

FAIR USE, FAIR DEALING, OR A HYBRID? COPYRIGHT, EDUCATION AND INNOVATION IN THE ASIA PACIFIC

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ABSTRACT

Although there is much debate in the academy about the specific features that support innovation, most commentators agree that an educated populace is essential. Yet education is heavily reliant on copyright works. This article identifies deficiencies in the permitted exceptions for educational users in the copyright laws of selected developing countries in the Asia Pacific region. It is argued that the United States' fair use provision is also inadequate for educational users and needs to be supplemented by more specific provisions. Some countries in the region have already emulated the United States' approach and introduced a hybrid fair use/fair dealing regime for education into their own copyright laws. Such an approach is recommended but, as the article cautions, without further steps, such as access to collective licensing bodies and open-source textbooks, the developing countries in the Asia Pacific will not be equipped to reap the economic benefits of innovation.

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I INTRODUCTION

*[W]estern intellectual property legislation is predicated upon a highly developed, literate and bureaucratic society with a strong State to administer and enforce law. These are not characteristics of many South Pacific countries.*¹

Copyright tends to be overlooked in the innovation paradigm because innovation is generally held to be stimulated by technological and biochemical advances, which are protected by the patent system. Yet education and access to information are essential tools for nations striving to achieve economic success through innovation,² and these tools are regulated by copyright law.³

As Olwan reminds us, innovation is not necessarily confined to developed countries and nor is it necessarily true that ‘both developed and developing countries have innovative capabilities’.⁴ Moreover, factors such as foreign investment, technology transfer, market and trade liberalisation policies and expenditure on research and development influence innovative activity.⁵ Nevertheless, education, particularly at the tertiary level, also plays a crucial part in 21st century innovation.⁶ Whereas in earlier times simple mechanical inventions might have been described as innovations, today’s successful innovations tend to be more technically complex.⁷ Basic numeracy and literacy skills are rarely sufficient to innovate in a way that increases economic performance; instead competence in more advanced areas of education, such as biochemistry, genetics, information and communication technologies, intellectual property and data logistics, is essential.⁸ The activity of building upon knowledge of advanced areas to develop a new idea can result in an economically viable innovation. In short, an educated community provides the foundation for an innovative economy.⁹

This article considers how the copyright provisions for education in selected developing countries in the Asia Pacific region might be improved. It warns, however, that such improvements are unlikely to be sufficient to address the innovative potential of those countries and notes that other

¹ Miranda Forsythe, ‘Intellectual Property Laws in the South Pacific: Friend or Foe?’ (2003) 7(1) *Journal of South Pacific Law* 1.

² On the development of the concept of innovation, see Julian Meyrick, ‘Exactly What Is Innovative about the Word “Innovation”?’ *The Conversation* (Web Page, 3 May 2016) <<https://theconversation.com/exactly-what-is-innovative-about-the-word-innovation-58720>>.

³ Rami M Olwan, *Intellectual Property and Development: Theory and Practice* (Springer, 2013) 17.

⁴ *Ibid* 120.

⁵ *Ibid* 121–36.

⁶ Ruth L Okediji, ‘The International Copyright System: Limitations, Exceptions and Public Interest Consideration for Developing Countries’ (Issue Paper No 15, International Centre for Trade and Sustainable Development, March 2006) 2.

⁷ ‘[T]he type of R&D done in developed countries is sophisticated when compared to that conducted in developing countries, which can be described as imitative and preliminary’: see Olwan (n 3) 133.

⁸ William J Baumol, ‘Education for Innovation: Entrepreneurial Breakthroughs vs. Corporate Incremental Improvements’ (Working Paper No 10578, National Bureau of Economic Research, June 2004) 23.

⁹ See discussion in UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, *The Asia and Pacific Regional Bureau's Education Support Strategy 2014–2021: Learning for Peace and Sustainable Development* (Report, 2014) 7–9, 15 <<https://unesdoc.unesco.org/ark:/48223/pf0000231083>>.

areas must be urgently addressed. These areas include provision of local copyright collective licensing organisations and the need for more locally focused educational materials.

