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THE ANTI-COUNTERFEITING TRADE AGREEMENT 2011

DR MATTHEW RIMMER
AUSTRALIAN RESEARCH COUNCIL FUTURE FELLOW,
ASSOCIATE PROFESSOR
THE AUSTRALIAN NATIONAL UNIVERSITY
COLLEGE OF LAW

The Australian National University College of Law,
Canberra, ACT, 0200
Work Telephone Number: (02) 61254164
E-Mail Address: Matthew.Rimmer@anu.edu.au

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, and a director of the Australian Digital Alliance. 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 also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement 2004*, and the *Copyright Amendment Act 2006* (Cth).

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 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

As an independent scholar and expert in intellectual property, I am of the view that the Australian Parliament should reject the adoption of the *Anti-Counterfeiting Trade Agreement 2011*.¹

I would take issue with the Department of Foreign Affairs and Trade's rather partisan account of the negotiations, the consultations, and the outcomes associated with the *Anti-Counterfeiting Trade Agreement 2011*. In my view, the negotiations were secretive and biased; the local consultations were sometimes farcical because of the lack of information about the draft texts of the agreement; and the final text of the *Anti-Counterfeiting Trade Agreement 2011* is not in the best interests of Australia, particularly given that it is a net importer of copyright works and trade mark goods and services. I would also express grave reservations about the quality of the rather pitiful National Interest Analysis – and the lack of any regulatory impact statement – associated with the *Anti-Counterfeiting Trade Agreement 2011*.

It is worthwhile reiterating that there has been much criticism of the secretive and partisan nature of the negotiations surrounding the *Anti-Counterfeiting Trade Agreement 2011*. Sean Flynn summarizes these concerns:

The negotiation process for ACTA has been a case study in establishing the conditions for effective industry capture of a lawmaking process. Instead of using the relatively transparent and inclusive multilateral processes, ACTA was launched through a closed and secretive “‘club approach’ in which like-minded jurisdictions define enforcement ‘membership’ rules and then invite other countries to join, presumably via other trade agreements.” The most influential developing countries, including Brazil, India, China and Russia, were excluded. Likewise, a series of manoeuvres ensured that public knowledge about the specifics of the agreement and opportunities for input into the process were severely limited. Negotiations were held with mere hours notice to the public as to when and where they would be convened, often in countries half way around the world from where public interest groups are housed. Once there, all negotiation processes were closed to the public. Draft texts were not released before or after most negotiating rounds, and meetings with stakeholders took place only

¹ *Anti-Counterfeiting Trade Agreement 2011*, [2011] ATNIF 22, not yet in force.

behind closed doors and off the record. A public release of draft text, in April 2010, was followed by no public or on-the-record meetings with negotiators..²

Moreover, it is disturbing that the *Anti-Counterfeiting Trade Agreement 2011* has been driven by ideology and faith, rather than by any evidence-based policy making. Professor Duncan Matthews has raised significant questions about the quality of empirical evidence used to support the proposal of *Anti-Counterfeiting Trade Agreement 2011*: ‘There are concerns that statements about levels of counterfeiting and piracy are based either on customs seizures, with the actual quantities of infringing goods in free circulation in any particular market largely unknown, or on estimated losses derived from industry surveys.’³ It is particularly disturbing that, in spite of past criticism, the Department of Foreign Affairs and Trade has supported the *Anti-Counterfeiting Trade Agreement 2011*, without engaging the Productivity Commission or the Treasury to do a proper economic analysis of the proposed treaty.

I have a number of concerns about the substance of the *Anti-Counterfeiting Trade Agreement 2011*. First, I am concerned that the *Anti-Counterfeiting Trade Agreement 2011* fails to provide appropriate safeguards in respect of human rights, consumer protection, competition, and privacy laws. Second, I argue that there is a lack of balance to the copyright measures in the *Anti-Counterfeiting Trade Agreement 2011* – the definition of piracy is overboard; the suite of civil remedies, criminal offences, and border measures is excessive; and there is a lack of suitable protection for copyright exceptions, limitations, and remedies. Third, I discuss trade mark law, intermediary liability, and counterfeiting. I express my concerns, in this context, that the *Anti-Counterfeiting Trade Agreement 2011* could have an adverse impact upon consumer interests, competition policy, and innovation in the digital economy. Fourth, I note that the *Anti-Counterfeiting Trade Agreement 2011* provides no positive obligations to promote access to essential medicines. It is particularly lamentable that Australia and the United States of America have failed to implement the *Doha Declaration on the TRIPS Agreement and Public Health 2001* and the *WTO General*

² Sean Flynn, ‘ACTA’s Constitutional Problem: This Treaty is not a Treaty’, (2011) 26(3) *American University Journal of International Law* 903.

³ Duncan Matthews, *The Fight Against Piracy and Counterfeiting in the Bilateral Agreements of the European Union*, Brussels: European Parliament, 2008, 6-7.

Council Decision 2003. Fifth, I express concern that the *Anti-Counterfeiting Trade Agreement* 2011 undermines the role of existing international organisations, such as the United Nations, the World Intellectual Property Organization and the World Trade Organization, and subverts international initiatives such as the *WIPO Development Agenda* 2007.

In this context, I am concerned by the shift in the position of the Labor Party in its approach to international treaty-making in relation to intellectual property. The Australian Parliament adopted the *Australia-United States Free Trade Agreement* 2004, which included a large Chapter on intellectual property. The treaty was a ‘TRIPS-Plus’ agreement, because the obligations were much more extensive and prescriptive than those required under the multilateral framework established by the *TRIPS Agreement* 1994. During the debate over the *Australia-United States Free Trade Agreement* 2004, the Labor Party expressed the view that it would seek to mitigate the effects of the TRIPS-Plus Agreement, when at such time it gained power. Far from seeking to ameliorate the effects of the *Australia-United States Free Trade Agreement* 2004, the Labor Government would seek to lock Australia into a TRIPS-Double Plus Agreement – the *Anti-Counterfeiting Trade Agreement* 2011. There has not been a clear political explanation for this change in approach to international intellectual property.

For both reasons of process and substance, I conclude that the Australian Parliament and the Australian Government should reject the *Anti-Counterfeiting Trade Agreement* 2011. The Australian Government would do better to endorse the *Washington Declaration on Intellectual Property and the Public Interest* 2011,⁴ and implement its outstanding obligations in respect of access to knowledge, access to essential medicines, and the *WIPO Development Agenda* 2007. The case study of the *Anti-Counterfeiting Trade Agreement* 2011 highlights the need for further reforms to the process by which Australia engages in international treaty-making.

⁴ *Washington Declaration on Intellectual Property and the Public Interest* 2011, <http://infojustice.org/washington-declaration-html>

1. Safeguarding Fundamental Freedoms and Rights

The preamble to the *Anti-Counterfeiting Trade Agreement 2011* contains a number of rather anodyne statements about protecting fundamental freedoms and rights. However, the text of the *Anti-Counterfeiting Trade Agreement 2011* does not provide substantive protection for values such as human rights, privacy, consumer rights, and access to justice and rule of law.

European Digital Rights have noted that the *Anti-Counterfeiting Trade Agreement 2011* fails to safeguard fundamental freedoms and rights in a substantive way:

In any national or international legal document which touches on fundamental rights, such as the freedom of communication and the right to privacy, it is clearly crucial to build in robust safeguards. This is essential to ensure balance and proportionality. ACTA contains far-reaching demands on injunctions, access to personal information, criminalisation and policing of communications by private companies... The digital chapter (Articles 27.2, 27.3 and 27.4) refers to the need to preserve ‘fundamental principles such as freedom of expression, fair process, and privacy’. In the absence of any clarity about what ‘fundamental principles’ might mean (the drafters chose not to refer to ‘fundamental rights’), this appears to be entirely unenforceable and, as a result, meaningless.⁵

Parties to the *Anti-Counterfeiting Trade Agreement 2011* have no positive obligation to protect freedom of expression, consumer rights, fair process, and privacy.

