

The Asian Pacific Copyright Code

JAL Sterling¹

Copyright is basically a legal discipline that deals with the rights of authors of literary, dramatic, musical and artistic works, and is considered in association with the related rights of performers. Protection may also be extended by these rights to the associated rights of broadcasters, cable distributors etc., and internet transmissions.

Three fundamental systems of copyright are distinguishable: the copyright system, applicable in common-law countries, i.e. the United Kingdom, the US and countries with similar systems; the author's right system, applicable in France and other civil-law countries; and the independent system, giving protection by other categories of rights (as in China).

The three categories of rights are distinguishable in the countries of the Asian Pacific region.

These distinct systems inevitably lead to discrepancies in the application of protection in these countries.

The aim of the Asian Pacific Copyright Code is to provide a record of the generally accepted principles in this area, so that right owners in one country of the region are accordingly assured of protection in all other countries of the region. As author of the Code, I am conscious of the great service to international understanding provided by the copyright system, which provides the possibility that authors and others protected by the laws in the region can claim and receive protection in other countries of the region.

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I believe that copyright, in providing a forum that brings together people of different countries and traditions, makes an important contribution to international understanding between the nations of the world.

I am grateful to the Asian Pacific Copyright Association (APCA) for the studies it has initiated on the Code, and the conference APCA arranged in connection with this in Hong Kong in 2016 – also to Associate Professor Susan Corbett for all the work she has put in to this area over many years.

Asian Pacific Copyright Code: Proposal for discussion

Adrian Sterling²

Introduction

While national and international copyright laws are well developed, the only specifically developed regional copyright law is that applying in the 28 States of the European Union, where Directives and other Union instruments provide harmonised protection of the copyright of authors and of related rights, including those of performers, film and phonogram producers, broadcasters (by wireless or wire) covering the majority of critical issues in this field (the only major area not being harmonised throughout the European Union being that concerning moral rights, which apply in all Union States, but with different provisions).

Undoubtedly, regional harmonisation in this field is of value to right owners and the public, providing as it does that neighbouring countries can develop their relations and mutual protection in this field.

In October 2015, the Trans-Pacific Partnership members (Australia, Brunei Darussalem, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam) announced the conclusion of the Trans-Pacific Partnership Agreement on trade, including provisions on intellectual property. The provisions of the Agreement reflect many aspects of United States law which, it is submitted, are not necessarily

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those which apply or should apply in the countries and territories of the Asian Pacific Region (i.e. countries and territories located in or bordering on the Pacific Ocean west of the International Date Line).

The Draft Asian Pacific Copyright Code here proposed reflects the objectives which, it is submitted, should be adopted in the countries and territories of the Asian Pacific Region.

The Draft Code proposes definitions, and provisions concerning beneficiaries, rights, limitations and exceptions, term of protection, infringement and remedies. The ultimate aim could be the setting up of an administration system to provide a central point of contact between participating countries and an Asian Pacific Copyright Arbitration Tribunal for settling disputes between rights owners in the Asian Pacific Region.

It is submitted that the application of the Code would greatly strengthen the recognition of copyright and related rights in the Asian Pacific Region to the benefit of rights owners, users of protected material and the general public.

Two general aims of the Code principles are firstly, to incorporate the principles recognised in the relevant international copyright and related rights instruments, and secondly, to incorporate on particular points higher standards of protection than in these instruments.

Procedure

The following Draft Asian Pacific Copyright Code is submitted for discussion by APCA. The draft is only an outline and is intended to bring to attention issues which need discussion and decision in this area. Additional issues may also need discussion.

Copyright is always developing and at a later stage updated versions of the Code may need consideration.

When APCA has formulated the final version of the Draft, the Code could be opened for signature by members of APCA and by other organisations and individuals interested in copyright and related rights (for example, authors, performers, broadcasters, internet service providers and administration societies).

When a sufficient number of signatories are obtained, the Code could be submitted to the Governments of countries and territories throughout the Asian Pacific Region, with the aim of adoption of the Code by them. It may be anticipated that consideration of the establishment of the Asian Pacific Copyright Arbitration Tribunal could be given by Governments adopting the Code.

The author of the Draft Code is Adrian Sterling, who proposes to license his copyright in the Code to the Asian Pacific Copyright Association.

