

2014

BioTechnology

An Indian Journal

FULL PAPER

BTAIJ, 10(24), 2014 [16024-16034]

On relationship between cultural diversity and intellectual property rights

Ye Junjun^{1*}, Zhang Shaohua²¹Zhejiangwenzhou, Zhejiang Industry & Trade Vocational College, add: Fudong Road 717# LuCheng District Wenzhou, (325000), (CHINA)²Hunanhengyang, Nanhua College of Industry and Commerce, Add: 113#, Tianping Jia Sha Tai South Road, Tianhe District, Guangzhou, (510507) (CHINA)

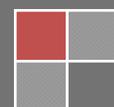
Email: yejunjun@hotmail.com, tepyy@126.com

ABSTRACT

It is becoming a hot topic about the relationship between cultural diversity and intellectual property rights when human's will of everlasting development conflicts with the trade profits brought about by IP trade. Intellectual property rights may prompt or hinder cultural diversity. trust of IPRS is main form which can harm cultural diversity ; measures taken by cultural diversity convention probably violate WTO agreement, especially TRIPS, which must be amended if cultural diversity convention is to be implemented ; the country can take some policies or measures to protect and prompt cultural diversity, including antitrust, quota, subsidy, controlling practices which have adverse effects on competition in the relevant market, cultural diversity exception. etc.

KEYWORDS

Cultural diversity; Intellectual property rights; TRIPS; Trust of intellectual property rights.



INTRODUCTION

The 20th century was a century of the rapid development of the globalization, the world trade system was represented by World Trade Organization and the predecessor General Agreement on Tariffs and Trade, which promoted the global trade greatly, on the one hand, it has promoted the progress of human, on the other hand, it also brought new problems and potential threats. Globalization might cause the decay of cultural diversity, and even extinction of a large number of cultural form, it was a prominent example. Since the late 1960s, the relevant problems of cultural diversity began to be discussed widely and deepening gradually, finally it formed some related international agreements or treaties. Under the framework of United Union, from the protection of biodiversity to the protection of the intangible cultural heritage, evolves further into cultural diversity protection, which reflected international society deepened the recognition of survival and development environment. On October 20, 2005, the convention of protection and promotion of culture forms (the convention of cultural diversity for short) has been passed through in Paris, it illustrated that the protection of cultural diversity as marking a new stage. Cultural diversity existed objectively, it was the one of prerequisites for sustainable development of human being. There is a sequence difference between civilization and culture, but there is no superior or inferior, they deserved the equal respects and joint protection of men. Bhoke, an American anthropologist, said: The value of diversity has not only enriched our social life, but also provided the resource for social update and adaptability change^[3].

The conflicts between the rational pursuit of human sustainable development and the benefit of intellectual property trade that created an important topic about the relationship of cultural diversity improvement and intellectual property protection. After Cultural Diversity Convention passed through, the world trade industry like a rising wind and scudding clouds, it showed that not much process made by world trade negotiation, some developed nations open up new negotiation filed and platform, such as sign an agreement about Anti-Counterfeiting Trade Agreement (ACTA), negotiation of TPP agreement and so on. So far, the most important achievement still is Cultural Diversity Convention in the cultural diversity industry, and the most widely used in the field of world trade is still a world trade agreement. In 2001, Doha announced to list Intellectual Property Negotiation and Biodiversity Convention, protection of traditional knowledge and folk literature as the important content of a new round of world trade negotiation, which established contact with cultural diversity and intellectual property protection, and entered trade industry. Most countries include some Western and American developed countries against trade-mad, they insisted that give a priority to cultural product and service, and considered as a carrying tool of cultural identity, value and connotation. A part of countries includes America, Japan and Australia that considered the contents of Cultural Diversity Convention as maintaining trade protectionist policy in the field of free trade area. There were some points between the ends that seems no any connection, for example, some country worry that cultural diversity would endanger national unity.

BASIC RELATION BETWEEN INTELLECTUAL PROPERTY PROTECTION AND CULTURAL DIVERSITY

When the function of intellectual property protection on cultural diversity is discussed, basic cognition about the relation between these two should be gained. The author considers that intellectual property can either promote or hinder cultural diversity. The relation between these two is mainly reflected in the following aspects.

