

Introduction

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The copyright laws of most countries of the Asian Pacific region² rarely constitute the subject of international academic commentary, which tends to focus mainly upon the judicial rulings and laws deriving from the European Union (EU) and the United States (US). This is due to many factors, including that much of the Asian Pacific region does not have the history implicit in western copyright law and the subject is therefore relatively new for the region. Moreover, many Asian Pacific nations simply have not had (and many continue not to have) the financial or intellectual resource capacity to deal with the finer details of copyright law. For example, it is well documented that many nations in the region signed up to international intellectual property obligations in the Agreement on Trade-Related Intellectual Property Rights (TRIPS) in exchange for other trade benefits, sometimes not fully appreciating the implications of such obligations or perhaps believing they had no real choice in the matter. This is related to the fact that the Asian Pacific region is mainly populated by countries that are overall users and importers of copyright works, whereas the EU and US – the main drivers of stronger intellectual property norms – are characterised (at least in copyright terms) by significant numbers of owners and exporters of copyright works. Indeed, absent the pressure imposed by their more powerful trading partners, there would arguably be no real incentive for the poorer countries of the region to introduce strong copyright laws into their domestic regimes.

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2 The Asian Pacific region is defined in the Statutes of the Asian Pacific Copyright Association as 'the Region embracing the countries and territories located in or bordering on the Pacific Ocean west of the International Date Line'.

This book aims to address a gap in the copyright discourse by providing a contemporary overview of developing areas of copyright law in the Asian Pacific region, particularly as they pertain to the potential for some degree of regional harmonisation. The time is ripe, with several Asian Pacific jurisdictions, such as China, Hong Kong and Singapore, now reflecting a mature level of scholarship in the field and challenging the regional dominance of frontrunners Australia and New Zealand. In recent years, nations of the Asian Pacific region have been highly active in the realm of free trade agreements (FTAs), and the heated manner in which the copyright provisions have been debated emphasises the importance and complexity of the relationship between copyright, development, trade and society.

This book is made up of selected papers from the second annual conference of the Asian Pacific Copyright Association (APCA). APCA was established on 15 November 2011 and includes countries and territories located in or bordering on the Pacific Ocean west of the International Date Line. The purpose of this demarcation was to offer the included countries a forum to discuss issues concerning copyright and related rights, specifically with respect to the region and its particular concerns. Furthermore, APCA aims to ensure that the needs and concerns of the people of the Asian Pacific region are taken into consideration by the international community in all discussions and international negotiations concerning such rights.

In view of this, Adrian Sterling, the founder of APCA, drafted a Code in 2015 to spark discussion about the possibility of harmonising protection of copyright and related rights in the Asian Pacific region. In the introduction to the Code, Sterling stated:

Undoubtedly, regional harmonisation in this field is of value to right owners and the public ...³

... 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.⁴

3 Adrian Sterling 'Asian Pacific Copyright Code' in this volume at 1 (emphasis added).

4 At 1.

Underlying these statements are the presumptions that copyright and neighbouring rights are implicitly beneficial and that harmonisation across the region would ultimately be advantageous, from the perspective of right owners, users and the general public.

Furthermore, Sterling noted the importance of providing a counter to FTAs, specifically referring to the Trans-Pacific Partnership Agreement (TPP), which ‘reflect many aspects of United States law which, it is submitted, are not necessarily those which apply or should apply in the countries and territories of the Asian Pacific Region’.⁵ Of course, while the TPP has caused much controversy, especially with respect to the US and the intellectual property chapter of the Agreement, the notion that the Asian Pacific nations might profit from allying with one another stands potentially true in the face of other forces, such as the EU.