The *Washington Declaration on Intellectual Property and the Public Interest 2011* has emphasized the need for intellectual property reforms to provide appropriate safeguards in respect of human rights, consumer protection, competition, and privacy laws:

Intellectual property systems are designed to serve human values and must be tailored to this end. Expansion of intellectual property rights and remedies may conflict with legal doctrines that express and safeguard these values, including human rights, consumer protection, competition and privacy laws. These laws provide a framework within which intellectual property rights must be drafted, interpreted and enforced. In particular, we should act to:

⁵ European Digital Rights, ‘ACTA and its “Safeguards”’, http://www.edri.org/files/EDRI_acta_series_5_20120120.pdf

- Promote and protect rights to freedom of expression, and to seek, receive and impart information, in the face of expansions in copyright and trademark scope and enforcement, including in the digital environment.
- Respect the rights to due process and a fair trial in the face of rapidly escalating intellectual property enforcement measures. We must insist on the provision of adequate evidentiary thresholds, fair hearings, impartial adjudicators, rights to submit evidence and confront accusers, proportionality in penalties, and strict scrutiny of public enforcement responsibilities delegated to private actors.
- Use human rights, including civil and political and social and economic rights, to scrutinize expansions of intellectual property rights that threaten access to essential knowledge goods and services.
- Use all available regulatory frameworks for controlling abuses of intellectual property rights, including mechanisms that protect consumers, control excessive pricing, prevent anti-competitive conduct, regulate licensing and contractual terms and open access to essential facilities.
- Protect traditional knowledge and cultural expressions against misappropriation through intellectual property rights.⁶

It is worthwhile noting that there have been particular concerns about the impact of intellectual property rights upon access to knowledge, the provision of health-care and access to essential medicines, and the protection of the environment, biodiversity, and climate.

1. The *Anti-Counterfeiting Trade Agreement 2011* fails to provide appropriate safeguards in respect of human rights, consumer protection, competition, privacy laws, and access to justice and rule of law.

⁶ *Washington Declaration on Intellectual Property and the Public Interest 2011*, <http://infojustice.org/washington-declaration-html>

2. Copyright Law

A. The Definition of Piracy

The *Anti-Counterfeiting Trade Agreement 2011* has a broad, unwieldy definition of piracy. The definition section defines ‘pirated copyright goods’ as meaning ‘any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked.’ Andrew Rens comments:

The use of the term ‘piracy’ in reference to copyright has historically taken place outside of legal discourse—in rhetorical efforts by interest groups seeking to change the law or public perception. The term, as applied to copyright, has not had a clear legal meaning. Earlier texts of ACTA used the term in reference to an unspecified and undefined kind of infringement. The appearance of such a vague, yet central rhetorical term in a draft international instrument signals that the text is written entirely from the perspective of the interest group that uses the term, if not by that group itself.⁷

It is inappropriate to graft the political rhetoric of ‘piracy’ into the text of an international intellectual property agreement such as the *Anti-Counterfeiting Trade Agreement 2011*.

In the ‘Panel’ case, McHugh, Gummow and Hayne JJ expressed deep reservations and concerns about the language of ‘piracy’ being invoked in copyright matters:

Professor Waddams, speaking of the use of terms such as ‘piracy’, ‘robbery’ and ‘theft’ to stigmatise the conduct of alleged infringers of intellectual property rights, describes ‘the choice of rhetoric’ as ‘significant, showing the persuasive power of proprietary concepts’. He also remarks: ‘Against the merits of enlarging the property rights of one person or class of

⁷ Andrew Rens, ‘Collateral Damage – The Impact of ACTA and the Enforcement Agenda on the World’s Poorest Peoples’ (2011) 26(3) *American University Journal of International Law* 784.

persons must always be set the loss of freedom of action that such enlargement inevitably causes to others.’⁸

William Patry has written about how copyright industries have used moral panics over ‘piracy’ as a means to lobby in a self-interested fashion for corporate welfare measures in legislation and international treaties.⁹

B. Enforcement Measures

The *Anti-Counterfeiting Trade Agreement* 2011 contains extensive obligations in respect of copyright law – dealing with civil remedies, criminal offences, border measures, enforcement of intellectual property rights in a digital environment, technological protection measures, and electronic rights management information. David Quinn provides a good summary of the chapters of the *Anti-Counterfeiting Trade Agreement* 2011, and the numerous, prescriptive obligations.¹⁰ The National Interest Analysis asserts, very controversially and without evidence, that such obligations ‘constitute best practice forms of IP enforcement.’ The provisions are hardly that.

The proposed enforcement measures were based upon a wish-list from copyright owners – such as the Recording Industry Association of America (RIAA). The United States commentator, Wendy Seltzer, noted: ‘RIAA’s proposal is a compendium of everything they dislike about rulings that have gone against them: the lack of a ‘making available’ right (*Atlantic v. Howell*); the requirement of knowledge before non-volitional actors such as ISPs can be held liable (*RTC v. Netcom*); the provisions of safe-harbor that let ISPs avoid liability (17 USC 512); the limitation of vicarious liability to situations where the proprietor has a right and ability to control; the possibility that non-infringing use could save a technology with infringing uses

⁸ *Network Ten Pty Ltd v TCN Channel Nine* [2004] HCA 14.

⁹ William Patry, *Moral Panics and the Copyright Wars*, Oxford: Oxford University Press, 2009.

¹⁰ David M. Quinn, ‘A Critical Look at the Anti-Counterfeiting Trade Agreement’ (2011) 17 *Richmond Journal of Law and Technology* 16, <http://jolt.richmond.edu/v17i4/article16.pdf>.

(Betamax); the status of hyperlinks (*Perfect 10 v. Amazon*).¹¹ Furthermore, she notes: ‘Add in codification of stronger versions of rulings they like such as Grokster, and you’ve got a prescription for utterly insane copyright law!’¹² While some of the more extreme proposals have been dropped during the negotiations, the remaining obligations are, by and large, measures promoted by copyright industries.

The Australian Government has failed to grapple with the problems associated with the over-enforcement of intellectual property rights by rights-holders. There has been much controversy in the United States and other jurisdictions about the problems caused by ‘patent trolls’ who hold technology developers to ransom – demanding license fees, and threatening litigation. In the 2006 case of *EBay Inc v. MercExchange LLC*, Justice Kennedy of the Supreme Court of the United States expressed his concerns about the rise of so-called ‘patent trolls’.¹³ He observed: ‘An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.’¹⁴ The judge observed: ‘For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licences to practice the patent.’¹⁵ Justice Kennedy suggested: ‘When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.’¹⁶

There have been similar problems with copyright trolls – such as in the infamous Righthaven litigation¹⁷ – and trademark trolls.

¹¹ Wendy Seltzer ‘The RIAA Has an ACTA Wish-List’, WendySeltzer.org, 1 July 2008, <http://wendy.seltzer.org/blog/archives/2008/07/01/the-riaa-has-an-acta-wish-list.html>

¹² Ibid.

¹³ *eBay v. MercExchange* 126 S.Ct. 1837 (2006).

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Electronic Frontier Foundation, ‘Righthaven Copyright Troll Lawsuit Dismissed as Sham’, 14 June 2011, <https://www EFF.org/press/archives/2011/06/14>

The *Washington Declaration on Intellectual Property and the Public Interest* 2011 notes that there are significant issues associated with the excessive enforcement of intellectual property rights:

The maximalist intellectual property agenda includes a push at all levels for stronger enforcement — in courts, on the street, at borders, and now on the Internet. Government and private IP enforcement are commandeering greater social resources in order to impose stricter penalties than ever before, with fewer safeguards and less procedural fairness. This trend in enforcement brings IP into ever-sharper conflict with other rights and public policy objectives, including protecting privacy and freedom of expression, providing due process, and promoting health and education. It creates new risks of wrongful searches and seizures. And it threatens the Internet’s original—and enormously valuable—decentralized architecture, as Internet service providers are increasingly being drafted to act as enforcement agents.¹⁸

The *Anti-Counterfeiting Trade Agreement* 2011 fails to meet the best-practice standards of the *Washington Declaration on Intellectual Property and the Public Interest* 2011. It does not ‘ensure that legal penalties, processes, and remedies are reasonable and proportional to the acts of infringement they target, and do not include restrictions on access to essential goods and services, including access to the Internet or to needed medicines and learning materials.’¹⁹ It fails to ‘promote proportional approaches to enforcement that avoid excessively punitive approaches to enforcement, such as disproportionate statutory damages; undue expansion of criminal and third party liability; and dramatic increases in authority to enjoin, seize and destroy goods without adequate procedural safeguards.’²⁰ It does not ‘ensure that countries retain the rights to implement flexibilities to enforcement measures and to make independent decisions about the prioritization of law enforcement resources to promote public interests.’²¹ It fails to ‘ensure that agreements and protocols between individuals, intermediaries, rights holders, technology providers, and governments