Intellectual property or object of intellectual property is naturally within the scope of cultural expressions, but the object of cultural expression is obviously more extensive than the object of intellectual property. From the manifestation form of expression, expression of intellectual property should be able to be fixed on tangible carrier and copied in principle; otherwise, it won't be protected. Therefore, the object scope of intellectual property is limited, and a large amount of cultural expression cannot be protected with intellectual property. However, expression referred to by cultural expression

contains a large number of forms that cannot be fixed and copied. They are mainly cultural contents imparted by hands and mouth, such as living habit and ethical beliefs. These contents are passed on from generation to generation, but they will not necessarily possess very stable or certain fixed forms.

Owner of intellectual property is often individual or unit, which means that the creator of intellectual property is individual or individual combination, while unit or organization cannot be the creator. However, the subject of cultural manifestation form not only includes individual and unit, but also covers group, ethnic group, nation or country in most cases.

Intellectual property should be innovative in most cases, and innovation is the dimension to define the creator's achievement or the existing achievement. Cultural expression lays more emphasis on repeatability, continuity, universality and fundamentality. Repeatability means that formation of cultural expression is not one-time and temporary. Instead, it is formed by repeated application and consolidation of multiple creations. Continuity means that cultural expression is handed down from age to age, never to stop. As for universality, users and audiences of cultural expression are extensive. Fundamentality means that cultural expression plays the most fundamental role in men's cultural life; for instance, language is a basic tool of human exchange.

Intellectual property is acknowledged as a private right and it is a kind of property right, so it enters the list of basic human rights^[4]. Only when implementation of intellectual property hinders realization of public policy objectives in a country's system, will the country restrict intellectual property to some extent. Cultural diversity does not belong to the category of private right; on the contrary, it reflects the group appeal.

Intellectual property owns privacy, and protection of intellectual property is to protect the property right of main market players like the individual; intellectual property is a market-oriented right. Cultural expression possesses public ownership feature or sociality; protection of cultural diversity is related to living state, values and life significance of the group.

Individuality of intellectual property and universality of cultural expression. Intellectual property is the individual existence form of cultural expression, and it is a special kind of cultural expression and individuality. Cultural expression is the generalized intellectual property and it is the source of intellectual property. Intellectual property with distinctiveness and cultural expression with universality interact with each other and promote progress of human civilization together.

Variability of intellectual property and stability of culture. Intellectual property is based on innovation protection, and seeking change and innovation is the characteristic of intellectual property; this is variability of intellectual property. If technology has no innovation, it will be unable to open the market and gain market advantage. If a work has no innovation, it will be unable to attract readers. Cultural expression reflects stability and conservatism; it will maintain the original state for a long time, so as to adapt to the physiological needs of the large-scale group. It shows people's preference to order and safety.

Will implementation of intellectual property hinder diversity of cultural expression? Sufficient market competition will result in market prosperity and rich product varieties; similarly, market guidance will also lead to cultural prosperity to some extent and help to promote flow and exchange among different cultures. Only through exchange, can the existence and value of cultural diversity be reflected; close culture cannot become the source of diversity. There are many exchange channels and forms, but intellectual property is the most direct and principal form. Protecting intellectual property has huge incentive function on creation. Intellectual property continues to enrich cultural expression and supplement fresh blood to cultural expression. On the other hand, intellectual property absorbs nutrient from the diverse cultural expression. The nourishments in Hollywood films are widespread: *The Lion King* draws materials from Africa; *Kung Fu Panda* and *Hua Mulan* draw materials from China. By containing and absorbing multiple cultures like Chinese elements and African elements, film industry with high value-added intellectual property is created, and the glory of Hollywood is achieved.

However, we should see that implementation of intellectual property might hinder cultural diversity.

