



No. 177 Public Enforcement of Intellectual Property Rights

Gregor Urbas

In 1709 the first English copyright statute (the "Act of Anne") outlawed the unauthorised reproduction of literary works, and imposed monetary fines payable in equal share or "moeity" to the Crown and the copyright holder, along with compulsory forfeiture and destruction of infringing copies. The division of labour between public and private in the enforcement of intellectual property rights has become somewhat less well defined since, though a public role is clearly entailed by the inclusion of criminal infringement provisions in modern copyright and trademarks legislation. Part of the difficulty lies in the limited capacity of public law enforcement agencies to deal with all demands on their resources, along with a reluctance to intervene in what is often seen as private commercial disputation. Added to this are rapid changes in technology, which provide new opportunities both for the infringement of intellectual property rights and their protection.

This Trends and Issues paper assesses the role of public enforcement of intellectual property rights through the recent experience of Australian customs, police and prosecution agencies.

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Intellectual property has emerged over recent decades as an increasingly valued "capital asset", particularly in the transition to an information-based economy (Wineburg 1991, p. 1):

Intellectual property—patents, trademarks, copyrights, and trade secrets—has become recognised for what it is: a major capital asset. The success of many companies domiciled in many different countries depends increasingly on whether they can use the technology of their choice. Use of technology of choice is increasingly determined by who can claim legal rights to that intellectual property and by whether those rights are valid and enforceable.

Against this background the protection of intellectual property becomes a business imperative. Not surprisingly, many larger (multinational) enterprises and industry groups have chosen to defend their interests through commercial litigation (see, for example, the anti-piracy web sites of Microsoft, the Business Software Alliance, the Business Software Association of Australia, the International Federation of the Phonographic Industry [IFPI], the International Intellectual Property Alliance and the Recording Industry Association of America). In Australia, smaller enterprises and individual traders have also been able to act collectively through a range of industry groups (see the web sites of the Australian Copyright Council, the Australasian Performing Right Association and Australian Mechanical Copyright Owners' Society, the Australian Record Industry Association, the Audio Visual Copyright Society and the Copyright Agency Limited). By contrast—and perhaps to some extent as a result—the role of traditional public law enforcement agencies in the protection of intellectual property has over recent years become subject to increasing uncertainty.

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Technological Change

Part of the problem is undoubtedly the rapidly changing technological environment within which the information economy operates. There is inevitably a significant timelag between the emergence of new technologies enabling novel forms of breach of intellectual property rights and the consequent refinement of laws protecting those rights. The general relationship between law, technology and intellectual property rights has been described as follows (Lessig 1999, p. 124):

Strengthen the law, holding technology constant, and the right is stronger. Strengthen the technology, holding the law constant, and the right is weaker.

Of course, this is a simplification—for one thing, emerging technologies provide new opportunities not only for breach of intellectual property rights but also for their protection. A new industry of electronic security services has begun to emerge, offering technological solutions to such business risks by way of encryption, water-marking, secure payments systems, virtual private networking and so on (Fiorini 2000; Grabosky, Smith & Dempsey forthcoming). Inevitably, given that much of this research and development originates in the private sector, it must be questioned what role remains for public agencies in the information age, particularly in the protection of intellectual property.

Private Right or Public Good?

An important indicator is the degree to which existing intellectual property rights are enforced, and the perception of whose business it is to enforce them. Central to this question is a debate over whether intellectual property rights are essentially “private rights” to be enforced primarily by civil infringement proceedings, or a “public good” to be protected by public law enforcement authorities.

The public–private dichotomy is of course somewhat artificial, especially given that public law enforcement agencies have long

been concerned with the protection of private (physical) property against theft and criminal damage. An overt public purpose is evident from laws such as the United States Constitution’s grant of power to the Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (article 1, section 8, clause 8).

Australian intellectual property law is less explicit in declaring its public purpose. Section 51(xviii) of the Commonwealth Constitution simply confers on the Federal Parliament the power to legislate with respect to “Copyrights, patents of inventions and designs, and trademarks”. However, a role for public law enforcement agencies is clearly entailed in the creation of criminal offences in Commonwealth legislation dealing with copyright and trademarks.

