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RESEARCH ARTICLE

HAN Liyu

Cultural products, copyright protection and trade rules

Abstract Cultural products are commodities with cultural contents, which are neither equivalent to cultural relics nor ordinary articles. Such dual natures bring forth divergences in trade policy, mandating the generality and particularity of trade rules. The WTO rules lay more emphases on free trade while the United Nations Educational, Scientific and Cultural Organization put more stress on the free exchange and diversity of cultures. Nations enjoy cultural sovereignty over their cultural policies and administrative measures. The rules of intellectual property rights also influence trade in cultural products. To develop trade in cultural products, science and technologies shall be employed to create diversified and competitive products of distinct cultural values.

Keywords cultural products, copyright protection, trade rules

摘要 文化产品是含有文化内容的商品，既不等同于文物，也不等同于一般商品。这一双重性质引起了贸易政策上的分歧，决定了贸易规则的一般性与特殊性。世界贸易组织规则更强调贸易自由性，而联合国教科文组织规则更强调文化的自由交流与多样性，各国对文化政策和管理措施享有文化主权。知识产权规则也规范着文化产品的贸易，发展文化产品贸易应利用科学技术创造出反映文化价值多样性的具有竞争力的产品。

关键词 文化产品，版权保护，贸易规则

In the present world of increasing economic globalization and frequent cultural exchange, the issues on trade policies and regulation of cultural products with

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HAN Liyu (✉)
School of Law, Renmin University of China, Beijing 100872, China
E-mail: hanliyu@263.net

cultural contents become increasingly outstanding. The US's complaint to the World Trade Organization's Dispute Settlement Body against China's trade policies and measures concerning books and audiovisual products leads to further consideration on the trade rules of cultural products. What are cultural products, what features do they have and how to promote the trade thereof, these issues concern not only the trade in cultural products, but also the inheritance and development of human cultures.

1 Cultural products, cultural property and cultural relics

There is no definition of cultural products and their scope. Cultural products are a relatively new terminology, and the cultural industry producing cultural products has been recognized only with the categorization of the tertiary industry. Classification of the cultural industry varies from country to country. (Yuan, 2005) As far as the present usage is concerned, it can be understood in a broad or narrow sense.

The competent authorities of China promulgated the Catalogue on Guiding the Export of Cultural Products and Services[1] in April 2007. As jointly promulgated by six ministries, commissions and administrations of the Central Government, the Catalogue is authoritative to some extent, which may be taken as a standard on defining cultural products. While the Catalogue does not distinguish between products and services, it classifies culture and service into four categories, namely, press and publication; radio, film and television; culture and arts; and comprehensive category. With respect to the details of the four categories, cultural products mainly include physical articles and products, such as publications, film and television products, audio-visual equipments, game products, fine art works, musical instruments, crafts and handicrafts, animation products and audiovisual products. From the perspective of industrial production, cultural products include industrial products and handicrafts.

National Bureau of Statistics of China (NBSC) promulgated the Classification of Cultural and Related Industries[2] in 2004. It was the first time for China to classify cultural and related industries, as the result of the joint research of several state ministries and commissions. The Classification defines the "cultural and related industries" as activities of providing the public with cultural and

[1] The Announcement No.27 [2007] of the Ministry of Commerce, the Ministry of Foreign Affairs, the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the State Council Information Office of the People's Republic of China.

[2] National Bureau of Statistics: Circular on printing and distribution of the classification of cultural and related industries. *Guo Tong Zi* No.24 [2004].

recreational products and services as well as the aggregation of the activities related to those activities. There are mainly six categories of activities of cultural and related industries: Production and sale of cultural products; cultural communication services; cultural leisure and recreation services; production and sale of cultural articles; production and sale of cultural equipment; and production and sale of related cultural products. Under such classification of the NBSC, cultural activities are divided by contents into two parts: Cultural services and related cultural services. Cultural services include press service; publishing, distribution and copyright services; radio, television and film services; cultural and art services; network cultural services; cultural leisure and recreation services and other cultural services; and related cultural services include the production of cultural articles, equipment and relevant cultural products, and the sale of cultural articles, equipment and relevant cultural products. While such classification by industry focuses on the production activities or providing processes of producers or providers, not on cultural products, it does not further categorize cultural products. But in view of physical articles, the Classification covers cultural products, cultural articles, cultural equipment and relevant cultural products. For instance, in the category of publishing, distribution and copyright services, the Classification lists publication of books, newspapers and journals but not books, newspapers and journals; lists the publication of audiovisual products but not audio-visual products. Thus, the classification of the NBSC could not provide an accurate guidance to define cultural products.

