

Re-thinking Intellectual Property

The political economy of copyright protection in the digital era

Dr YiJun Tian

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Copyright laws and Intellectual Property Rights (IPRs) now play an increasingly important role in the creation of business fortunes, the access to and dissemination of knowledge, and human development in general. As a global issue in the digital age, ensuring that copyright laws and IPRs strike a sound balance is an important challenge for policy- and law-makers to address.

This book critically examines the current copyright and IPR regime in the context of digitalisation, knowledge economy and globalisation. Referring to international IP consensus, recent developments in regional IP forums and the successful experiences of various countries, Tian provides specific theoretical, policy and legislative suggestions for addressing current copyright challenges. This book contends that each nation should strengthen the co-ordination of its IP protection and development strategies, adopting a more systematic and heterogeneous approach, in order to make sure that IP theory, policy, specific legal mechanisms, marketing forces and all other available measures work collectively to deal with digital challenges and in a way that contributes to the establishment of a knowledge equilibrium international society.

The adoption of a theoretical and practical approach means that this book will appeal to a wide range of readers with diverse interests. It will be of interest to lecturers, students, scholars and professionals of international law, particularly in the area of digital legislation, intellectual property rights, international trade and public policy.

Dr YiJun Tian is a lecturer in Law at the University of Technology Sydney, Australia.

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Finally, I would like to dedicate this book to my father Tian Langqi and mother Ma Yunxiang. This book would not have been possible without the support of my parents.

Acronyms

ACP	African, Caribbean and Pacific Group of States
AGLC	Australian Guide to Legal Citation
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
AUSFTA	Australian-United States Free Trade Agreement
BSA	Business Software Alliance
BTA	Bilateral Trade Agreement
CAFTA	Central American Free Trade Agreement
CAN	Andean Community or Comunidad Andina de Naciones
CIA	Central Intelligence Agency
CGKD	Centre for Governance of Knowledge and Development
CSS	Content Scramble System
CTEA	Copyright Term Extension Act
DAA	Digital Agenda Act
DBMS	Database Management System
DMCA	Digital Millennium Copyright Act
DVD	Digital Video Disc
EFF	Electronic Frontier Foundation
EU	European Union
EUCD	European Union's Copyright Directive
FoD	Friends of Development
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
GPS	Global Positioning System
IACC	International Anti-counterfeiting Coalition
ICT	Information Communication Technology
ICTSD	International Centre for Trade and Sustainable Development
IDC	International Data Corporation
IFPI	International Federation of the Phonographic Industry
IIM	Inter-sessional Intergovernmental Meetings

IP	Intellectual Property
IPR	Intellectual Property Right
IS	Information System
ISP	Internet Service Provider
JCO	Japan Copyright Office
JCCT	Joint Commission on Commerce and Trade
KE	Knowledge Equilibrium
KOCCA	Korea Culture and Content Agency
LDCs	Least Developed Countries
MFN	Most Favored Nation
MIPI	Music Industry Piracy Investigations
MIT	Massachusetts Institute of Technology
MNC	Multinational Company
NAFTA	North American Free Trade Agreement
NGO	Non-Government Organization
NII	National Information Infrastructure
NT	National Treatment
RIAA	Recording Industry Association of America
SPC	Supreme People's Court
OECD	Organisation for Economic Co-operation and Development
OCILLA	Online Copyright Infringement Liability Limitation Act
PCT	Patent Cooperation Treaty
PPP	Purchasing Power Parity
PTA	Preferential Trade Agreement
RMI	Rights Management Information
RTA	Regional Trade Agreement
SME	Small and Medium Enterprise
SACU	Southern African Customs Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
USSFTA	United States-Singapore Free Trade Agreement
USTR	United States Trade Representative
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WSIS	World Summit on the Information Society
WTO	World Trade Organization

Preface

Advances in technology, particularly digital technology, not only fundamentally change the rules of information distribution and dissemination and bring about great challenges for traditional copyright laws, but also generate profound effects on international IP trade, knowledge economy, civil society, globalisation and the changing international socio-economic and legislative environment in general. With the widened application of technology in recent years, copyright law's sphere of influence now extends to almost all disciplines and all corners of the world. Copyright laws, along with other Intellectual Property Rights (IPRs), constitute the legal foundation for the 'global knowledge-based economy' and copyright law now plays an increasingly important role in the creation of business fortunes, the access to and dissemination of knowledge, and human development in general. In response to technology-driven challenges, a number of international IP treaties and IP related bilateral/regional trade agreements have been established to harmonise and strengthen the protection of copyright and other IPRs. Particularly, in recent years, the rise of bilateralism/regionalism is fundamentally changing the landscape and context of IP/knowledge distribution.

Overly strong IPR requirements in Bilateral Trade Agreements (BTAs)/Regional Trade Agreement (RTAs) not only intensify the inherent imbalance in a copyright regime and benefit conflicts between developing and developed nations, but also intensify the 'knowledge divide/digital divide' worldwide. Thus, the question of how to establish proper copyright policy and law in order to facilitate the resolution of potential international intellectual property (IP) trade conflicts and contribute to harmony between copyright protection and social development has become an important issue that all countries have to face up to in the digital age.