The boundary between intellectual property and cultural expression is not clear in some cases. By transforming objects that originally belong to public domain into the scope of intellectual property protection, legitimacy will be lost and it goes against the principle of fairness and justice. If intellectual property is not properly protected, it might hinder the public and even prevent the group that originally owns a certain cultural expression from using it. Moreover, it will also hamper freedom of speech and freedom of expression of the public.

Overuse of intellectual property might also change the original cultural expression and destroy the original cultural expression to different degrees; finally it might lead to disappear of the original cultural expression. This phenomenon is quite prominent in copyright field. For instance, the adaptation behavior or behavior of re-creation via the original cultural expression will destroy the original cultural expression to some extent, and constitute conversion or replacement for the original expression. Some spoof behaviors might cause mental discomfort, malaise and even hate of the original ethnic group.

INTELLECTUAL PROPERTY MONOPOLY IS THE MAJOR FORM OF INTELLECTUAL PROPERTY PROTECTION WHICH DAMAGE THE CULTURAL DIVERSITY

The protection of intellectual property rights can actually damage the cultural diversity, the author thought the primary damage is the monopoly of intellectual property rights. Under the system of free trade, the result of competition will gradually move to cultural monopoly, and the cultural monopoly can damage cultural diversity.

Accompanied with the economic globalization, the western powerful culture is represented by The United State that dominates the industry, and it widespread and popularizes its culture through the world. Under the high pressure of powerful culture, those disadvantaged culture and the expression is becoming more and more fragile, even endangered or extinct.

The protection of intellectual property rights is the inherent demand of the market, in turn, the development of the market promotes the development of the intellectual property system. The legal system represented by intellectual property law leads to the development and mature of market economy, and even has a decisive significance to the modern industrial revolution. Just like the sufficient market competition result in market prosperity, enrich product variety, to some extent, the guide of market will lead to the prosperity of culture. But, without the intervention of national macro-control, let the main body of market to compete randomly, which will go to the monopoly inevitably, that has been proved by the economic development of the developed capitalist countries. The consequence of intellectual property competition will always lead to the concentration of intellectual property. Data shows that the patents are increasingly concentrating to the large multinational companies and large enterprises, and gather in a few developed countries^[5]. Large enterprises accounted for 80% among world brand value, the developed countries occupied a majority of the well-known trademarks^[6].

We could say the relationship between copyright and cultural diversity are more closely. The concentrated monopoly trend also appears in the copyright field. Copyright protection evolves from creation protection into investment protection, we can take film production as an example, and the center of the copyright has been transferred to investors. Similarly, the focus of software protection is to protect developers, actually the investors, as same as the protection of the database. In "Given", the protection directive clause 7th of European Union database points out, in order to protect the database because the database production requires considerable human, technical and financial resources, so it needs to be protected. In the same way, the emergence of a large number of post works, which makes the creator's personal achievement inundating by the unit or organization. Unit become to the author for being protect, then the essence is the investment protection. The center of copyright protection moves from innovator to investor. Through the transfer of copyright or copyright licensing, the investor keeps the real control for productions. This control has even emerged at pre-work creation stage. As the marketization of creation guide, and the corresponding will necessarily be the productization of literature works. The characteristics of the product must be similar and standardization. The result of market orientation is that the productions will be treated as material products for planning, production,

sales, in order to realize the benefit maximization. To meet the needs of the consumers will be the primary goal of creation. Copyright protection will move from free creation to market result, which results in the gather of benefits and revenues, this kind of profits concentration will further affect the next round of investment, impact on follow-up creations, make further creation simplification, then all the similar productions will appear on the market, and forms a “All the flowers withered after my flourishing” situation. This situation will go against with the requirement of cultural diversity.

But we also should see that many obstacle factors of cultural diversity are not from economic industry. Politics, science, technology and religious is more likely to affect cultural diversity. Intellectual property rights can only be one of the many factors in influencing the cultural diversity at most, and maybe a litter bit effect. What makes the reason of intellectual property rights become the focus of cultural diversity may be the economic benefits behind intellectual property, and relatively be controversial.

