions for books

The core protections

The *Copyright Act 1968* protects the original expression of ideas in creative and intellectual activities, including literary, musical, dramatic and artistic works, as well as sound recordings, films, television and sound broadcasts and published editions. Copyright, like all intellectual property rights, is legally separated from physical property rights — a person who owns a physical copy of a book does not own the copyright material within the book. Unlike patents or trademarks, copyright protection applies automatically to the creators of original works — there is no requirement to register a copyright work prior to it being protected.

The Act guides the use and trade of copyright-protected works by granting copyright holders a number of ‘exclusive rights’, depending on the material being protected. The two main exclusive rights afforded copyright holders are:

- the ‘reproduction’ right, or right to make multiple copies of a work
- the ‘publication’ right, or right to make the work first available for sale.

These rights make copying and selling of copyright material without the permission of the author or publisher an infringement under the Act, except in some limited circumstances. Box 3.1 outlines some of the necessary conditions for copyright protection in Australia.

The right to control who may use their work gives authors and publishers the ability to trade their intellectual property — to allow others to use their work at a price that is mutually agreeable. In the case of books, publishers seek permission to use an author’s creative work in exchange for payment, usually as a royalty based on a percentage of the recommended retail price or sales revenue from a book. The publication of a work as a book is not the only right that authors have — they can allow the production of an electronic version of their work (such as e-books), as well as allow adaptations of their work, such as in a film or television series. Publishers make an assessment of the potential sales for a particular book, and this will influence the amount of money they will offer for the right to use an author’s creative output. Authors may place conditions on how their work may be used by the publisher.

Publishers pay for the exclusivity associated with being the only entity in a territory with the permission to produce a book containing an author’s work. In this way, publishers act as an intermediary between authors who wish to realise some financial value from their copyright, and consumers, who ultimately pay for, and consume, the work.

Box 3.1 Aspects of Australian copyright law applying to books

Qualifying for copyright

Australian copyright law automatically protects literary works provided that:

- the original expression of ideas, as distinct from the original ideas themselves, has not been copied from another work
- the work has been written down in a material form using words or figures
- the work is connected with Australia by, for example
 - the author being an Australian citizen or a permanent resident in Australia at the time the work was made (for unpublished manuscripts), or
 - the book's edition being first published in Australia (for printed works).

The *Copyright Act 1968* grants protection to authors for a period of 70 years from the end of the year of their death, and protects publishers for 25 years from the end of the first year of publication.

Types of copyright

A published book is protected by copyright in a number of ways. In the first instance, the author owns the copyright in the written material of the book — for example, the fictional story or the descriptive narration in a non-fiction work. However, the publisher also owns copyright in published editions separately from the author's copyright. The publisher's copyright may protect, for example, the selection and arrangement of material within a book including the title, font choices, page layouts and cover art. Illustrators may also own the copyright in any illustrations within the book.

Moral rights

Since 2005, the Copyright Act has also granted several 'moral rights' to individual creators of copyright-protected material. These moral rights are indivisible and cannot be traded, sold or surrendered by the creator of a work. They include the rights:

- to ensure that the author of a work is clearly and prominently identified
- to prevent a person who is not the author from being identified as such
- to object to the doing of anything in relation to the work (such as altering, distorting or mutilating) that is prejudicial to the author's honour or reputation.

International treaties

Australia is a party to several international agreements that require signatories to recognise the copyright-protected works from other signatory countries in the same way that they protect the copyright of their own nationals. Such international cooperation is essential to extend copyright protection beyond national borders. The main agreements signed by Australia concerning copyright law are the 1886 *Berne Convention for the Protection of Literary and Artistic Works* and the 1994 World Trade Organisation agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS).

The parallel import restrictions

The terms of reference do not request the Commission to undertake a wholesale review of Australia's copyright system, but rather to review the specific effects of the parallel importation laws for books.

Subject to certain conditions, Australian copyright law provides for an almost total ban on Australian retailers importing books from overseas if a version of the book has been published locally. Under the *Copyright Act 1968* (s.37), it is an infringement for an Australian bookseller to parallel import copies of a book to sell in Australia without the permission of the copyright holder, even if those copies have been legitimately published in another country.

However, in 1991, the Act was amended to permit Australian booksellers to parallel import one or more copies of a book without the permission of the Australian copyright holder if Australian publishers do not meet certain conditions.

The 30 day release rule

Prior to 1991, publishers could buy the Australian rights to a foreign book and delay the release of the title indefinitely.