This book examines major problems in the current IPR regime, particularly the copyright regime, in the context of digitisation, knowledge economy and globalisation. This book contends that the final goals of IP law and policy-making are to enhance the progress of science and economic development, and the use and even-distribution of intellectual resources at the global level. By referring to major international IP consensus, recent developments in

regional IP forums and the successful experiences of various countries, the author of this book is able to provide specific theoretical, policy and legislative suggestions for addressing current copyright challenges. This book contends that each nation should strengthen the co-ordination of its IP protection and development strategies, adopt a more systematic and heterogeneous approach, and make IP theory, policy, specific legal mechanisms, marketing forces and all other available measures work collectively to deal with digital challenges and in a way that contributes to the establishment of a knowledge equilibrium in international society. When an immediate international consensus on international IPR reform is not easily achievable, regional and domestic solutions (regional digital development agenda and copyright templates/law models) may serve as appropriate stepping stones for future multilateral solutions.

YiJun Tian,
Sydney 2008

Foreword by Professor Jane Winn

Intellectual property law and information technology have both undergone radical changes in recent years, expanding their impact on societies around the world. Developed countries generally, and the United States in particular, have leveraged their unequal bargaining power in trade negotiations with developing countries to extract major concessions in the form of very high levels of protection of intellectual property rights. These laws have no precedent in the history of international trade and economic development: the richest and most powerful nations in the world today achieved high levels of economic development in the absence of strong international intellectual property laws. As traditional sectors of the US economy such as manufacturing continue to decline, and the US becomes ever more dependent on 'knowledge economy' exports to try to offset its growing trade imbalances, US government demands for such concessions have intensified. As soon as participation by developing countries increased in multilateral arenas such as the Doha Round of negotiations in the World Trade Organisation (WTO), the US shifted its attention away from multilateral arenas towards bilateral and regional fora where its influence is greater. Advocates for developing countries have strongly opposed efforts to strengthen intellectual property laws beyond the increases mandated by the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) because they seem likely to exacerbate rather than ameliorate the 'Digital Divide'.

Yijun Tian provides an excellent overview of these developments, analysing their economic and political impact on developed and developing countries from the perspectives of legal theory, government policy and legislative strategies. He offers a balanced analysis of the growing conflict between developed and developing countries over the proper scope of intellectual property laws, explaining the significance of the issues without becoming a partisan in highly polarised debates.

While a great deal has been said about the impact of stronger patent rights on the delivery of health care services in developing countries, less has been said about the impact of strong copyright law on the ability of developing countries to participate in the emerging global knowledge economy. This book focuses on several important recent developments addressing the impact of digital technology on copyright law: safe harbours

for Internet Service Providers (ISPs); prohibitions on the circumvention of technologies designed to prevent unauthorised copying of copyright material in digital form; and intellectual property rights in databases. These examples clearly illustrate how the expansion of digital technology has proved to be a double-edged sword for copyright owners: it has both expanded the scope of material protected by copyright, and increased the difficulty of enforcing copyright.

Tian focuses on the relationship between copyright law, communications technologies and social institutions, and argues that pursuit of a 'knowledge equilibrium' would benefit both developed and developing countries more than the current system. Such a knowledge equilibrium would require expanding access to knowledge resources in less developed nations; developing the capacity for indigenous innovation and scientific progress in less developed nations; developing the capacity for commercialisation of scientific and artistic advances; and assuring representation of developing countries in negotiating trade agreements related to intellectual property and in standard setting activities that have an impact on the global knowledge economy. Tian notes that the regional approach taken by the US to 'divide and conquer' its opponents in more broadly representative multilateral fora could turn from a sword to be used against developing countries into a shield. If less developed countries adopt their own regional approach to harmonisation of copyright law, they would be better able to preserve the benefits of greater integration into global markets while avoiding the costs of implementing legislation tailored to the needs of developed countries rather than their own.

Americans have a saying: where you stand depends on where you sit. Perceptions of how an equitable balance among the competing interests represented in copyright law vary widely depending on the vantage point from which the issues are viewed. Tian's interpretation is clearly informed by his personal background as a citizen of the People's Republic of China, but is not limited by it. He draws on legislation from the US, the EU, Canada and Australia to isolate models suited to current conditions in less developed countries generally. Tian integrates accurate descriptions of recent developments in international copyright law with a conviction that a just resolution of current controversies is possible. He argues persuasively that a framework for such a just resolution should be heterogeneous in order to accommodate the wide disparities in economic development, and should be informed by authoritative sources of international law. Tian shows that information technology can be harnessed to serve the needs of less developed countries, and that international harmonisation of copyright law need not impede that process.

Jane K. Winn, Professor of Law,
Director of the Shidler Center for Law,
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