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A Submission to the Australian Law Reform Commission on Copyright and the Digital Economy: International Law

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A SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

**COPYRIGHT AND THE DIGITAL ECONOMY:
INTERNATIONAL LAW**



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BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I

am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012), with Alison McLennan.

I am a researcher and commentator on the topic of intellectual property, public health, and tobacco control. I have undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics.

EXECUTIVE SUMMARY

This submission draws upon a number of pieces of research and policy work on copyright law and international trade – including:

1. Matthew Rimmer, 'Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement' (2006) 11 (3) *First Monday* URL: http://www.firstmonday.org/issues/issue11_3/rimmer/index.html, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855805
2. Matthew Rimmer, 'Submission to the Joint Standing Committee on Treaties on the Australia-Chile Free Trade Agreement: Intellectual Property and Development', June 2008, http://works.bepress.com/matthew_rimmer/57/
3. Matthew Rimmer, 'Trick or Treaty? The Australian Debate over the Anti-Counterfeiting Treaty' (2012) *International Centre for Trade and Sustainable Development*, forthcoming.
4. Matthew Rimmer, 'Opening Pandora's Box: Secret Treaty Threatens Human Rights', *The Conversation*, 4 April 2012, <https://theconversation.edu.au/opening-pandoras-box-secret-treaty-threatens-human-rights-6092>
5. Matthew Rimmer, 'A Mercurial Treaty: The Trans-Pacific Partnership and the United States', *The Conversation*, 15 June 2012, <https://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471>
6. Matthew Rimmer, 'A Dangerous Investment: Australia, New Zealand, and the Trans-Pacific Partnership', *The Conversation*, 2 July 2012, <http://theconversation.edu.au/a-dangerous-investment-australia-new-zealand-and-the-trans-pacific-partnership-7440>

RECOMMENDATIONS

The Australian Law Reform Commission poses a question in respect of international law in the issues paper on *Copyright and the Digital Economy*.

Question 1. The ALRC is interested in evidence of how Australia’s copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- a. affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- b. affects the introduction of new or innovative business models;
- c. imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- d. places Australia at a competitive disadvantage internationally.

In response, I would make a number of observations about Australia and its position under international copyright law – with regard to copyright exceptions.

Recommendation 1

The Australian Law Reform Commission – and the Australian Government – should make use of flexibilities under the *Berne Convention for the Protection of Literary and Artistic Works* in crafting copyright defences, exceptions, and limitations.

Recommendation 2

The Australian Law Reform Commission – and the Australian Government - should not interpret Article 13 of the *TRIPS Agreement* 1994 in a restricted fashion.

In her piece, ‘International Copyright Law: (W[h]ither) User Rights?’, Myra Tawfik observes:

Article 13 of *WTO/TRIPS* has been interpreted as the overarching normative standard from which to evaluate all limitations and exceptions that curtail rights conferred under the *Berne*

Convention and *WTO/TRIPS*. Its scope has been the subject of much discussion and commentary, including having been at issue in a recent WTO Dispute Panel decision. Although the test is emerging as the pre-eminent measure for assessing limitations and exceptions and has found its way from *Berne* to *WTO/TRIPS* as well as to the *WIPO Treaties*, its interpretation is still evolving. While there remains uncertainty about the contours of this test, at least one aspect seems clear: the three-step test does not undermine the discretion enjoyed by national legislatures to enact limitations and exceptions so long as they remain consistent with the *Berne Convention* and conform to the objectives the test was formulated to achieve. More specifically, the test does not prevent countries from introducing “free use” limitations and exceptions, nor does it require further restrictions on existing permitted use formulations.¹

In this context, the Australian Law Reform Commission and the Australian Government have the freedom to fashion general exceptions – like the defence of fair use – as well as particular exceptions and limitations.

Recommendation 3

The Australian Government should take action to mitigate the impact of the *Australia-United States Free Trade Agreement 2004*. In particular, there is a need to address the recommendations of Labor Senators in respect of the need to enhance and expand Australia’s copyright exceptions in response to this agreement.

Recommendation 4

The Australian Government should support the *WIPO Development Agenda 2007* – particularly in respect of copyright flexibilities designed to promote education, technology transfer, and access to knowledge.

¹ Myra Tawfik, ‘International Copyright Law: (W[h]ither User Rights?) in Michael Geist (ed.), Michael Geist, (editor). *In The Public Interest: The Future of Canadian Copyright Law*. Toronto: Irwin Law, 2005, 77. See also Myra Tawfik, ‘International Copyright Law and Fair Dealing as a ‘User Right’’, *UNESCO e-Copyright Bulletin*, http://portal.unesco.org/culture/en/files/27422/11514150881Myra_e.pdf/Myra_e.pdf

Recommendation 5

The Australian Government should support the adoption of a *Treaty on Access to Knowledge* (A2K):

http://www.cptech.org/a2k/a2k_treaty_may9.pdf Such a Treaty should protect and enhance access to knowledge, and facilitate technology transfer. Such a Treaty would address copyright exceptions, distance education, library and educational exceptions, disability rights, parallel importation, orphan works, and statutory licensing.

Recommendation 6

The Australian Government should not ratify the *Anti-Counterfeiting Trade Agreement 2011* (ACTA) – given the failure of the treaty to protect fundamental human rights, civil liberties, and consumer rights.

Recommendation 7

The Australian Government should not support the *Trans-Pacific Partnership Agreement* – particularly in respect of current proposals on the Intellectual Property Chapter, copyright exceptions, and the Investment chapter. It is disturbing that the Department of Foreign Affairs and Trade has been promoting a copyright maximalist agenda in the negotiations, and has been seeking to confine copyright exceptions in the *Trans-Pacific Partnership* – according to leaked documents. The Australian Government should maintain its position that it will not adopt trade agreements, with state-investor dispute resolution mechanisms.

Recommendation 8

The Australian Government should adopt and support the *Washington Declaration on Intellectual Property and the Public Interest 2011* - <http://infojustice.org/washington-declaration>