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It’s Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression

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This article examines the implications of the World Trade Organization (WTO) China-Intellectual Property Rights Enforcement case for the relationship between human rights law and trade-related intellectual property law. It shows that, despite the theory whereby international trade law can spontaneously support the freedom of expression and possibly other human rights, the parties and the panel were, in practice, oblivious to the human rights context of the dispute. In the WTO, human rights considerations will be integrated with international trade law (and intellectual property law within it) only if a party makes explicit arguments to this effect, and a panel opts to consider such arguments on their merits, not through issue avoidance.

Keywords freedom of expression; cultural life; public morals; censorship

And if anybody asks me, “Is it easy to forget?”
I’ll say, “It’s easily done,
You just pick anyone,
And pretend that you never have met!” Bob Dylan¹

The China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights² dispute (the China-IPR Case) was a World Trade Organization (WTO) first in more than one respect. Most obviously, it produced the first panel report relating to the enforcement of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) commitments.³ It marked the first time that China had successfully defended elements of its legal regime against a WTO complaint.⁴ It was also, less obviously, the first time that a WTO complaint included a direct challenge to a national measure whose non-trade-related aim was to restrict an international human right: the freedom of expression.⁵ The focus of this article is on the latter aspect of the case.

A lot has been written in recent years about the intersections, on the international plane, between international trade law (including IPR protected by TRIPS) and human rights law (Lang, 2007). Much of this discourse has dealt with the potential for conflict between these areas of international law, such as the clash between patent protection and the right to health (Hestermeyer, 2007). Another strand of the literature has focused on the capacity of trade interests to promote human rights indirectly, when trade benefits and concessions are made contingent on human rights performance (Alston, 1982; Bartels, 2005). A separate, more theoretical debate has covered the controversial claim that trade law and liberalization are in themselves “constitutional” protections of human rights (Alston, 2002; Howse, 2002; Petersmann, 2002a; 2002b). Yet, only rarely has it been posited that WTO law and its robust dispute-settlement system can actually have the practical effect of directly promoting a human right as a legal matter. This might conceivably happen in instances where a human rights violation is concurrently trade restrictive or is otherwise inconsistent with WTO law. In cases such as these, in which there are overlapping violations, one might
anticipate a confluence of remedies as well, that is, that the removal of the trade restriction or WTO inconsistency would lead to a removal of the human rights restrictions. Trade law would then be vindicated as a veritable handmaiden for human rights, instead of an obstacle thereto.

Within these relatively narrow parameters, academics and advocates have put forth the general proposition that trade law might serve specifically to promote and protect the freedom of expression, especially with respect to internet communications (Panizzon, 2008; Rundle, 2005; Wu, 2006). Picking up the academic lead, a non-governmental organization called the California First Amendment Coalition (CFAC) has lobbied in favour of filling a complaint in the WTO against China’s internet-filtering laws, touting this potential case as “the biggest access-to-information and free speech case in history”. To this end, the CFAC has even retained international trade law counsel, which has presented a legal case against Chinese media control, based entirely on WTO law, to the office of the US Trade Representative (USTR) and to the US–China Economic and Security Review Commission.

In short, there exists a claim that, at least when it comes to the freedom of expression, international trade law (which includes significant elements of intellectual property law ever since the entry into force of TRIPS) and human rights are in spontaneous confluence rather than in conflict, that they “point in the same direction”, to borrow a phrase from the International Law Commission’s study group fragmentation report.

On this background, the China-IPR Case provided a rare concrete opportunity to see how this potential confluence between international trade law and human rights law can play out in practice, in the hands of the WTO dispute-settlement system. The final (and unappealed) Report of the Panel devoted approximately 30 pages to the legal relationship between censorship and TRIPS copyright enforcement obligations, in a case in which no less a formidable censor than China, with its tenuous regard to political freedoms, acted as respondent. These could be the makings of a landmark case in international law. How did the panel handle the human rights aspects of the trade and intellectual property case? And what are the real implications of the report on the freedom of expression in China? Has the human right been advanced?

This article argues and demonstrates that contrary to any prior expectations of spontaneous confluence between trade, intellectual property and human rights, the reasoning of the China-IPR Report is entirely oblivious to the human rights implications of the dispute, and that it could even have negative effects on the legal framework of the freedom of expression in China.