THE MEASURE SET BY CULTURAL DIVERSITY CONVENTION MAY VIOLATE THE WTO PROTOCOL INCLUDING INTELLECTUAL PROPERTY AGREEMENT

Undoubtedly, Intellectual property rights agreement plays a key role in the current International intellectual property rights protection system. In order to cultural diversity convention, it has become a focus issue that whether intellectual property agreement’s rights and obligations can be cut or reduced.

We know that intellectual property rights obligation has limitation towards intellectual property rights itself. These limitations aims to control side effects brought by the implication of intellectual property rights. To stimulate cultural diversity, cultural diversity obligation also sets rules that member states can apply policy and measures to enhance cultural diversity. Through comparing these two contents, we can look for their similarities. If cultural diversity obligation’s policy or measures are mostly similar to limitations or exceptions of intellectual property rights, cultural diversity obligation and intellectual property agreements can coexist and cooperate with each other. Otherwise, it implies that the essence of these two has conflict of interests and cannot coexist. Thus, comparing the most important substantive provisions can hit the nail on the head.

In intellectual property rights obligation, there exist some limitations or exceptions, as well as control to some extent. These limitations or exceptions can be divided into two groups. One group is for the least developed members and developing members, while another group is for all members. Moreover, in the preorder of intellectual property agreement, one normal pledge admits that detailed rules and obligations brought and implemented by the least developed members enjoy the special needs of the widest flexibility. They can therefore build up a solid and effective technique foundation. Those for the least developed members and developing members includes article 66 and 67. Article 66 in Intellectual property obligation provides at least 10 years’ adaptive phrase for the least developed countries. During that phrase, the least developed members may not apply intellectual property obligation. At the same time, developed members are asked to encourage their local enterprises and organizations, and techniques are encouraged to make over to the least developed countries.

Article 67 sets rules that developed members should provide beneficial techniques and financial cooperation towards developing members and the least developed members. Limitations or exceptions for all members include article 7,8,40 and 73. Article 7 is summarized as purpose limitation or target limitation. Article 8 is summarized as exceptions for public health and nutrition, public interests towards members’ important departments of social finance and technology development, as well as intellectual property rights holders’ abuse of power, unreasonable ways of restraining trades, or causing adverse impacts on international technology transfer. The first paragraph sets rule of exceptions on the legislative level. Limitations are only on administrative or judicial level. So exceptions are higher level of limitation towards rights. According to article 40, members can legislate, take measures to avoid or control obstructing methods of work towards competition. When other members or residents’ obstruct practices towards competition in applying intellectual property right, members can hold a discussion

about them. Article 73 is summarized as safety exception. When members' fundamental safety interests are under threats or obstruction, members may not protect a certain of intellectual property.

Cultural diversity convention sets examples that members can take measures and release policies to protect and promote cultural diversity, and mainly in article 6, 7, 8 and 20. Article 20 gives definition towards cultural policy and measure-- "Cultural policy and measure" are various policies and measures that have direct impacts on culture itself or individual, groups, or society's ways of cultural expression, including creation, production, spreading, sale, as well as policies and measures which relating to cultural events, products and services. The title of article 7 is "measures of promoting cultural expression", but there are barely detailed measures. Article 8 is protection measures towards cultural expressions which face the danger of extinction. These measures can surely include intellectual property rights' unprotected content. However, just like protecting endangered animals and plants, intellectual property rights do not take a large proportion in it. It is financial support, technique support and related protection or emergency measures that actually give greater weight, and they are not very related to intellectual property rights. Article 20 occupies a special status in the convention, because this article states that cultural diversity convention and other international conversions have relations of "mutual support, complement and not belong each other". However, its contents are unclear and contradict itself. One the one hand, this article sets the rule that contracting party should carry out duties in this and other conventions with good faith. This convention should promote itself and other conventions to support each other. Contracting party is asked to explain and apply related regulations for its other conventions or consider this convention's relating rules when undertaking other international duties. On the other hand, this convention sets the rule that any regulations are not allowed to explain the changes of contacting party's rights and duties in its other conventions. According to this rule, as a matter of fact, the relationship between intellectual property agreements and cultural diversity convention cannot be discussed.