The above-mentioned two documents promulgated by the competent authorities of China do not aim at defining cultural products, and the scope of application of each document is different. For example, compared with the classification of the cultural industry by the NBSC, the document of the six agencies does not mention cultural articles and equipment. Therefore, the two documents mentioned above may provide guidance to define cultural products, but not decisive on the definition of cultural products. However, the instructions in the document of the NBSC on preparation and drafting are significant for us to understand the scope of cultural products as they classify cultural products into core cultural industries (such as press, publication and film and television), peripheral cultural industries (such as network culture and cultural leisure and recreation) and related cultural industries (such as cultural articles and equipment). Cultural products, in a broad sense, shall include the products of the above-mentioned three industries, covering cultural articles, equipment and tourism and sports articles. In a narrow sense, they shall include books, newspapers and magazines, audiovisual products and network cultural products.

The above-mentioned governmental documents of China also indicate that cultural products and cultural industries are not corresponding concepts. According to the initial definition by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the cultural industry refers to “a series of

activities of production, reproduction, storage and distribution of cultural products and services according to industrial standards". Recently, the UNESCO defines the cultural industry as activities and outputs based on the forms of creation and expressions of arts and heritages and historic relics, including ten categories, namely cultural heritage, published and printed works and documentaries, music, performance arts, visual art, audio media, visual media, social cultural activities, sport and game, environment and nature. (Yuan, 2005) Cultural products are only a form of the outputs of the cultural industry.

It can be seen from Chinese provisions and related international documents that cultural products are equal to neither cultural property nor cultural relics. Cultural products, also called cultural materials, mainly refer to industrial products. The UNESCO Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character[3] and Agreement on the Importation of Educational, Scientific and Cultural Materials and Protocol[4] have adopted such expression. The goods listed in the Tariff Agreement on Providing Facilities for the Importation of Goods Exhibited or Used in Fair, Exposition, Conference or Similar Activities of the World Customs Organization (WCO) (Customs Cooperation Council, CCC) mainly include such products as printed matter, catalogue, instruction and brochure.

"Cultural property" used in international conventions mainly refers to cultural relics in Chinese law, which is clear from the nature of the conventions aiming to protect the relevant cultural properties. The Convention for the Protection of Cultural Property in the Event of Armed Conflict and First Protocol,[5] the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict,[6] and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural

[3] It was concluded in Beirut in 1948, hence called the Beirut Agreement. It has 38 member states including the US.

[4] It was concluded in Florence in 1950. At present, it has 99 members without China. The Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials was passed at the 34th plenipotentiary meeting of the UNESCO on Nov. 26, 1976, which has 42 members without China.

[5] The Convention was concluded in Hague in 1954, including implementation rules and (the first) protocol. The Standing Committee of the National People's Congress of China approved the Convention on Oct. 31, 1999. The Convention and its protocol require that culture property shall be respected and protected, making specific provisions on protecting cultural property in the event of armed conflicts. The Convention also defines the mark for cultural property to distinguish it from other properties.

[6] The Second Protocol was adopted in Hague in 1999, which aims at supplementing the Hague Convention by improving the protection of cultural property in the event of armed conflicts, and formulating a system to mainly protect specially designated cultural property. The Protocol emphatically provides for general protection and key protection, and provides for criminal liabilities for and jurisdiction on violation of the Convention or Protocol.

Property[7] are all conventions on protecting human cultural heritages. As a supplementary private law convention to supplement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UNIDROIT Convention on Prohibiting the Illicit Import and Export of Cultural Property directly uses the term "cultural objects", which has the same meaning as "cultural property" in the same Convention.[8] In addition, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[9] and Convention for the Safeguarding of the Intangible Cultural Heritage[10] are conventions aiming to protect cultural heritage rather than industrial products, though physical articles, handicrafts and cultural places may be involved therein.

The Law of the People's Republic of China on the Protection of Cultural Relics (hereinafter referred to as the Law of Cultural Relics) does not make any definition of cultural relics, but in view of the objects of protection listed, the cultural relics therein refer to historical relics, as each category listed in Article 2 contains the important definition "historical".[11] The English version of the Law

[7] The Convention was adopted in Paris in 1970. The cultural property the Convention applies to means the property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science and which falls in the seven categories of the Convention.

[8] For the reason to choose the term "cultural objects", the secretariat of UNIDROIT explains when drafting the Convention, in consideration of the distinction between the French and English versions, the Expert Committee opted for the term "cultural objects" in stead of "cultural property", the latter being a relatively new concept in common law. The French term "biens culturels" was adopted in the UNESCO Conventions since 1954 and in many national and international regulations thereafter, which had been accepted by most legal scholars. Moreover, the use of the term "cultural objects" does not give rise to any misunderstandings, being clearly defined in Article 2 of the Convention. See Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report, Unid L. Rev. 2001–3, p. 488.

[9] It was adopted by the UNESCO in Paris in 1972. The Standing Committee of the National People's Congress of China approved it on Nov. 22, 1985.

[10] It was adopted by the UNESCO on Nov. 3, 2003. The Standing Committee of the National People's Congress of China approved it on Aug. 28, 2004.

