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As an intellectual property academic, I would like to make a personal submission in relation to the *Intellectual Property Laws Amendment Bill 2008* (South Africa).

I am a senior lecturer and the director of Higher Degree Research at the Australian National University College of Law based in Canberra, Australia. This institution has a particular interest in law reform, because it is based in the capital city of Australia, which is home to the Parliament of Australia, the Prime Minister and Cabinet, the High Court of Australia, the Governor-General, and the public service.

I have a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University, and a PhD in law from the University of New South Wales. I am an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I am a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance. I am the author of two books, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, and *Intellectual Property and Biotechnology: Biological Inventions*, and the editor of the collection, *Patent Law and Biological Inventions*. I have also published three book chapters and thirty-eighty refereed articles.

Over the last decade, I have written a number of pieces on the protection of traditional knowledge. In particular, I have looked questions of copyright law, moral rights, performers' rights, a right of resale, trade mark law, passing off and consumer protection law, access to genetic resources, patent law, and plant breeders' rights. I have attached a range of my publications in this field to assist your policy process:

- Rimmer, M. "The Genographic Project: Traditional Knowledge and Population Genetics", *Australian Indigenous Law Review*, 2007, Vol. 11 (2), p. 33-55.
- Rimmer, M. "A Right of Resale? Indigenous Art Under the Hammer", ABC News Opinion, 27 July 2007, <http://abc.net.au/news/stories/2007/07/27/1989699.htm>
- Rimmer, M. "Australian Icons: Authenticity Marks And Identity Politics", *Indigenous Law Journal (University of Toronto)*, Fall 2004, Vol. 3, p. 139-179.
- Rimmer, M. "Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge", *The Southern Cross University Law Review*, December 2003, Vol. 7, p. 1-49.
- Rimmer, M. "Albert Namatjira: Copyright Estates and Traditional Knowledge", *Incite*, June 2003, Vol. 24 (6), p. 6
- Rimmer, M. "Bangarra Dance Theatre: Copyright Law And Indigenous Culture", *Griffith Law Review*, 2000, Vol. 9, No. 2, p. 274-302.
- Rimmer, M. "Four Stories About Copyright Law And Appropriation Art", *Media And Arts Law Review*, December 1998, Vol. 3, No. 4, p 180-193.

I note, with interest, that the policy document, *The Protection of Indigenous Knowledge through the Intellectual Property System*, has paid particular heed to the experience of Australasia in dealing with traditional knowledge: "Lessons can be learned from New Zealand and Australia, which are both good examples of countries whose courts use the common law to protect traditional knowledge."

I would comment that the Australian experience has been a mixed one. It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the "Carpets" case, and the "Bulun Bulun" decision. However, there have been limits to the extent of judicial innovation in Australia – as illustrated by the refusal of the High Court of Australia to recognise the linkage between native title rights and traditional knowledge in the case of *Ward v Western Australia*. The case law has demonstrated that there is a need for a more fundamental legislative reform of laws with respect to traditional knowledge in Australia.

Unfortunately, the Australian Parliament has thus far failed to heed the recommendations of Terri Janke's landmark report, *Our Culture, Our Future*. The old Howard Conservative Government showed little interest in the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented. Thus far, there have only been piecemeal reforms. The authenticity trade marks scheme, which was set up in 2000, has collapsed. The Federal access to genetic resources scheme does make reference to native title rights; but only provides limited remedies for non-compliance with the regime. The Queensland access to genetic resources regime fails to adequately address the issue of the protection of traditional knowledge.

The new Rudd Labor Federal Government has yet to establish its priorities in respect of the protection of traditional knowledge. It has expressed an interest in establishing a right of resale – which would have the potential to benefit Indigenous artists and communities.

