



ASIAN TRADE CENTRE

Working Paper

**FOSTERING INNOVATION AND GROWTH IN ASIA:
IP, COPYRIGHT AND DIGITAL TRADE**

**RCEP Perth Round
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RCEP officials are meeting to discuss intellectual property (IP) rules for Asia at an exciting new time. Many of the existing provisions that have governed trade and IP were crafted for a time when digital trade did not exist.

Mobile penetration rates in Asia, for instance, are growing faster than anywhere else in the world. China accounts for more than one quarter of all smart phone users on the planet. Internet usage rates for the region are similarly strong.

The explosive growth in digitally enabled trade has thrown up a host of new issues that officials need to consider. Many of these topics are novel and have not been carefully explored in any existing trade regimes. This paper sets out a few cutting-edge issues in just one narrow slice of the intersection between digital trade and intellectual property rights—how should some copyright provisions be handled?

Copyright rules in a digital era will need to evolve. This policy brief outlines six areas for consideration in RCEP negotiations: fair and reasonable copyright exceptions to accommodate evolving technology; allowable rules for temporary reproductions; quotations and snippets of work; copyright exhaustion; proportionality of damages; and safe harbours for internet providers.

These are not, of course, the only issues related to IP and digital trade. Nor are they likely to be the only issues at the intersection of digital trade, IP and copyright. But these are important sets of concerns and can serve as valuable points of discussion for unlocking broader conversations about the appropriate balance of interests between protections of rights holders, spreading innovation, creating new sources of economic growth, and managing new and rapidly changing technologies.

Introduction

Internet industries have thrived in countries that provide a balanced copyright framework: both clear enforcement provisions and justified exceptions and limitations on liability. As the Australian Law Reform Commission found:

Copyright protection is vital in allowing creators and rights holders to exploit the value of their materials, and to increase the incentive to create those materials—but this monopoly need not extend indefinitely or into markets which the creator had no real interest in exploiting. Copyright must leave ‘breathing room’ for new materials and productive uses that make use of other copyright material. By appropriately limiting the ambit of copyright, exceptions can increase competition and stimulate innovation more generally, including in technologies and services that make productive use of copyright material.¹

RCEP provides an opportunity for the negotiating parties to consider the above and related questions. An appropriate balance in copyright systems can encourage the growth of the Internet throughout the region, which, in turn, is conducive to facilitating commerce, culture, and education - driving the growth of both copyright-dependent industries and Asia-Pacific Internet companies.

The countries negotiating RCEP are at the heart of the world's most mobile-focused region, with hundreds of thousands of developers and startups building apps and Internet platforms for an increasingly global market. A balanced copyright framework can enable these SMEs in ASEAN and emerging markets to grow quickly and compete on an international stage with established players. Indeed, surveys of venture capital investors reveal that copyright flexibilities, limitations, and safe harbours are critical to spurring investment in startups in this region.

To pave the way for this next generation of SMEs, the following subjects should be addressed in RCEP negotiations:

- **Fair and reasonable copyright exceptions** to accommodate evolving technologies;
- **Temporary reproductions**;
- **Quotations and snippets**;
- **Copyright exhaustion**; and
- **Proportionality of damages**.
- **Safe harbours** for internet service providers;

RCEP negotiators have the opportunity to consider these new issues and start to create international copyright rules that take into consideration the value that comes from intellectual property balance, particularly in the digital and mobile first world. The issues highlighted above can help RCEP parties set a new global standard on balanced copyright, driving innovation and global competitiveness in these countries, while at the same time granting due protection to rights holders.

Fair and Reasonable Copyright Exceptions and Limitations

RCEP should discuss the role of certain copyright exceptions that can enable APAC Internet companies and users to take full advantage of new technologies in a manner that does not harm legitimate interests of copyright holders.

Why This Matters

Safe harbours for Internet services (discussed more below), by themselves, may be insufficient to permit the full range of new services and technologies that APAC companies seek to introduce. There are many socially and economically productive activities that Internet and other technology companies in the region seek to undertake -- e.g., the caching and indexing of websites to create more efficient search engines, text and data mining for research purposes, machine learning, and new forms of creative expression for both commercial and non-commercial purposes. Certain exceptions are critical to supporting online creativity and emerging artists as well as providing broader audiences easier access to knowledge and education.

