Copyright and (dis)harmonisation: Can developing nations prioritise their own public good in a global copyright hegemony?

1. Introduction

Copyright comes to the attention of parliaments around the world on a frequent basis in recent decades, stimulated by rapid changes in reproduction technologies such as the introduction of the photocopy machine, the tape recorder or widespread adoption of the Internet. In 1912, the Attorney General, when moving the Copyright Bill for the second time, opened with the words "The measure before the Chamber deals with a matter of very considerable importance to every civilized community".[1] The Bill was to adopt a British approach to copyright ("much to be preferred to that in force in America"), taking the 1911 Copyright Act, making it "clear and effective" throughout the Empire. Times have indeed changed, but pressure for conformity remains, albeit from a different empire. The global agenda a century later for intellectual property protection has been driven by the large industrial property and creative industry generating jurisdictions, whether the European Union for Geographical Indicators, or in the last half-century the United States pushing for extended copyright protection, and of course for the vested (multi-national corporate) interests within those nations. Due to the push for global harmonisation of intellectual property rights, global agreements have a strong influence on the development of legal copyright frameworks for smaller (in terms of intellectual property protected outputs) nations, whether or not they provide any directly attributable benefit in that realm.

Copyright related industries are undoubtedly important to all nations, whether least developed, developing or highly developed. In some nations, even though the dollar value is small when compared to the global copyright giants, the contribution to gross domestic product (GDP) may be significant. Although perhaps a blunt tool to measure a nations creative performance, particularly as reflected to those outputs referenced in copyright, GDP does provide a useful metric. This is reflected by the World Intellectual Property Organisation's provision of an instrument to provide a guide on the methodology for nations to collect data on the economic contribution of creative industries, which it has been applying for over a decade.[2] The data provided in the most recent report, based on reports from 42 countries, shows clear evidence of the value of creative industries in terms of GDP.[3] Developing nations are undoubtedly

[1] Commonwealth, Parliamentary, House, Wednesday, 30 October 1912, 1, HUGHES, William Morris. The "enlightened, effective, and simple piece of legislation" read that day became the Copyright Act 1912, which ran to 23 pages. The current Australian Commonwealth Copyright Act 1968 in comparison runs to 768 pages, the longest in the world, and cannot be called clear and simple by any stretch of the imagination.

[2] World Intellectual Property Organisation "Guide on Surveying the Economic Contribution of Copyright Industries" 2015. The previous Guide on Surveying the Economic Contribution of the Copyright-Based Industries 2003 was widely used to get a baseline of economic activities related to such industries. The new Guide is online at http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf

[3] World Intellectual Property Organisation "WIPO Studies on the Economic Contribution of the Copyright Industries" 2014. The relationship between creativity and how it is impacted and impacts culture is beyond the

influenced by such data, in addition to strong trading nations' pressure, to update their copyright legislation to bring it more in line with developed nations, for example by bringing in legislation in the jurisdiction to ensure compliance with the WIPO Copyright Treaty.[4] The norm is to discuss the (protected) industry's direct contribution to GDP, as reflected by the World Intellectual Property Organisation's Guide.[5] However, it is also a useful tool to identify 'small' copyright nations. Naturally, nations that are small in intellectual property terms will have smaller overall outputs, and thus may be of less consequence in terms of global influence, but nonetheless copyright related industries may play an important role in contributing to the economy. Following the global contribution scale, we can call these nations "Small Copyright" (SC) or Small Intellectual Property (SIP) nations, reflecting their lack of ability to influence global developments. Bhutan, for example, would be considered an SC, despite copyright and related industries contributing to over 5% GDP and 10% employment, and others can be seen in the WIPO *Guide*.[6] It needs to be noted, however, that the ability to make the most of fair use, and its contribution to economies, tends to get less attention from WIPO or IP development considerations as a whole.[7]

In the realm of copyright, which is perhaps the most harmonised intellectual property right, the room for the SC nations to cut out a niche for their own jurisdictions is limited. This chapter discusses the possibilities for such nations to take actions that fall outside the current norms for intellectual property harmonisation.

