

# Conclusion

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These papers from the 2016 proceedings of the Asian Pacific Copyright Association (APCA) demonstrate the vitality of copyright scholars focusing on the Asian Pacific region. Several of the papers show a depth of understanding on a range of issues, such as traditional knowledge, performance rights, free trade agreements, fair use and open government data. Some of the papers provide a theoretical framework as a window into regional debates. The theory suggests that regional studies can be generalised into broader principles that shape international intellectual property law. There is more than a promise in this volume for a vital scholarship on Asian Pacific copyright law. What have we learned and where should we be headed?

An initial question is why an Asian Pacific-centred copyright law? In the United States, copyright is rife with moral panic; a confused field in the shadow of patent law and digital rights. Why would the field be vital anywhere else? Furthermore, the Asian Pacific region is a diverse one with multiple religions, languages, economies and histories that potentially undermine any coherent perspective. Can there be a coherent copyright law that meets the needs of the various industries, consumers and cultural groups? At the threshold, the prospect for an Asian Pacific Copyright is not promising.

But what seems to be a vice can prove to be a virtue. As copyright in the United States falls into a moral panic, lessons can be gleaned from such failures, both actual and perceived. An Asian Pacific Copyright Code can revitalise the field, reinvigorating debates through a reconsideration of foundational principles. The diversity of the Asian Pacific region provides

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the ingredients for a healthy re-examination and reformulation of copyright law. Expressive activity, the domain of copyright, takes many forms in the Asian Pacific region through the complexity of trading patterns and the rich cultural mix of traditional expression and modern artistic forms. This mix is made more complex by the multiplicity of languages, religions and interactions with other regions, whether Europe, the Americas or South Asia. Identifying and developing an Asian Pacific copyright holds much promise for revitalising copyright. A deep scholarly dive into the issues facing the region invites new lessons that can be exported to the rest of the world through better informed baselines for a global system of copyright.

The chapters in this volume each contribute to this enterprise. Readers have engaged already with the high-quality work presented here. For those readers who have chosen to consult the Conclusion first before perusing the rest, be advised that there is much valuable thought here. Return immediately to page one and read this Conclusion afterwards. What I have gleaned from my reading are three sets of lessons that can guide future research in Asian Pacific copyright scholarship and global copyright law and policy more broadly. The editors have divided this volume into the themes of ‘Norm-making’, ‘Norm-taking’, ‘Users and Access’ and ‘Non-authors’. While these are instructive markers, I propose dividing the lessons from these articles into three more basic categories: the economics, the culture and the politics of copyright.

Since copyright has traditionally found justification in economics, I turn to that category first. The traditional story is the familiar one about incentives. Copyright provides a set of exclusive rights designed to benefit authors, those who create original works. What counts as a work and what counts as original is a choice about what types of creative works society wants to incentivise through exclusive rights. In some circumstances, the exclusive rights granted to the copyright owner may conflict with the rights of other creators or with beneficial uses, such as for education, research or news. When such conflicts arise, limitations on the exclusive rights are needed, through specific exceptions or general limitations such as fair use or fair dealing.

Economic incentives are complicated. They are implemented in order to create markets for the copyrighted works. These markets can extend across several industries and across borders. Several chapters demonstrate this complexity in the Asian Pacific context. Professor Yu offers a descriptive account of pending multilateral trade regimes that might structure Asian

Pacific markets based on copyright. He warns of the risks inherent in adopting the strong protections and enforcement measures required by such regimes, pointing out the likelihood of countries in the Asia Pacific that are already party to free trade agreements with high standards putting pressure on other jurisdictions to similarly strengthen their copyright laws. While noting that many countries of the region are developing nations, for which strong copyright protections are not necessarily beneficial, Yu also points out that the situation is complex as there is some evidence that stronger rights can result in development. Thus, Yu urges parties to the proposed multilateral trade agreements to understand both sides of the coin. Professor Ayoubi offers a rigorous and valuable analysis of the interests of indigenous people, particularly with respect to Traditional Cultural Expressions, in the emerging economic system. Her chapter points to the problems of legal harmonisation, and implicitly economic integration, in taking account of the interests of all members of society. Human rights considerations, as she advocates, may address the problems of harmonisation and integration. Flexibility for nation states in protecting the rights of indigenous people is necessary in defining the economics of copyright, especially if the incentives created work against the interests of traditionally marginalised groups. Professor Lai's excellent chapter on performers' rights in New Zealand offers a focused discussion of the economics of copyright as applied to performers. Her chapter presents a thoughtful argument for structuring copyright incentives through liability rules to ensure compensation while limiting misappropriation. How contracts are negotiated and enforced with respect to performance rights is an important topic for future research and legal advocacy to ensure that her important ideas are implemented effectively.