Now, under section 29(5) of the Copyright Act, the holder of Australian copyright for a new book has 30 days to supply copies of the book to the Australian market after its release in another market. If the copyright holder fails to meet this requirement, Australian booksellers become free to import non-infringing copies of the book from any overseas supplier. Australian publishers therefore have an incentive to release titles promptly to preserve the PIRs on their titles.

The 90 day resupply rule

Section 44A contains the 90 day resupply rule, which places an onus on Australian publishers to maintain a supply of the books they publish to Australian booksellers. An Australian publisher forfeits parallel import protection over a publication if:

- a bookseller has requested the publisher to supply a book, but the publisher has not responded within 7 days advising they will supply the book within 90 days, or
- the publisher has not supplied the book to the bookseller within 90 days.

Under the current law, it is not clear whether a publisher loses parallel importation protection permanently if unable to supply a book within 90 days, or only until supply is restored. This lack of clarity continues partly due to the fact that there has been very little parallel importation through forfeiture of protection under the 90 day rule.

Other situations

The Act also sets out some other situations in which booksellers may parallel import books. For example, booksellers are able to parallel import a single copy of a book to satisfy a written customer order or to supply books to a library.

Also, the 1991 amendments to the general prohibition on parallel importation did not directly affect the pre-existing rights of consumers to purchase books for personal use from overseas.

3.2 The objectives of the copyright provisions

In assessing the PIRs, the terms of reference ask the Commission to examine the extent to which they promote and achieve the objectives of the *Copyright Act 1968*, and to have regard to the intended objectives of the PIRs within the government's overall policy framework.

General objectives

Unlike much contemporary legislation, the *Copyright Act 1968* does not explicitly state its objectives. Given the importance that copyright law has for Australia's intellectual output, the proper role and objectives of copyright law have long been discussed. And many submissions included views on how the objectives of the Copyright Act can be characterised (see box 3.2).

It is widely accepted that copyright law, like intellectual property law generally, aims to provide incentives for investment in creative works while achieving a balance between such creation and the diffusion of creative works through the community. Reflecting this view, the Ergas Committee stated:

Broadly speaking, 'intellectual property rights' is a generic term for the various rights accorded by law for the protection of creative effort or for the protection of economic investment in creative effort. In Australia, legislation grants limited exclusive rights to the owners of creative works, in order to encourage investment in innovation, as well as its diffusion throughout the economy. (IPCRC 2000, p. 22)

The pursuit of 'balance' in copyright law reflects the different incentives created by granting exclusive rights.

On the one hand, without any copyright protection, investment in creative work would decline. Copyright prevents those who have not contributed to the original investment in a work from 'free riding' — that is, benefiting from the work without paying for it. Most intellectual property can be easily copied or used at little cost without the knowledge or permission of the copyright holder. Authors and publishers

invest in producing books, both directly and through forgone income-earning opportunities. Thus, without copyright protection, authors and publishers would find it more difficult to recoup the cost of their investment.

On the other hand, there is a social cost to granting authors and publishers the exclusive right to exploit their work. Such exclusive rights enable copyright holders to restrict the diffusion of their work in order to raise its price and thereby increase private profits. This reduces the dissemination of the ideas embodied in the work, and thus the associated benefits to society. Thus, in return for guaranteeing a specific degree of protection to rights holders, society balances these rights against other social goals.

Specifically, the copyright legislation seeks to balance these competing considerations in two key ways:

- by only protecting the particular expression of the ideas or facts, not the ideas or facts themselves
- by limiting the time that copyright holders enjoy exclusive rights, after which the work passes into the public domain.

In its submission, the Australian Copyright Council (sub. 249, p. 3) stated that, while an incentive to produce and invest in new works is an important objective of copyright, it is also intended to reward creators of works that provide education and enjoyment to others, whatever their motivation for producing those works. In this context, it pointed among other things to the report of the 1959 Spicer Committee — that preceded passage of the current Copyright Act — and stated (in part):

The primary end of [copyright law] is to give the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. (CLRC 1959, pp. 8–9)

The concept of ‘just reward’ is of course difficult to define. In one sense, the concept is arguably encompassed in the balance that copyright aims to achieve between incentives to create new copyright material on the one hand, and the benefits to users on the other. However, another interpretation might be that the Act should enable publishers and authors to earn at least some minimum financial return from their works. The Act, by enabling publishers and authors to trade their work, certainly does enable them to obtain a greater financial return for it — indeed, this is the key way in which the Act provides an ‘incentive’ for investment in creative works. But the magnitude of that return is dependent on the willingness of others to pay for the work in the market place. Hence, like other property rights, copyright law does not seek to ensure that rights holders obtain any particular return for their rights; nor would it be well suited to doing so. Other government measures, available to Australians of all vocations, exist to address distributional matters.