[11] Article 2 of the Law of the People's Republic of China on the Protection of Cultural Relics: The state shall place under its protection in the territory of the People's Republic of China the following cultural relics: (1) Sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings and mural paintings that are of historical, artistic or scientific values; (2) Important historical sites, physical objects and typical buildings of modern and contemporary times related to significant historical events, revolutionary movements or famous people that are highly memorable or of great significance for education or historical value; (3) Valuable works of art and handicraft articles of different historical periods; (4) Important literatures as well as manuscripts, books and materials of historical, artistic or scientific value dating from different historical periods; and (5) Typical physical objects reflecting the social systems, production or life of various nationalities in different historical periods.

of Cultural Relics translates the term "wenwu" into "cultural relics",[12] which further stresses the nature of historical relics. However, international conventions concerned has adopted not the term "cultural relics", but the terms "cultural property" or "cultural objects", to express the same meaning. Thus, the "cultural property" or "cultural relics" used in international conventions concerned only mean the cultural relics in Chinese Law of Cultural Relics rather than the cultural products used herein.

In 2006, the Central Committee of the Communist Party of China (CPC) put forth "establishing a dynamic system of culture administration and production and operation of cultural products", "to provide diversified cultural products and services at reasonable prices and enhance the international competitiveness of cultural products".[13] By the term "production of cultural products", cultural products mean the products made through certain production process. Thus, cultural products should not include cultural relics or historical relics in common sense.

2 Features of cultural products

2.1 Cultural products as a kind of tangible goods

As a kind of physical objects, cultural products have the general features of physical objects, which are visible and tangible. Cultural products trade or circulation is flow of tangible physical objects. In the Harmonized Commodity Description and Coding System of the WCO, cultural products fall into the category of goods, mainly covered in Chapter 37, Chapter 49 and Chapter 85. For example, tariff item 3706 includes motion-picture film, exposed and developed; tariff item 4901 includes books, brochures, leaflet prints & similar prints; tariff item 4902 includes newspapers, magazines & periodicals (whether or not with illustrations or advertising materials); tariff item 4903 includes children's picture story books, drawings or coloring books; tariff item 4904 includes music, printed or in manuscript, bound or illustrated; tariff item 4905 includes printed maps & hydrographic charts, atlases, terrestrial globe and celestial globe; tariff item 4906 includes designing and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand, as well as manuscripts and copies thereof in photos of photographic printing paper or carbon paper; tariff item 4907 includes post stamps, duty stamps and similar vouchers circulating in designated countries or

[12] See the English version of the Law of Cultural Relics at the website of the State Administration of Cultural Heritage of China.
[13] The decisions on several important issues of the CPC Central Committee on constructing a harmonious socialist society. Beijing: People's Publishing House, 2006. 14–15.

newly transformed and unused; stamp-impressed papers; blank cheques; stock, bond and similar title certificates; tariff item 4908 includes transfer printing decal papers (decalcomanias); tariff item 4909 includes printed or illustrated post cards; printed cards bearing personal greetings, messages or announcement (whether or not illustrated, with or without envelopes or trimmings); tariff item 4910 includes printed calendars (calendar blocks of any kind, printed); tariff item 4911 includes other printings (including print pictures & photos); tariff item 8523 includes prepared unrecorded media (non film) for recording sound or other information (exclusive of the products in Chapter 37), inclusive of magnetic tapes, videotapes and magnetic discs; and tariff item 8524 includes recorded gramophone records, magnetic discs and media, inclusive of master slice and master tapes to be used for copy, exclusive of those listed in Chapter 37 (further classified by education purposes and other purposes). CD- ROM is also included.[14]

2.2 Cultural products with cultural contents

Different from general physical objects, cultural products are products with cultural content relating to value concepts. "Cultural content" refers to the symbolic meaning, artistic dimension and cultural values originating from or expressing cultural attributes.[15] Such content influences the emotion, cognition and even judgment of users. "Culture is understood as a set of norms and values penetrating human life of external forms and thoughts." (Perroux, 1987) Even those who have different views on cultural connotation could not deny the cultural attributes of cultural products that are different from general commodities. Traditional bulk goods such as coal, wheat and limber, and contemporary and modern industrial goods such as auto and steal are without such attributes, and even the so-called intelligent computer is a dull object without software. This is totally different from inspiration and enlightenment contained in books and newspapers.

Cultural products are sometimes called spiritual products, and the wording of spiritual products highlights the special nature of cultural products. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions[16] clarifies that cultural products "convey cultural identities, values and

[14] See the relevant commitments of China to the most-favored-nation treatments for accession to the WTO: Annex 8 of the Legal Instruments on China's Accession to the World Trade Organization. Beijing: Law Press, 2002. 125 et seq.