From an economic standpoint, exceptions to copyright can enable innovation and increase investment in Internet services. It is important to note that flexible copyright limitations exceptions can allow both content providers and Internet companies to thrive, as demonstrated by recent econometric research covering several RCEP parties that have already adopted flexible copyright

rules.ⁱⁱ In 2006, Singapore implemented flexible copyright exceptions into its Copyright Act. Prior to that, private copying technology industries experienced about 2% annual growth. After the changes were introduced, the same industries enjoyed a 10% average annual growth rate.ⁱⁱⁱ

Parties that have adopted limitations and exceptions note that balanced copyright can “provide diverse benefits for large and small business, consumers, authors, artists, and workers in the information, entertainment, and technology sectors.”^{iv} Balanced copyright can also “recognize and promote respect for the important interests of individuals, businesses and institutions who rely on appropriate exceptions and limitations.”^v

Status in RCEP Countries

Requiring certain fair and reasonable exceptions would be compatible with the legal regimes of RCEP parties and would benefit the development of innovative businesses as well as education, research, and culture within these countries.

Korea, Malaysia, the Philippines, and Singapore all have copyright exceptions with statutory factors that a court must apply to determine whether a person has used copyrighted material in a non-infringing way. This flexibility allows the copyright laws of these countries to respond to evolving technology, without requiring constant recourse to a legislature or an administrative agency.^{vi} Australia, Brunei, India, and New Zealand also have exceptions that allow a degree of flexibility, even if not as much as in the countries listed above.^{vii}

Issues to Consider in RCEP Negotiations

RCEP negotiators have the opportunity to clarify the importance of copyright exceptions to international trade. The following issues are important:

- Achieve an appropriate balance in copyright and related rights system, among other things by means of certain limitations or exceptions, including those for the digital environment.
- Give due regard to legitimate purposes such as comment; news reporting; critique; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.
- Whether use that has commercial aspects can, in appropriate circumstances, be considered to have a legitimate purpose.

In analyzing these questions, RCEP negotiators could look to a list of legitimate uses of copyrighted content already contained in the flexible exception in the Philippines.^{viii}

Temporary Reproductions

Negotiators ought to discuss whether the RCEP IP chapter should or should not include language that would allow rights holders to prohibit temporary copies of their works, and whether it should enable Internet services to make temporary copies -- including temporary storage of content in electronic form -- without being subject to licensing fees.

Why This Matters

Allowing content owners to block or charge a license fee for the temporary reproduction of copyrighted works can inhibit new forms of computer and Internet-enabled trade, vital to many

RCEP negotiating countries. Internet services increasingly make temporary copies (such as buffers and cache files) in order to speed up the delivery of videos, apps, and websites. The creation of temporary copies or caches becomes all the more important when content is being requested and delivered across borders. Without the ability to create temporary copies, such cross-border transactions may be slowed down.

Excluding temporary copies from the scope of the reproduction right benefits both Internet services and consumers by permitting, for example, local caching of online videos during the course of streaming. This reduces the costs of streaming for Internet service providers and results in faster and more efficient streaming of videos to consumers. In contrast, treating temporary reproductions as copies increases rights holder control over a digital file after its lawful acquisition by a consumer, and exposes Internet service providers to liability for temporary reproductions made in their servers as content moves across the Internet.

It is important to clarify that withholding protection from temporary reproductions would not facilitate widespread infringement over digital networks. Any person engaged in broad, unauthorized dissemination would still clearly infringe an exclusive right, whether the reproduction right when he first stores the work in his computer, or the communication to the public right when he when he makes it available to others.

Status in RCEP Countries

The treatment of temporary reproductions under international copyright law has been changing over the past few decades. In the past, digital files stored in long-term memory such as a computer hard drive or a thumb drive was understood to constitute “copies” for purposes of most copyright systems. In contrast, there has been less consensus about whether a copy in a computer’s “working” or random access memory (RAM) is sufficiently fixed so as to constitute a copy that could trigger infringement liability.

Some RCEP countries have extended protection for temporary copies, which in turn has necessitated the adoption of additional exceptions. For example, Singapore Copyright Act Section 15(A) specifically provides that reproduction “includes the making of a copy which is transient or is incidental to some other use of the work.” This required the adoption of an exception at Section 38A for temporary or transient reproductions made in the course of making or receiving a communication. Section 43A of the New Zealand Copyright Act similarly excuses transient or temporary reproductions that are integral and essential to a technological process for making or receiving a communication or enabling the lawful use of a work, and has no independent economic significance. Australia also excuses the temporary reproduction of the work as part of the technical process of making or receiving a communication, or if it is incidentally made as a necessary part of a technical process of using a copy of the work.

In other words, those RCEP countries that have granted such protection have subsequently adopted exceptions to this protection. This added layer of complexity may be avoided if temporary reproductions are not treated as copies in the first place.