2. Global Copyright Harmonisation

Since the Berne Convention 1886,[8] there has been a global to move towards 'harmonised' copyright laws around the world aided by treaties and bilateral agreements. The SC nations have had very little influence on the progress of the negotiations that lead to these agreements. Even developing nations with some influence, such as India, had great difficulty in getting compromise in the negotiations for TRIPS (although they were somewhat successful in getting the postponement of the adoption of some patent compliance). There have been legions of articles on impact of international treaties on jurisdictions' intellectual property development,[9] whether criticisms on the breadth of exceptions or the need for 'technology neutral' copyright

scope of discussion here, but for some insights see Y Mu, S Kitayama, Shan, and M Gelfand "How culture gets embrained: Cultural differences in event-related potentials of social norm violations" PNAS | December 15, 2015, vol. 112, no. 50 .

[4] World Intellectual Property Organisation Copyright Treaty (WCT), Geneva 20 December 1996. Even if not party to the WCT many nations have brought in parts, such as anti circumvention legislation. See, for example, the Seychelles Copyright Act 2014, s.32, prohibiting circumvention of technology protection measures.

[5] WIPO "Guide ON Surveying the Economic Contribution of the Copyright Industries", 2015 revised edition. *Supra note 2.*

[6] Ibid.

[7] Discussed below at note 13

[8] Berne Convention for the Protection of Literary and Artistic Works 1886, available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698

[9] For example, see Perry, M. , and Margoni, T., "Scientific and Critical Editions of Public Domain Works: An Example of European Copyright Law (Dis)Harmonization" Canadian Intellectual Property Review, 2011-1, p. 157-170, and Sheldon W. Halpern, and Phillip Johnson, "Harmonising Copyright Law and Dealing with Dissonance: A Framework for Convergence of US and EU law" Edward Elgar, UK, 2014.

legislation to meet the digital needs of the modern era. Discussions on the ability of nations to construct IP frameworks for the benefit of their own particular environment often focus on the "three step test",[10] and how various types of legislation do or do not contradict the requirements of various agreements.[11] However, in the mainstream of copyright development inside jurisdictions, the need for continued movements towards further global copyright harmonisation is seen as a 'good thing'.

There are also a plethora of international treaties directly relating to copyright, and Australia, for example, is party to seven.[12] Some of the SC nations have been given a copyright agreement designation of 'unclear' by the United States Copyright Office, or not mentioned at all.[13]

Naturally, the subsequent revisions since Berne, inclusions in TRIPS and the many other copyright treaties such as WCT and WPPT, as well as bilateral and multilateral agreements have been subject to a great deal of analysis from numerous perspectives. However, there has been little note of how SC nations can escape the straightjacket of international copyright construction, which has mainly been driven by highly developed Western nations. Herein, is an attempt to highlight the potential for developing nations to tailor their own copyright legislation well as subsequent related *sui generis* legislation to assure maximum benefit to their own situation, but without breaching the letter of agreements to which they are a party.

3. The constraints of harmonisation

Often the intellectual property clauses in bilateral agreements are included as an issue that is part of a larger trade agreement. Cynical commentators may say that the intellectual property clauses are slipped in to larger agreements to aid the United States' quest for global harmonisation of intellectual property in the mould and model provided by the United States . A kind of intellectual property colonialism. Often discussion of intellectual property rights is

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[10] The test for limitations of exceptions has permeated copyright treaties, from Berne Article 9 to TRIPS Article 13 and the WCT Article 10, but generally it limits them special cases that don't negate a a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the rights holder.

[11] For example, the Australian Law Reform Commission "Copyright and the Digital Economy" ALRC Report 122, at 4.164 "To deny Australia the significant economic and social benefits of a fair use exception," [here discussing the three step test in Berne, TRIPS and AUSFTA] "the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law."

[12] Seven, not counting bilateral treaties: *Berne (Paris)* Apr. 14, 1928; Universal Copyright Convention, Geneva, 1952, May 1, 1969; Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, Geneva, 1971, June 22, 1974; Universal Copyright Convention as revised at Paris, 1971, Feb. 29, 1978; Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974, Oct. 26, 1990; World Trade Organization (WTO), established pursuant to the Marrakesh Agreement of Apr. 15, 1994, to implement The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Jan. 1, 1995; World Intellectual Property Organisation (WIPO) Copyright Treaty, Geneva, 1996, July 26, 2007; WIPO Performances and Phonograms Treaty, Geneva, 1996, July 26, 2007. Note that the date following the treaty date is that of Australia's ratification. This data is taken from the United States Copyright Office "International Copyright Relations of the United States" June 2016, online at http://copyright.gov/circs/circ38a.pdf.