The above cultural diversity conventions have no substantive relationship with intellectual property exceptions or limitations, or the demarcation is unclear. What really should be discussed is the relationship between policies or measures in article 6 and exceptions or limitations in intellectual property agreement. We doubt whether cultural diversity convention's article 6 goes against spirit, principle and rules of intellectual property convention, and whether cultural diversity convention's article 6 compliant or goes against those exceptions or limitations of intellectual property convention.

Article six's detailed contents are:

(a) Article six: Contracting party's domestic rights

Within cultural policy and measures' scopes of item 6 in article 4, each contracting party can take measures to protect and promote diverse way of cultural expression, according its own unique situation and needs.

(b) These measures include

- 1) Administrative measures to protect and promote diverse ways of cultural expression;
- 2) Some related measures, in domestic setting, to create, produce, release and enjoy domestic cultural events, products and services, including rules in language using area;
- 3) Measures that enable domestic cultural industries and informal industry sectors to effectively get ways of production, spreading and sale, cultural events, and products and services;
- 4) Measures of providing public financial support;
- 5) Measures to encourage non government organizations, public and private sectors, artists, and other cultural professionals to develop mental and cultural ways of expression, cultural events, and products and services, in order to freely exchange ideas, meanwhile, to stimulate innovative and aggressive spirits;
- 6) Measures to build up and properly support public sectors;
- 7) Measures to cultivate and support artists and other members who participate into creative ways of cultural expression activities;

8) Measures which aim to enhance media diversity, including usage of public service broadcasting.”

Article 6 belongs to normal rules; therefore each contracting party can take measure in a certain wide aspect. When put into intellectual property aspect, it seems that article six's item 2, 3 and 4 betray principle of national treatment. Item 2 takes measures to provide more chances towards domestic cultural activities, products and services. It means that other countries' cultures are discriminated. It is easy to get cultural quotas which are inconsistent with free trade spirit. Item 3 can provide other supports for the governments' way of intervening market, and government's these actions are adverse for the market to set up fair competition. Item 4 can directly lead to subsidy policy. Under the setting of world trade, subsidy only happens in individual area and it normally betrays rules of world trade. As is known to all, governments should stand at a neutral position at the market. If cultural diversity convention is implemented, contracting party will have more sufficient reasons to intervene culture more frequently and intense than before. Therefore, at related cultural market, balance will be broke by government.

Especially to point out that, the so called scope of administrative measures item 2 of article 6 point 1 can be very broad. Apart from limitations towards intellectual property rights, foreign cultural goods and services are even forbidden from importing. And foreigners are not allowed to provide cultural events domestically.

The last four measures are not related to intellectual property rights.

Obviously, if cultural diversity convention is persevered, it may very likely to clash with intellectual property agreement and other world trade agreement. What cultural diversity convention affirms, to a large extent, may relate with measures of intellectual property agreement, so it which disagree with intellectual property agreement itself. Meanwhile, these measures do not include those exceptions and limitations in intellectual property agreement. The only crossing part is in article 6 item 2 point 1. It seems that the management measures can include some actions to control anti-competition behaviors, which are content of rule 40 in intellectual property agreement.

According to the above analysis, we can draw a conclusion that, if cultural diversity convention's contracting party tries to completely applies treaties and not obey intellectual property agreement, intellectual property agreement must be modified.

THE RELATED MEASURES IN INTELLECTUAL PROPERTY AGREEMENT FOR PROMPTING CULTURAL DIVERSITY

As far as I'm concerned, under the current world trade system, we can use The WTO agreement, especially the System of quotas and subsidies, Restrictions on competition of control measures, the anti-monopoly control as well as the protection of exception in intellectual property agreement to promote cultural diversity.

The application of quotas and subsidies

Strictly speaking, quotas and subsidies don't belong to the content of intellectual property agreement, instead, belong to the general trade measure. However, subsidies and quota violate the principles of National treatment and Free trade, in the same time, these rules are also principles of intellectual property agreement, thus exerting quotas and subsidies in the field of culture industry and intellectual property can also violate the intellectual property agreement.