Each of Sterling’s propositions is distinct, complicated and debatable. ‘Pirate parties’, the ‘open movement’ and academic literature on the aptness of copyright in the modern global and digital world,⁶ would suggest that we cannot presume that copyright and neighbouring rights are implicitly beneficial, whether for right owners, users or the general public. Similarly, the discourse regarding the putative harmonising effects of the multilateral Agreement on TRIPS and FTAs that include TRIPS-plus provisions (requiring stronger protections than embodied in TRIPS), especially in developing countries,⁷ would indicate that harmonisation comes with downsides. Policymakers, interest groups and civil society in the Asian Pacific are increasingly challenging the intellectual property chapters in FTAs with the EU and US. The TPP is a case in point, having spurred protests across the Asian Pacific region. As an illustration, a key issue was the increase of the copyright term to 70 years. Another was increased protection for technological protection measures. Thus, harmonisation via a Code across the region must differ from coerced ‘harmonisation’ via multilateral trade agreements (MTAs) and FTAs.

5 At 1.

6 See e.g. Rebecca Giblin and Kimberlee Weatherall (eds) *What if We Could Reimagine Copyright?* (ANU Press, Canberra, 2017) (doi.org/10.22459/WIWCRC.01.2017); and Jessica Litman ‘Fetishizing Copies’ in Ruth L Okediji (ed) *Copyright in an Age of Limitations and Exceptions* (Cambridge University Press, Cambridge, 2017).

7 Gustavo Ghidini, Rudolph JR Peritz and Marco Ricolfi (eds) *TRIPS and Developing Countries: Towards a New IP World Order?* (Edward Elgar, Cheltenham, 2014); and Joseph Strauss ‘The Impact of the New World Order on Economic Development: The Role of Intellectual Property Rights System’ (2006) 6 J Marshall Rev Intell Prop L 1.

One could view the extent to which the intellectual property chapter of the TPP was debated as highlighting the increasing importance of intellectual property as a tool of trade and development in the Asian Pacific region. Moreover, the controversy exemplifies the burgeoning importance of the Asian Pacific region and the potential strength it may have as a regional unit. This leads to two observations. First, that there is a lot of potential for the nations of the Asian Pacific region to work together, find common ground and shift international bargaining power. Second, in so doing, the region could tailor any regional agreements to suit local needs. These are the ways that a Regional Code could differentiate itself from existing MTAs and FTAs as a more inclusively negotiated agreement.

At the same time, it is questionable whether defensive harmonisation is possible or desirable. Harmonisation requires a certain level of shared legal culture, policy aims and – related to this – economic and technological position.⁸ As noted by Melanie Johnson, Robin Wright and Susan Corbett in this volume, harmonisation has proved challenging even between Australia and New Zealand, which have a common language, shared history and culture, and comparatively similar laws. Furthermore, harmonisation inevitably entails the surrender of some sovereignty. This then raises the question of why the Asian Pacific region would want to do this in the realm of copyright and related rights. Put another way, what would the region gain in return? In FTAs, the answer is ostensibly that nations can ‘cash in’ their ‘intellectual property chips’ in exchange for something that is considered to be to their benefit, such as access in the agricultural sector. Free of such an exchange, the benefits of harmonising copyright and related rights are less obvious. Moreover, harmonisation of copyright and related rights would raise the concern of whether this would benefit the region as a whole, as envisaged by the Code, or just a few nations within the region.

It is trite to write that the social, economic and cultural situation varies in every jurisdiction and that extant flexibility in international obligations is key to addressing such variance. A Code will, thus, only be desirable

8 See e.g. Susy Frankel and Megan Richardson ‘Trans-Tasman Intellectual Property Coordination’ in Susy Frankel (ed) *Learning from the Past, Adapting to the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 527; Susy Frankel and others ‘The Challenges of Trans-Tasman Intellectual Property Coordination’ in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 101; and Susy Frankel and others ‘The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy’ in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 17.

if it deals with common aims and concerns, but allows much flexibility in regard to the specific domestic situations pertaining to each of its signatories. Moreover, one must recognise that much harmonisation has already taken place through the TRIPS Agreement and the myriad of existing FTAs. That is, a Code for the Asian Pacific region has to cover common goals and areas that the region can realistically harmonise, and has to accept that certain spaces have more or less been filled by existing international obligations.