In contrast, the reproduction right under Section 14(a)(i) of the Indian Copyright Act includes storing a work by electronic means, but does not explicitly extend to temporary or transient copies.

Issues to Consider in RCEP Negotiations

RCEP negotiators have the opportunity to establish a clear rule that duly addresses the complexity and innovation and efficiency aspects related to the protection of temporary copies or temporary reproductions.

To this end, RCEP negotiators should:

- Discuss the consequences of either including explicit references to “temporary” or “transient” copies or reproductions in the negotiating text, or of granting authors exclusive rights over all reproductions of their works in any manner or form, including electronic form.

Quotation Rights

Negotiators also have an opportunity to consider the question of quotation rights – and, specifically, whether the RCEP IP chapter should contain a mandatory exception permitting quotations from news reports.

Why This Matters

Article 10(1) of the Berne Convention provides that “it shall be permissible to make quotations from a work which has already been lawfully made available to the public.” This quotation right specifically extends to “quotations from newspaper articles and periodicals in the form of press summaries.”^{xix}

An appropriately framed news quotation right – as an expression of the fair use principle – can promote freedom of expression and the ability of citizens to be informed of the news of the day. It can also support startup companies in providing innovative information aggregation services in the region.

Status in RCEP Countries

RCEP countries permit quotations of news reports in different ways. In some RCEP countries, the reproduction right includes the exclusive right to control the reproduction of “the whole work or a substantial portion thereof...”^{xx} This suggests that quoting a small portion of an article would not infringe the reproduction right (although the publisher might argue that a headline or lead sentence is qualitatively a substantial portion of the article).

Some RCEP countries have an explicit exception for quotations. Malaysia, for example, permits “the making of quotations from a published work if they are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”^{xxi} Similarly, under Article 28 of the Korean Copyright Act, “it shall be permissible to make quotations from a work already made public: provided that they are within a reasonable limit for news reporting, criticism, education, and research, etc. and compatible with fair practices.”^{xxii}

Several RCEP countries have specific exceptions permitting the reproduction and distribution of news articles unless such use has been expressly prohibited. By way of example, Section 184(c) of the Philippines Copyright Act permits “the reproduction or communication to the public by mass media of articles on current political, social, economic, scientific or religious topic, lectures,

addresses and other works of the same nature, which are delivered in public if such use is for information purposes and has not been expressly reserved....^{xiii}

The Commonwealth countries in RCEP have provisions that allow the fair dealing with a work for the purpose of reporting current events. Section 37 of the Singapore Copyright Act, for example, provides that a fair dealing with a work “shall not constitute infringement of the copyright in the work if it is for the purpose of, or is associated with, the reporting of current events...in a newspaper, magazine or similar periodical...or...by means of broadcasting....^{xiv}

Finally, as noted above, several RCEP countries have flexible, open-ended exceptions that would encompass the quotation of newspaper headlines or text, to the extent not already permitted under another exception or limitation.

Issues to consider in RCEP negotiations

To eliminate possible ambiguity when considering the question of quotation right, RCEP negotiators could look to Article 10(1) of the Berne Convention that specifically refers to quotations from news reports. This would simply clarify the position across Asia and reduce risk and uncertainty for companies.

A similar relevant provision can be found, for instance, in the above-mentioned Section 13(m) of the Malaysia Copyright Act:

- Parties shall permit the making of quotations from a published work if they are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries

Exhaustion of Copyright

Negotiators should discuss the principle of copyright exhaustion, in particular given the novel questions it presents in the digital context with the increasing prominence of electronic commerce and online transmissions.

Why This Matters

Copyright laws typically provide the rights holder with an exclusive right to distribute copies of a work to the public. That right is exhausted with respect to any particular copy after the first sale of that copy with the rights holder’s authorization. However, copyright laws vary in their application of the exhaustion (or first sale) doctrine to foreign sales. The approach adopted towards exhaustion – whether national, regional or international -- determines whether parallel imports can be opposed based on an existing copyright. As such, this question bears a direct relevance to trade flows in the region.

Status in RCEP Countries

RCEP countries have adopted different approaches to copyright exhaustion. For example, Singapore permits the importation of all non-infringing copies.^{xv} New Zealand permits the importation of non-infringing copies, with the exception of films within five months of release.^{xvi} In contrast, Australian law prohibits parallel imports, with some exceptions.^{xvii}

Issues to Consider in RCEP Negotiations

RCEP negotiators should discuss their approach towards exhaustion of copyright, as well as the applicability and possible effects of this principle in the digital context. It is also noteworthy that many RCEP countries are relatively small, and that therefore consumers and small businesses in these countries often use the Internet to find merchants in other countries who can sell them goods not on the market in their countries.