[13] Namely Kiribati, Nauru, Palau, Somalia, Southern Sudan, Tuvalu. SIDS make up four of these, with other SIDS being members of only Berne (such as the Federated States of Micronesia) or TRIPS (such as the Seychelles) or few other treaties. United States Copyright Office "International Copyright Relations of the United States" June 2016, online at http://copyright.gov/circs/circ38a.pdf.

mentioned as an afterthought, or buried amongst other pressing issues, and only comes to the fore due to criticisms from politicians and scholars aware of the area, and often such critical commentary is only available after the deal is negotiated. For example, the AUSFTA,[14] although making extensive changes to intellectual property in Australia, such as extending the copyright period by twenty years, was described by Ambassador Zoellick:

> "There is a hard-headed economic reality that supports this free trade agreement. More than 99% of the manufactured goods traded between the United States and Australia will be duty- free on the first day this 'Manufacturing FTA' goes into effect… This is the most significant immediate reduction of industrial tariffs ever achieved in a U.S. free trade agreement."[15]

More recent negotiations on international agreements, such as the Trans-Pacific Partnership (TPP),[16] also have intellectual property clauses, as well as SC nation involvement. [17] The TPP has gathered a great deal of commentary during its development, especially on the attempted patent term extension and data exclusivity for drug companies,[18] and criticism on the grounds of its insufficient recognition of the rights over traditional knowledge, which may be set back again by the adoption of stronger intellectual property right norms.[19] Other agreements that are under discussion include the Regional Comprehensive Economic Partnership,[20] which aims to establish a single trading partnership between ASEAN nations and countries which have free trade agreements with ASEAN members,[21] and discussions are supposed to come to a conclusion in late 2016. However, although intellectual property is one of the areas under consideration, little detail of what is being negotiated has been released.[22]

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[14] Australia and United States Free Trade Agreement, online at http://dfat.gov.au/trade/agreements/ausfta/official-documents/Pages/official-documents.aspx

[15] The announcement was made in 18th May 2004, Office of the United States Trade Representative , Executive Office of the President, online https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2004/may/united-states-and-australia-sign-free-trade-a [*sic*]. For the excitement eventually generated in Australia see K Weatherall "Locked In: Australia Gets a Bad Intellectual Property Deal" Intellectual Property Research Institute of Australia Occasional Paper No. 4/04, December 2004; Fitzgerald, Brian (2005) The Australian Sony PlayStation Case: How Far will Anti- circumvention Law Reach in the Name of DRM?. In *Proceedings International Conference on Digital Rights Management: Technology Issues, Challenges and Systems (DRMTICS), November 2005*, Sydney.

[16] Trans-Pacific Partnership, with Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam, is now less likely to proceed as envisioned due to the two United States Presidential candidates saying that they will not support its progress. Rob Salmond "Why did the TPP fail?" Public Address Polity 10:46 Aug 22, 2016, online at http://publicaddress.net/polity/why-did-the-tpp-fail/ puts the attempts of the agreement to lessen protection on goods, but with greater protection of intellectual property and investment as key reasons to substantial opposition to the TPP in the United States of America.

[17] Apart from Japan and the USA, all the others can be regarded as SIPS nations.

[18] Commentary by D G Shah "Impact Of The TPP On The Pharma Industry" 02 Dec 2015, Intellectual Property Watch online at http://www.ip-watch.org/2015/12/02/impact-of-the-tpp-on-the-pharma-industry/

[19] Carwyn Jones, Claire Charters, Andrew Erueti, Jane Kelsey,"Māori Rights, Te Tiriti O Waitangi and the Trans-Pacific Partnership Agreement", Expert Paper #3 online at https://tpplegal.files.wordpress.com/2015/12/tpp-te-tiriti.pdf

[20] The Joint Declaration is online at http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf

[21] Namely Australia, China, India, Japan, Korea and New Zealand.

[22] Most commentary is in the form of gung ho press releases from politicians.