As it is, the proposed Code does not take us beyond existing norms and obligations found in international instruments and FTAs. In other words, it does not include anything specifically relevant for or important to the region. Given the preponderance of FTAs (such as the lingering TPP and the impending Regional Comprehensive Economic Partnership (RCEP)), which include a significant number of Asian Pacific countries, a Code needs to bring something different. The authors of this volume deal with several such possibilities, such as the relationship between copyright and privacy (discussed by Doris Estelle Long) and copyright and data licensing (examined by Jyh-An Lee). Perhaps most striking is the strong proposition that having indigenous peoples and traditional communities is a core commonality among Asian Pacific jurisdictions. Three chapters in this volume specifically focus on how a regional Code could address these interests of indigenous peoples and traditional communities (Lida Ayoubi, Natalie Stoianoff and Evana Wright, and Jonathan Barrett).

The remainder of this Introduction provides an outline of the structure of the book and a brief taste of the various topics addressed by its authors.

Part 1 of the book provides analysis and commentary on norm-making in the Asian Pacific region. **Peter Yu** discusses the potential regional FTAs (namely RCEP and the TPP), and the copyright provisions contained within these Agreements. **Lida Ayoubi** then addresses the potential for a Code to bring the region together, in particular through recognising that the Asian Pacific nations share common goals with respect to their indigenous peoples and traditional communities. The third chapter in Part 1, by **Natalie Stoianoff and Evana Wright**, discusses the move to introduce fair use into Australian copyright law and suggests how the potential risks fair use presents for indigenous cultural expressions more generally might be addressed in the Code.

Closely connected to this, Part 2 examines the idea of taking norms from other jurisdictions and fields of law. **Doris Estelle Long** highlights the opportunity to address the copyright and privacy interface in the Code, while **Susan Corbett** investigates partial norm-taking (with respect to anti-circumvention provisions) and explains how, without the rulemaking feature of US copyright law, strengthened anti-circumvention measures will likely be to the detriment of Asian Pacific jurisdictions.

Because many Asian Pacific jurisdictions are developing countries and net importers of copyright works, the ability to use and access copyright works is of crucial importance to the Asian Pacific region. In other words, getting the balance correct between owners and users is imperative. Accordingly, Part 3 of the book explores this theme, including the fact that the correct balance is specific to the particular situation in different parts of the region, underscoring the importance of harmonisation providing certain flexibilities. **Melanie Johnson, Robin Wright and Susan Corbett** discuss the potential of 'fair use' in New Zealand and Australia, particularly highlighting the disjunction between increasing levels of protection, often at the behest of the US, but not similarly adopting the broad and flexible fair use doctrine. **Jyh-An Lee** then addresses the licensing of government data and the concept of 'openness'.

Of similar importance, and related to the aforementioned balance, are the copyright implications of the availability of locally created art and culture, including traditional indigenous cultural expressions, to the citizens of the Asian Pacific region. The final part of the book, therefore, discusses the complexity of including exceptions from the perspective of indigenous peoples and the need for performers' rights for incentivising and supporting cultural creation. **Jonathan Barrett** scrutinises the permitted use 'freedom of panorama' vis-à-vis indigenous works, while **Jessica C Lai** analyses the historical background to performers' rights provisions in copyright law, and questions whether the extensive rights required by the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty are in reality of no practical use to many performers, particularly those in the Asian Pacific region.

An insightful and thought-provoking conclusion to the book is provided by **Shubha Ghosh**, whose carefully structured critique and commentary on each chapter adds an important dimension to this work.

This text is taken from *Making Copyright Work for the Asian Pacific: Juxtaposing Harmonisation with Flexibility*, edited by Susan Corbett and Jessica C Lai, published 2018 by ANU Press, The Australian National University, Canberra, Australia.