

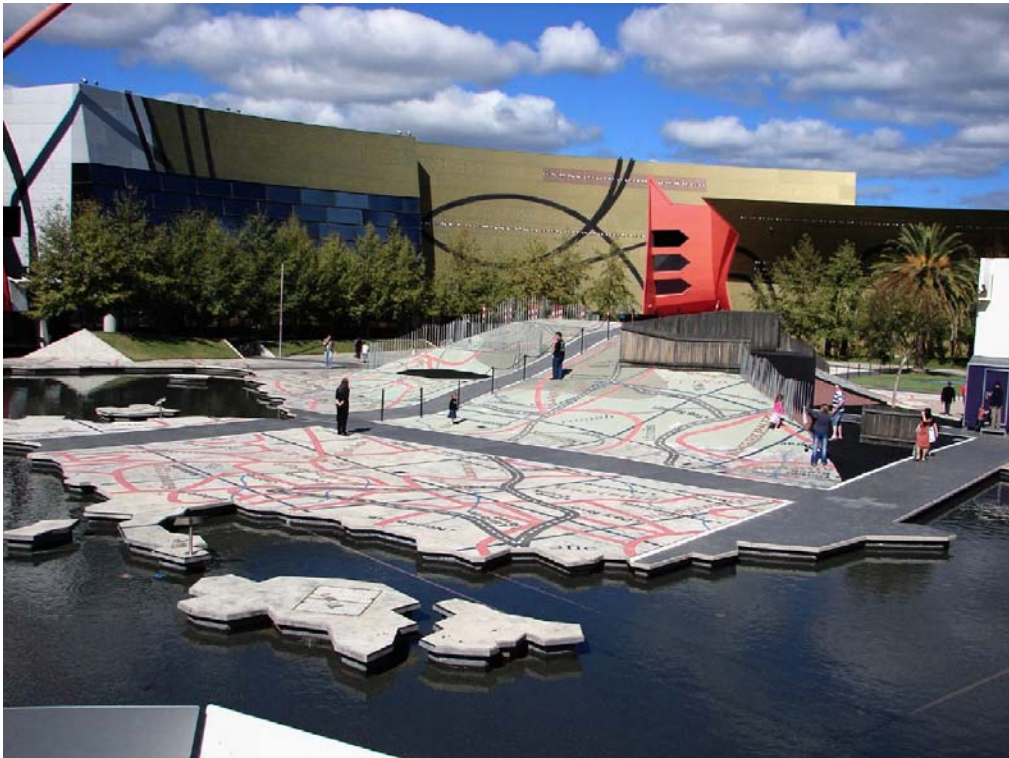
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A Submission to the Australian Law Reform Commission on Copyright and the Digital Economy: Moral Rights

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AUSTRALIAN LAW REFORM COMMISSION

COPYRIGHT AND THE DIGITAL ECONOMY: MORAL RIGHTS



The Garden of Australian Dreams, the National Museum of Australia, Wikimedia

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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 on copyright law and moral rights in Australia – including a number of refereed articles and book chapters:

1. Matthew Rimmer, 'The Garden of Australian Dreams: The Moral Rights of Landscape Artists' in Fiona MacMillan, and Kathy Bowrey (ed.) *New Directions in Copyright Law: Volume 3*. Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2006, p. 132-168, URL: http://www.elgar.co.uk/Bookentry_Main.lasso?id=3756, and SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=746405
2. Matthew Rimmer, 'The Grey Album: Copyright Law and Digital Sampling' (2005) 114 *Media International Australia* 40-53, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=648323
3. Matthew Rimmer, 'Crystal Palaces: Copyright Law And Public Architecture' (2002) 14 (2) *Bond Law Review* 320-346, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600865
4. Matthew Rimmer, 'Daubism: Copyright Law And Artistic Works' (2002) 9 (4) *Murdoch University Electronic Journal of Law*, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600864
5. Matthew Rimmer, 'Heretic: Copyright Law And Dramatic Works' (2002) 2 (1) *Queensland University of Technology Law And Justice Journal* 131-149, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600862
6. Matthew Rimmer, 'Shine: Copyright Law And Film' (2001) 12 (3) *Australian Intellectual Property Journal* 129-142, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600841

7. Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law And Indigenous Culture' (2000) 9 (2) *Griffith Law Review* 274-302, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600824

8. Matthew Rimmer, 'The Demidenko Affair: Copyright Law, Plagiarism And Ridicule' (2000) 5 (3) *Media And Arts Law Review* 159-176, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600822

9. Matthew Rimmer, 'Four Stories About Copyright Law And Appropriation Art' (1998) 3 (4) *Media And Arts Law Review* 180-193, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594642

I have also presented a number of conference papers on the topic:

10. Matthew Rimmer, 'Moral Rights and Monty Python's Flying Circus: Terry Gilliam's Quixotic Quest to Secure the Final Cut', Copyright 2010: A Decade of Moral Rights and the Digital Agenda, Conference, 21 June 2010. (conference paper)

11. Matthew Rimmer, 'Let In The Light: Copyright Law, Moral Rights And Cultural Institutions', ALIA, McDonald Room, Menzies Library, The Australian National University, 21 August 2002.