¹⁸ *Washington Declaration on Intellectual Property and the Public Interest* 2011, <http://infojustice.org/washington-declaration-html>

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

relating to enforcement on the Internet are transparent, fair and clear.’²² Moreover, it fails to ‘ensure that public authorities retain and exercise rigorous oversight of critical enforcement functions, including policing, criminal enforcement and ultimate legal judgments.’²³

The chapter on the enforcement of intellectual property rights in a digital environment remains controversial. Annemarie Bridy comments: ‘The omission of mandatory graduated response from the final text of ACTA should not, however, be taken as a definitive sign that the entertainment industries have failed in their concerted effort to globalize graduated response.’²⁴ She observes that ‘ACTA in its final form both accommodates existing graduated response mandates and requires parties to promote the development of voluntary graduated response regimes in countries where mandates do not exist.’²⁵

C. Copyright Defences, Limitations, and Exceptions

Susan Sell has observed: ‘Enforcement means not only enforcing IP holders’ rights, but it also means enforcing balance, exceptions and limitations, fair use, civil rights, privacy rights, and antitrust (or competition policy).’²⁶

The preamble to the *Anti-Counterfeiting Trade Agreement* 2011 stresses that the agreement will ‘address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users.’

²² Ibid.

²³ Ibid.

²⁴ Annemarie Bridy, ‘ACTA and the Specter of Graduated Response’, (2011) 26(3) *American University Journal of International Law* 559.

²⁵ Ibid.

²⁶ Susan Sell, ‘The Global IP Upward Ratchet, Anti-Counterfeiting, and Piracy Enforcement Efforts: The State of Play’ (Research Paper No 15, Program on Information Justice and Intellectual Property at Digital Commons @ American University Washington College of Law).

Unfortunately, though, neither the individual articles nor the chapters of the *Anti-Counterfeiting Trade Agreement* 2011 provide for recognition of copyright defences, exceptions, and limitations.

Despite modelling other aspects of United States copyright law in the *Australia-United States Free Trade Agreement* 2004, the Howard Government refused to recognise a general defence of fair use in respect of copyright infringement. The *Copyright Amendment Act* 2006 (Cth) instead recognised a narrow range of new exceptions: there was a new defence of fair dealing for parody or satire; there were limited exceptions in respect of ‘format-shifting’; and there were some special provisions for libraries, archives, and cultural institutions. However, the full sum of such new exceptions was notably less than the breadth of immunity afforded by the United States defence of fair use.

Section 107 of the *Copyright Act* 1976 (US) provides for a broad and flexible defence of fair use in respect of actions for copyright infringement: ‘Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.’

The Supreme Court of the United States has interpreted the defence of fair use in such a way as to protect transformative uses of a work - such parody. The defence of fair use has been extended, in case law, to cover such various activities, as time-shifting,

space-shifting and format-shifting; the use of thumbnail images and caching by search engines; and the creation of inter-operable computer software.

The Gillard Government has promised a review of copyright exceptions by the Australian Law Reform Commission. The former Attorney-General, Robert McClelland, observed:

The inquiry will seek a review of whether the exceptions in the Copyright Act are adequate and appropriate in the digital environment. Currently the Copyright Act has general exceptions to the rules regarding infringement of copyright. These include: fair dealing, the 10 per cent rule and private copying when format-shifting, time-shifting or for special purposes. There are also specific exceptions such as allowing the making of a copy of a computer program resulting from the process of normal use of the program or for back-up purposes. However, in a fast changing, technologically driven world it is vital for us to see whether existing statute is appropriate and whether it can be improved

It is of concern that the *Anti-Counterfeiting Trade Agreement 2011* will enhance the rights and remedies of copyright owners – but will do nothing to address outstanding concerns about the limitations of copyright defences and exceptions.

Arguably, there should be several main reforms to ensure that there is balance within the copyright regime in Australia.²⁷

First, there is a need to establish a Fair Use Project in Australia, given the lack of any equivalent entity in the legal landscape. The relevant government departments – such as the Attorney General's Department, the Department of Broadband, Communications, and the Digital Economy, and the Department of Foreign Affairs and Trade – are focused on questions of legislation and policy; and have no capacity or interest in running test cases in respect of copyright exceptions. The Copyright Tribunal has had a rather narrow role of arbitration. The copyright collecting societies are obviously hostile to copyright exceptions, generally, and have opposed broad readings of copyright exceptions in both the context of policy disputes, and litigation. The Australian Copyright Council and the Arts Law Centre of Australia are very

much focused upon the defending the economic and moral rights of artistic creators and copyright owners. The community legal centres in Australia do not possess any particular track record or expertise in respect of copyright litigation, generally, and disputes about copyright exceptions, more particularly, the defence of fair dealing. The Australian Digital Alliance is focused upon the interests of libraries, educational institutions, and technology developers. The Creative Commons Australia is primarily focused on the development and up-take of Creative Commons licences, rather than larger questions of copyright litigation and law reform. The Electronic Frontiers Australia has a broader remit than merely copyright law, looking at larger issues of freedom of speech and censorship on the Internet. Well-established university centres, such as the Intellectual Property Research Institute of Australia, the Australian Centre for Intellectual Property in Agriculture, and the Cyberspace Centre for Law and Policy, have a broader remit than copyright law, and lack any accompanying legal clinic. Moreover, it would be accurate to say that the cause of copyright exceptions has not had the charismatic leadership in Australia – compared to say Professor Lawrence Lessig in the United States, or Professor Michael Geist in Canada.

In the absence of any Fair Use Project, the defence of fair dealing is currently championed by ill-suited defendants in Australia. Large media broadcasters – such as Network Ten Pty Ltd - have been the main ones to raise the defence of fair dealing in litigation.²⁸ Such entities are clearly poor champions of the defence of fair dealing, because they equally have an interest in protecting the large portfolio of copyright works. The Fair Use Project in the United States has played an important role in providing a strong voice for copyright exceptions – even though the outcomes of the cases that it has been involved in have been variegated.

²⁷ This submission is based upon my paper: Matthew Rimmer, 'A Fair Use Project for Australia: Copyright Law and Creative Freedom' (2010) 28 (3) *Copyright Reporter* 165-212.

²⁸ Infamously, Network Ten Pty Ltd refused argue the point for fair dealing before the High Court of Australia, despite the frustration of the judges on the bench. In *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 59 IPR 1, the High Court of Australia made it clear that it was up to Parliament to reform the current defence of fair dealing. Justice Kirby observed: 'To the extent that it is suggested that the fair dealing defence under the Act is unduly narrow, that submission should be addressed to the Parliament.' His Honour observed: 'The correction of any remaining defects is a matter for the Parliament. It is not for this Court.'