Box 3.2 Participants' views on the objectives of copyright and PIRs

Participants presented a number of different 'takes' on the objectives of copyright law:

We believe that the 'high objective' of copyright law is to optimise innovation and creation, and at the same time, to ensure that works are available to use and access for the public interest. Because of this, we see that copyright policy is about creating a balance between adequate access to materials on the one hand, and adequate incentives to create those materials on the other. (Australian Digital Alliance, the Australian Libraries Copyright Committee and the Australian Libraries and Information Association, sub. 252, p. 4)

The Copyright Act does not spell out its objectives, although they can be inferred: they are intended to provide copyright holders with automatic and exclusive moral, commercial, and territorial rights to the fruits of their labour. (Scribe Publications, sub. 122, p. 2)

The objectives of the copyright act are to provide incentives for creativity, for people to produce new works, which in turn benefit society as a whole. The current provisions in the Copyright Act achieve this basic objective. In addition they achieve the higher objective of copyright, which is the promotion and the expansion of knowledge, as books from various countries are vigorously traded to other countries. (Australian Literary Agent's Association, sub. 124, p. 5)

The Copyright Act provides for the recognition of the rights of creators of artistic works. The implicit intention may be taken as that of fostering, promoting and rewarding creativity in artistic works. (Margaret McKenzie, sub. 211, p. 1)

The existing rules provide the essential balance as required by the Copyright Act between the various property interests of creators, including commercial protection of their work, and the public interest in ensuring equity of access to this material. (Ann Cunningham, sub. 233, p. 1)

Participants also had differing perspectives on the aim of PIRs, and the 1991 changes:

Territorial copyright means that the contracts that creators enter into under the terms of copyright are in tune with the law. Territorial copyright can therefore be justified as a means to enforce the inherent right of copyright that attaches to creative effort. The Copyright Act cannot fulfil its objectives in the absence of territorial copyright because without it copyright holders cannot enforce the contracts they license. (Text Publishing, sub. 63, p. 10)

The current rules were introduced in 1991 to overcome the post-colonial problem whereby United Kingdom (UK) and United States of America (USA) publishers divided the English-language book market between them. Australian rights were often assigned with UK rights, and this meant that many USA books did not become available in Australia until the UK publishers produced their edition, for which they also usually held Commonwealth rights. (Australian Society of Authors, sub. 70, p. 2)

The purpose of the 1991 copyright amendments was not to limit competition, but to balance the benefits conferred by copyright on authors with the needs of consumers. (Australian Publishers Association, sub. 244, p. 3)

The 1991 amendments were principally intended to provide a greater range of available titles, but were also intended to encourage the early availability of paperback versions (which are cheaper than hardback versions). (Australian Copyright Council, sub. 249, p. 4)

Printing Industries hopes that this latest study ... will finally determine that the current arrangements which were introduced in 1991 ... are working as intended by protecting the interests of book readers and book purchasers as well as other stakeholders in the book production value chain ... (Printing Industries Association of Australia, sub. 106, p. 5)

Objectives of the parallel importation restrictions

Like the Copyright Act as a whole, the objectives of the PIRs are not explicitly detailed in the Act. However, the construction of the Act can help in gaining an understanding of those objectives.

The Australian PIRs are implemented as an extension of the publication and reproduction rights — that is, those who hold those rights in Australia can prevent the importation of overseas editions of a book. By adding to what the holder of the publication and reproduction rights can control, the PIRs thus potentially add to the value that those rights might have in the marketplace. The Australian Copyright Council noted this point in its submission, stating:

The parallel importation provisions are thus not an *additional* incentive, ... but rather a means of maintaining the incentive provided by the exclusive right of reproduction. (sub. 249, p. 4)

Author Garth Nix (sub. 102, p. 3) made the same point: ‘Restrictions against parallel importation are not “additional rights”’.

While Australia’s parallel importation restrictions may not technically amount to an additional right under copyright law, what is clear is that the ability to restrict parallel imports is separable from the underlying exclusive rights enjoyed by copyright holders.¹ In this context, neither the Berne Convention nor the TRIPS agreement require member states to prohibit or to allow parallel importation, and member states are free to choose for themselves their laws on parallel importation.