Proportional Damages

RCEP officials should reconsider rules on damages for copyright infringement. The rise of digital technology means that many existing regulations regarding infringement and damages may need careful reconsideration or recalibration. The balance between upholding the legal protections for rights holders and avoiding disproportionate damages that may deter innovation and product development is always tricky. Rapidly evolving technology makes this balance harder to achieve.

Why This Matters

The nature of the Internet can expose service providers to a large number of copyrighted works. While safe harbours and flexible exceptions can reduce a service's exposure to infringement liability, firms must consider their potential damage liabilities when determining whether to offer a new service. Copyright protection is undoubtedly crucial, but it is also to be kept in mind that disproportionate remedies may deter service offering.

Status in RCEP Countries

Several RCEP countries, including India (at Section 55) and the Philippines (at Section 216.1) provide only for actual damages and an accounting of the defendant's profits.

The copyright laws of New Zealand and Australia authorize courts to award "additional damages" in cases involving "flagrant" infringement. The Australian Copyright Act at Section 115 provides courts with detailed guidance on factors they should consider in awarding additional damages, including the flagrancy of the infringement; the need to deter similar infringements; the conduct of the defendant after being informed that he had infringed (e.g., receiving a cease and desist letter); whether the conduct involved the digitization of an analog work; and the benefit the defendant received from the infringement.^{xviii}

The copyright acts of several RCEP countries, including Singapore, Malaysia, and Korea, permit the award of statutory damages, but make clear that the award must be proportionate to the injury.^{xix}

Issues to consider in RCEP negotiations

While damages for copyright infringement are a crucial part of any IP system, damages regimes that are too harsh or too uncertain can have a chilling effect on innovation. For example, 78% of global investors reported that they would not invest in Internet business models in which the amount of damages (in the event of liability) is uncertain, or not tiered or staged in relation to the various levels of violation.^{xx}

Because of the diversity of approaches to damages in RCEP countries, RCEP negotiators could consider the following as guidance in addressing this issue:

- The TRIPS approach of requiring compensatory damages, but permitting countries to allow the recovery of other forms of damages, e.g., infringer’s profits, additional damages, or pre-established damages.
- A proportionality provision requiring each Party to take into account the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties.

Safe Harbours

RCEP negotiators should also consider provisions to allow safe harbours from liability for Internet service providers, and the conditions that need to be fulfilled for this.

Why This Matters

Internet service providers may need relief from potential liability for the infringing activities of their users if they are to invest in the development and deployment of new services. A recent survey of global investors -- covering seven RCEP negotiating countries -- found that 71% of investors “are uncomfortable investing in Internet businesses where the intermediaries could be held liable for third party content or actions.”^{xxi} Thus, safe harbours are critical to Internet services such as Internet access providers, cloud services, social media platforms, and search engines. In addition to enabling the growth of these services within RCEP countries, safe harbours can also protect the millions of APAC SMEs that rely on Internet services and platforms as trade lanes to reach billions of global customers in international markets.

Status in RCEP Countries

As a result of free trade agreements, Singapore included safe harbour provisions for Internet service providers for copyright infringement in domestic law, while Australia and Korea introduced partial safe harbour provisions.^{xxii} Japan also has a safe harbour in place, although court rulings have been somewhat contradictory.

Issues to Consider in RCEP Negotiations

Negotiators can address the following crucial questions related to safe harbours:

- Notice-and-action systems that enable service providers to cooperate with copyright owners to deter unauthorized storage of copyrighted materials;
- Limitations that preclude monetary or other relief against service providers for copyright infringement that they do not control, initiate or direct; and
- Possible need for prohibitions on requiring service providers to proactively monitor a service or affirmatively seek facts indicating infringing activity.

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ⁱ Australian Law Review Commission, *Copyright and the Digital Economy* (ALRC Report 122) available at http://www.alrc.gov.au/sites/default/files/pdfs/publications/_05.executivesum.pdf.

ⁱⁱ See *Firm Performance in Countries With and Without Open Copyright Systems*, <http://infojustice.org/archives/34386>.

A recent study on the impact of flexible exceptions in Singapore found that such a framework “is correlated with higher growth rates in private copying technology industries while having a very limited impact on copyright industries.” Roya Ghafele & Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore*, available at <http://infojustice.org/download/copyright-flexibilities/articles/Roya%20Ghafele%20and%20Benjamin%20Gibert%20-%20The%20Economic%20Value%20of%20Fair%20Use%20in%20Copyright%20Law.pdf>.