The following part discusses the relevance of copyright law to education more generally and explains why an exclusive reliance upon permitted exceptions for education in copyright law is unsatisfactory, while the United States' fair use provision (often touted as advantageous to fair dealing) is similarly unsatisfactory for all educational requirements and is supplemented with more specific provisions. Moreover, the use of collective licensing bodies as a practical solution to inadequate educational provisions is rarely available in developing countries. Part III describes, as exemplars, the specific provisions for educational institutions and students in the national copyright laws of three countries in the Asia Pacific region: Samoa, Fiji and China. Each of these countries is classified by the World Bank as a developing country.¹⁰ (Although China is rapidly developing an innovative economy in its industrial regions, there are many rural areas that remain primitive and contribute to the country's ongoing classification as 'developing'.)

Part IV discusses Singapore and Korea, two countries of the region that have introduced a hybrid fair use/fair dealing paradigm into their copyright legislation, as well as the Philippines, which has also very recently introduced a hybrid regime. Given the different political, cultural, economic and social environments of the countries within the Asia Pacific region, as well as the diverse approaches taken when drafting their domestic copyright laws, regional harmonisation of the provisions for educational users may be impractical. Nevertheless, the article concludes that the potential improvements to the education systems in the Philippines, Singapore and Korea may encourage other countries in the region to move to a hybrid fair use/fair dealing paradigm in their own copyright legislation.

II THE ROLE OF COPYRIGHT IN EDUCATION

Copyright law is pervasive in its influence throughout education systems worldwide. Analogue teaching materials and textbooks as well as computer software, music recordings, films, broadcasts and ebooks are protected by copyright for many years.¹¹ International treaties and agreements, including the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*')¹² and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPs*')¹³ set out the minimum standards for national copyright laws. All Member States are bound to comply with the well-known 'three-step test' when providing user exceptions in their copyright laws. The three-step test first appears in the *Berne Convention*¹⁴ and is reiterated (with

¹⁰ For analysis of the meaning of 'developing countries', see Olwan (n 3) 23–25.

¹¹ For example, the term of copyright protection for literary works in New Zealand is the life of the author plus 50 years. The equivalent term in Australia is the author's life plus 70 years.

¹² *Berne Convention for the Protection of Literary and Artistic Works*, as revised on 24 July 1971 and amended on 28 September 1979, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 4 December 1887) ('*Berne Convention*').

¹³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPs*'). In practice there are very few nation states that are not members of the *Berne Convention* and *TRIPs*.

¹⁴ *Berne Convention* (n 12) art 9(2).

minor changes in wording) in *TRIPs*.¹⁵ The test has hitherto been considered to be ‘an obstacle to the adoption of open-ended flexible provisions at the national level’.¹⁶ This somewhat oppressive description is based largely on the interpretation of the three-step test adopted by World Trade Organization panels in international trade disputes.¹⁷ More recently, however, scholars have argued that the test was drafted with the intention that it serve ‘as a flexible balancing tool offering national policy makers sufficient breathing space to satisfy economic, social and cultural needs’.¹⁸ Geiger and his co-authors provide examples of the tacit acknowledgement of flexibility in the application of the three-step test in recent changes to the copyright laws of Singapore, Israel, Malaysia, Canada and Korea.¹⁹ More recent examples include South Africa and the Philippines. Each of these countries has now either expanded the scope of their fair dealing exceptions for education, or taken the bolder step of including a combination of fair use and fair dealing exceptions in their national copyright laws.²⁰ This latter step, now taken by three countries of the Asia Pacific region, could provide a useful example for others in the region and is discussed further in Part IV.

The drawbacks of an exclusive regime of prescriptive permitted acts for education in copyright laws are well traversed in the literature.²¹ For example, typical permitted acts for education are contained in s 44(3) of the *Copyright Act 1994* (NZ), which allows an educational institution to copy no more than the greater of 3% or three pages of a work, but the same part may not be copied by the same educational institution within 14 days (s 44(6)). Clearly such a provision is impractical for many educational institutions and has resulted in all New Zealand universities and most schools paying for licences from copyright collective management bodies to expand their uses of copyright works.

By contrast, educational institutions in the United States are able to rely to a limited extent upon a seemingly more flexible ‘fair use’ provision for making copies of copyright works for classroom use.²² Section 107 of the *Copyright Act 1976* states that

¹⁵ *TRIPs* (n 13) art 9. The three-step test also appears in other more recent international copyright treaties, which are not yet as widely signed up to as the *Berne Convention* and *TRIPs*.