(a) The application of the subsidies

Subsidy includes actionable subsidies, non-actionable subsidies and prohibited subsidy. The so-called prohibitive subsidies can also be called the red subsidies, is the subsidies that the member of WTO cannot grant or sustain. The export subsidy and import substitution subsidies are prohibitive subsidies.

The actionable subsidies can also be called the yellow subsidies. It is the subsidies that the member of WTO are granting or sustaining which cause negative influence to other members of the

organization. As for the list of the actionable subsidies, the agreement doesn't clarify as the prohibited subsidy, instead, putting forward a important concept, the negative influence. If one member of WTO grants some kind of subsidies which cause the negative influences to other members, this subsidies can be identified as the actionable. The definition of the negative influence is listed in the Subsidies agreement. If the subsidies accord with one of the standard of the three, it is the actionable subsidies. Here are the three standard of it. First, impair the domestic industry of other WTO members'. Second, eliminate or impair the direct or indirect benefits of other WTO members according the General agreement on tariffs and trade 1994, especially the binding of concessions rights in the Article 2 of the general agreement. Third, impair others rights severely.

The non-actionable subsidies, which are also called the green subsidies, refer to the subsidies that can be adopted by WTO members. This kind of subsidies can neither be submitted to the disputes procedure of the WTO to deal with, nor can exert anti-subsidy measures to the subsidized imported products. There are two kinds of non-actionable subsidies. First is the one which doesn't belong to the Specific Subsidy of the Subsidies agreement. It can be acquire universally, and has no pertinence to enterprise, industry and area. The second type is the general kind Specific subsidy of the Subsidies agreement. However, it has three items be included in the non-actionable subsidies. They are Research and development subsidies, Subsidies to poor areas and Environmental subsidies. The so-called Research and development subsidies refers to the aid for the research and development activity of the enterprise, and the aid exerting by higher educational institution and research institution based on the contract signed with the enterprise. As for the Subsidies to poor areas, is the aid for the poor area according to its own development plan. And the Environmental subsidies are aimed to provide assistance to the enterprise for the purpose of the adaptation between the available utility and the new environmental requirement of the law^[7].

In the procedure of the protection of cultural diversity, the measure to provide subsidy to the weak cultural expression has been adopted by many countries. For instance, in Japan, the amount of the money provided by country for the protection of the intangible cultural property is approximately 216 million yen for individual projects and 126 million yen for group and synthesized projects. The money be used for survey of intangible cultural property is 50 million yen, and 180 million yen for cultural property inheritance and related activities per year^[8]. However, is a question that which way to adopt as the form of providing subsidy. I am inclined to subsidize based on the cultural diversity. And this kind of subsidy belong to the second kind of the non-actionable subsidies, which means that it can be used for specified area, enterprise and area. The main purpose of subsidy is to assist industry or others things in the weak. And cultural expression has its territoriality, sometimes are related to a specific group of people. For example, recently my country is advancing the definition of the traditional culture inheritance, which involves with some specific artists. So, if these artists established enterprises in promoting the defined inherited cultural expression, these company or enterprise can receive the special subsidy according to the policy. Of course, providing subsidy according to the cultural diversity should be limited in the cultural expressions which are in the weak or be threatened. It's a better condition to define them by setting standards and publication procedures. Its adaptation should also be negotiated in a WTO frame if its subsidy has international influence.

(b) The application of the quota

Quota is another important form of protecting domestic industry. But, in general, the quota system is contrary to the WTO system. GATT assured that countries can sustain its own film quota system, but can not enlarge the application of the quota system. The United States strongly objected the Cultural immunity concept by Europe, which be compromised by GATT, leads to the specific items for films regardless the Cultural immunity thing. It turned out that the audio and visual elements still be hid in the GATT separately, and Europe still sustain its original system of subsidy, taxation and quota. According to incomplete statistics, there are more or less 20 countries has screen quota including British, France, Italy, Korea, Pakistan, Mexico, Brazil, and of course, China.

