



Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (RCEP)

Haochen Sun, Associate Professor of Law and Director, Law and Technology Centre,
The University of Hong Kong

This Statement is open to endorsement and comment. Click [here](#) to sign the Statement.

Introduction

The Regional Comprehensive Economic Partnership (RCEP) aims to conclude a comprehensive agreement that promotes free trade and investment among Australia, China, India, Japan, New Zealand, South Korea and member states of the Association of Southeast Asian Nations (ASEAN). As a hallmark of this proposed agreement, the RCEP Intellectual Property (IP) Chapter will set out a host of minimum standards for IP protection in the sixteen participating countries.

We are deeply concerned about the copyright protection standards proposed for the RCEP IP Chapter. They may cause unintended effects of stifling creativity, free speech, and economic growth. We urge that the new rounds of RCEP negotiations reconsider those standards by applying the following three principles:

- 1. Integrate the public interest as a core value for copyright negotiations.**
- 2. Increase transparency of negotiations for the public interest.**
- 3. Institute changes in copyright provisions for the public interest.**

Guided by these three principles, RCEP negotiations would produce the largest mega-regional free trade agreement to procedurally and substantially protect the public interest in copyrighted works. The RCEP copyright provisions, therefore, stand to benefit nearly 50% of the world's population, who live in the sixteen RCEP participating countries.

Principle One: *Integrate the Public Interest as a Core Value for Copyright Negotiations*

At the national, regional, and international levels, copyright law serves not only the private interest of copyright owners, but also the public interest of society at large. It protects the economic and moral interests of copyright owners, and simultaneously affords the public with sufficient freedom in creating new works, disseminating information and accessing knowledge. The Preamble of the WIPO Copyright Treaty (WCT), therefore, stresses “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information...”

RCEP negotiators should integrate the public interest as a core value for setting copyright provisions by taking the following actions:

- **Scrutinize current protection of the public interest in using copyrighted works:** A committee consisting of negotiators and copyright experts should be set up to identify myriad public interests in using copyrighted works in RCEP participating countries. The committee will further consider whether and how the RCEP should promote those interests.
- **Examine public interest mandates under international copyright treaties:** The committee should carefully study the extent to which international copyright treaties obligate the RCEP participating countries to protect the public interest. For example, Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) mandate protection of the public interest in technological innovation and diffusion and market competition.
- **Consider public interest mandates under international human rights treaties:** The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights protect human rights that bear direct relevance to copyright protection. These human rights mainly protect freedom of opinion and expression and promote education, participation in the cultural life of the community, enjoyment of the arts, and sharing of scientific advancement and its benefits. The committee should consider the relevance of these human rights obligations to the RCEP.

Principle Two: *Increase Transparency of Negotiations for the Public Interest*

Procedurally, the transparency of negotiations is key to ensuring adequate protection of the public interest by the RCEP in general and its copyright provisions in particular. The RCEP will affect the lives and livelihoods of billions of people not only in the RCEP participating countries but across the globe. The public, therefore, deserves a democratic right to know how the RCEP negotiating process has and will have adopted provisions protecting the public interest. However, the past sixteen rounds of RCEP negotiations have yet to result in the release of any substantive negotiating texts for public scrutiny.

Against this backdrop, we urge that the transparency of the new rounds of RCEP negotiations should be increased through the following public consultation procedures:

- **Release negotiation information:** The RCEP should take affirmative measures to make all negotiating texts and other relevant documents publicly available as soon as possible. For this purpose, the RCEP should learn from the example of the World Intellectual Property Organization (WIPO), which carried out transparency measures that facilitated the successful conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. WIPO publicly released draft negotiating documents promptly. It also publicly webcast the negotiating process.
- **Strengthen stakeholder engagement:** When considering critical issues, the RCEP should open up channels through which the relevant stakeholders can submit their opinions. Stakeholders may include not only business groups but also civil society representatives. When necessary, the RCEP should organize public hearing meetings where various stakeholders can discuss the merits and demerits of draft proposals and negotiators can explain decision-making processes.

Principle Three: *Institute Changes in Copyright Provisions for the Public Interest*

The RCEP will culminate in a set of provisions that protect copyright. Against this backdrop, RCEP negotiators should also endeavor to craft provisions to protect the public interest primarily by carving out limitations and exceptions to copyright and setting up a safe harbor system for Internet service providers.

Copyright limitations and exceptions, such as fair use and compulsory licensing, guarantee that the public interest in creativity, education, and free speech can be promoted through the necessary uses of

copyrighted works. RCEP negotiators should adopt a hybrid approach to crafting copyright limitations and exceptions as follows:

- **Liberal apply the three-step test¹:** The new rounds of RCEP negotiations should make every endeavor to address concerns that the three-step test may rule out limitations and exceptions that are open-ended and flexible. It should be made clear that nothing in the test shall prevent the introduction or retention of limitations and exceptions for legitimate purposes such as criticism, comment, education, news reporting, parody, research, and facilitating access for persons with disability.
- **Expressly recognize certain limitations and exceptions:** The new rounds of RCEP negotiations should also acknowledge crucial limitations and exceptions such as temporary reproduction, text and data mining, and regional exhaustion of copyright.