¹⁶ Christophe Geiger, Daniel Gervais and Martin Senftleben, ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (Research Paper No 2013-04, American University Washington College of Law, Program on Information Justice and Intellectual Property, December 2013) 3. See also Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Martinus Nijhoff Publishers, 2012) 79.

¹⁷ The first such dispute was *United States – Section 110(5) of US Copyright Act*, WTO DOC WT/DS160/R, 26 January 1999. For discussion, see Susy Frankel, *Intellectual Property in New Zealand* (LexisNexis New Zealand, 2nd ed, 2011) 40–41.

¹⁸ Geiger, Gervais and Senftleben (n 16) 3.

¹⁹ *Ibid* 42.

²⁰ *Ibid*.

²¹ Alexandra Sims, ‘The Case for Fair Use in New Zealand’ (2016) 24 *International Journal of Law and Information Technology* 176.

²² 17 USC § 107 (1976).

the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.²³

However fair use is not without its pitfalls — in the main this is because only a court can rule definitively whether a particular use is fair or not fair. Section 107 continues:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Moreover, the precise quantity of a work that may be used or copied for the purpose of education under the umbrella of fair use is not clear. The United States Copyright Office has provided guidance on fair use, but qualifies its advice with the warning that it ‘cannot give legal advice or offer opinions on what is permitted or prohibited’.²⁴ Teaching staff are provided with a plethora of unofficial recommended practices,²⁵ including how to make their own prior evaluation on the fairness of a proposed use, but the uncertainty inherent in this process has led most United States educational institutions to pay copyright collective licensing management fees.

The fair use provision has been supplemented by the *Technology, Education and Copyright Harmonization Act of 2002*, which permits teachers and students of accredited, non-profit educational institutions to transmit performances and displays of copyright works as part of a course if certain conditions are met. If these conditions are not or cannot be met, in order to be lawful, a use would arguably have to qualify under another exception, such as fair use.²⁶ Moreover, teachers and educational institutions in the United States are safeguarded to some extent from the vagaries of fair use by another statutory provision that protects them from being ordered to pay statutory damages should a court find that their use of copyright material was infringing. The proviso to this section is that the teacher or institution satisfies the court that they had used the copyright material believing, on reasonable grounds, that what they were doing constituted fair use.²⁷

Although national copyright laws provide certain permitted exceptions for educational uses, clearly, in most countries, these exceptions are limited in scope and provide little practical help. Therefore, most educational institutions in developed countries pay substantial fees to copyright

²³ Ibid.

²⁴ United States Copyright Office, ‘Reproduction of Copyrighted Works by Educators and Librarians’ (Circular No 21, August 2014) 21.

²⁵ See Kenneth D Crews, *Copyright, Fair Use and the Challenge for Universities: Promoting the Progress of Higher Education* (University of Chicago Press, 1993); Kenneth D Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions* (American Library Association, 2nd ed, 2006).

²⁶ For analysis, see Kenneth D Crews, ‘Copyright and Distance Education: Making Sense of the TEACH Act’ (2003) 35(6) *Change* 34.

²⁷ 17 USC § 504(c)(2) (1976).

collective licensing organisations in order to provide sufficient materials to their students. This solution is, however, not available in many developing countries in which there are no established copyright collective licensing bodies.

The Appendix to the *Berne Convention* allows developing countries to grant compulsory licences for the bulk reproduction and translation of copyright works for educational purposes. However, the complicated procedural requirements set out in the Appendix are expensive and impractical.²⁸ In addition, the Appendix has no provision that would permit educational institutions to provide digital versions of works to students. Consequently, there has been very limited uptake of the compulsory licence regime by any of the developing countries.²⁹ In her examination of ‘special legal regimes for access to education’, Štrba concludes that the procedural requirements and the limited scope of the Appendix reflects a deliberate policy adopted by the developed countries to discourage uptake of the compulsory licensing regime and to protect the economic interests of their authors and publishing industries.³⁰