[15] Article 4 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[16] The Convention was adopted in Oct. 2005, and entered into force on March 18, 2007. As of Nov. 10, 2007, it has 74 contracting states and a contracting party as regional organization (the EC), without the US, Japan and Australia.

meanings" with "dual economic and a cultural attributes", and they shall not be deemed as solely being of commercial value, and thus may be formed even without commercial value. The various names of cultural industry such as copyright industry, creative industry and content industry underline the special feature of cultural products.[17]

On the other hand, cultural content is intangible and the cultural products with cultural content are only a carrier of expression of cultural content. With the development of science and technology, the identical cultural contents may be expressed via different carriers. For example, book, television, film and network can be used to convey the same cultural content. Thus, it is clear that cultural content needs a carrier for loading and a tool for display, and consequently such carrier and tool become the objects closely related to cultural products. For instance, a film could not be projected without projection equipment and the tune of the Moon Reflected in Erquan Spring could not be played without the instrument "erhu". Such carrier and tool become cultural products in a broad sense.

2.3 Cultural products mostly under copyright (intellectual property) protection

The expressions of the cultural contents of news, publication, film and television and network works as core and peripheral cultural products are protected by copyright (including neighboring rights). Copyright holders are entitled to exclude others from reproducing or distributing their cultural products without authorization. The automaticity and regional feature of copyright protection restrict the freedom of trade in cultural products to a large extent. Some crafts may be under the protection of design law.

Unlike general commodities a few of which are protected by granted patent after examination and approval only, almost all cultural products are protected by copyright automatically. A great number of commodities other than cultural products are not patent products. In the US, trade in cultural products is called copyright trade. It shall be noted that the trade in cultural products and copyrights trade may not have the same connotation and denotation necessarily due to the different definitions of the scope of cultural products.

2.4 Cultural products closely related to cultural services

The Classification of Cultural and Related Industries promulgated by the NBSC and the Catalogue on Guiding the Export of Cultural Products and Services

[17] See Preamble (18), Article 1(2) and Article 4(4) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

promulgated by six ministries and commission do not distinguish cultural products and services explicitly, which demonstrates the close relationship between cultural products and services to certain extent. The Service Sectoral Classification List of the GATS forms the technical basis for the negotiation on trade in services at the Uruguay Round. According to the list, publishing and printing, audiovisual services, distribution services, recreational cultural and sport services deemed as cultural services[18] are directly related to cultural products.

The provision of cultural products usually covers that of cultural services, such as advertisements in newspapers and audiovisual products; and the provision of cultural services usually accompanies that of cultural products, for instance, the production and broadcasting of television programs are usually accompanied by the production and sale of film and television products. Hence, the management of trade in cultural products may involve that of cultural services, and vice versa. The same measure may involve both the rules of trade in goods and the rules of trade in services. The settlement of periodicals' dispute between Canada and the US through the WTO dispute settlement process is just a good example.

3 Trade policies and rules of cultural products

3.1 The conflicts and coordination of trade policies of cultural products

Due to the feather of "norms and values" of cultural products and the fact of cultural diversity resulted from the differences of countries in terms of history, culture, social system, and economic development level, countries may adopt different trade policies on cultural products. Some may advocate free trade while some may attach more attentions to the impact of the content of cultural products on people's thoughts, hence prohibiting or restricting the import of cultural products from other countries. Moreover, the administrative measures based on social order and public morals are recognized by international communities. The combination of those two elements renders the trade policies on cultural products of the governments different from those on general commodities.

It shall be noted that there may be big differences in the uses of cultural

[18] GNS/W/120. According to the list, publishing and printing belong to other business services; audiovisual services belong to communication services, including motion picture and video tape production and distribution services, motion picture projection service, radio and television services, radio and television transmission services, sound recording and else; distribution services include commission agents' services, wholesale trade services, retailing services, franchising and else; and recreational, cultural and sporting services (other than audiovisual services) include entertainment services, news agency services, libraries, archives, museums and other cultural services, sporting and other recreational services and else.

products. For instance, people's attitude towards books for education is very different from that for recreation. Such different attitudes lead to different trade policies and different measures on products of different uses. With respect to cultural products for education, most countries advocate free trade, while for other cultural products, more emphasis is on their cultural contents and values therein. Such difference implies that it is arbitrary and unreasonable to impose a single uniform administrative measure on trade in cultural products.

Because of the different views and focuses on cultural products, there are two conflicting arguments on trade in cultural products for a long time. "To some extent, the history of international cultural (products) trade is the history of conflicts between the group advocating trade freedom led by the US and the group emphasizing cultural exception and protecting cultural diversity led by France and Canada." (Li, 2006) To protect its culture from impacts by foreign cultural products, France promotes "cultural exception" and then "cultural diversity" campaign, whose battlefield moves from trade to diplomacy, and from market to values. (Li, 2006) In fact, there is no cultural exception in an absolute sense. The physical attribute of cultural products implies that the trade in cultural products is still a trade in goods, which shall be governed by general rules on trade in goods. However, it is also unrealistic to have complete freedom of trade in cultural products. The cultural content of cultural products implies such products are of ideological impacts different from general commodities. Hence, the trade policy on cultural products should be compromise based on both considerations.