Australian Aboriginal and Torres Strait Islander communities have been promoting the need for greater legislative protection of Indigenous Intellectual Property. I would note that Professor Mick Dodson of the National Centre for Indigenous Studies at the Australian National University has been instrumental in lobbying for the greater protection of traditional knowledge both in Australia and at an international level. He was influential in pushing for the protection of Indigenous intellectual property as part of the *Declaration on the Rights of Indigenous Peoples 2007*.

In light of this experience, I would like to commend the Government of South Africa on its initiative in developing a substantive piece of legislation on the protection of traditional knowledge. It is a shame that the Australian Government has not yet shown the same sense of purpose in developing a comprehensive regime for the protection of traditional knowledge.

I have a number of specific comments on the *Intellectual Property Laws Amendment Bill 2008* (South Africa):

1. International Law

I would recommend that the South African legislation make explicit reference in a preamble to the *Declaration on the Rights of Indigenous Peoples*. In particular, there is a need to make specific reference to Article 31 (1) which provides: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Furthermore, Article 31 (2) provides: “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

2. Copyright

The South African Government has taken a sensible approach in creating a new category of subject matter – “traditional work”. I would recommend a more inclusive definition of “traditional work” to include the subject matter of cinematographic films; sound recordings; broadcasts; programme-carrying signals; published editions; and computer programs. The experience of Australia is a salutary one. Indigenous creators and communities have not just been involved in the creation of “literary work”, “artistic work”, “musical work” and “dramatic work”. There has been a significant amount of involvement of Indigenous creators and communities in various forms of mass media – particularly “cinematographic films”, “sound recordings”, and “broadcasts”.

The *Copyright Act 1978* (South Africa) has a number of subject-matter specific exceptions – from section 12 to the new proposed section 19C. A more general comment would be that the South African Government should think about adopting

an open-ended, flexible defence of fair use – like the United States. There should ideally be the same range of exceptions and defences available, notwithstanding the cultural subject matter and technological form involved.

### 3. Moral Rights

It would be advisable that there is an amendment made to section 20 of the *Copyright Act 1978* (South Africa) to make it clear that moral rights can be exercised in respect of “traditional work”. Again, the experience of Australia has been that Indigenous creators and communities have been keen to rely upon both economic and moral rights in protecting Indigenous intellectual property. Questions of attribution, false attribution, and integrity can be very important to Indigenous communities.

### 4. Performers’ Rights

The *Performers’ Protection Act 1967* (South Africa) provides quite limited rights to South African performers. Arguably, there is a need for South African performers – particularly those from Indigenous communities – to enjoy full economic and moral rights, like authors under the copyright system.

### 5. Right of Resale

I would recommend that the South African Government consider the establishment of a right of resale in respect of artistic works. The Australian Government and the New Zealand Government have been drafting legislative bills to establish a right of resale in their respective jurisdictions: *Resale Right for Visual Artists Bill 2008* (Cth) and *Copyright (Artists’ Resale Right) Amendment Bill 2008* (NZ).

### 6. Trade Mark Law and Geographical Indications

The *Intellectual Property Laws Amendment Bill 2008* (South Africa) provides for the registration of traditional terms and expressions as certification and collective trade marks and geographical indications by Indigenous Communities. It also gives that the registrar to refuse applications in respect of traditional terms and expressions by non-Indigenous applicants.

It is perhaps thinking about the New Zealand model as a counterpoint. Drawing upon such recommendations, the *Trademark Act 2002* (NZ) requires the Commissioner to establish an Advisory Committee to provide advice on the registration of trademarks which contain Māori signs, such as text or imagery. Section 17(1)(b) provides that an absolute ground for refusing registration of a trademark is that it would be likely to offend a significant section of the community, including Māori.

Arguably, the South African legislation needs to specifically provide the registrar with wider powers to deal with offensive and scandalous trade marks. Section 10 (12) of the *Trade Marks Act 1993* (South Africa) could be amended to specify “likely to give offence to any class of persons (including Indigenous communities)”. That could be particularly important, given the provisions in the South African Constitution dealing with hate speech.