III EDUCATIONAL PROVISIONS IN THE COPYRIGHT LAWS OF DEVELOPING COUNTRIES IN THE ASIA PACIFIC REGION

Before considering how the perceived problems for educational institutions in the Asia Pacific could be addressed, this part describes the current permitted uses for education in the domestic copyright laws of three developing countries in the region: Samoa, Fiji and China. All three are classified by the World Bank as developing countries.³¹ However, it would be wrong to assume that they have identical needs. To be sure, each is a copyright user, but only Samoa and Fiji are net importers of copyright educational materials; China has many local publishers.³² While Chinese universities continue to import foreign educational materials for many disciplines, in 2018 China instigated a strict policy of allowing only ‘state-approved’ locally published textbooks and other course materials to be used in its schools, requiring local publishers to remove any foreign content.³³

Nevertheless, in the three countries, foreign books and international academic databases are expensive and sometimes physically unobtainable or inaccessible. Copyright exceptions for education are therefore crucial.

²⁸ *Berne Convention* (n 12) Appendix.

²⁹ See Margaret Chon, ‘Intellectual Property “from Below”: Copyright and Capability for Education’ (2007) 40 *University of California Davis Law Review* 803, 829; Okediji (n 6) 32.

³⁰ Štrba (n 16) 89–109.

³¹ For analysis of the meaning of ‘developing countries’, see Olwan (n 3) 23–25.

³² ‘The Book Publishing Industry in the Chinese Mainland’, *Encyclopedia.com* (Web Page, 28 March 2020) <<https://www.encyclopedia.com/books/international-magazines/book-publishing-industry-chinese-mainland>>.

³³ Zou Shuo, ‘Schools Told to Use Approved Textbooks’, *ChinaDaily* (online, 20 September 2018) <<https://www.chinadailyhk.com/articles/45/85/38/1537418279569.html>>.

A Samoa

From 19 December 1972 to 31 August 1998, Samoa did not provide statutory copyright protection.³⁴ Copyright in Samoa is now regulated by the *Copyright Act 1998* (Samoa), which has retrospective effect.³⁵ Compared with the copyright statutes of developed countries in the Asia Pacific region, such as New Zealand and Australia, the Samoan legislation is brief and to the point, containing only 35 sections.³⁶ The term of protection is life of the author plus 75 years. Moral rights have the same term of protection as copyright.³⁷ There is generous provision in s 8 for ‘private reproduction for personal purposes’:

A physical person may reproduce a single copy of a published work provided it is exclusively for his or her own personal purposes³⁸ ... provided the reproduction does not conflict with a normal exploitation of the work or otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright.³⁹

Section 10 regulates reproduction for teaching, permitting

[t]he reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with fair practice and does not exceed the extent justified by the purpose.⁴⁰

Section 10(1)(b) permits the reproduction, for face-to-face teaching in not-for-profit educational institutions,⁴¹ of published articles, other short works or short extracts of works, to the extent justified by the purpose.⁴² However, reproduction must be isolated — occurring, if repeated, on separate and unrelated occasions.⁴³ Moreover, if there is a collective licence available (that is, offered by a collective administration organisation of which the educational institution is or should be aware) under which such reproduction can be made, then the permitted exception in s 10(1)(b) may not be utilised.⁴⁴ So far as is practicable, the name of the author and the source of a work that has been reproduced must be indicated on all reproductions made under s 10(1).⁴⁵

³⁴ In *Fauolo v Gray* [1997] WSSC 1; CP 364 1995 (5 August 1997) the court refused to recognise common law copyright claims.

³⁵ *Copyright Act 1998* (Samoa) s 1(3); see discussion in *Galumalemana v Timani Samau & Sons Truck Services Ltd* [2006] WSCA 6 (26 April 2006) [10], per Ellis, Gallen and Salmon JJ sitting in the Court of Appeal at Samoa.

³⁶ Interestingly, the *Copyright Act 1998* (Samoa) s 29 explicitly protects ‘expressions of folklore’ (defined broadly in s 2 to include ‘all manner of indigenous cultural works’) and provides that the use of folklore can be authorised by an authority determined by the Minister of Justice with payment for such authorisation ‘to be used for the purposes of cultural development’.

³⁷ *Ibid* s 16.

³⁸ *Ibid* s 8(1). Sections 8(2)(a)–(c) provide that works of architecture, databases and computer programs are excluded from s 8(1).