There is also concern that Internet service providers are at risk of being held secondarily liable for copyright infringements committed by users. As information intermediaries, Internet service providers play an increasingly vital role in protecting the public interest in the digital age. They provide a wealth of services that support the smooth and speedy flow of commercial, cultural and technical information. Those services include Internet access, search function, social media, content platform, e-commerce, and cloud computing.

In that regard, the new rounds of RCEP negotiations should consider adopting a fair, transparent and streamlined system capable of effectively and expeditiously stopping online copyright infringing activities, such as a safe harbor system that mainly utilizes a notice-and-take-down procedure. RCEP negotiators should scrutinize the following key issues:

- Exempt Internet service providers from legal liability for the copyright infringement that they do not initiate, control, or direct by delineating the scope of qualified Internet services and discharging Internet service providers' obligations of proactively monitoring their services;
- Include an effective counter-notice procedure requiring that Internet service providers properly restore materials they have removed; and
- Impose penalties on parties who deliberately abuse the notice or counter-notice procedure.

Conclusion

In the digital age, copyright protection deeply affects the interests of authors, creative industries, users and society at large. Therefore, the RCEP should urgently adopt and follow the three public interest principles proposed in this statement to reshape its landscape of copyright protection.

¹ The three-step test has been established by the Berne Convention for the Protection of Literary and Artistic Works, the TRIPS Agreement, and the WCT as a core minimum standard for international protection of copyright. According to the negotiating proposals, the RCEP appears to have adopted the three-step test as well. By nature, the three-step test constrains legislative discretion to carve out limitations and exceptions to copyright. For example, Article 13 of the TRIPS Agreement requires that member states "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

Signatories:

Peng-Hwa Ang

Professor
Nanyang Technological University, Singapore

Tanya Aplin

Professor in Intellectual Property Law
The Dickson Poon School of Law, King's College London, United Kingdom

Lida Ayoubi

Lecturer
School of Law, Auckland University of Technology, New Zealand

Ida Madieha Abdul Ghani Azmi

Professor of Law
International Islamic University Malaysia, Malaysia

Brook K. Baker

Professor of Law
Northeastern University School of Law, United States

Arpan Banerjee

Assistant Professor and Assistant Dean
Executive Director, Centre for IP & Technology Law
Jindal Global Law School, India

Jonathan Barrett

Senior Lecturer
School of Accounting and Commercial Law
Victoria University of Wellington, New Zealand

Anne Barron

Associate Professor in Law
Department of Law, London School of Economics, United Kingdom

Shamnad Basheer

Honorary Research Chair Professor
Nirma University, India

Kathy Bowrey

Professor of Law
Faculty of Law, University of New South Wales, Australia

Robert Burrell

Professor of Law
University of Sheffield, United Kingdom
University of Melbourne, Australia

Michael Carroll

Professor of Law
Director, Program on Intellectual Property and Information Justice
American University Washington College of Law, United States

Anupam Chander

Director, California International Law Center
Martin Luther King, Jr. Professor of Law
University of California, Davis, School of Law, United States

Margaret Chon

Donald and Lynda Horowitz Professor for the Pursuit of Justice
Seattle University School of Law, United States

Mishi Choudhary

President and Founding Director
Software Freedom Law Centre, India

Susan Corbett

Associate Professor
School of Accounting and Commercial Law
Victoria University of Wellington, New Zealand

Guobin Cui

Associate Dean and Associate Professor
Tsinghua University Law School, China

Angela Daly

Vice Chancellor's Research Fellow
Queensland University of Technology Faculty of Law, Australia

Ben Depoorter

Sunderland Chair & Professor of Law
University of California, Hastings College of the Law, United States

Martin J. Dürst

Professor
Department of Integrated Information Technology, College of Science and Engineering, Aoyama Gakuin University, Japan

Sarah Eskens

PhD Candidate
Institute for Information Law, University of Amsterdam, Netherlands

Sean Flynn

Associate Director, Program on Information Justice and Intellectual Property
Professorial Lecturer in Residence
American University Washington College of Law, United States

Jerry G. Fong

Professor of Law
College of Law, National Chengchi University, Taiwan

Dev S. Gangjee

Associate Professor in Intellectual Property Law
Tutorial Fellow, St Hilda's College
University of Oxford, United Kingdom

Michael Geist

Canada Research Chair in Internet and E-commerce Law, University of Ottawa, Canada
Visiting Professor, University of Hong Kong Faculty of Law (2016, 2018), Hong Kong

Shubha Ghosh

Crandall Melvin Professor of Law
Director, Technology Commercialization Law Program
Syracuse University College of Law, United States

Rebecca Giblin

Associate Professor
Faculty of Law, Monash University, Australia

Graham Greenleaf

Professor of Law & Information Systems
Faculty of Law, University of New South Wales, Australia

Wenwei Guan

Assistant Professor
School of Law, City University of Hong Kong, Hong Kong

Lucie Guibault

Associate Professor
Institute for Information Law, University of Amsterdam, Netherlands