4. Some examples of individualistic development of intellectual property and related laws and possible approaches for SC nations

From a practical standpoint it is extremely hard, or pointless, for SC nations to attempt to change the course of global harmonisation when such policy directions in intellectual property are driven by economic juggernauts. An alternative may be to see what local legislative development can do to minimise the deleterious effects that such globalisation may have on the local public good, whilst avoiding breaches of the constraints in agreements such as the three step test in its many iterations, although that is very hard to determine in advance. One route is to look to local need and construct acceptable exceptions, or create local specialty. Grenada and Trinidad and Tobago, two SC nations, have created individualistic protection over works of 'mas', which refers to the masquerades typically made for the culturally important *Carnival* festival. The works are defined in Trinidad and Tobago Copyright Act Article 3,[23] and protected under Article 6,[24] with protection going to the producer (the person who makes the arrangements for the making of the work, subject to agreement) under Article 26(5).[25]

Article 3 provides that a "work of mas" is

> "an original production intended to be performed by a person or a group of persons in which an artistic work in the form of an adornment or image presented by the person or persons is the primary element of the production, and in which such adornment or image may be accompanied by words, music, choreography or other works, regardless of whether the production is intended to be performed on stage, platform, street or other venue".[26]

This kind of individualistic development in copyright raises many issues, for example, should such local rights be protected in other nations,[27] such as in the Notting Hill Carnival in London, and indeed should the Trinidad and Tobago rights be recognised?[28]

India, as a large developing nation, and as one of countries with a large copyright based industry that has often questioned Western IP ideology, has taken a strong stance on constructing IP laws to meet the needs of its own people. This is reflected in both legislation

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[23] Article 3, Copyright Act 1997 (as amended), Chapter 82:80, Laws of Trinidad and Tobago, available online at http://tradeind.gov.tt/wp-content/uploads/2016/02/Copyright-Act-82.80.pdf.

[24] Ibid, Article 6.

[25] Ibid, Article 26(5).

[26] Ibid, Article 3.

[27] Of course, some 'works of mas' may fall within the ambit of protection under parts of the UK legislation as works of art.

[28] For discussion of the works of 'mas' issue, see Terrine Friday "Copyright Economy: Protecting 'Works of Mas' in Trinidad and Tobago" 21st November 2013 online at http://www.iposgoode.ca/2013/11/copyright-economy-protecting-works-of-mas-in-trinidad-and-tobago/

and treatment by the courts.[29] The recent decision from the High court of India, *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v Rameshwari Photocopy Services & Anr.,*[30] demonstrates the court's interpretation of the copyright legislation that keeps closely to the intention of the parliament to give education broad exceptions. The court also dealt with the application of the international "three step test":

> "India, under the international covenants aforesaid, though has the freedom to legislate as to what extent utilization of copyrighted works for teaching purpose is permitted but agreed to ensure that the same is to the extent "justified by the purpose" and does not "unreasonably prejudice the legitimate rights of the author".[31] […] The international covenants aforesaid thus left it to the wisdom of the legislators of the member / privy countries to decide what is "justified for the purpose" and what would "unreasonably prejudice the legitimate interest of the author". Our legislators, while carrying out the amendments to the Copyright Act are deemed to have kept the said international covenants in mind. Parliament / legislators have permitted reproduction of any work by a teacher or a pupil in the course of instructions. […] The legislators have found reproduction of the copyrighted work in the course of instruction to be justified for the purpose of teaching and to be not unreasonably prejudicing the legitimate interest of the author. It is not for this Court to impose its own wisdom as to what is justified or what is unreasonable, to expand or restrict what the legislators have deemed fit. The legislature is not found to have imposed any limitation on the extent of reproduction."[32]

Indian courts lead in their application of intellectual property norms that are focused at local benefit rather simply following developed world interpretations.

Often leveraging current intellectual property frameworks is feted as a tool for developing nations and disadvantaged groups, and indeed sometimes such tools can be utilised. For example, in the Taita Taveta County of Kenya the World Intellectual Property Organisation has brought together 400 sisal basket weavers to discuss a collective mark for their products,[33] as part of its project to show the importance of the trademark system to basket weavers.[34] Clearly some of the standard intellectual property tools can also be used for local benefit under a traditional 'develop product – brand product – market product' scheme, even where the product is eons old.

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[29] In terms of restraining what is seen as excessive extension of patents, see Novartis v. Union of India (2013) S.C. 1311 where the Indian Supreme Court upheld the decision on the rejection of a patent application by

Novartis for its beta crystalline form of Imatinib Mesylate (Glivec). The Court observed Novartisto be indulging a strategy, mostly accepted in the West, that led to 'ever-greening' of its patents,. See discussion in Sunita Tripathy "Bio-Patent Pooling and Policy on Health Innovation and Access for Medicines that Treat HIV/AIDS: A Meeting of [Open] Minds?" in Mark Perry, *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* Springer 2016.