Second, there is a need for the Australian Government to introduce a defence of fair use, like its United States counterparts. William Patry has observed that copyright owners have run a ‘swiftboating’ campaign against the introduction of the defence of fair use in jurisdictions outside the United States:

There is a counter-reformation movement afoot in the world of copyright. The purpose of the movement is to chill the willingness of countries to enact fair use or liberal fair dealing provisions designed to genuinely further innovation and creativity, rather than, as is currently the case, merely to give lip service to those concepts as the scope of copyright is expanded to were-rabbit size. The counter-reformation movement is presently at the stage of a whispering campaign, in which ministries in countries are told that fair use (and by extension possible liberal fair dealing provisions) violate the ‘three-step’ test. And who wants to violate the three-step after all? The appeal by counter-reformation forces to external and abstract concepts like the three-step test is a time-worn tactic: when you can't win on the merits, shift the debate elsewhere to grounds on which you think you can win. Given that few ministry officials are experts in copyright law, much less arcana like the three-step test, these appeals - made by those who claim to be such experts - can be effective. They shouldn't be. National governments should make policy decisions based on the merits of the proposals, free from such scare tactics. The three-step test is not a bar to a single proposal of which I am aware.²⁹

There has certainly been evidence of such a campaign in Australia. There have been numerous calls for a defence of fair use from the Copyright Law Review Committee, parliamentary committees, and scholars – but such efforts have been somewhat nobbled and frustrated. At most, the Federal Government was willing to add a new defence for fair dealing in respect of parody and satire in 2006; some format-shifting exceptions; and a flexible dealing defence under s 200AB of the *Copyright Act 1968* (Cth).³⁰ Arguably, Australia should go further and introduce an open-ended, multi-

²⁹ William Patry, ‘Fair Use, The Three-Step Test, and the Counter-Reformation’, The Patry Copyright Blog, 2 April 2008, <http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html>

³⁰ Fair Dealing for Parody or Satire, SS 41A, 103AA of the *Copyright Act 1968* (Cth); Time-shifting television broadcasts – S 111 of the *Copyright Act 1968* (Cth); Space-shifting sound recordings - S 109A of the *Copyright Act 1968* (Cth); Format-shifting cinematographic films – S 111AA of the *Copyright Act 1968* (Cth); Format-shifting books, newspapers and periodical publications – S 43C of the *Copyright Act 1968* (Cth); Format-shifting photographs – S 47J of the *Copyright Act 1968* (Cth);

factorial defence of fair use. Indeed, it has had a remarkably similar defence of reasonableness for a decade under the moral rights regime – there has been nary a complaint or a controversy over it.

Third, there is a need to take a progressive approach to the interpretation of exceptions under international copyright law. There has been much debate within the World Trade Organization panels about the meaning of the three-step test.³¹ Some commentators have been willing to contemplate the possibility that the defence of fair use somehow violates the three-step test under the *Berne Convention for the Protection of Literary and Artistic Works* and the *TRIPS Agreement* 1994.³² In her piece, ‘International Copyright Law: (W[h]ither) User Rights?’, Myra Tawfik provides an important corrective to such procrustean interpretations of the three-step test:

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.

Cultural preservation – SS 51A and 110BA of the *Copyright Act* 1968 (Cth); and Flexible dealing provision – s 200AB of the *Copyright Act* 1968 (Cth).

³¹ United States—Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R (June 15, 2000); and Canada -- Patent Protection of Pharmaceutical Products, Report of the Panel, WTO Doc. WT/DS114/R (April 2, 2000).

³² See, for instance, David Brennan ‘The Three-Step Frenzy: Why the TRIPS Panel Decision Might be Considered Per Incuriam’ (2002) 2002 *Intellectual Property Quarterly* 212-225; and Samuel Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 5 April 2003, SCCR/9/7, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf at page 69: ‘It is quite possible that any specific judicial application of Section 107 will comply with the three-step test as a matter of fact; the real problem, however, is with a provision that is framed in such a general and open-ended way. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).’

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.³³

Far from being radical or controversial, the defence of fair use in the United States has a hallowed history dating back to Justice Joseph Story. Accordingly, it would be worthwhile for the Australian Government to promote a Treaty on Access to Knowledge, with scope for flexible copyright exceptions, such as the defence of fair use.³⁴ Members of the World Intellectual Property Organization and World Trade Organization – and parties to TRIPS-Plus trade agreements with the United States – deserve to enjoy the equivalent protection afforded by the United States defence of fair use, in a process of harmonization.

Fourth, it is striking that *Anti-Counterfeiting Trade Agreement 2011* does not contain civil and criminal penalties in respect of the abuses of copyright and other forms of intellectual property law.

A particular problem warranting sanction is the problem of ‘copyfraud’. In his work, *Copyfraud and other Abuses of Intellectual Property Law*, Jason Mazzone details the problem of ‘copyfraud’:

Copyfraud is therefore the term I use to refer to the act of falsely claiming a copyright in a public domain work. In the typology I use... to classify forms of overreaching, copyfraud entails a false claim to intellectual property where none exists. Copyfraud has serious consequences. In addition to enriching publishing who assert false copyright claims at the expense of legitimate users, copyfraud stifles valid forms of reproduction and creativity and

³³ 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

³⁴ Amy Kapczynski, ‘The Access to Knowledge Mobilization and the New Politics of Intellectual Property’ (2008) 117 *Yale Law Journal* 804.

undermines free speech. False copyright claims, which are often accompanied by the threat of litigation for reproduction of a work without the putative owner's permission, result in users seeking licences and paying fees to reproduce works that are free for everyone to use, or altering their creative projects to excise the un-copyrighted material. Copyfraud also fosters misunderstanding concerning the scope of intellectual property, which further emboldens publishers and other content providers to claim rights beyond those they actually possess.³⁵

Mazzone complains: 'Facing no threat of civil action under the Copyright Act for copyfraud, and little risk of criminal penalty, publishers and other content providers are free to put copyright notices on everything and to assert the strongest possible claims to ownership.'³⁶

Such measures are reinforced by the *Washington Declaration on Intellectual Property and the Public Interest* 2011, which emphasizes the need for treaties on international intellectual property to make proper provision for defences, exceptions, and limitations:

Limitations and exceptions are positive enabling doctrines that function to ensure that intellectual property law fulfills its ultimate purpose of promoting essential aspects of the public interest. By limiting the private right, limitations and exceptions enable the public to engage in a wide range of socially beneficial uses of information otherwise covered by intellectual property rights — which in turn contribute directly to new innovation and economic development. Limitations and exceptions are woven into the fabric of intellectual property law not only as specific exceptional doctrines ('fair use' or 'fair dealing,' 'specific exemptions,' etc.), but also as structural restrictions on the scope of rights, such as provisions for compulsory licensing of patents for needed medicines.³⁷

2. The copyright regime proposed by the *Anti-Counterfeiting Trade Agreement* 2011 is distorted: it provides an over-broad definition of piracy; it allows for the excessive over-enforcement of rights; and it lacks any appropriate measures in respect of copyright defences, exceptions, and limitations.

³⁵ Jason Mazzone, *Copyfraud and other Abuses of Intellectual Property Law*, Stanford: Stanford University Press, 2011, 2-3.

³⁶ Ibid, 8.

³⁷ *Washington Declaration on Intellectual Property and the Public Interest* 2011, <http://infojustice.org/washington-declaration-html>

3. Trade Mark Law and Counterfeiting

Unfortunately, there has been only passing analysis of the trade mark dimensions of *Anti-Counterfeiting Trade Agreement 2011* thus far in both scholarly and policy circles.

I have recently written about trade mark law and counterfeiting in this refereed article for the *Journal of Information, Law, and Science*.³⁸ I viewed the debate over *Anti-Counterfeiting Trade Agreement 2011* in the context of ongoing litigation by trade mark owners – such as Tiffany’s, LVMH, and L’Oreal – against the online bazaar, eBay, in a variety of jurisdictions.

In the United States, the illustrious jewellery store, Tiffany & Co, brought a legal action against eBay Inc, alleging direct trademark infringement, contributory trademark infringement, false advertising, unfair competition and trademark dilution. The luxury store depicted the online auction-house as a pirate bazaar, a flea-market and a haven for counterfeiting. During epic litigation, eBay Inc successfully defended itself against these allegations in a United States District Court.³⁹ Sullivan J held:

The rapid development of the Internet and websites like eBay have created new ways for sellers and buyers to connect to each other and to expand their businesses beyond geographical limits. These new markets have also, however, given counterfeiters new opportunities to expand their reach. The Court is not unsympathetic to Tiffany and other rights owners who have invested enormous resources in developing their brands, only to see them illicitly and efficiently exploited by others on the Internet. Nevertheless, the law is clear: it is the trademark owner’s burden to police its mark, and companies like eBay cannot be held liable for trademark infringement based solely on their generalized knowledge that trademark infringement might be occurring on their websites.⁴⁰

³⁸ Matthew Rimmer, "'Breakfast at Tiffany's': eBay Inc., Trademark Law, and Counterfeiting', (2011) 21 (1) *Journal of Law, Information, and Science* <http://www.jlisjournal.org/abstracts/Rimmer.21.1.html>

³⁹ *Tiffany (NJ) Inc v eBay Inc*, 576 F Supp 2d 463 (SD NY, 2008).

⁴⁰ *Tiffany (NJ) Inc v eBay Inc*, 576 F Supp 2d 463, 527 (SD NY, 2008).