Copyright and Trademarks Offences

Mandatory sanctions for infringement of intellectual property rights date back at least to the 1709 English copyright statute known as the “Act of Anne” (Ricketson & Richardson 1998, p. 59). In Australia, the Commonwealth enacted copyright and trademarks legislation soon after Federation. The inclusion in the *Copyright Act 1905* (Cwlth) of “drastic” anti-piracy offence provisions was justified as follows (Kelcey 1995, p. 232):

[M]any piracies take place on the part of persons against whom it is useless to proceed for damages or to take out an injunction because, to put it in the vernacular, they are not worth powder and shot. Therefore, some summary remedies have to be provided to give authors protection against piracies.

Criminal infringement provisions were continued in the *Copyright Act 1912* (Cwlth) and in subsequent enactments, though the term “piracy” was discarded. The current *Copyright Act 1968* contains a number of summary offences relating to various

(mostly commercial) dealings with copyright articles where the offender “knows, or ought reasonably to know” of the infringement involved (ss. 132–133A, 248P–248T). Penalties range up to 550 penalty units (currently \$60,500 for individuals, or five times this amount for a corporation) and/or imprisonment for not more than five years (s. 132[6A]). Amendments contained in the *Copyright Amendment (Digital Agenda) Act 2000* relating to digital copying (new s. 132[6AA]) will increase the maximum fine to 850 penalty units (\$93,500).

Similar infringement offences are to be found in Part 14 of the *Trademarks Act 1995* (Cwlth), though not in other Commonwealth intellectual property legislation such as the *Designs Act 1906*, *Circuit Layouts Act 1989* and *Patents Act 1990*. The practical significance of these offences and their enforcement are best examined by considering in detail the respective roles of the customs, police and prosecution services.

Australian Customs Service

The Australian Customs Service (ACS) has no specific powers *ex officio* in relation to intellectual property—pirated and counterfeit goods, for example, are not designated “prohibited goods” under the *Customs Act 1901* or *Customs (Prohibited Imports) Regulations*. However, a specific detention or seizure function is reserved for the ACS in Commonwealth copyright and trademarks legislation. (No analogous provisions are to be found in patents, designs or circuit layouts legislation.)

Copyright Act 1968

(i) Notices of Objection

Division 7 of Part V of the *Copyright Act 1968* establishes a procedure whereby a person (the “objector”) who is owner or exclusive licensee of copyright in copyright material may lodge with the ACS a notice of objection in relation to the importation of copies of that material (s. 135[2]).

“Copyright material” means a work, sound recording, cinematographic film, published edition of a work, or a television or sound broadcast as recorded in a cinematographic film or a sound recording (s. 134B).

Prior to amendment of the *Copyright Act 1968* in July 1995 to implement Australia’s response to the obligations relating to copyright contained in the Trade-Related Aspects of Intellectual Property Rights agreement, the objection provisions applied only in relation to printed copies of published literary, dramatic or musical works. ACS has reported that no notice of objection was ever received under this scheme (LACA Inquiry, ACS Submission, para. 2.3).

Since the inclusion of subject matter other than works (most notably encompassing compact disc [CD] sound recordings, video tapes, computer software, clothing and footwear) notices of objection have become more prevalent. ACS reports having some 52 current notices in place under the *Copyright Act 1968*, lodged by 43 companies (LACA Inquiry, ACS Submission, para. 2.11).

(ii) Seizure

Section 135(7) of the *Copyright Act 1968* empowers the ACS to seize goods which are imported for the purposes of trade, which are subject to the control of Customs within the meaning of the *Customs Act 1901*, and which are covered by a current Notice of Objection. It is important to note that the ACS does not itself adjudicate on copyright infringement, but is empowered simply to seize any such goods and hold them for 10 working days, extendible for a further 10 days upon reasonable request by the objector (*Copyright Act 1968*, s. 135AC and *Copyright Regulations*).

As soon as practicable after the seizure, the ACS must serve written notification on both the objector and importer, stating that the seized copies will be released to the importer unless an action for infringement is instituted by the objector in respect of the copies. In many

cases, particularly those involving small consignments of goods, the importer simply consents to forfeiture of the seized copies (ss. 135AC and 135AE) rather than defend an action for copyright infringement.

During 1998–99, more than 60 seizures were made by ACS on the basis of copyright infringement, with values of consignments ranging up to \$45,000, though a majority are valued at less than \$1,000 (LACA Inquiry, ACS Submission, para. 4.2). The fact that the offence provisions of the *Copyright Act 1968* effectively penalise only those infringements engaged in “for the purpose of trade” (s. 132[1], [2] and [2A]) may provide one incentive for the importation of infringing material in smaller quantities. Another is the disincentive for objectors to enter into potentially costly civil litigation in relation to small quantities of such material (LACA Inquiry, ACS Submission, para. 3.6).