This has implications for how the merits of PIRs are assessed. For example, Text Publishing (see box 3.2) contended that PIRs are necessary because, without them, copyright holders could not in its view enforce the contracts they enter under the Copyright Act. However, one interpretation of this view is that legislation should be shaped to align with the (desired) practices of industry participants, rather than vice-versa. Because PIRs are separable from the core copyright protections, the issue for policy makers is whether any additional benefits that PIRs generate for the community, including the benefits for copyright holders, outweigh any costs they entail. One aspect of this assessment is the extent to which — and the conditions

¹ Some responses to the discussion draft interpreted the Commission’s draft recommendation as applying to copyright in general, and were concerned that it would thus reduce copyright from the life of the author plus seventy years to only 12 months (see, for example, DR398, p. 1 and DR436, p. 1). To clarify, the draft recommendation related only to the period for which PIRs would apply to book titles, with no change to the period of protection afforded by the publication and reproduction rights. The recommendations in this report also apply only to the PIRs; they would not affect the length of copyright provided by the core restrictions in the Act.

under which — the PIRs augment the value of other protections in the Act. This requires analysis; it cannot be determined solely from first principles.

In relation to the 1991 amendments to the general prohibition on parallel imports, the intended objective is more straightforward. The terms of reference state that ‘these changes were intended to address concerns about delays in obtaining copies of overseas books’. The reforms were designed to provide Australian publishers with a commercial incentive (namely, forfeiture of territorial protection and thus exposure to the threat of parallel imports) to undertake the timely and continuous supply of the titles they publish to the benefit of Australian book consumers. Chapter 5 discusses the outcomes of these reforms.

3.3 The broader policy environment

The Government’s ‘overall policy framework’ mentioned in the terms of reference is not tightly defined. The reference indicates only that it includes ‘competition, intellectual property, trade and industry policies’. The Commission considers that other government policies, such as those relating to Australian arts and culture, are also potentially highly pertinent aspects of the overall policy framework.

Competition, trade and industry policies

Over the past 25 years, Australia’s industry policy has been characterised by broad-based initiatives designed to expose the economy to greater competitive pressures. Building on earlier initiatives to reduce border protection by abolishing quotas and reducing tariffs, wide-ranging reform programs including the National Competition Policy (NCP) and the more recent National Reform Agenda (NRA) aimed to extend competitive pressures to more parts of the Australian economy. Both the NCP and NRA were agreed to by all Australian Governments.

The Competition Principles Agreement (CPA), signed by the Australian, State and Territory governments, established the overriding objective of competition policy as being to maximise Australia’s welfare by maintaining and enhancing competition, where appropriate, in markets. Clause 5 of the CPA states:

- ... legislation should not restrict competition unless it can be demonstrated that the:
- (i) benefits of the restriction to the community as a whole outweigh the costs; and
 - (ii) objectives of the legislation can only be achieved by restricting competition.

The CPA requires a thorough assessment of the benefits and costs of restrictions on competition on various stakeholders — recognising that the costs are often more diffusely spread across the economy and are therefore more difficult to observe than

the benefits that accrue to particular sectors. The CPA recognises that there will be circumstances where restrictions on competition are justified on public interest grounds. However, it also puts the onus of proving that a restriction on competition is in the public interest on those seeking to introduce or retain the restriction.

Cultural and related social policies

The Australian Government has a range of cultural and related social objectives. These goals are pursued through various policies, including education and arts policies, and more specific policies relating to the books sector. The Australian Government's arts policies aim to 'encourage excellence in artistic effort, support for cultural heritage and public access to arts and culture' (Australian Government, 2009c). The promotion of literacy is also an important objective of government policies that helps to overcome social disadvantage, and to establish the platform of human capital that underpins economic prosperity.

The Australia Council for the Arts is the Australian Government's primary arts funding body which, through the work of its Literature Board, aims to 'support the excellence, diversity, vitality, viability and distinctiveness of Australian literature' (Australia Council, 2009a).

Beyond the support provided by copyright law, the Australian Government provides financial support for Australian literature in a number of ways (appendix F). In broad terms, they include:

- direct financial support for authors and publishers for the creation, production, marketing and export market development of Australian books
- funding for campaigns to increase awareness about the importance of literacy skills and about Australian literature more specifically
- prizes for excellence in Australian writing and publishing in a range of genres
- financial compensation for Australian works held in public and education libraries
- tax concessions for private organisations and charities whose goal is to support and promote Australian writers and literature.

In 2006-07, the Australian Government provided total cultural funding of \$25 million for literature and print media (Australian Government, 2009b).

Australian publishers are also eligible for general industry assistance measures that apply broadly across the economy, such as the Export Market Development Grants scheme and tax concessions relating to research and development. Chapter 6 contains further discussion of Australia's cultural policy objectives.