This decision was upheld by the United States Court of Appeals for the Second Circuit, in large part.⁴¹ Tiffany & Co made a desperate, unsuccessful effort to appeal the matter to the Supreme Court of the United States. The matter featured a number of interventions from amicus curiae — Tiffany was supported by Coty, the Fashion Designer's Guild, and the International Anticounterfeiting Coalition, while eBay was defended by publicly-spirited civil society groups such as Electronic Frontier Foundation, Public Citizen, and Public Knowledge as well as Yahoo!, Google Inc, Amazon.com, and associations representing telecommunications carriers and internet service providers.

The litigation in the United States can be counterpointed with the fusillade of legal action against eBay in the European Union. In contrast to Tiffany & Co, Louis Vuitton triumphed over eBay in the French courts — claiming its victory as vindication of the need to protect the commercial interests and cultural heritage of France. However, eBay has fared somewhat better in a dispute with L'Oréal in Great Britain and the European Court of Justice. It is argued that, in a time of flux and uncertainty, Australia should follow the position of the United States courts in *Tiffany & Co v eBay Inc*.

In response to such mixed litigation, there has been a push by intellectual property owners to provide for higher standards of intellectual property protection through international treaties, such as *Anti-Counterfeiting Trade Agreement* 2011. Memorably, Susan Sell called the international treaty 'a TRIPS Double-Plus Agreement'.⁴² The instigators of such negotiations included the United States, the European Commission, Japan, and Switzerland; and participants included Canada, Australia, Korea, Mexico, and New Zealand. One of the key proponents of *Anti-Counterfeiting Trade Agreement* 2011 was the International Trademark Association, which submitted to President Barack Obama:

⁴¹ *Tiffany (NJ) Inc v eBay Inc*, 600 F 3d 93 (2d Cir NY, 2010).

⁴² Susan Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting, and Piracy Enforcement Efforts: The State of Play' (Research Paper No 15, Program on Information Justice and Intellectual Property at Digital Commons @ American University Washington College of Law).

A strong economic future, including sustained job growth, will only be achieved when coupled with aggressive protection of intellectual property globally. Nor is this solely an economic or business issue. Counterfeit products, such as fake pharmaceuticals, electrical devices and critical technology components, pose serious threats to the health and safety of consumers and to national security. ACTA can have a significant impact in fighting counterfeiting, a problem that exists globally and affects all national economies, and INTA supports the efforts by the United States and its negotiating partners who are working on this important initiative.⁴³

There has been much concern about the closed, secretive, and selective nature of the negotiations over *Anti-Counterfeiting Trade Agreement 2011*. There have been fears that the agenda has been driven by lobbyists from intellectual property industries; and that e-commerce, consumer, and competition interests have had little say in the development of the text of the proposed agreement. There have also been concerns that the European Union has used the device of international trade negotiations to push for stronger intermediary trademark liability — eBay Canada expressed a number of reservations about the demands of European negotiators.⁴⁴

There has also been disquiet about the one-sided substantive content of *Anti-Counterfeiting Trade Agreement 2011*.⁴⁵ The agreement emphasises that ‘that the proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public’.⁴⁶

⁴³ International Trademark Association, *Submission to President Barack Obama on the Anti-Counterfeiting Trade Agreement* (23 March 2010) http://www.ustr.gov/webfm_send/1737.

⁴⁴ Michael Geist, ‘Submissions on Canada-EU Trade Deal: eBay Canada Warns Against Overbroad IP Provisions’ 19 January 2010, <http://www.michaelgeist.ca/content/view/4709/125/>.

⁴⁵ For an overview and commentary, see Michael Geist, ‘ACTA’s State of Play: Looking Beyond Transparency’ (2011) 26(3) *American University Journal of International Law* 543.

⁴⁶ *Anti-Counterfeiting Trade Agreement 2011*, [2011] ATNIF 22, not yet in force.

A. The Definition of Counterfeiting

Counterfeiting is broadly and inclusively defined under the proposed international agreement.⁴⁷ The definition provides that ‘counterfeit trademark goods’ means ‘any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked.’ Andrew Rens comments:

‘Counterfeit’ has borne a number of legal meanings, one of which describes the large-scale production and sale of goods that bear an intentionally deceptive resemblance to trademarked goods. Another meaning relates to the integrity of state-issued currency.⁵⁸ As the East African experience shows, the term is used through ACTA as part of the enforcement agenda’s goal of not only referring to goods subject to copyright, patents, and other IP rights, but also to characterize otherwise non-infringing conduct as an infringement and, in some cases, a criminal offense. The term ‘counterfeit trademark goods’ was defined for the first time in the October consolidated text of ACTA; however, the singular term ‘counterfeit’ has not been defined.

The use of ‘counterfeit’ in the title of ACTA raises doubt whether the term refers only to trademarked goods or to goods subject to patents and other forms of IP, especially because the agreement applies to a wide variety of forms of IP. ‘Counterfeit’ as used in the title and preamble has a vague but ominous meaning intended to homogenize a heterogeneous set of regulations and practices.⁴⁸

Indeed, the term ‘counterfeiting’ is something of a free-floating signifier in the *Anti-Counterfeiting Trade Agreement 2011* – which allows it to be constructed broadly by trademark owners.

⁴⁷ It is noticeable how far the concept of counterfeiting, as defined in the *Anti-Counterfeiting Trade Agreement 2010*, has drifted from its historical moorings. In his elegant book, *The Forger's Shadow*, Nick Groom investigates the history and the derivation of the word ‘counterfeiting’. See Nick Groom, *The Forger's Shadow: How Forgery Changed the Course of Literature* (Picador, 2003) 44.

⁴⁸ Andrew Rens, ‘Collateral Damage – The Impact of ACTA and the Enforcement Agenda on the World’s Poorest Peoples’ (2011) 26(3) *American University Journal of International Law* 798-9.

B. Enforcement Measures

As well as providing for institutional agreements, the proposed international treaty contains obligations on border measures, civil and criminal enforcement of intellectual property rights, technological protection measures, electronic rights management information and international co-operation. The final agreement has some 26 references to trademarks. Initial drafts of the international treaty had a whole section devoted to online infringement. The final draft has Article 27(4), which provides:

A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.⁴⁹

There have been concerns that the obligations could have an adverse impact upon consumers' privacy, free speech, innovation, competition and the digital economy. The Computer and Communications Industry, in particular, expressed concerns about *Anti-Counterfeiting Trade Agreement 2011* supporting a protectionist trade agenda in the area of e-commerce: 'From a trade perspective, the USTR should be concerned when French authorities penalize U.S. companies for the conduct of French citizens who find it economically attractive to import authentic goods from U.S. businesses.'⁵⁰ The NetCoalition was similarly disturbed by the impact of the *Anti-Counterfeiting Trade Agreement 2010* upon the precedents established by the *Tiffany v eBay*

⁴⁹ *Anti-Counterfeiting Trade Agreement 2011*, [2011] ATNIF 22, not yet in force.

⁵⁰ The Computer and Communications Industry, *Comments on the Anti-Counterfeiting Trade Agreement* (February 2010) 5

<http://infojustice.org/wp-content/uploads/2011/02/CCIA-Comments-to-USTR.pdf>.

litigation: ‘Foreign states increasingly apply their laws in a protectionist manner, obstructing U.S. Internet businesses’ access to markets’.⁵¹

C. Trade Mark Defences, Exceptions and Limitations

The *Anti-Counterfeiting Trade Agreement* 2011 fails to address defences, exceptions, and limitations under trade mark law.

There is a need to reconceptualise trade mark law⁵² so that there is a better recognition of the interests of consumers in collaborative consumption.⁵³ Indeed, I would argue that there is a need to develop an open, flexible defence of fair use in trade mark law — much like has evolved in United States copyright law. Reviewing the jurisprudence, William McGeeveran has argued that there is a need to simplify and refine the fair use doctrine in United States trade mark law, both in order to reduce uncertainty and allow for quick adjudication, and promote public interest values.⁵⁴ He maintained: ‘We should craft simpler affirmative defenses that immunize particular categories of expressive uses, thereby reducing uncertainty and allowing for quick adjudication.’ The jurisprudence for the defence of fair use under trade mark law,

⁵¹ NetCoalition and the Computer and Communications Industry, *Letter to United States Trade Representative Ron Kirk on his Confirmation* (2009) <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000346/NC-CCIA-May-09-Kirk-Letter.pdf>.