³⁹ *Ibid* s 8(2)(d). This subsection reiterates the matters set out in the three-step test in *TRIPs* (n 13) art 13.

⁴⁰ *Copyright Act 1998* (Samoa) s 10(1)(a).

⁴¹ ‘[T]he activities of [the educational institutions] do not serve direct or indirect commercial gain’: *ibid* s 10(1)(b).

⁴² *Ibid*.

⁴³ *Ibid* s 10(1)(b)(i).

⁴⁴ *Ibid* s 10(1)(b)(ii).

⁴⁵ *Ibid* s 10(2).

The provision in s 8 for the personal use of copyright works appears generous, but in practice it is likely to be rarely used, since it requires the user to assess whether or not their proposed use satisfies the three-step test in the *Berne Convention*:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁴⁶

As reiterated and reformulated in *TRIPs*:

Members shall 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.⁴⁷

For Samoan educational institutions, s 10 is also limited in scope and usefulness. Section 10 does not apply to distance education institutions, does not permit (in any practical sense) the making of multiple copies for course books, and contains undefined phrases such as ‘the extent justified by the purpose’⁴⁸ and ‘compatible with fair practice’,⁴⁹ which provide uncertainty instead of clarity. Samoa currently does not appear to have any copyright collective management organisations.

B *Fiji*

The *Copyright Act 1999* (Fiji) is roughly based on New Zealand copyright legislation, but its educational permitted exceptions are tightly ring-fenced in favour of copyright owners. For example, the provision that allows an individual to make a single copy of any copyright work for research or private study, which also appears in the *Copyright Act 1994* (NZ),⁵⁰ is subject under Fijian law to the proviso that the exception does not apply ‘if there is a collective licence available under which the copying can be done’.⁵¹ Computer programs are also excluded from the permitted exception for research or private study provision in the Fijian *Copyright Act*.⁵²

An identical proviso and exception applies to the permitted exception for copying by schools and other educational establishments for their students and staff.⁵³ Arguably, it is more acceptable for these bodies to be required to take out a licence, although in a small country the issue of potential anti-competitiveness of any collective licensing body must be taken into consideration. Moreover, at the time of writing there appears to be only one established copyright collective licensing body operating in Fiji: the Fiji Performing Rights Association.

⁴⁶ *Berne Convention* (n 12) art 9(2).

⁴⁷ *TRIPs* (n 13) art 13.

⁴⁸ *Copyright Act 1998* (Samoa) ss 10(1)(a)–(b).

⁴⁹ *Ibid* s 10(1)(a).

⁵⁰ *Copyright Act 1994* (NZ) s 43(1).

⁵¹ *Copyright Act 1999* (Fiji) s 42(1).

⁵² *Ibid* s 42(8).

⁵³ *Ibid* ss 43(1), 43(4), 44(1), 44(7).

C *China*

The *Copyright Law of the People's Republic of China* ('PRC Copyright Law') was promulgated in 1990 and revised in 2001 and 2010. A third amendment was proposed by the State Council in 2012, and three drafts of that amendment have since been released to the public for comment. A 'finalised' set of draft amendments was released on 6 June 2014.⁵⁴ However, as yet, there is no final revised form. The proposed amendments do not appear to change the permitted exceptions for education and libraries, apart from providing 'a mechanism for the collective management of copyright' and the 'extension of competence of copyright collective management associations'.⁵⁵ If passed into law, these provisions will amend art 8 of the PRC Copyright Law, which currently permits the copyright owners themselves to appoint a collective copyright administration organisation.

'Limitations on Rights' are set out in art 22 and are brief and somewhat ill-defined (but due to their lack of definition possibly rather generous) provisions for education and libraries. Article 22 requires that the name of the author and the title of the work be indicated and 'the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced'.⁵⁶ If the foregoing requirements are satisfied, a published copyright work may be translated or reproduced 'in a small quantity of copies' for use by teachers in classroom teaching, 'provided that the translation or the reproductions are not published for distribution'.⁵⁷ In order to encourage the compilation and publication of textbooks for the nine-year compulsory education or state education planning, unless an author has stated that his works are prohibited from such use, fragments of works, short written works or musical works, a single work of fine art, or photographic works that have been published may be compiled in textbooks, 'with remuneration paid, the name of the author and the title of the work indicated, and without prejudice to the other rights enjoyed by the copyright owners according to this Law'.⁵⁸

China is both more advanced and more liberal in its provisions for education than the other countries discussed in this article. The Regulations on the Protection of the Right to Network

⁵⁴ See 'PRC Copyright Law (Revision Draft for Solicitation of Comments)', *China Law Translate* (Web Page, 6 July 2014) <<https://www.chinalawtranslate.com/en/prc-copyright-law-revision-draft-for-solicitation-of-comments>>.