There is great potential for geographical indications to provide protection for Indigenous communities. The concept of geographical indications recognises collective ownership; acknowledges a connection between place and product; and allows for potentially perpetual protection.

However, it should be recognised that there has sometimes been conflict over the boundaries of geographical indications. Thus, in France, there are intense battles over the inclusion and exclusion over particular villages in Champagne. In Australia, there has been long-running disputes over the boundaries of the wine region, Coonawarra.

In light of this experience, it would be worthwhile for the National Council for Traditional Intellectual Property to also play a dispute settlement function, and resolve potential disputes between Indigenous communities in respect of geographical indications.

#### 7. Designs Law

The proposed amendments to designs law under the *Intellectual Property Laws Amendment Bill 2008* (South Africa) seem sensible. Creating a category for a “traditional design” would appear to be a good approach to dealing with this issue.

#### 8. Patent Law

The *Patents Amendment Act 2005* (South Africa) is a good start at reforming South Africa’s patent laws. However, there is a need to consider questions about informed consent and benefit-sharing, not only in the context of agriculture and biodiversity, but in respect of biomedical research. The controversies over the Human Genome Diversity Project, the genetic research on the Havasupai tribe, the DeCode Project in Iceland, and the Genographic Project relate to concerns about informed consent and benefit sharing in respect of population genetic research. The *UNESCO Declaration on Bioethics and Human Rights 2005* provides a blueprint for legislative reform in respect of informed consent, and benefit-sharing in respect of biomedical research.

#### 9. Plant Breeders’ Rights

Curiously, the *Plant Breeders Rights Act 1976* (South Africa) is not amended in the *Intellectual Property Laws Amendment Bill 2008* (South Africa) – despite some reference to plant breeders’ rights in the policy document. There are a number of measures that could be taken to make the *Plant Breeders Rights Act 1976* (South Africa) compatible with the protection of traditional knowledge. There could be scope for the recognition of communal ownership of plant breeders’ rights. There could be provision for a requirement of informed consent and benefit-sharing, much like the *Patents Amendment Act 2005* (South Africa). Moreover, it would be sensible if the proposed National Council for Traditional Intellectual Property included plant breeders’ rights within its remit.

#### 10. Biodiversity

A mega-diverse nation, the South African Government has established the *Biodiversity Act 2004* (South Africa). Chapter 6 of the legislation lays down a regime

in respect of access to genetic resources and benefit-sharing for bioprospecting. There is a particular emphasis on the protection of Indigenous genetic resources.

It is questionable whether a Minister should have the unfettered power under section 86 to declare that the legislation does not apply to particular Indigenous biological resources.

The *Biodiversity Act 2004* (South Africa) could have a wider range of penalties in respect of breaches of the access to genetic resources regime. In Australia, the State of Queensland has included remedies in its legislation to allow a full recovery of benefits from bioprospecting entities who do not comply with the regime.

Arguably, the National Council for Traditional Intellectual Property should also have the topic of access to genetic resources within its remit.

#### 11. Trade Secrets and Confidential Information

The policy paper briefly mentioned the benefits and shortcomings of trade secret protection.

In the experience of Australia, trade secrets and confidential information has been invaluable in protecting a wide range of Indigenous intellectual property.

Careful thought will need to be given to the interaction between a national database for the recordal of traditional intellectual property, and the protection of confidential information held by Indigenous communities.

#### 12. National Council, Database, and Trust Fund

The *Intellectual Property Laws Amendment Bill 2008* (South Africa) makes provision for the establishment of a National Council in respect of traditional intellectual property; the creation a national database for the recordal of traditional intellectual property; and the establishment of a national trust and a trust fund in respect of intellectual property. The establishment of such infrastructure is important.

Arguably, though, the powers of the National Council need to be expanded, so that in addition to a policy function, it can perform an enforcement function. There needs to be a well-resourced, legally literate body able to defend the various intellectual property rights of Indigenous communities. The model of a copyright collecting society could be worth thinking about in this regard.

Yours sincerely,  
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