ⁱⁱⁱ Ghafele and Gilbert (2012), <http://infojustice.org/download/copyright-flexibilities/articles/Roya%20Ghafele%20and%20Benjamin%20Gibert%20-%20The%20Economic%20Value%20of%20Fair%20Use%20in%20Copyright%20Law.pdf>.

^{iv} Tradewinds Blog, *USTR Introduces New Copyright Exceptions and Limitations at San Diego TPP Talks* Office of the U.S. Trade Representative (July, 2012), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

^v *Id.* Ambassador Froman likewise stressed “the importance of matching incentives for innovation with mechanisms to assure access and dissemination.” Michael Froman, U.S. Trade Representative, Office of the U.S. Trade Representative, *A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress* (Feb. 18, 2014) in https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P.

^{vi} The factors in these countries’ exceptions are similar to those in the “fair use” provision in the U.S. Copyright Act. Courts in the United States have found that fair use permits activities as diverse as: the copying of images found on the World Wide Web for the purpose of creating an image search engine; the copying of library books for the purpose of creating a search index and providing accessible copies to the print disabled; the disassembly of computer programs for the purpose of achieving interoperability; the copying of student papers for the purpose of creating a plagiarism detection database; the copying of websites for the purpose of reading them; and the timing-shifting or space-shifting of broadcast content by consumers.

^{vii} The exceptions in these countries are based on the United Kingdom’s “fair dealing” provision. Many Commonwealth countries have such provisions. Courts in several Commonwealth countries have held that fair dealing does not apply to commercial uses. Indeed, Singapore in 1998 amended its fair dealing provision to apply to commercial uses after the Singapore Court of Appeal ruled that the existing fair dealing provision did not extend to a software firm’s reverse engineering of software for the purpose of achieving interoperability because of the activity’s commercial purpose. However, the Canadian Supreme Court has interpreted the Canadian fair dealing provision in a manner similar to the U.S. fair use doctrine, applying it to both commercial and non-commercial uses.

^{viii} Section 185.1 of the Intellectual Property Code of the Philippines provides that “the fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright.”

^{ix} With the exception of Cambodia and Myanmar, all RCEP negotiating countries are parties to the Berne Convention.

^x Malaysia Copyright Act Sec. 13(1). See also New Zealand Copyright Act Sec. 29(2)(a) (“doing a restricted act...in relation to the work as a whole or any substantial part of it...”); India Copyright Act Sec. 14 (the exclusive right...to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof...”); Philippines Copyright Act Sec. 177.1 (“reproduction of the work or substantial portion of the work”).

^{xi} Malaysia Copyright Act Sec. 13(m).

^{xii} See also Philippines Copyright Act Sec. 184(b).

^{xiii} See also Korea Copyright Act Article 27; India Copyright Act Sec. 52(m); Malaysia Copyright Act Sec. 13(n).

^{xiv} See also Australia Copyright Act Sec. 42; New Zealand Copyright Act Sec. 42; (Malaysia Copyright Act Sec. 13(2)(a); India Copyright Act Sec. 52(b)).

^{xv} Singapore Copyright Act 32. In *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351 (2013), the U.S. Supreme Court found that the first sale doctrine in the U.S. Copyright Act, 17 U.S.C. § 109(a), allowed a Thai graduate student living in the United States to sell on eBay lawfully published textbooks his family imported from Thailand.

^{xvi} New Zealand Copyright Act 35(1) and (3).

^{xvii} See Australian Copyright Act 37 and 44A.

^{xviii} See also New Zealand Copyright Act at Sec. 121.

^{xix} See Singapore Copyright Act Sec. 119, Malaysia Copyright Act Sec. 37(1), Korea Copyright Act Article 125*bis*.

^{xx} Fifth Era, *The Impact of Internet Regulation on Investment* (2016), available at <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/568ea4b9e0327c3a3cf9293b/1452188857368/2016+Fifth+Era+Report+-+The+Impact+of+Internet+Regulation+on+Investment.pdf>.

^{xxi} Fifth Era, The Impact of Internet Regulation on Investment (2016), available at <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/568ea4b9e0327c3a3cf9293b/1452188857368/2016+Fifth+Era+Report+-+The+Impact+of+Internet+Regulation+on+Investment.pdf>.

^{xxii} Safe harbours for Internet service providers first appeared in the 1998 Digital Millennium Copyright Act (DMCA) in the United States. The European Union adopted similar safe harbours in 2000 in the E-Commerce Directive. Article XX of the intellectual property chapter of the EU-Vietnam Free Trade Agreement requires the adoption of safe harbours based on those in the E-Commerce Directive.