If we exert the quota system merely for the purpose of cultural diversity, obviously it will enlarge the application range of the system. This is beyond the items of the WTO agreements. Considering that cultural diversity should also protect those cultures which are not dominant or popular enough, the quota system has no practical significance. Quota system will greatly hinder cultural communication and freedom of expression in the field of film, publishing and audio production. In fact, quota system only controls the import of foreign cultural products, it has no benefit to domestic cultural diversity. In conclude, except for film and television, I disagree with the quota system. Even the screen quota system, it should only sustain its precedent system rather than enlarge its application range.

In a word, compare with subsidy and quota, I am inclined to subsidy for its pertinence, practical application as well as effective control.

(c) The application of Measures against limit competition in cultural diversity agreements

From my point of view, in order to promote cultural diversity as well as protection of it, the administrative measures arose in paragraph 2 article 6 of cultural diversity agreement can be applied to the article 40 of the intellectual property agreement.

According to the article 40 of the intellectual property agreement, first of all, all the members should admit that the permission of the intellectual property activity and the condition of it can limit competition. Second, members have the right to legislate in order to limit competition activities. More, members can take actions to prevent or control this kind of activities. And members can ask for negotiation for the purpose of limiting competition, citizens or inhabitants of other members who violate its related legislation in their own territory and citizens or inhabitants of its own who violate legislation in other members' country.

The limitation of competition in intellectual property is a kind of right abuse, which can lead to monopoly of intellectual property and do harm to cultural diversity. Controlling of the limitation of competition can protect this diversity in the initial stage. The problem is, can we identify the items involving contents of hindering cultural diversity as a competition-limit one? As far as I am concerned, it's ok to say so, but we should realize that we have to stipulate these activities at first, thus the law can has its application base. First, these restrict competitive behavior have to occur in permission activities. Second, it has to be listed in the law, for example, inhibit license be drew from the third party, inhibit the follow-up development of the license, the enforcement of resale, compulsory license, etc. The clause can be composed like this, activities under intellectual property permission field and permissive conditions have following idiosyncrasy which restrict competition should be regulated.....

(d) Apply the exception of the intellectual property agreement for cultural diversity protection and development

The exception of the intellectual property agreement is the important restriction to the exertion of intellectual property rights. Different from subsidy, quota system and anti-monopoly, the exception is the peculiar in intellectual property agreement, which has the direct relation with intellectual property regime. When compared with competition restrictions, the measures allowed by the exception are stronger and can be applied in a wider range.

Can the exception of cultural diversity institute the exception of intellectual property protection? If so, what's the condition of it? The so-called exception of cultural diversity refers to the activity which permits no protection or diminished protection for intellectual property for the purpose of cultural diversity. So, for this aim, can we violate the intellectual property agreement and diminish the obligation of it when carrying out the article 6 of the cultural diversity agreements? For my part, I think carrying out the exception of the intellectual property should meet some basic principles. First, the exception of cultural diversity cannot institute the negation of the intellectual property protection. When dealing with the related issue, the protection is the general rule, the cultural diversity is the exception. We can not imagine promoting cultural diversity without intellectual property protection. Thus, cultural diversity can merely be one of the exceptions of the intellectual property protection. Second, the exception of cultural diversity cannot deny the basic principles of the intellectual property agreements such trade

freedom principle, national principle, etc. Last, negotiation should become the universal way to solve problems. For example, exerting quota system in film according to GATT, but the system has to be determined through negotiation rather than merely determined by countries^[9].

I think it is worthy discussing the exception of public health and intellectual property related cultural diversity. We should figure out that whether the exception of cultural diversity is as urgent and inevitable as the exception of public health. If so, we can put the exception of the cultural diversity into the intellectual property agreements. If not, we have to find other ways to protect as well as promote cultural diversity.

Of course, for the exception of intellectual property agreements, there are no specific stipulations for the conditions of exception apply. Obviously, it is necessary. The exception means that the protection of intellectual property should be on the first, thus the clause for intellectual property protection should be applied firstly. If it wants to apply the exception, it needs to meet the strict condition. Otherwise, the exception will becomes general, then impair the whole intellectual property agreements. As a result, if we cannot accord with the international agreements, the law produced by exception of singular country will possibly violate international agreements. So, just like the negotiation on exception of public health in the international sense, the conditions must be specific.