⁵⁵ *Copyright Law of the People's Republic of China* (Revision Draft, Submission Version, 18 June 2014) ch 5 s II.

⁵⁶ *Ibid* art 22. Article 22 also provides that each of the limitations on the rights of authors is also applicable to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

⁵⁷ *Ibid* art 22(6).

⁵⁸ *Ibid* art 23. This article is also applicable to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

Dissemination of Information (‘the PRC Regulations’)⁵⁹ provide educational institutions with generous additional exceptions to copyright for works distributed on the internet. The purpose of the PRC Regulations is stated in art 1:

[F]or the purposes of protecting the right of dissemination via information network of copyright owners, performers and sound and visual recording makers as well as encouraging the production and dissemination of the works that are beneficial to the construction of socialist spiritual and material civilization.⁶⁰

The PRC Regulations provide eight very specific permitted exceptions for users, including ‘[p]rovision of a published work, in a small amount, to a small number of teachers or scientific researchers for classroom teaching or scientific research’,⁶¹ and for ‘[t]ranslation, into a minority nationality language, of a published work created in the Chinese Han language by a Chinese citizen, legal person, or any other organization and provision thereof to the minority nationalities inside China’.⁶² Importantly, the PRC Regulations also provide for distance education, allowing distance education institutions to provide students with ‘segments of published works or short written works, musical works, fine art works in the form of a single-piece, or photographic works that have been published’ without permission from the copyright owner, provided that remuneration is paid to the copyright owner.⁶³

Fair dealing provisions for education tend to either allow very limited uses of copyright works or provide vague guidelines that, in practice, are unworkable by educational institutions. Furthermore, drawing from the United States’ experience, an isolated fair use provision is not sufficient for educational needs; the United States has introduced additional statutory provisions for distance teaching and also provides specific exceptions in regard to potential damages payable for copyright infringement by an educational user. This can be described as a hybrid regime and is an approach emulated by the Philippines, Singapore and Korea.

IV HYBRID REGIMES: FAIR USE AND FAIR DEALING FOR EDUCATION

The copyright statutes of the three countries described in this part — the Philippines, Singapore and Korea — also include statutory licensing provisions that permit educational institutions to make multiple copies of articles or books or to communicate them to students, with remuneration to the copyright owner to be agreed or alternatively to be determined by a copyright tribunal.⁶⁴

⁵⁹ *Regulation on Protection of the Right to Network Dissemination of Information* (People’s Republic of China) State Council, Order No 468, 18 May 2006 (as amended by the Decision of the State Council on Amending the Regulation on Protection of the Right to Network Dissemination of Information, 30 January 2013). For an English translation, see HFG Law & Intellectual Property, *Regulations on the Protection of Right of Dissemination via Information Network* (2013) (2014) <https://www.hfgip.com/sites/default/files/law/regulations_on_the_protection_of_right_of_dissemination_via_information_network_2013_english.pdf>.

⁶⁰ *Ibid* art 1.

⁶¹ *Ibid* art 6(3).

⁶² *Ibid* art 6(5).

⁶³ *Ibid* art 8.

⁶⁴ *Copyright Act 1987* (Singapore) s 52.

The Philippines has introduced a United States-style fair use provision into s 185.1 of its intellectual property code — ‘fair use of a copyrighted work for criticism, comment, news reporting, teaching including limited number of copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright’. In determining whether a specific use is fair, the code requires consideration of the same four factors as are required by the United States fair use provision. The uncertainties surrounding fair use as discussed previously do not appear to have been addressed in the Philippines’ provision.