[20 November 2015]

Draft Asian Pacific Copyright Code
Part I: General

Preliminary

- A. Definitions
- B. Beneficiaries
- C. Rights
- D. Limitations and exceptions
- E. Term of protection
- F. Infringement
- G. Formalities, remedies and procedure
- H. Administrative provisions

Part II: Asian Pacific Copyright Arbitration Tribunal

[text to be established]

Annex: International Copyright and Related Rights instruments – Membership (Asian Pacific Region)

Preliminary

The Asian Pacific Copyright Code sets out the principles which the signatories hereto recognise as representing the standards of protection of copyright and related rights which apply or should apply in the

countries and territories of the Asian Pacific Region being those countries and territories located in or bordering on the Pacific Ocean west of the International Date Line.

A. Definitions

Authors: creators of original works including all categories mentioned in Article 2 of the Berne Convention, computer programs and databases.

Broadcasting organisations: Organisations engaged in transmission by wire or wireless, other than internet service providers.

Communication to the public: the act of bringing material protected by copyright or related rights to the perception of members of the public by means of performance in the presence of such members or by transmission of any kind including broadcast and on-demand.

Copyright: rights of authors in their works, including economic and moral rights.

Film producer: producer of moving image recordings.

Internet service provider: entity communicating to the public by on-demand transmission.

On-demand transmission: communication to the public by wire or wireless means by making available works, material protected by related rights and other material in such a way that members of the public may access such works and material from a place and at a time individually chosen by them.

Phonogram producer: producer of sound recordings.

Related rights: rights of performers, film and phonogram producers, broadcasting organisations and internet service providers in their respective performances, productions and transmissions.

Relevant international instruments: Berne Convention for the Protection of Literary and Artistic Works 1971, ('Berne'), Universal Copyright Convention 1971 ('UCC'), Convention for the Protection of Performers, Phonogram Producers and Broadcasting Organisations 1961 ('Rome'), Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms 1971 ('Phonograms'), Convention relating to the Distribution of Programme-carrying Signals

transmitted by Satellite 1974 ('Sat'), Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 ('TRIPS'), WIPO Copyright Treaty 1996 ('WCT'), WIPO Performances and Phonograms Treaty 1996 ('WPPT'), and, when entered into force, WIPO Audiovisual Performances Treaty 2012 ('WAVPT') and WIPO Visually Impaired Persons Treaty 2013 ('WVIPT').

B. Beneficiaries

1. Beneficiaries under the Code are authors, performers, film and phonogram producers, broadcasters and internet service providers, such beneficiaries being either beneficiaries under the relevant international instruments or nationals of or resident in or incorporated in countries or territories of the Asian Pacific Region.
2. Countries and territories acknowledging this Code may apply reciprocity provisions in accordance with their regional or international obligations.

C. Rights

1. Authors have the rights in respect of their works to claim authorship, to prevent degradation and to prevent unauthorised copying or communication to the public, as well as the other rights granted to them by the relevant international instruments.³
2. Performers have the rights to authorise copying or communication to the public of their performances, as well as the other rights granted to them by the relevant international instruments.⁴
3. Film and phonogram producers have the rights to authorise copying and communication to the public of their respective film and sound recordings, as well as the other rights granted to them by the relevant international instruments.⁵
4. Broadcasting organisations and internet service providers have the rights to authorise copying or communication to the public of their respective transmissions, as well as the other rights granted to them by the relevant international instruments.⁶

3 Compare Berne Arts 5, *6bis*, 8, 9, 11–12, 14, *14bis*; TRIPS Arts 10, 11; WCT Arts 5–8.

4 Compare Rome Arts 7, 12; WPPT Arts 5–10, 15; WAVPT Arts 5–11.

5 Compare Rome Arts 10, 12; WPPT Arts 11–15.

6 Compare Rome Art. 13.

D. Limitations and exceptions

1. Limitations and exceptions under this Code are confined to those which are permitted by the relevant international instruments in certain special cases and which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights owners.⁷ In accordance with Article 12 of the Rome Convention 1961, remuneration rights instead of rights of authorisation may be granted to performers and phonogram producers in regard to the communication to the public of published phonograms.
2. Signatories to the Code agree to seek amendments to the Code which will provide a specific list of permissible limitations and exceptions under the Code.

E. Term of protection

1. The term of protection of author's rights is the life of the author plus 70 years after his/her death. The term of 70 years shall apply in respect of all categories of works mentioned in Article 7 of the Berne Convention instead of the respective durations of protection there specified.
2. The term of protection for performers' rights is 50 years from the year of the giving of the performance, or if the performance is published during that period, 50 years from the year of first publication of the performance.
3. The term of protection for film and phonogram producers' rights is respectively 50 years from the year of making of the film or sound recording concerned or if the recording is published during that period, 50 years from the year of first publication of the recording.
4. The term of protection for broadcasting organisations' and internet service providers' rights is respectively 50 years from the year of first transmission of the transmission concerned.