I have also written case notes and opinion-editorials and book reviews on the subject of moral rights:

12. Matthew Rimmer, 'Moral Rights And Their Application To Australia: A Book Review' (2004) 32 (2) *The Federal Law Review* 331-336.

13. Matthew Rimmer, 'Damned To Fame: The Moral Rights of the Beckett Estate' (2003) 24 (5) *Incite*, <http://www.alia.org.au/incite/2003/05/beckett.html>

RECOMMENDATIONS

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

Question 18. The *Copyright Act 1968* (Cth) provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

In response, I would emphasize a number of themes in respect of moral rights.

Recommendation 1

There is a need for the Australian Law Reform Commission to consider the history of moral rights in Australia and its contextual operation – in respect of copyright subject matter, such as literary works, artistic works, musical works, dramatic works, performances, cinematographic films, and architecture.

Recommendation 2

For over a dozen years, Australia’s moral rights regime has utilised a flexible, open-ended, multi-factorial defence of reasonableness.

This defence has been uncontroversial. It has produced no discernible ill-effects. The magistracy and the judiciary has not been gripped by uncertainty or indeterminacy. The digital economy has not ground to a halt. The defence has not been struck down by international trade agreements. The sky has not fallen in.

The flexible, open-ended, multi-factorial defence of reasonableness should be retained. The defence could be refined in small ways.

The defence of reasonableness under moral rights strengthens the case for a defence of fair use in respect of economic rights.

Recommendation 3

In light of the ruling of the Supreme Court of Canada in *Théberge v. Galerie d'Art du Petit Champlain inc.*, it is observed that there is a need for Australian courts to show consistency and harmonisation between how mash-ups are dealt with under economic rights and moral rights.

Recommendation 4

The test of reasonableness should take into account the age of a copyright work – and whether the author of a copyright work can be located.

Recommendation 5

The test of reasonableness in respect of moral rights should recognise parody, satire, and transformative uses such as remixes and mash-ups.

Recommendation 6

The test of reasonableness in respect of moral rights should take into account considerations of human rights – in particular freedom of speech and freedom of artistic expression.

Recommendation 7

It is suggested that, under the moral rights regime, cultural groups and professional associations could create an industry code of conduct, governing remixes and mash-ups, helping to delineate what uses are reasonable and what uses are unreasonable.

Recommendation 8

It is suggested that, under the moral rights regime, cultural groups and professional associations could create industry codes of conduct to help delineate what uses are reasonable and what uses are unreasonable.

Recommendation 9

The specific consent provisions under the moral rights regime should be retained. There is a need to strengthen the sanctions under the moral rights regime in respect of the illegitimate use of waivers. There is a need to ensure that moral rights are not subject to contracting out – beyond circumstances where there is specific, prior, and informed consent.

Recommendation 10

The moral rights regime – as well as the economic rights regime – would benefit from a clear statement of the factors to be taken into account in respect of joint authorship.

Recommendation 11

The moral rights regime should not engage in the special treatment of cinematographic films in respect of authorship, infringement, exceptions, and duration. There should be a simplification of the moral rights regime.

Recommendation 12

The moral rights regime should apply to both performers in respect of sound recordings and audio-visual works – especially in light of the *World Intellectual Property Organization Beijing Treaty on Audiovisual Performances 2012*.

Recommendation 13

The moral rights regime should be revised to ensure that architects should full moral rights – and not merely a limited right of consultation.

Recommendation 14

The Australian Law Reform Commission should review the specific exceptions under s 195AT of the *Copyright Act 1968* (Cth) in respect of architecture and moveable artistic works.

Recommendation 15

There is a specific moral rights exception under s 195AT (j) of the *Copyright Act 1968* (Cth) relating to cultural restoration and preservation work. There should be a discussion as to whether there should be a general cultural heritage defence or exception under the copyright regime for both moral rights and economic rights.

Recommendation 16

The Australian Law Reform Commission should consider moral rights and intermediary liability particularly under the exception of s 195AVB of the *Copyright Act 1968* (Cth). There is a lack of consistency with how intermediary liability is dealt with in respect of economic and moral rights.

Recommendation 17

Moral rights should not be subject to parallel importation restrictions – eg s 195AU of the *Copyright Act 1968* (Cth). Such restrictions should be repealed.

Recommendation 18

The moral rights regime – and the economic rights regime - should recognise Indigenous cultural works as a separate subject matter protected by copyright law.

Recommendation 19

The moral rights regime – and the economic rights regime - should recognise that Indigenous cultural works can be subject to collective ownership.

Recommendation 20

The moral rights regime – and the economic rights regime - should take into account Indigenous cultural norms and standards in the assessment of copyright exceptions.