Trademarks Act 1995

(i) Notices of Objection

The *Trademarks Act 1995* similarly allows for notices of objection to be lodged with the ACS in respect of infringing imports. Such notices may be lodged by either the registered owner of a registered trademark or, in certain circumstances, by an authorised user of the trademark (s. 132). A notice of objection remains in force for a period of two years from the date of the notice unless revoked earlier.

(ii) Seizure

Section 133 provides for the seizure of imported goods which bear a mark that, in the opinion of the ACS, is “substantially identical with, or deceptively similar to” a trademark in respect of which a notice of objection has been lodged. Unlike the non-mandatory seizure provisions under copyright legislation, however, s. 133(2) of the *Trademarks Act 1995* provides that the ACS must seize the suspect imported goods unless satisfied that there are no reasonable

grounds for believing that the notified trademark is infringed by the importation.

As soon as practicable after seizure, both the objector and the designated owner must be notified in writing (s. 134). As with copyright seizure, unless the objector commences an infringement action within 10 days (extendible to 20 days on request), the goods are released to the owner. In any case, the goods must be released after 21 days unless a court order provides otherwise (s. 136, and regulations).

Australian Federal Police

The Australian Federal Police (AFP) is the principal law enforcement agency entrusted with the provision of police services in relation to laws of the Commonwealth (*Australian Federal Police Act 1979*, s. 8). As such, the AFP receives regular referrals in relation to intellectual property infringements in general and the offence provisions of Commonwealth copyright and trademarks legislation in particular. Under ss. 132–133 of the *Copyright Act 1968*, offences constituting commercial infringement of copyright carry a maximum penalty of 550 penalty points (currently \$60,500—or five times this amount for a corporation) and/or imprisonment for not more than five years. Offences under ss. 145–149 of the *Trademarks Act 1995* carry a maximum penalty of 500 points (\$50,000) and/or two years’ imprisonment. In addition, the AFP has particular interests in “new forms of criminal activity” and “the investigation of economic crime, in all its forms, transnational crime and crime involving information technology and communications (including electronic commerce)” (LACA Inquiry, AFP Submission, p. 2).

Referrals involving intellectual property matters may come from other agencies such as the Australian Customs Service (ACS), or from industry bodies such as the Australasian Film and Video Security Office, the Anti Counterfeiting Action Group (ACAG) and Music Industry Piracy Investigations. It must be

noted, however, that such referrals constitute only a small proportion of total AFP referrals, all of which are evaluated on the basis of a “case categorisation and prioritisation model”. Most intellectual property referrals are rejected or withdrawn (Urbas 2000, p. 25). Those remaining are investigated to determine whether offences have been committed. AFP data on intellectual property offences indicate peaks in the early and mid-1990s, followed by a decline in recent years (Table 1).

Declining levels of offences dealt with by the police do not necessarily correspond to declining levels of criminality. A more obvious explanation is to be found in the prioritisation criteria against which referrals are assessed. During the relevant period, these were stated to include the availability of limited resources, the level and extent of criminality involved, and the prospects of a successful conviction (LACA Inquiry, AFP Submission, p. 3).

As to the level and extent of criminality, the AFP reports that

in those copyright cases which it has investigated it “has not established any significant evidence to substantiate the involvement of organised criminal groups within Australia in copyright infringement” (LACA Inquiry, AFP Submission, p. 4). This would appear to overlook the role of overseas organised crime groups in the production and distribution of pirate CDs and computer software, particularly in south-east Asia, which ultimately find their way onto Australian markets (LACA Inquiry, IFPI Submission, Appendices A and B). By contrast, the National Criminal Intelligence Service, in a recent assessment of the impact of organised crime in the United Kingdom, ranks intellectual property crime (computer and music piracy) alongside business fraud and drug trafficking as “high-impact crime” (WJIN 2000).

Another important factor is the availability of alternative means of resolution, including investigation by other agencies, regulatory action or civil proceedings. The police

perception is that “the most appropriate avenue for dealing with the greater proportion of copyright infringements is through civil proceedings between the parties rather than by recourse to the criminal process”. A significant contribution to this perception is the record of often unsuccessful prosecutions of copyright offences, and in particular the experience that “establishing proof of copyright in individual items is often expensive, impractical and on occasions unsuccessful” (LACA Inquiry, AFP Submission, pp. 5–6).