F. Infringement

Infringement of copyright and related rights is committed by doing any act in any territorial or extraterritorial area including Space without the necessary authorisation of the owner of the rights in the protected material involved in such act.

⁷ TRIPS Art. 13.

G. Formalities, remedies and procedure

1. The provisions of UCC Article III and Phonograms Article 5 apply regarding satisfaction of formalities.
2. Criminal and civil remedies are to be imposed for infringement of rights under this Code, as decided by the respective legislatures, together with notice and takedown measures in respect of unauthorised transmissions of protected material.
3. (a) A person who is within the jurisdiction of the courts of a particular country may in addition to proceedings for infringement in that country be prosecuted or sued in that country for infringement of copyright or related rights in any other country and the law of that other country will apply in this respect.⁸
(b) Any person irrespective of country of residence, nationality or incorporation may in a particular country be prosecuted or sued for infringement of copyright or related rights in that country.

H. Administrative

1. The Asian Pacific Copyright Code is administered by the Asian Pacific Copyright Association.
2. The Association promotes the maintenance and development of the Code through meetings between signatories to the Code and persons and organisations and others interested in copyright and related rights in the Asian Pacific Region.

Part III: Asian Pacific Copyright Arbitration Tribunal

The Asian Pacific Copyright Arbitration Tribunal on establishment provides the means for settlement of disputes as to the recognition and application of copyright and related rights in the Asian Pacific Region.

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Signatories

[to be applied]

⁸ Compare UK case *Lucasfilm Ltd and ors v Ainsworth and anor* [2011] UK SC 39 (27 July 2011, UK Supreme Court).

Annex: International Copyright and Related Rights instruments –
Membership (Asian Pacific Region)

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Annex:

**International Copyright and Related Rights instruments –
Membership**

(Asian Pacific Region)

COUNTRY	BERNE	UCC	ROME	PHONOGRAMS	TRIPS	WCT	WPPT	SAT
Australia	1928(P78)	1969(P78)	1992	1974	1995	2007	2007	1990
Brunei Darussalam	2006(P)				1995			
Cambodia		1953(G)			2004			
China	1992(P)	1992(GP)		1993	2001	2007	2007	
Fiji	1971(B)	1971(G)	1972	1973	1996			
Indonesia	1997(P)				1995	2002	2005	
Japan	1899(P75)	1956(P77)	1989	1978	1995	2002	2002	2000
Kiribati								
Korea, Dem People's Rep. of	2003(P)							
Korea, Rep. of	1996(P)	1987(GP)	2009	1987	1995	2009	2009	2012
Malaysia	1990(P)				1995	2012	2012	
Marshall Islands								
Micronesia, Fed. State of	2003(P)							
Nauru								
New Zealand	1928(R47)	1964(G)		1976	1995			
Palau								
Papua New Guinea					1996			
Philippines	1951(P97)		1984		1995	2002	2002	
Russian Federation	1995(P)	1973(P95)	2003	1995	2012	2009	2009	1989

MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC?

COUNTRY	BERNE	UCC	ROME	PHONOGRAMS	TRIPS	WCT	WPPT	SAT
Samoa	2006(P)				2012			
Singapore	1998(P)				1995	2005	2005	2005
Solomon Islands					1996			
Taiwan					2002			
Thailand	1931(P95)				1995			
Timor-Lesté								
Tonga	2001(P)				2007			
Tuvalu								
Vanuatu	2012(P)				2012			
Vietnam	2004(P)		2007	2005	2007			2006

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NOTE: The instruments to which reference is made in the above listing are:

- Berne Convention: Convention for the Protection of Literary and Artistic Works 1886, 1971 ('Berne') (R = Rome Act 1928, B = Brussels Act 1948, P = Paris Act 1971);
- Universal Copyright Convention 1952, 1971 ('UCC') (G = Geneva Act 1952, P = Paris Act 1971);
- Rome Convention: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 ('Rome');
- Phonograms Convention: Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms 1971 ('Phonograms');
- Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 ('TRIPS');
- WIPO Copyright Treaty 1996 ('WCT');
- WIPO Performances and Phonograms Treaty 1996 ('WPPT');
- Satellites Convention: Convention relating to the Distribution of Programme-carrying Signals Transmitted by Satellite 1974 ('SAT').

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