⁵² On trade mark law theory, see Graeme Dinwoodie and Mark Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research*, Edward Elgar, 2008; and Lionel Bently, Jennifer Davis and Jane Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique*, Cambridge University Press, 2008.

⁵³ There is some interesting work emerging on trade mark law and consumers, see Rosemary Coombe, *The Cultural Life of Intellectual Properties* (Duke University Press, 1998); Sonia Katyal, ‘Semiotic Disobedience’ (2006) 84(2) *Washington University Law Review* 489; Rebecca Tushnet and Bruce Keller, ‘Even More Parodic than the Real Thing: Parody Lawsuits Revisited’ (2004) 94 *Trademark Reporter* 979; and Laura Heyman, ‘The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer’ (2009) 43 *Georgia Law Review* 651.

⁵⁴ See also: William McGeeveran, ‘Four Free Speech Goals for Trademark Law’ (2008), 18 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1205; and William McGeeveran, ‘The Trademark Fair Use Reform Act’ (2010) 90 *Boston University Law Review* 2267.

arguably, needs to be adopted by other jurisdictions, such as Australia, which have no such general defence for claims of trade mark infringement, and instead rely upon thinly framed, particularised exceptions.⁵⁵

Arguably, this distinctive legislative and jurisprudential approach to trade mark exceptions should be followed in other jurisdictions. Trade mark exceptions, in particular, could better take into account concerns about consumer rights, competition, freedom of speech, and artistic expression. Such a proposal is neither radical nor edgy. There have been parallel developments in exceptions in patent law,⁵⁶ copyright law,⁵⁷ and Internet domain names.⁵⁸ It is time that the question of the reform of trade mark exceptions is given similarly close attention. Further research could explore the various dimensions of a whole-hearted revision of defences, exceptions and limitations under trade mark law.

Arguably, the *Anti-Counterfeiting Trade Agreement 2011* should be seen as an illegitimate means of seeking to reform United States domestic law — particularly with regard to trade mark law. The treaty proposal provides a poor model for the regulation of trade mark law, e-commerce and counterfeiting, and should be rejected.

3. The trade mark regime in the *Anti-Counterfeiting Trade Agreement 2011* is detrimental to consumer welfare, competition, and innovation in the digital economy.

⁵⁵ The defences in Australian trade mark law are incontrovertibly fragmented and narrow — see for instance s 122 of the *Trade Marks Act 1995* (Cth). With respect, putting the case for fair use in Australian trade mark law is neither radical nor presumptuous — it is similar to putting forward broad, open-ended exceptions in other areas of intellectual property, such as the defence of experimental use in patent law, and a defence of fair use in copyright law.

⁵⁶ Matthew Rimmer, 'A Fair Use Project for Australia: Copyright Law and Creative Freedom' (2010) 28(3) *Copyright Reporter* 165.

⁵⁷ Matthew Rimmer, 'The Freedom To Tinker: Patent Law and Experimental Use' (2005) 15(2) *Expert Opinion on Therapeutic Patents* 167.

⁵⁸ Jacqueline Lipton, *Internet Domain Names, Trademarks and Free Speech*, (Edward Elgar, 2010).

4. Patent Law and Access to Essential Medicines

A. The Ambiguous Status of Patent Law and Access to Essential Medicines

The preamble of the *Anti-Counterfeiting Trade Agreement 2011* stresses that it recognises ‘the principles set forth in the *Doha Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference’. However, the text of the *Anti-Counterfeiting Trade Agreement 2011* in fact provides for no such recognition or acknowledgment of the principles in the *Doha Declaration 2001*.

There has been concern that the *Anti-Counterfeiting Trade Agreement 2011* will have an adverse impact upon access to medicines, notwithstanding disclaimers.

Brook Baker has expressed concerns about the impact of *Anti-Counterfeiting Trade Agreement 2011* on access to essential medicines: ‘Extending third-party enforcement and imposing provisional measures and permanent injunctions could interfere with the goals of robust generic competition and access to medicine when applied against (1) innocent active pharmaceutical ingredient (‘API’) suppliers whose materials are used in the manufacturing of patent infringing medicines or in mislabeled products without their knowledge, (2) transporters who use international channels of commerce through countries where the ‘patent manufacturing fiction’ or ‘trademark confusion’ claims might apply, and (3) other actors in the global procurement, supply, and even registration of medicines.’⁵⁹

Similarly, Andrew Rens has noted:

ACTA threatens access to medicines through the indeterminacy of the terms ‘counterfeit’ and ‘enforcement.’ Similarly problematic are provisions that mandate injunctions against a broad class of actors, including third parties, and mandate interception of goods in transit by customs officials applying the IP law of the transit country. In the ‘final’ text, patents are excluded only

⁵⁹ Brook Baker, ‘ACTA - Risks of Third-Party Enforcement for Access to Medicines’, (2011) 26(3) *American University Journal of International Law* 579.

from Section 3 of Chapter 2, which concerns border measures. The exclusion operates through a footnote, raising the question: why it is not firmly placed in the text?⁶⁰

This is an important point. The Department of Foreign Affairs and Trade made repeated assurances that the *Anti-Counterfeiting Trade Agreement 2011* would not deal with patents. Yet, the final text of the *Anti-Counterfeiting Trade Agreement 2011* does not expressly fully exclude patent law – which could lead to future disagreement.

B. The Doha Declaration on the TRIPS Agreement and Public Health 2001 and the WTO General Council Decision 2003.

Sadly, neither the United States of America nor Australia have implemented international law on access to essential medicines – such as the *Doha Declaration on the TRIPS Agreement and Public Health 2001* and the *WTO General Council Decision 2003*.

It would be fair to say that, over the course of the last decade, the Australian Government has been unaccountably slow to respond to the urgent and pressing public policy issues in respect of patent law and access to essential medicines. It is hard to fathom the reasons for this procrastination. There has been bipartisan support for both the *Doha Declaration on the TRIPS Agreement and Public Health 2001*, and the *WTO General Council Decision 2003*, during the terms of office of the Howard Government and the Rudd Government. The public health epidemics in relation to HIV/AIDS, tuberculosis, malaria, and tropical diseases have caused great hardship particularly in developed countries and least developed countries. Moreover, there has been a spate of troublesome new infectious diseases, such as the SARS virus, avian influenza, and porcine influenza. Nonetheless, the Australian Government has been, inexplicably, tardy in reforming its patent regime to address the pressing public health concerns associated with access to essential medicines. In addition, it must be said that the domestic pharmaceutical industry – both the brand name companies and the generic industry – have not been as constructive or co-operative as it might be.

⁶⁰ Andrew Rens, 'Collateral Damage – The Impact of ACTA and the Enforcement Agenda on the World's Poorest Peoples' (2011) 26(3) *American University Journal of International Law* 784.

At a meeting in Qatar in November 2001, the members of the WTO adopted the *Doha Declaration on the TRIPS Agreement and Public Health 2001*.⁶¹ This acknowledged ‘the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.’ Article 4 emphasized ‘that the *TRIPS Agreement* does not and should not prevent Members from taking measures to protect public health.’ It highlighted a number of measures to promote access to essential medicines - most notably, compulsory licensing, in which a patent holder can be compelled to provide access to a patented invention in return for a royalty. The *Doha Declaration on the TRIPS Agreement and Public Health 2001* also emphasized the need for member nations to resolve outstanding issues over patent law and access to essential medicines. Article 6 provides: ‘We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the *TRIPS Agreement*’. It furthermore urged: ‘We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.’

In August 2002, the Trade Minister Mark Vaile endorsed the *Doha Declaration on the TRIPS Agreement and Public Health 2001*, saying:

As the WTO Director General Supachai Panitchpakdi has noted, this is an historic agreement. It is a further demonstration that the WTO is able to respond to the public-health problems faced by developing countries, and to make its contribution to broader domestic and global action to address this crucial social issue. I have consistently said, particularly since the Sydney WTO informal ministerial meeting in November last year, that all WTO member countries had a moral obligation to resolve this issue. The problems poorer countries face in dealing with ravaging diseases such as HIV/AIDS, malaria and tuberculosis are immense. After many months of work, all WTO members have agreed an outcome that will allow these countries better access to affordable medicines. This decision is one endorsed by all WTO members. Now we must move past old battle lines and all work to ensure the solution makes its contribution to dealing with the public health problems poorer countries face.⁶²

⁶¹ WTO Doc WT/MIN (01)/DEC/2 (2001).