In international community, the trade rules of cultural products fall into two categories generally: Firstly, the relevant trade rules of the WTO; and secondly the relevant trade rules of the UNESCO. One of the aims of the WTO is to promote more freedom in world trade, focusing less on the cultural contents of cultural products, and trade in cultural products may, according to the public order and morals reflected in cultural contents, subject to certain preconditions, deviate from the current trade obligations such as the national treatment and quantitative restriction obligations. However, the UNESCO has the mission to facilitate the free exchange of thoughts, and prevent the damage to cultural diversity by completely free trade in cultural products while promoting the free exchange of cultural products containing cultural contents. For the UNESCO, trade in cultural products is only a means for facilitating exchange of thoughts rather than a purpose, which is different from the aim of the WTO. Meanwhile, since the members of both organizations are not totally the same and the members that participate in the relevant conventions are not totally the same, it is possible for member governments to have conflicts of trade policies on cultural products.

Either promoting trade or protecting culture, those rules acknowledge the

following basic principles on trade in cultural products: Firstly, no free trade rules on cultural products shall affect the right of contracting states to take measures, in conformity with their legislation, to prohibit or limit the importation, or the circulation after importation, of articles on grounds relating directly to national security, public order or public morals;[19] secondly, free trade rules on cultural products shall not modify or affect the laws and regulations of any contracting state or any of its international treaties, conventions, agreements or proclamations, with respect to copyright, trade marks or patents;[20] thirdly, if the importation of cultural products cause serious injury to the domestic industry in that territory producing like products, the contracting state shall be free to take protective measures;[21] fourthly, developing countries enjoy preferential treatment of development of cultural industry and trade in cultural products.[22]

3.2 UNESCO trade rules of cultural products

3.2.1 Agreement for facilitating the international circulation of visual and auditory materials of an educational, scientific and cultural character

Each of the contracting states accords, with respect to visual and auditory materials of an educational, scientific and cultural character, exemption from all customs duties and quantitative restrictions and from the necessity of applying for an import license. To obtain such treatment, a certificate issued by the relevant contracting states or the UNESCO shall be obtained to prove that such material is of an educational, scientific and cultural character. The Agreement is only applicable to the visual and auditory materials of an educational, scientific and cultural character, whose primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or whose content is such as to maintain, increase or diffuse knowledge, and augment international understanding and friendship.

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[19] Article Ⅴ of the Agreement on the Importation of Educational, Scientific and Cultural Materials; Article Ⅶ of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials; Article XX of the General Agreement on Tariffs and Trade.

[20] Article Ⅵ of the Agreement on the Importation of Educational, Scientific and Cultural Materials; Article Ⅶ of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials; Article XX of the General Agreement on Tariffs and Trade.

[21] Clause of Reservation of the Agreement on the Importation of Educational, Scientific and Cultural Materials, Article ⅩⅨ of the General Agreement on Tariffs and Trade and the Agreement on Safeguards.

[22] Article Ⅶ of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials; and Article ⅩⅧ of the General Agreement on Tariffs and Trade.

3.2.2 Agreement on the importation of educational, scientific and cultural materials and its protocol

The Agreement on the Importation of Educational, Scientific and Cultural Materials[23] provides the following preferences for applicable objects: (1) Exemption of customs duties; (2) internal taxes not exceeding those applied directly or indirectly to like domestic products; (3) providing necessary import license or foreign exchange; and (4) providing facilities for the import and export of exhibits.

To provide the convenience for the US to enter the Agreement, the protocol of the Agreement provides for a clause of reservation, which allows the US to enter the Agreement accordingly on one hand, and on the other hand permits the provisions of that reservation to be invoked by the US with regard to any of the contracting states to this Agreement, or by any contracting State with regard to the US, provided that any measure imposed pursuant to such reservation shall be applied on a non-discriminatory basis. The contents of the reservation clause are similar to the provisions of Article IX of safeguards of the GATT, but do not allow other contracting states than the US to apply the clause to each other.

The Agreement defines educational, scientific and cultural materials applicable to the Agreement by annexes. There are five annexes: Annex A includes books, publications and documents; Annex B includes works and collectors' pieces of an educational, scientific or cultural character; Annex C includes visual and auditory materials of an educational, scientific or cultural character; Annex D includes scientific instruments or apparatus; and Annex E includes articles for the blind. Except for the products listed in Annex A, the products listed in other annexes shall meet other conditions to obtain the above-mentioned treatments: Firstly, the relevant materials shall be of educational, scientific and cultural character; and secondly, such materials shall be only used in officially approved organizations or institutions. In addition, even Annex A excludes some products from the treatment of exemption of customs duties. Hence, it is clear that the materials included in the five annexes do not contain all the materials under those categories.

The Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials adopted by the UNESCO in November 1976, is mainly to facilitate the freedom of educational, scientific and cultural materials trade and fundamentally to extend exemption provided for in the Agreement to more materials. According to the Protocol, the scope for the materials exempt from customs duties provided for in the Agreement shall be extended to the materials

[23] Articles I to Ⅲ of the Agreement on the Importation of Educational, Scientific and Cultural Material.

listed in the Annexes of the Protocol, the provisions on collecting internal taxes on a non-discriminatory basis extended to all the products in the Annexes, and foreign exchange and necessary import licenses provided to more materials. It also added a new provision on export: The contracting states undertake not to levy on relevant materials any customs duties or other internal taxes.[24] The Protocol contains 8 annexes from Annex A to Annex H, each covering different products. However, it allows contracting states, when approving it, to announce the obligations of the Protocol do not apply to products covered in Annexes C.1, F, G and H, namely visual and auditory materials; sports equipment; musical instruments and other musical equipment; and material and machines used for the production of books, publications and documents. The US and the UK declared that they will not be bound by Annexes C.1, F, G, and H.

The Agreement clarifies two exceptions to the above-mentioned treatments and the Protocol reiterates such two exceptions: Firstly, nothing in this Agreement shall affect the right of contracting States to take measures, in conformity with their legislation, to prohibit or limit the importation, or the circulation after importation, of articles on grounds relating directly to national security, public order or public morals. Secondly, this Agreement shall not modify or affect the laws and regulations of any contracting State or any of its international treaties, conventions, agreements or proclamations, with respect to copyright, trade marks or patents.[25] The innovation of the Protocol is to grant the right for developing countries to protect their emerging industries, in other words, an exception to obligations provided for in the Agreement.[26]

3.2.3 Convention on the protection and promotion of the diversity of cultural expressions

The Convention defines "cultural diversity" as the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. "Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used."

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[24] Articles I to V of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials

[25] Articles Ⅴ and Ⅵ of the Agreement on the Importation of Educational, Scientific or Cultural Materials, and Items 9 and 11 of Article Ⅶ of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials.

[26] Item 10 of Article Ⅶ of the Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials.

"Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content. "Cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originated from or express cultural content. Such definitions allow the cultural diversity to contain not only the diversity of cultural heritage from ancient times up to now, but the production and trade of diversified cultural products, hence providing guidance for trade in cultural products.

The Convention recognizes cultural activities, products and services have the particularity of conveying cultural identities, values and meanings and have both economic and cultural attributes (principle of particularity); confirms states have the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory (principle of sovereignty); and establishes the principle of the complementarity of economic and cultural aspects of development, stating the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy (principle of complementarity). Moreover, the guiding principles include the principle of respect for human rights and fundamental freedoms, the principle of equal dignity of and respect for all cultures, the principle of international solidarity and cooperation, the principle of sustainable development, the principle of equitable access and the principle of openness and balance. The impact of the Convention on trade in cultural products is obvious.

With respect to rules regarding rights and obligations of contracting states, the Convention reaffirms contracting states' sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention (cultural sovereignty). As its embodiment, within the framework of its cultural policies and measures and taking into account its own particular circumstances and needs, each party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. Such measures include regulatory measures, measures that provide opportunities for domestic cultural activities, goods and services for the creation, production, dissemination, distribution and enjoyment; measures aimed at providing domestic independent cultural industries, access to the means of production, dissemination and distribution of cultural activities, goods and services; and measures aimed at providing public financial assistance. With respect to the measures for protecting the diversity of cultural expressions, contracting parties may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding, and may take all appropriate measures to protect and preserve cultural expressions in a manner consistent with

the provisions of the Convention. The Convention also makes special provisions on promoting the cultural industries in developing countries, such as international cooperation, market development, technical transfer, financial support and preferential treatment. Hence, it is clear that there is no restriction similar to the national treatment obligation in terms of the protection of domestic cultural industry.

Besides provisions of the principles and specific rights and obligations, the Convention has another function of defining its relationship to other international treaties. Without subordinating the Convention to any other treaty, The contracting parties shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and when interpreting and applying other treaties to which the contracting parties are parties or when entering into other international obligations, the contracting parties shall take into account the relevant provisions of the Convention. Nothing in the Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties. Meanwhile, the contracting parties undertake to promote the objectives and principles of the Convention in other international forums, and for this end, they will consult and cooperate with others. Due to such provisions of the Convention on its relationship with other international treaties, the Convention will have certain impact on the interpretation of other international treaties, especially the rules of the WTO.