I think we could imitate the way that the exception of public health carried out to stipulate the exception of cultural diversity. In August 31st 2003, members of WTO passed the final document of the compulsory license system of patent medicine. That is the decision in exerting the intellectual property related public health. According to the decision, the developing countries and underdeveloped countries can carry out the compulsory license for using and producing the related patent medicine when they are confronted with AIDS, malaria, phthisis and other public health-threatened epidemic diseases. So the specific conditions for the exception of cultural diversity can include as follows. First, it can only be applied to the non-mainstream cultural which is under extinction. We should list specific expressions which can be the exception through international negotiation and institute a system aiming at identifying the intangible cultural heritage. This list should be flexible. Second, we can have institution and set standards for identifying the cultural under threat. We can also identify countries and areas which permits the exception of cultural diversity. Third, for the cultural that are ready to be identified as exception, we should make restriction and announcement. Fourth, make announcement of the intellectual property that is going to be restricted and the areas of it. Fifth, pay the appropriate fee for the use of intellectual property. Sixth, list the adoptable measures for diminishing the intellectual property protection. Whether the items above be conducted by countries themselves or by international negotiation? I think it should take the domestic legislation as the principal, and accompanied by the essential international negotiation. It should also permits international arbitration and judgment towards domestic legislation.

(e) Applying the anti-monopoly investigation for intellectual property is the principal measure for promoting cultural diversity

Monopoly is a kind of severe restriction for competition. However, anti-monopoly does not form a exception, instead, it's a applicative investigation for any rights. Anti-monopoly is called the constitution of economic, which has a wide range of application. It's obviously that it can also be applicable in intellectual property. The exception of cultural diversity discussed above does not require monopoly for application. Even though now we have some basic principles for intellectual property anti-monopoly, it's rare to exert anti-monopoly investigation towards copyright which relates more with cultural diversity. We have demonstrated how monopoly in intellectual property can affect cultural diversity before, so we have to investigate the monopoly in the field of copyright. Someone has already discussed about the way of investigation for the copyright monopoly^[10], but no further research for application been put forward.

From my point of view, the issue that we should be concentrated on is the cultural monopoly. Applying the restriction of competition or exception seems controversial, it is also superficially to say that control of matters that don't show its possibilities to hinder diversity will promote culture

communication and prosperity. Subsidy is a kind of more active measure, but it's doubtful if subsidy can really rescue those fading cultural expression especially when cultural expressions have their own law of development. Anti-monopoly investigation is different because it mainly prevents some cultures become too aggressive. Like a giant tree will cast adverse effects on its adjacent plants, the tree should be cut down some branches for the maturity of other plants.

REFERENCE

- [1] Wu Handong; On legal protection of traditional culture, *China Legal Science*, 1 (2010).
- [2] Hu Kaizhong; The influence on the intellectual property international trade system of cultural diversity protection, *Studies in Law and Business*, 6 (2008).
- [3] See "people's Daily" October 23, 3 (2005).
- [4] Wu Handong; "The Private Power of Intellectual Property and The nature of human rights", C.
- [5] See WIPO"; In 2007 the Patent Report", source: <http://www.cnipr.com/ztxx/zltj/default.html>.
- [6] See "The world's top 500 brands" by the world brand laboratory (World Brand Lab) exclusive annual (fourth).
- [7] Yi Jun; 'Stuy on WTO Subsidy Rules, *Journal of Political Science and Law*, 6 (2004).
- [8] Wang Zhuo; "The Theory and Practice of Foreign Intangible Cultural Heritage Protection," *Cultural Journal*, 6 (2008).
- [9] See article4 of "GATT" about the film special provisions", from " The results of the Uruguay round of multilateral trade negotiations, legal text", Ministry of foreign trade and economic cooperation of international economic and trade relations division translation, Law Press(first edition), October (2000).
- [10] Peng Yuyong; Modern Trends and Anti-trust Measures of Copyright, *Electronic Intellectual Property*, 2 (2007).