⁶² Mark Vaile, ‘Vaile Welcomes Breakthrough on Essential Medicines’, Department of Foreign Affairs and Trade, 31 August 2002, http://www.trademinister.gov.au/releases/2003/mvt067_03.html

On 30 August 2003, the member governments of the WTO reached an agreement on implementing the paragraph of the *Doha Declaration on the TRIPS Agreement and Public Health* 2001 that calls for a solution to compulsory licensing for member states without manufacturing capabilities.⁶³ The decision has been known as the *WTO General Council Decision 2003*⁶⁴ Article 2 emphasized that a member country could export pharmaceutical products made under compulsory licences within the terms set out in the decision. Article 3 emphasized the need for ‘adequate remuneration’ with respect to such compulsory licences. Article 4 stressed that eligible importing members should take reasonable measures to address the risk of trade diversion, and prevent re-exportation of the products. Article 5 observed that members should ensure the availability of effective legal means to prevent the importation into, and sale in, their territories of products produced under the system set out in this Decision. Article 6 enables a pharmaceutical product produced under a compulsory licence in one country to be exported to the markets of developing countries who share the health problem in question. Article 7 stressed the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector in order to overcome the problem identified in paragraph 6 of the Declaration.

In the lead-up to the World Trade Organization Ministerial in Hong Kong in December 2005, the Member States endorsed the proposal to transform the *WTO General Council Decision 2003* – described as a ‘waiver’ - into a permanent amendment of the *TRIPS Agreement* 1994.⁶⁵ In an accompanying statement to the

⁶³ General Council, ‘Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health’, 1 September 2003, WT/L/540, http://www.wto.org/english/tratop_e/TRIPS_e/implem_para6_e.htm.

⁶⁴ This decision has also been variously called ‘the August 30 decision’ because of its timing; ‘the Geneva decision’ because of the locale where it is reached; ‘the Cancun decision’ due to its proximity to the trade talks in Cancun; and ‘the Motta text’ in honour of the TRIPS Council Chair, Ambassador Perez Motta of Mexico.

⁶⁵ WTO General Council (2005), *Amendment of the TRIPS Agreement*, WT/L/641, http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm (8 December).

decision, the WTO General Chairman, Pascal Lamy made a number of comments.⁶⁶ He promoted the amendment in these terms:

The agreement to amend the TRIPS provisions confirms once again that members are determined to ensure the WTO's trading system contributes to humanitarian and development goals as they prepare for the Hong Kong Ministerial Conference. This is of particular personal satisfaction to me, since I have been involved for years in working to ensure that the TRIPS Agreement is part of the solution to the question of ensuring the poor have access to medicines.⁶⁷

Two thirds of the members will need to ratify the change by December 2011. At present, there would appear to be little enthusiasm for codifying the WTO General Council Decision, given its failure to facilitate the export of pharmaceutical drugs.

A small number of developed countries and regional groups have established domestic regimes to implement the *WTO General Council Decision 2003*. In North America, Canada has established the *Jean Chrétien Pledge to Africa Act 2004* (Canada). The European Union has issued a directive regulating the export of generic pharmaceutical drugs. The Netherlands, Switzerland, and Norway have established national regimes. In Asia, India, China, and South Korea have all developed legislative regimes to allow for the export of pharmaceutical drugs to address public health concerns. However, a significant number of key developed countries have egregiously not implemented domestic regimes under the *WTO General Council Decision 2003*. Most notably, the United States, Japan, and Australia have shown little enthusiasm in establishing regimes to facilitate the export of pharmaceutical drugs to developing countries. The partial, uneven implementation of the *WTO General Council Decision 2003* by developed countries has raised questions about both its efficacy and its legitimacy.

⁶⁶ http://www.wto.org/english/news_e/news05_e/trips_319_e.htm

⁶⁷ WTO (2005), 'Members OK Amendment to Make Health Flexibility Permanent', Press/426, http://www.wto.org/english/news_e/pres05_e/pr426_e.htm, (6 December).

In July 2007, Rwanda became the first country to notify the World Trade Organization of its intention to import essential medicines under the *WTO General Council Decision 2003*. The Delegation of Rwanda informed the TRIPS Council thus:

Based on Rwanda's present evaluation of its public health needs, we expect to import during the next two years 260,000 packs of TriAvir, a fixed-dose combination product of Zidovudine, Lamivudine and Nevirapine (hereinafter referred to as the 'Product') manufactured in Canada by Apotex, Inc. However, because it is not possible to predict with certainty the extent of the country's public health needs, we reserve the right to modify the foregoing estimate as necessary or appropriate. Pursuant to Paragraph 7 of the Doha Declaration and implementation thereof by the TRIPS Council (Decision of the Council for TRIPS of 27 June 2002), we have decided that we will not enforce rights provided under Part II Section 5 of the TRIPS Agreement that may have been granted within Rwanda's territory with respect to the Product.

There have been no other successful instances of imports of essential medicines under the *WTO General Council Decision 2003*.

C. Failure of Australia to Implement Obligations With Respect to Access to Essential Medicines

In 2007, the Joint Standing Committee on Treaties in the Australian Parliament recognised: 'Providing better access to medicines to the world's poorest people is a worthy subject for an international treaty'.⁶⁸ The Committee agreed with 'the Department of Foreign Affairs and Trade that Acceptance of the protocol by Australia would demonstrate our support for the ability of developing countries and least developed countries to respond effectively to public health emergencies.' The Committee observed:

The Committee supports acceptance of the Protocol, followed by any necessary amendments to the *Patents Act 1990* (Cth) to allow for compulsory licensing to enable export of cheaper versions of patented medicines needed to address public health problems to least-developed and developing countries. The Committee encourages the consultations to be coordinated by

⁶⁸ Joint Standing Committee on Treaties. *Protocol Amending the TRIPS Agreement*, Canberra: Australian Parliament August 2007, <http://www.aph.gov.au/house/committee/jsct/9may2007/report/chapter9.pdf>

IP Australia later this year and urges the Government to actively support the provision of patented medicines to least developed and developing countries.

However, the Committee also noted that it shared my concerns ‘that the TRIPS Protocol requires intricate, time-consuming and burdensome procedures for the exportation of medicine, when what is needed is a simple, fast and automatic mechanism’.

Three years after the Joint Standing Committee on Treaties report, in April 2010, IP Australia released its consultation paper, *Implementing the TRIPS Protocol*.⁶⁹ It provided an indifferent model to address access to essential medicines. It is unclear whether the proposed regime in its current form will be able to satisfy the need for a simple, fast, and automated export mechanism. Moreover, it would seem unlikely that a compulsory licensing mechanism in isolation will be sufficient to provide for the timely export of essential medicines. What is needed is an integrated approach to the issue – which draws upon not only compulsory licensing mechanisms for domestic use and export; but also provides for a broad defence of experimental use and a liberal safe harbour for research and regulatory approval in respect of pharmaceutical drugs. There is also a need for the deployment of such flexible and creative mechanisms as patent pools, public sector licensing, medical prizes, and Health Impact Funds. There is a need to reform the remedies under patent law, in light of recent pronouncements of the Supreme Court of the United States on the need to carefully exercise discretion before granting injunctions. The Australian patent regime also needs stronger penalties to deter the practice of ‘evergreening’ in relation to pharmaceutical drugs, medicines, and other inventions related to the provision of health care.

As at January 2012, there has been no further action emanating from the consultation paper, *Implementing the TRIPS Protocol*.

4. The Anti-Counterfeiting Trade Agreement 2011 fails to fully and properly exclude patent law from its operation. The Anti-Counterfeiting Trade Agreement 2011 fails to place positive obligations on parties to promote access to medicines.

⁶⁹ IP Australia, *Implementing the TRIPS Protocol*, Canberra: IP Australia, 2010.