[30] *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v Rameshwari Photocopy Services & Anr.* 16th September, 2016 CS(OS) 2439/2012, I.As. No. 14632/2012 (of the plaintiffs u/O 39 R-1&2 CPC), 430/2013 (of D-2 u/O 39 R-4 CPC) & 3455/2013 (of D-3 u/O 39 R-4 CPC).

[31] Ibid, para 96.

[32] Ibid, para 97.

[33] WIPO "Basket Weaving Project in Kenya Gains Momentum" 29 June 2016 online at http://www.wipo.int/cooperation/en/funds_in_trust/japan_fitip/news/2016/news_0002.html. See also WIPO "Second Training Workshop and Stakeholders Meeting of the Branding Project using Intellectual Property (IP) for 'Taita Basket'" WIPO/IP/WK/NBO/2/16, online at http://www.wipo.int/meetings/en/details.jsp?meeting_id=40666.

[34] WIPO "Bringing IP and Branding to Basket Weaving in Kenya" 17th March 2016 online at http://www.wipo.int/cooperation/en/funds_in_trust/japan_fitip/news/2016/news_0001.html

Other SC nations can be regarded as escaping the strictures imposed by the Big Intellectual Propery (BIP) nation hegemony by avoiding major harmonising agreements such as TRIPS and WCT. Libya, for example, has managed to maintain its pre-Berne stance of life of the author plus 25 years for copyright.[35]

BIP nations, typically those big in copyright production as well as other intellectual property rights, are not restrained in introducing intellectual property variations in their own interest, of course. For example, the European Union's protection of non-original databases,[36] or the early adoption of anti-circumvention of technology protection measures by the United Kingdom in 1988,[37] prior to the WIPO Copyright Treaty.[38] Usually these changes to intellectual property laws are aimed at extending the reach, strength, breadth and length of protection, so they are unlikely to face challenges under international agreements, which are primarily focused on setting a minimum standard of protection rather than providing a basis for exceptions. Even within the EU there are variations that allow for works to be excepted or included in protection dependent on where they are, for example the treatment of photographs of sculptures and other works in public spaces.[39] Indeed, at times it seems as if the EU has difficulty even deciding what is the standard level of originality required for copyright.[40] At the time of writing, it is rumoured that the EU is drafting a new directive to ensure the introduction of further exceptions to copyright.[41] These would include broad mandatory exceptions for research (data mining), education and the ability for news' publishers to authorise online use (i.e. reduce authors' control over their contributions).

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[35] See Ezieddin Mustafa Elmahjub "Protection of Intellectual Property in Islamic Shari'a and the Development of the Libyan Intellectual Property System" PhD Thesis, QUT 2014 online at http://eprints.qut.edu.au/76106/1/Ezieddin%20M.%20Jaballa_Elmahjub_Thesis.pdf: "A particular flexibility unique to the Libyan situation is the protection term for copyright works. As discussed above, Libyan Copyright Law protects copyright for the life of author plus twenty five years. Libya is entitled to use the flexibility provided under art 7/7 of the Berne Convention to keep the copyright term as it is. Any potential copyright law should make use of this flexibility." at p.325.

[36] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996. The Commission of the European Communities DG Internal Market and Services Working Paper "First evaluation of Directive 96/9/EC on the legal protection of databases" December 2005 noted "Introduced to stimulate the production of databases in Europe, the "sui generis" protection has had no proven impact on the production of databases." Online http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf.

[37] Copyright, Designs and Patents Act 1988, c.48, section 296, as enacted online at http://www.legislation.gov.uk/ukpga/1988/48/section/296/enacted

[38] WIPO Copyright Treaty (WCT) (adopted in Geneva on December 20, 1996) online at http://www.wipo.int/edocs/lexdocs/treaties/en/wct/trt_wct_001en.pdf

[39] There is a range of works in the public eye that are given a wide differential treatment for exceptions even in Europe when they are reproduced, for example as incidental copying in photographs. This exception is embodied in *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* as an exception to copyright, but some countries such as France are struggling to implement the same.

[40] See Thomas Margoni, "The Harmonisation of EU Copyright Law: The Originality Standard" in Mark Perry, *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* Springer 2016.

[41] "COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT on the modernisation of EU copyright rules"unverified draft at http://statewatch.org/news/2016/aug/eu-com-copyright-draft.pdf 3 Sept 2016.