3.3 WTO trade rules and norms of cultural products

There are no set of different norms on trade in cultural products in the rules of the WTO except Article IV of the GATT providing for special provisions relating to Cinematograph films, and therefore the trade in cultural products shall comply with the rules on trade in general goods. According to those rules, members grant the most-favored-nation treatment and national treatment to products from other member states, give special and different treatment to products from developing countries, bind and further reduce customs duties, eliminate quantitative restrictions generally, standardize and reduce the use of license, lower technical trade barrier and take according relevant rules anti-dumping, countervailing duties and safeguard measures when the importation of products results in injury to domestic industries. Those rules form the basic rules of the WTO on trade in goods. Similarly, cultural products shall apply the obligation exceptions applicable to general goods, such as general exceptions. Those exceptions are consistent with the basic principles of trade in cultural products mentioned above.

Article XX of the General Agreement on Tariff and Trade (GATT) provides for general exceptions to member obligations, one of which involves the protection

of public morals relating to cultural products.[27] According to the GATT/WTO's dispute settlement practices, the following conditions are prerequisites to obtain such exceptions: The measures are used for protecting public morals and are necessary for such protection, that is, the measures are essential to pursue the objectives of policies and there is no other measures with less restrictions on trade. In terms of implementing means of measures, there is no arbitrary or unjustifiable discrimination or disguised restriction on trade. Due to the nature of exceptions, the application of Article XX is very strict so as to avoid free interpretation that may cause failure of the obligations under the GATT. In the goods dispute settlements in the GATT and WTO, there is no case in which exception defense based on public morals is successful, while in one case of trade in services, namely, US–Gambling, the US successfully proved the purpose of public morals under Article XIV General Exception of the General Agreement on Trade in Services.

4 Relationship between IPRs protection and trade regulation of cultural products

Intellectual property right is mainly a property right, a category of private right in nature. The establishment of such property right by intellectual property legislation overcomes the defects and shortcomings of the traditional protection caused by the intangibleness of intellectual property, and the automatic copyright protection of works eliminates the inconvenience and uncertainty resulted from the examination and approval of industrial property rights. At the same time, the protection period of the lifetime of an author and fifty years after his death ensures the works to remain under protection for a long time. Without permission of the copyright owner, a third party shall not commit any of the following acts of infringement: Reproducing, distributing, performing, presenting, broadcasting or compiling a work or making it available to the public through information network.[28]

Compared with general property right, intellectual property rights including copyright lays more emphases on the passive right to exclude, stressing exclusiveness, while general property rights emphasize more on the active rights,

[27] Article XX of the General Agreement on Tariffs and Trade (general exceptions): Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; and else.

[28] Article 47 of the Copyright Law of the People's Republic of China.

namely, rights to possess, use, dispose and gain profit. Resulted from the intangibleness of the objects of intellectual property rights, such exclusive right in the nature of passive right restricts the right of others to dispose the objects of copyright protection.

Established on the basis of international copyright protection conventions including Berne Convention and the Agreement on Trade-related Aspects of Intellectual Property Rights, the international copyright protection regime makes it possible to protect a work in many countries at the same time (which is different from international protection of patent and trademark). Related to the exclusive right of copyrights, such extensive international protection restricts not only the trade of works between the originating country (place where the author lives or the work is published) and other countries, but also the trade among other related countries. Reproducing and distributing a work without permission of its copyright holder is prohibited by law. More, Article 16 of the Berne Convention explicitly establishes the international seizure system for infringing copies of a work: "Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection. The provisions shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected." In accordance with United Nations Convention on Contracts for the International Sale of Goods, a seller bears the obligation to the buyer of ensuring the goods he sells do not infringe the relevant intellectual property right.[29] The Convention on the Protection and Promotion of the Diversity of Cultural Expressions affirms in its preamble the significance of intellectual property right for in sustaining those involved in cultural creativity, though not mentioning intellectual property in its articles. Thus, it can be conceived that the protection of intellectual property rights is an element to be considered for protection of cultural diversity.

The above-mentioned restrictions on trade in cultural products imposed by copyright are evidently different in nature from trade restrictions imposed by states in terms of economic policies or other social policies, and hence not equivalent or replaceable. The importation and exportation of a cultural product that does not share copyright protection may be free, while a cultural product

[29] Article 42.1 of the United Nations Convention on Contracts for the International Sale of Goods provides: The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property: (a) Under the law of the state where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that state; or (b) in any other case, under the law of the state where the buyer has his place of business.

prohibited or restricted to import or export may enjoy the protection of copyright. Hence, as a property right in the sense of private law, copyright will be under some restriction by public right undoubtedly. The different natures of copyright restriction and trade restriction are confirmed in the Berne Convention: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."[30]

Under the TRIPS Agreement of the WTO and its relevant trade rules, if the government of a member could not protect the intellectual property right of nationals of other member, other member may impose restriction on the importation of products from that member. Such practice treats the protection of intellectual property right as a social policy of trade regulation. Moreover, the general exceptions of Article XX of the GATT include the exception for the enforcement of intellectual property rights: Subject to the requirement that such measures are not applied in a manner which would constitute a means of discrimination or a disguised trade restriction, if the measures not complying with other obligations are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to the protection of patents, trademarks and copyrights, the member taking such measure takes no liability for such measures. The purpose of the exception is to regulate trade by reason of protection of intellectual property rights, and such exception is consistent with the TRIPS Agreement. Those provisions indicate that the copyright restriction on trade in cultural products and the trade restriction based on the policy of protecting intellectual property are totally different, as one is the restriction in the sense of private law and the other is the restriction in the sense of public law.