What Professors Ayoubi and Lai show is how cultural background can shape economic incentives and markets. Cultural theories of copyright go beyond pecuniary incentives to understand why expressive works are created. Cultural theories, also, highlight how culture is disseminated outside the market system. Oral and written transmission across generations, integration of works into community practices, such as religious rituals, and shared understandings of the sacred are just some examples of how works are transmitted to communities and their members. A central problem in cultural theories of copyright is determining what uses should be permitted and which should be allowed within the legal system. Should groups for whom a work has cultural meaning be allowed legally to prevent exploitation through commercialisation or transformation of

the sacred work? Or should creative redefinition and remixing be allowed? Professors Ayoubi and Lai suggest possible ways to answer these questions, whether through human rights limitations on copyright or through legal mechanisms of contract and liability. Their chapters are at the intersection of economic and cultural theories of copyright, serving as both critique and analytical framework for assessment of the law.

The chapter by Professors Johnson, Wright and Corbett examines fair use, as it exists under United States copyright law, as an important copyright doctrine to import into Australian and New Zealand legislation. Their argument is grounded in the need for limitations on copyright, and the flexibility of fair use in facilitating the development of new industries and new uses. Such flexibility is essential, they argue, for integration into the knowledge economy. Their argument is in part on the need for correct economic incentives, but their analysis delves into the cultural challenges of importing foreign law into the Australian and New Zealand contexts. These challenges are further explored by Professors Stoianoff and Wright, who discuss the need for appropriate legislative intervention to protect traditional cultural expressions and knowledge from misuse by third parties under the auspices of broad user rights such as fair use. They draw upon earlier work with Indigenous Australian communities to propose a way forward that could be encapsulated in Professor Sterling's draft Asian Pacific Copyright Code and that would achieve an appropriate balance between the interests of indigenous communities in the Asian Pacific region to custodianship of their traditional knowledge, on the one hand, and the permitted exceptions for users in copyright laws, on the other hand. Professor Barrett offers a detailed analytical framework for how to recast and reform existing rights to address practices in the creation of two-dimensional works, specifically ones that capture three-dimensional works such as buildings and statuary (the so-called right to panorama). His proposal for reform suggests ways in which the law can protect customary practices while also recognising the rights of copyright owners.

What undergirds much of the debate over copyright is a political question of how reform occurs and how various interests, whether economic or cultural, are represented in the law. Professor Long provides a useful summary of arguments for the incorporation of privacy interests in copyright law. She focuses on the copyright–privacy interface promulgated by technological developments in a plethora of areas – from notice and takedown regimes, to drones and other surveillance techniques, to the unauthorised online circulation of personal images. She explains that at

least one advantage of introducing personal privacy issues into copyright law might be that it would provide courts with the opportunity to take a more nuanced approach to assessing relief in copyright disputes. Professor Corbett provides a rigorous and concrete discussion of digital rights management as imported into New Zealand. Her chapter shows sensitivity to the administrative context for implementing copyright law and the need for both legal development and flexibility through administrative rule making. She points to an important factor in the success of importing copyright laws: the creation of political institutions for fitting the laws to unique social contexts particular to the nation state. Professor Lee's chapter complements this point about administration through advocacy for open government data. Transparency and accountability guide how law is implemented and develops. Citizens need to know how government reaches its decisions and how it collects information from the public. His call for open government policies with respect to data collection and use emphasises how public-minded political institutions are needed for citizen participation in creating the rules that will structure economic and cultural interactions.

The Asian Pacific region provides a rich environment for academic debate on the economics, cultural context and politics of copyright. As these chapters show, copyright as field is a vital one in the region and touches upon a range of concerns across countries in the region. These nine chapters serve as a bellwether for how copyright debates can be transformed. They also serve as models for future scholarship from the APCA and from scholars committed in creating a copyright law that serves creators, participants in cultural communities and political actors, within and beyond the Asian Pacific region.

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