The picture of how intellectual property rights are managed is further complicated by state action badged as promoting creative development. For example, in some countries intellectual property assets and royalties are given significant tax breaks, ranging from Hungary where royalties from intellectual property of all kinds are on reduced tax, to the United Kingdom where there is a 'patent box' to give tax relief on profits. Although these types of mechanisms are outside the range of intellectual property legislation, they give significant bias towards particular types of business development.[42]

One of the key general points is that there are a number of approaches to copyright that are not typically addressed in discussion of the economic benefits of protection, in particular the contribution made by the *non-protection* aspects of copyright regimes. For example, the role of fair use as part of the foundations of some industries ability to contribute to the economy, globally exceeding trillions of US dollars,[43] is typically not reflected upon as a positive economic course that can be followed. SC nations can typically increase protection on what they regard as key assets that can come under copyright, whether works of 'mas' or perhaps even in areas of traditional knowledge or sacred sites and vistas of natural beauty, but using some of the examples provided for by the BIP nations.[44] However, it should be noted that perhaps the best route for smaller intellectual property nations, and those with little power to leverage on an international basis, can make use of exceptions and limitations to copyright to best serve their own peoples.

5. Conclusion

Looking across those developing nations that have recently implemented changes to their intellectual property laws, and in particular their copyright legislation, the explanation for the maximalist approach can be seen as the easiest route for them to take: i.e. adopt the norms promulgated by the BIP nations. It is perhaps not only due to a sense of facing the inevitable pressures but also a sense of optimistic acceptance of the promulgated reports that there will be greater overall economic benefit by taking on board the suggestions of powerful players. Others may feel that adopting the BIP nation structured international agreements aids

42 For discussion of tax policy, see Klemens, Ben, A Boxing Match: Can Intellectual Property Boxes Achieve Their Stated Goals? (15th August 2016). Available at SSRN: http://ssrn.com/abstract=2822575 or http://dx.doi.org/10.2139/ssrn.2822575 , who in short argues that the tax incentives create corporate benefits over state benefits.

43 Thomas Rogers & Andrew Szamosszegi, "Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use" (CCIA: 2010) available online at www.ccianet.org gives a figure of such industries generating revenues of $4.7 trillion dollars in 2007 in the United States of America, employment in industries benefitting from fair use at 17.5 million (p. 8).

44 France, for example, claiming rights over all photos of the Eiffel Tower – see Lobert, Joshua and Isaias, Bianca and Bernardi, Karel and Mazziotti, Giuseppe and Alemanno, Alberto and Khadar, Lamin, The EU Public Interest Clinic and Wikimedia Present: Extending Freedom of Panorama in Europe (April 25, 2015). HEC Paris Research Paper No. LAW-2015-1092. online http://ssrn.com/abstract=2602683 or and Bryce Newell " Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography" 44 Creighton L. Rev. 405 (2010-2011).

development.[45] Some nations, such as Libya, have managed to escape the excesses of intellectual property protection from being imposed by the BIP nations more through an accident of history rather than purposeful policy direction.[46] Others, such as India, discussed above, although party to most international agreements relating to Intellectual Property, have taken measures to restrict excesses of protection, which they see as contrary to their own public interest. There are examples of where the adoption of open data, open science, open culture and open access provide benefits not only to developed nations with relatively well funded and advanced science research platforms but also to developing nations.[47] It behoves policymakers in developing nations to take perhaps the harder route to the creation and modernisation of the copyright laws, and other intellectual property laws, by reaching for solutions that are outside of those that come on the table from seemingly helpful sources, whether they be the BIP nations or international bodies heavily influenced by the hegemony. Rather than pick up TRIPs or the latest international harmonisation agreement and copy into legislation perhaps look to where best to adjust the local balance between protecting rights holders and giving access.

[45] For example, a co-contributor to this book Adebambo Adewopo writes :"…developing countries will continue to provide the geo-political imperative for the reconstruction and balance of international copyright law and remain the main issue that would determine the future of IP as an instrument for development" Chapter XXX, "Copyright Legacy And Developing Countries: Lessons For Nigeria's Emerging Copyright Reform" at p.YYY

[46] *Supra* 35 and see also Ezieddin Mustafa Elmahjub "A Case For Flexible Intellectual Property Protection In Developing Countries: Brief Lessons From History, Psychology And Economics"EIPR vol38, 1 (2016) p31.

[47] See Vera Lipton The benefits of open data science infrastructures for developed, emerging and developing countries "Chapter XXX" at "YYY"