While some copyright and trademarks prosecutions are undertaken by police in courts of summary jurisdiction, more complex cases are referred to the Commonwealth Director of Public Prosecutions.

Director of Public Prosecutions

The Office of the Commonwealth Director of Public Prosecutions (DPP) has primary responsibility for the prosecution of criminal offences under Commonwealth law (*Director of Public Prosecutions Act 1983*, ss. 6, 9). However, the DPP is not itself an investigative agency and has no investigative powers or functions. Rather, the DPP prosecutes cases investigated by police or other investigative agencies, though it often provides advice to such agencies during the investigation stage, particularly in large and complex matters (LACA Inquiry, DPP Submission, p. 2).

Referrals

As a matter of prosecution policy, the DPP does not accept referrals directly from individuals or industry groups, on the basis that an informant may become liable for prosecution costs in the case of failed or discontinued proceedings. In principle, referrals could be accepted from any government agency charged with the investigation of intellectual property infringements. In practice, however, in the absence of any other public authority dedicated to performing this function, referrals to the DPP on intellectual property matters come

Table 1: Intellectual property offences dealt with by the AFP during the last 10 years

Year	Reported	Cleared	(%)	Value (\$A)
1989–90	42	27	64	n/a
1990–91	81	43	53	50,000
1991–92	1246	900	72	2,151,805
1992–93	763	519	68	17,840
1993–94	597	247	41	410,061
1994–95	1924	303	16	838,310
1995–96	486	42	9	630,500
1996–97	145	12	8	n/a
1997–98	n/a*	60	n/a*	n/a
1998–99	n/a*	32	n/a*	n/a
1999–00	n/a*	6	n/a*	1,000,000

Source: AFP Annual Reports

Note: Classification is based on the Australian National Classification of Offences (ANCO) issued by the Australian Bureau of Statistics in 1985, where “Copyright and Patents” includes both “Copyright Act offences” and “Trademark/description offences” (ABS 1985, S Group 839). This has recently been replaced by the general category “Theft of Intellectual Property” (ABS 1997, Group 0822).

* The clearance rate by percentage (column 4) does not appear in the AFP reports, but was incorporated into a similar table covering the years 1992–96 in Grabosky and Smith 1998, p. 95. From 1997–98 on, the AFP ceased publishing the reported numbers of crimes alongside the numbers cleared, instead adopting the term “confirmed offence”, so that such a calculation is no longer possible. A confirmed offence is “an offence which has been cleared by one of the following actions: arrest, summons, warrant, voluntary attendance at court, caution, or cleared otherwise” (see 1997–98 and 1998–99 reports).

exclusively from the AFP and (less regularly) State police.

Prosecution Policy

The DPP decides whether to undertake prosecutions on the basis of guidelines set out in the Prosecution Policy of the Commonwealth, which require that:

- there must be sufficient evidence to prosecute the case (not just to make out a prima facie case but to ensure reasonable prospects of conviction); and
- it must be clear from the facts of the case and all the surrounding circumstances that prosecution would be in the public interest.

In order to decide these matters, a brief of evidence is prepared on the basis of information supplied by police. Critical issues are whether evidence will be available, whether in Australia or from overseas, in a form which will be admissible in criminal proceedings in an Australian court. Of particular concern in a number of prosecutions have been the availability and admissibility of evidence establishing ownership of copyright by overseas business groups.

Copyright and Trademarks Prosecutions

Prosecutions under the *Copyright Act 1968* and *Trademarks Act 1995* constitute a small proportion of total numbers of matters handled by the DPP each year. Peaks during the last 10 years coincide with similar patterns for police dealings with copyright offences (Table 2).

Annual DPP statistics do not reveal the proportion of intellectual property cases in which prosecution is successful. Clearly, prosecution is far easier when a defendant pleads guilty: see, for example, *Pontello v. Ceselli* (1989) 16 IPR 645. Prosecution for offences under the *Trademarks Act 1995* is also facilitated by the system of registration of trademarks in Australia, which makes it relatively easy to establish who is a “registered owner” or “authorised user” (ss. 6, 8). By contrast, there is no registration system for copyright under

Table 2: DPP copyright and trademarks prosecutions 1989–1999

Year	Copyright	Trademarks	Total
1989–90	10	n/a	n/a
1990–91	11	n/a	n/a
1991–92	20	n/a	n/a
1992–93	14	22	36
1993–94	6	13	19
1994–95	11	20	31
1995–96	8	11	19
1996–97	3	11	14
1997–98	4	3	7
1998–99	12	12	24
1999–00	15	7	22

Source: DPP *Annual Reports*

Notes: Annual reports to 1996–97 provide statistics for each State and Territory separately; from 1997–98 on, prosecutions are classified only under the indictable/summary offence distinction. Offences under the Copyright Act and Trademarks Act are mostly dealt with summarily. No trademarks prosecutions are separately recorded for the years 1989–1992.