He Guo

Professor of Law
Executive Director, Intellectual Property Teaching and Research Center
Renmin University of China Law School, China

Michael Handler

Associate Professor
Faculty of Law, University of New South Wales, Australia

Masayuki Hatta

Assistant Professor of Economics
Faculty of Economics and Management
Surugadai University, Japan

Richard Hill

President
Association for Proper Internet Governance, Switzerland

Reto M. Hilty

Managing Director, Max Planck Institute for Innovation and Competition, Germany
Professor, University of Munich, Germany

Peter Jaszi

Professor of Law Emeritus
American University Washington College of Law, United States

Malavika Jayaram

Executive Director
Digital Asia Hub, Hong Kong

Ge Jiang

Associate Professor
Tsinghua University Law School, China

Melanie Johnson

Copyright Officer, Libraries and Learning Services
University of Auckland, New Zealand

Reji Joseph

Associate Professor
Institute for Studies in Industrial Development, India

Ariel Katz

Associate Professor and Innovation Chair in Electronic Commerce
Faculty of Law, University of Toronto, Canada

Alice Lee

Associate Dean and Associate Professor
University of Hong Kong Faculty of Law, Hong Kong

Jyh-An Lee

Assistant Professor
Faculty of Law, The Chinese University of Hong Kong, Hong Kong

Peter Lee

Professor of Law
University of California, Davis, School of Law, United States

Mark A. Lemley

William H. Neukom Professor of Law
Director, Program in Law, Science & Technology
Stanford Law School, United States

Chen Li

Professor of Law and UNESCO Chair in Copyright and Neighboring Rights
Renmin University of China Law School, China

Yahong Li

Associate Professor
Director, LLM Program in Information Technology and Intellectual Property Law
University of Hong Kong Faculty of Law, Hong Kong

Xiuqin Lin

Professor of Law
Dean, Intellectual Property Research Institute
Xiamen University, China

Chuntian Liu

Chairman, China Intellectual Property Law Society
Dean, Intellectual Property Academy, Renmin University of China Law School, China

Kung-Chung Liu

Lee Kong Chian Visiting Professor of Law

Director, Applied Research Center for Intellectual Assets and the Law in Asia (ARCIALA)
School of Law, Singapore Management University, Singapore

Bryan Mercurio

Professor and Vice Chancellor's Outstanding Fellow
Faculty of Law, The Chinese University of Hong Kong, Hong Kong

Rostam J. Neuwirth

Associate Professor
Faculty of Law, University of Macau, Macau

Sayuri Noma

Assistant Professor of Law
Teikyo University, Japan

Michael Palmedo

Assistant Director, Program on Information Justice and Intellectual Property
American University Washington College of Law, United States

Kyung-Sin Park

Professor of Law
Korea University Law School, Korea

Christoph Rademacher

Associate Professor
Faculty of Law, Waseda University, Japan

Srividhya Ragavan

Professor of Law
Texas A&M University School of Law, United States

AHM Bazlur Rahman

Chief Executive Officer
Bangladesh NGOs Network for Radio & Communication, Bangladesh

Jerome H. Reichman

Bunyan S. Womble Professor of Law
Duke University School of Law, United States

Pamela Samuelson

Richard M. Sherman Distinguished Professor of Law & Information
Co-Director, Berkeley Center for Law & Technology
University of California, Berkeley, United States

Martin Senftleben

Professor of Intellectual Property
Director, Kooijmans Institute for Law and Governance
Vrije Universiteit Amsterdam, Netherlands

Daniel Seng

Associate Professor
Director, LLM Program in Intellectual Property and Technology Law
Faculty of Law, National University of Singapore, Singapore

Chung-Lun Shen

Professor of Law
College of Law, National Chengchi University, Taiwan

Alexandra Sims

Associate Professor
Head, Department of Commercial Law
The University of Auckland Business School, New Zealand

Anubha Sinha

Program Officer
Centre for Internet and Society, India

Paul Sumpter

Senior Lecturer
Auckland Law School, The University of Auckland, New Zealand

Madhavi Sunder

Senior Associate Dean for Academic Affairs
Martin Luther King, Jr. Professor of Law
University of California, Davis, School of Law, United States

Uma Suthersanen

Chair in International Intellectual Property Law
Centre for Commercial Law Studies, Queen Mary University of London, United Kingdom

David Tan

Vice Dean, Dean's Chair and Associate Professor
Faculty of Law, National University of Singapore, Singapore

Tatsuhiko Ueno

Professor of Law
Faculty of Law, Waseda University, Japan

Kimberlee Weatherall

Professor of Law
The University of Sydney Law School, Australia

Rolf H. Weber

Professor of Law Emeritus
Faculty of Law, University of Zurich, Switzerland

Ming Yang

Professor of Intellectual Property Law
Peking University Law School, China

Simon Young

Professor and Associate Dean (Research)
Faculty of Law, The University of Hong Kong, Hong Kong

Peter K. Yu

Professor of Law
Co-Director, Center for Law and Intellectual Property
Texas A&M University School of Law, United States