5 Chinese policies and legislation on trade in cultural products

The Convention on the Protection and Promotion of the Diversity of Cultural Expression confirms the states have the sovereign right to formulate and implement the policies on culture and adopt the measures to protect and promote the diversity of cultural expressions. "Cultural policies and measures" refer to those policies and measures relating to culture, whether at local, national,

[30] Article 17 of the Berne Convention: Possibility of control by the government of circulation, presentation and exhibition of works.

regional or international level that are either focused on culture as such or designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution and access to cultural activities, goods and services. Taking into account its own particular circumstances and needs, each party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. The development of trade in cultural products therefore is consistent with the purposes, rights and obligations of the Convention on the Protection and Promotion of the Diversity of Cultural Expression.

The 16th National Congress of the Communist Party of China (NCCPC) planned a strategy for the development of the cultural industry: "To develop the cultural industry is an important way to enrich the socialist culture in market economy and to meet the spiritual and cultural needs of the people. It is essential to improve the policies on the cultural industry, support its development and enhance the overall strength and competitiveness of the cultural industry of China." (Jiang, 2002) The 17th NCCPC established the mode for development of the cultural industry: "We must vigorously develop the cultural industry, launch major projects to lead the industry as a whole, speed up development of cultural industry bases and clusters of cultural industries with regional features, nurture key enterprises and strategic investors, create a thriving cultural market and enhance the industry's international competitiveness. We will use new and high technology to create new ways of producing cultural works, foster new forms of operation in the cultural industry and accelerate the establishment of a dissemination system featuring fast communication and wide coverage". (Hu, 2007) Those are the policy guidance for China to develop trade in cultural products.

Being commodities, cultural product shall be of international competitiveness. The protection and development of cultural product markets is the important premise and condition for the development of trade in cultural products. To adopt high technologies to create new ways of cultural production, and diversify and enrich cultural products is an important way to develop trade in cultural products. Producing cultural products embodying socialist ideology, building harmonious culture and promoting Chinese cultures are the right orientation for the development of trade in cultural products.

Cultural contents are disseminated by virtue of science and technology. A culture with long history and rich contents as such is neither a cultural product nor a competitive advantage of cultural products. As a kind of commodities, cultural products shall comply with market rules and trade rule. Developed countries boast more advantages in cultural products. The cultural products of enterprises and countries with strong strength and power may affect, reduce and even damage cultures of other places or countries. "Market and capitalism

'destroy' the cultural and moral values they cannot replace." "Market and capitalism may in fact shake cultural standards easily." (Perroux, 1987) Therefore, the realization of China's above-mentioned policy objectives, to a large extent, relies on reasonable and fair trade rules. Freedom and protection, obligation and exception, and equality and discrimination are the issues to be tackled in the trade rules of cultural products. China shall, on the one hand, rely on the special policies of developing cultural industry provided for in current international rules and make use of the measures stipulated therein for cultural products to facilitate the further development of her cultural industry; on the other hand, China shall formulate reasonable trade rules of cultural products that both comply with the current international rules and embody the policies on promoting the development of Chinese cultural products. To transfer such policies into legal rules, scientific legislative techniques and skills are essential requirements. Hence, taking into consideration of the requirements of the current international trade rules and taking initiatives to use the convenience, opportunities and means provided by such rules is the best way for China's further effort.

In October 2007, with respect to China's measures concerning the trading rights of certain books and audiovisual products, the US filed a complaint to the WTO dispute settlement body, alleging that the Chinese government had prohibited free import and export of books and other relevant products in violation of its commitment regarding to trading rights.[31] The basic response of the Chinese government was that books and like products were special goods that reflected values, hence there should be an exception to general obligations. If the Chinese and the American governments cannot settle the dispute through consultation, the final settlement of the case will depend on the understanding of panelists or Appellate Body members of the peculiarity of cultural products as well as the coordination of trade rules as a whole, which will further influence the development trend of trade rules on cultural products to which we shall pay due attention.

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Author

Han Liyu, Ph.D, is an associate professor of law, and director of International Law Teaching and Research at Renmin University of China, Vice Secretary-General of WTO Section in China Law Society, and member of China's International Economic Law Society. Mr. Han teaches and does research on international economic law and WTO law, publishing several monographs and articles on the US trade law and the WTO law. For many times, Mr. Han did research as visiting scholar in American universities and UNIDROIT. Mr. Han got a post-graduate diploma in Common Law from Hong Kong University.