Australian law (unlike some other jurisdictions such as the United States), so that where a defendant contests a charge of copyright infringement, the prosecution’s task is considerably more difficult (LACA Inquiry, DPP Submission, p. 2):

The DPP’s general experience has been that copyright cases can be difficult, highly technical and expensive prosecutions with enormous problems in strictly proving ownership of copyright where it is held overseas.

This experience is illustrated by a number of cases in which Australian courts have been reluctant or unable to accept evidence of copyright ownership by such well-known enterprises as the Walt Disney Company (*Lollback v. Young*—unreported, New South Wales Local Court, 8 February 1996), Twentieth Century Fox Film Corporation, Warner Bros and Metro Goldwyn Mayer Inc (*Holder v. Searle* [1998] FCA 1775 [Federal Court]). In *Donnelly v. Hughes* (1999) FCA 1775 the DPP was unable to prove beyond reasonable doubt that the defendant knew or ought to have known that no licence to sell and distribute certain sound recordings existed. The difficulty was that purported licensing agreements had been issued by overseas “licence brokers”, even

though local exclusive distribution agreements already existed. The case was dismissed, with an order for the defendant’s costs to be paid by the DPP.

Effects of Changes in Law and Technology

The liberalisation of parallel importing restrictions on sound recordings in mid-1998 was widely predicted to produce a significant increase in the level of importation of goods in breach of copyright (“pirates”) and trademarks (“counterfeits”). One reason given was that prior to liberalisation Customs officials could more readily detect pirated CDs since these were imported in consignments to persons other than the known exclusively licensed importers (LACA Inquiry, IFPI Submission, p. 2). The same concerns arise in relation to proposed relaxation of parallel importing restrictions on computer software (Jackson 2000). However, data available from the ACS and other law enforcement agencies do not at this stage yield evidence of an increase in piracy levels (Urbas 2000, pp. 23–24).

In any case, it should be noted that a significant proportion of the pirated and counterfeit material sold within Australia is locally produced rather than imported. On one

estimate, approximately 60 per cent of the illegal clothing on sale in Australian markets is made in "sweat shops" in this country, thus beyond the reach of the ACS (LACA Inquiry, ACAG Submission, p. 7). Customs also has no enforcement role in relation to domestic piracy of CDs, an increasingly affordable option using locally available CD burners and recordable CDs (ABC 2000). The same holds for the rapidly expanding practice of direct downloading of music in digital form ("MP3") from the Internet (Frosch 2000).

This latter development challenges the traditional legal basis of copyright law, as "arguments for a geographical segregation of copyright markets disappear in the face of technology that substantially reduces the significance of geography" (Davison 1997, p. 272). At the same time, technological change makes the task of enforcement considerably more difficult, as the AFP candidly admits (LACA Inquiry, AFP Submission, p. 3):

The long-term view of copyright is that with emerging technologies, it is almost impossible to police. The Internet provides infinite opportunities to copy material with limited prospects of ever being detected. Modern technology increases the opportunities to make minor alterations to originals which almost always results in a failure to convince tribunals of a breach of criminal or civil law.

While legal disputes around increasingly popular "file-sharing" web sites like Napster, MP3.com and Gnutella are yet to be finally resolved (WJIN 2000), recent opinion suggests that protection of intellectual property in the digital age must rely more on technological solutions than on traditional law enforcement (Smith 1997, p. 5; Grabosky, Smith & Dempsey forthcoming). It is noteworthy in this regard that most of the new offence provisions of the Commonwealth's *Copyright Amendment (Digital Agenda) Act 2000* relate to the manufacture and use of circumvention tech-

nologies (new ss. 132[5A]–[5J]—passed 17 August 2000, to commence on 4 March 2001 unless proclaimed earlier).

Note

Research for this paper includes interviews with ACS, AFP and DPP officials conducted during December 1999 and January 2000 as part of a consultant's report to the Intellectual Property and Competition Review Committee.

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