Similar United States-style fair use provisions, albeit sometimes described as ‘fair dealing’ provisions,⁶⁵ have been introduced into Singapore’s and South Korea’s copyright statutes. These open-ended provisions operate alongside more specific provisions that permit certain educational uses, such as copying by non-reprographic means and things done for the purpose of examinations.

The *Copyright Act 1987* (Singapore) includes an open-ended provision, similar to the United States’ fair use provision, that permits ‘fair dealing with a copyright literary, dramatic, musical, or artistic work or with an adaptation of any one of these for any purpose’.⁶⁶ The fair dealing provision includes a fifth factor, in addition to the four factors required in the United States fair use provision, requiring the courts to have regard to ‘the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price’.⁶⁷ In a current review of the Singapore Act, however, it has been proposed that this fifth factor should be removed due to its lack of clarity in a digital era and the possibility that it implies there is always an obligation to seek a licence before relying on the exception.⁶⁸ The *Singapore Copyright Review Report* has also proposed changing the term ‘fair dealing’ to ‘fair use’ to reflect its similarities to the United States’ open-ended provision.⁶⁹

Jong explains that a general clause on fair use, art 35^{ter}, was inserted into the *Copyright Act of Korea* in 2011:

In determining whether a use falls under this paragraph, the following factors shall be considered under the Act:

- Purposes and characters of use, such as for-profit or non-profit;
- Types and uses of works, etc.;
- Proportions of used parts in the entire works, etc. and their importance;
- Impact of the use of works, etc. on the current market or value or potential market or value of such works, etc.⁷⁰

⁶⁵ Ibid s 35(1).

⁶⁶ Ibid s 35.

⁶⁷ Ibid s 35(2)(e).

⁶⁸ ‘Proposal 6: Strengthening the General “Fair Use” Exception’, in Singapore Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (Report, 17 January 2019) 25, 26.

⁶⁹ Ibid 28.

⁷⁰ Sang Jo Jong, ‘Fair Use in Korea’ (Conference Paper, Australian Digital Alliance Copyright Forum, 24 February 2017) <<http://infojustice.org/archives/37819>>.

Although, as Jong reports, there have been several cases where the new fair use clause justified legitimate uses, he also notes that another question remains to be addressed by Korea: ‘[H]ow to minimize uncertainty and unpredictability under the fair use doctrine’.⁷¹

It appears that the introduction of a hybrid regime to national copyright laws has some benefits but has also introduced additional uncertainty. Educational institutions are not confident of the legal boundaries of fair use, or indeed of some of their permitted exceptions. For instance, despite their own hybrid regime and the useful clause limiting damages payable by educational institutions, educational institutions in the United States continue to subscribe to collective copyright licensing bodies to ensure they are legally protected when providing educational materials to their students. Similarly, fair dealing provisions for education tend to either allow very limited uses of copyright works or provide guidelines that, in practice, are unworkable for educational institutions. Therefore, educational institutions in fair dealing countries also subscribe to collective copyright licensing bodies, rather than rely upon the uncertainties of fair dealing.⁷²

V CONCLUSION

*A well-informed, educated and skilled citizenry is indispensable to the development process.*⁷³

The Asia Pacific region comprises many developing nations that are excluded from the economic advantages of innovation. Without increased concessions for education in the copyright laws of the region, many countries and territories will continue to be disadvantaged. The introduction of hybrid fair use/fair dealing provisions for education by some Asia Pacific nations is a step in the right direction. However, there are other contributing factors to the problems of developing countries. These include the lack of copyright collective licensing organisations in many developing countries and the need for suitable educational materials appropriately focused on the specific domestic market, resulting in an over-dependence on expensive international educational materials. With improved copyright exceptions for education, the provision of licensing organisations and access to suitable educational materials, developing countries in the Asia Pacific could, eventually, be equipped to reap the economic benefits of innovation.

⁷¹ Ibid.

⁷² For analysis of the failures of fair use and fair dealing provisions to resolve the issue of permissible quantitative copying limits for educational users, see Muhammad Masum Billah and Saleh Albarashdi, ‘Fair or Free Use of Copyrighted Materials in Education and Research and the Limit of Such Use’ (2018) 17 *Chicago-Kent Journal of Intellectual Property* 422.

⁷³ Okediji (n 6).