5. International Law and the Development Agenda

The preamble to the *Anti-counterfeiting Trade Agreement* 2011 maintains that ‘this Agreement operates in a manner mutually supportive of international enforcement work and cooperation conducted within relevant international organizations.’ In fact, the agreement serves to undermine the role of existing multilateral organisations, such as the World Intellectual Property Organization and the World Trade Organization, and duplicate and fragment international law on intellectual property enforcement.

The *Anti-counterfeiting Trade Agreement* 2011 subverts important initiatives, such as the Development Agenda.

As part of its Development Agenda,⁷⁰ the WIPO promised to explore ‘intellectual property-related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries’. In October 2007, the WIPO General Assembly adopted a series of 45 recommendations to enhance the organisation’s development activities.⁷¹ The *WIPO Development Agenda* 2007 recommendations are organised into six clusters. The first cluster of recommendations relate to technical assistance and capacity building. The second cluster of recommendations looks at norm-setting, flexibilities, public policy and public domain. The third cluster concerns technology transfer, information and communication technologies (ICT) and access to knowledge. The fourth cluster concerns assessment, evaluation and impact studies. The fifth cluster concerns institutional matters including mandate and governance. The final cluster focuses upon enforcement, emphasizing the need ‘to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns... in accordance with Article 7 of the *TRIPS Agreement*’.⁷²

⁷⁰ World Intellectual Property Organization, *Patent Agenda: Options for Development of the International Patent System*, WIPO Doc A/37/6 (19 August 2002), http://www.wipo.int/edocs/mdocs/govbody/en/a_37/a_37_6.doc

⁷¹ *World Intellectual Property Organization Development Agenda: 45 Recommendations*, <http://www.wipo.int/ip-development/en/agenda/recommendations.html#c> (‘*WIPO Development Agenda* 2007’)

⁷² Recommendation 45 of the *WIPO Development Agenda* 2007.

Andrew Rens comments on the need to consider the *Anti-Counterfeiting Trade Agreement 2011* in the context of the United Nations Millennium Development Goals

More than 1.4 billion people in the world live below the poverty line, defined by the World Bank as 1.25 U.S. dollars per day. People living at or below the poverty line are vulnerable to disease, starvation, and the natural elements and are deprived of medicines, knowledge, and power over the international laws and economic dispositions that affect their daily lives. However, what does this have to do with the Anti-Counterfeiting Trade Agreement — the subject of secretive negotiations by the United States, Europe, and a few close allies? ACTA is, after all, described by its advocates as a trade agreement. Little attention has been paid to its potential impact on the world's poorest people.⁷³

Rens comments that the *Anti-Counterfeiting Trade Agreement 2011* scorns the United Nations Millennium Development Goals:

The immediate effect of ACTA, even before considering the pressure exerted on developing countries, is the exclusion of most developing countries from international decision-making. Indeed, ACTA is a means of circumventing WIPO and WTO processes. India raised this concern in a letter to the WTO: 'Another systemic concern is that [IP rights] negotiations in [regional trade agreements] and plurilateral processes like ACTA *completely bypass the existing multilateral processes.*' Because WIPO is a United Nations organization, it is duty-bound to pursue development. One consequence of the abandonment of the commitment to multinational decision-making is an effective disregard of the United Nations Millennium Development Goals adopted by the United Nations General Assembly.⁷⁴

He comments: 'The impact of ACTA on developing countries will be far reaching, given its broad scope encompassing different types of IP and its inclusion of a range

⁷³ Andrew Rens, 'Collateral Damage – The Impact of ACTA and the Enforcement Agenda on the World's Poorest Peoples' (2011) 26(3) *American University Journal of International Law* 784.

⁷⁴ Ibid.

of measures—such as civil and criminal penalties, border and information gathering requirements, and mandatory government speech in favor of entrenched IP regimes.’⁷⁵

Considering the impact of the *Anti-Counterfeiting Trade Agreement 2011*, Rens envisages: ‘In the short term, developing countries will continue to experience the effects of enforcement through the interception of goods in transit, including generic medicines’. He anticipates: ‘In the medium term, developing countries will come under increasing trade pressure to adopt wide ranging ‘anti-counterfeiting’ measures, which threaten access to medicines and access to learning materials.’⁷⁶ Rens concludes: In the long term, developing countries will also be pressured to agree to ACTA and thereafter will be required to devote scarce resources to furthering the commercial interests of a small but exceptionally powerful group of multinational corporations, thereby further depriving their poorest citizens of access to medicines and learning materials.’⁷⁷

During consultations over the *Anti-Counterfeiting Trade Agreement 2011*, officials at the Department of Foreign Affairs and Trade paid short shrift to the *WIPO Development Agenda 2007*. When pressed, the officials engaged in buck-passing, and suggested that the *WIPO Development Agenda 2007* was the responsibility of IP Australia. The failure of the Department of Foreign Affairs and Trade to take a holistic approach to Australia’s international obligations regarding intellectual property is of great concern.

Perhaps, the time has come for there to be a new lead agency to co-ordinate Australian governmental responses to negotiations over intellectual property.

5. The *Anti-Counterfeiting Trade Agreement 2011* undermines the role of international institutions, such as the United Nations, the World Intellectual Property Organization, and the World Trade Organization

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

CONCLUSION

In conclusion, the Australian Parliament should reject the *Anti-Counterfeiting Trade Agreement* 2011 because it is a piece of corporate welfare designed to promote the interests of private, foreign intellectual property owners.

Instead, the Australian Parliament and Government would do better to endorse the *Washington Declaration on Intellectual Property and the Public Interest* 2011. The preamble of this Congress emphasizes:

Time is of the essence. The last 25 years have seen an unprecedented expansion of the concentrated legal authority exercised by intellectual property rights holders. This expansion has been driven by governments in the developed world and by international organizations that have adopted the maximization of intellectual property control as a fundamental policy tenet. Increasingly, this vision has been exported to the rest of the world. Over the same period, broad coalitions of civil society groups and developing country governments have emerged to promote more balanced approaches to intellectual property protection. These coalitions have supported new initiatives to promote innovation and creativity, taking advantage of the opportunities offered by new technologies. So far, however, neither the substantial risks of intellectual property maximalism, nor the benefits of more open approaches, are adequately understood by most policy makers or citizens. This must change if the notion of a public interest distinct from the dominant private interest is to be maintained.⁷⁸

To that end, Australia should ensure intellectual property reforms respect human rights; value openness and the public domain; strengthen intellectual property limitations and exceptions; support cultural creativity; check enforcement excesses; and implement the *Doha Declaration on the TRIPS Agreement and Public Health* 2001, the *WTO General Council Decision* 2003, and the *WIPO Development Agenda* 2007. It is particularly important that future domestic and international intellectual property reform is informed by evidence-based policy-making.

⁷⁸ *Washington Declaration on Intellectual Property and the Public Interest* 2011, <http://infojustice.org/washington-declaration-html>

The case study of the *Anti-Counterfeiting Trade Agreement 2011* highlights the need for the reform of international treaty-making by the Australian Government. In the classic work, *No Country is an Island*, the leading international and public lawyers Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams lament:

The power to commit Australia to new international obligations lies with the executive alone. Especially in regard to bilateral agreements, governments continue to make key decisions outside the public eye and without parliamentary involvement. Whether or not this is appropriate, it is fair to say that, even after the 1996 reforms, the role of parliament in the treaty process is a minor one. Ironically, the more prominent role taken by parliament may have lessened the fears held by some about Australia's engagement with international treaties, although the modest role now played by parliament has done little in reality to reduce the democratic deficit that prompted the fears in the first place.⁷⁹

The secretive origins of the *Anti-Counterfeiting Trade Agreement 2011* highlights the need for greater transparency and information-sharing about treaty negotiations; the necessity of democratic participation in policy formulation and development; and the demand for evidence-based policy making informed by independent, critical research on the economic, social, and political costs of treaties. The role of the Department of Foreign Affairs and Trade in international intellectual property negotiations needs to be re-evaluated; there should be a new lead agency to co-ordinate intellectual property negotiations; and there should be a greater critical role for the Australian Parliament and the Joint Standing Committee on Treaties in assessing and evaluating international treaties, particularly those relating to intellectual property.

⁷⁹ Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *No Country is an Island: Australia and International Law*, Sydney: UNSW Press, 2006, 153.