It is in a way telling that throughout the report, the panel much preferred to use the somewhat euphemistic term “content review”, which was used literally 100 times in the report in comparison with only nine times that the “explicit name” of censorship was used—the latter usually on the basis of the submissions made by the Chinese government itself. The legal confines of the narrow international copyright law question posed to the panel, combined with the structure of the parties’ arguments, allowed the panel easily to avoid any discussion of the human rights implications of the dispute, which were potentially significant. If this dispute can be treated as a representative case study, international trade and trade-related intellectual property law in the WTO cannot be expected to promote human rights spontaneously. Rather, this could happen only when parties make explicit human rights-based claims and argue that WTO law must be interpreted in their light, and, in this respect, China-IPR is also instructive. Clearly, all parties and third parties preferred to steer clear of such claims.

In the next section, I will discuss China’s relevant censorship-related measure and its substantive relationships with international intellectual property law as protected in the WTO, and with international human rights law relating to the freedom of expression. Subsequently, I will critique the arguments of the parties and the panel’s analysis in the China-IPR Case, followed by
brief conclusions on the potential for human rights promotion through WTO intellectual property law.

China’s Measure, TRIPS, the Berne Convention and Human Rights

In China-IPR, the United States challenged three separate features of China’s intellectual property law: its thresholds for criminal prosecution of certain counterfeiting and piracy constituting IPR infringements; its measures for disposing of confiscated goods infringing intellectual property rights; and the denial of copyright and related rights protection and enforcement to works not yet authorized for publication or distribution within China. It is this last claim that is of interest to us in the present context.

The measure at issue in this claim was the first sentence of article 4 of China’s copyright law, which provided (as per the translation agreed between the parties for the purpose of the dispute proceedings) that “Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law.” The United States argued that this provision constituted a violation of article 5(1) of the Berne Convention as incorporated by article 9.1 of TRIPS and of article 41.1 of TRIPS. The United States had also made tentative arguments relating to article 2(6) of the Berne Convention, but these were found by the panel to be outside its terms of reference for procedural reasons. The United States arguments alleging that China’s content review constituted a “formality”, on which copyright is made contingent being inconsistent with article 5(2) of the Berne Convention, were found by the panel not to “contribute further to a positive solution to this dispute”, in light of its findings with respect to article 5(1) of the Berne Convention. The United States claim was, therefore, in sum, that by depriving copyright protection from works that could not legally be published in China under China’s censorship laws, China was in violation of its TRIPS and Berne obligations.

Notably, the United States claims in the dispute were of an “as such” rather than an “as applied” nature. In other words, the claim was not that there were necessarily specific violations of TRIPS obligations in China, with respect to particular works and authors, but rather that the relevant provisions of China’s legislation, in abstracto, were inconsistent with TRIPS obligations (and in the case of copyright, of Berne requirements). Indeed, much of the outcome of the entire dispute, well beyond the copyright enforcement claim, should be understood as a derivative of the “as such” construction of the complaint. Whereas an “as applied” complaint would have required detailed factual evidence on violations of IPR in China—evidence that the United States was evidently not prepared to provide—an “as such” complaint would seemingly require less onerous evidence pertaining primarily to the way in which China’s laws were to be properly interpreted. Thus, with respect to the non-enforcement of copyright claim, the report includes extensive analysis of China’s laws and practice, in order to deduce what should rightfully be considered works “prohibited by law” in the terminology of article 4 of China’s copyright law.

Certainly, this question evolved as a key issue and ultimately as a significant limitation on the scope of the United States’ success in its claims. While China essentially acknowledged that copyright protection was denied from works whose content was substantively illegal under a series of Chinese laws and regulations (whose content we will return to in the next section), the United States contended that this denial covered not only works that had actually failed to pass censors’ muster but also a broader range of works at different procedural stages of content review, namely (a) works never submitted for content review; (b) works submitted and awaiting the results of China’s content review; (c) the unauthorized versions of works edited for authorized distribution in China; and (d) works that have failed content review. Crucially, in terms of the dispute's
outcome, the panel ruled that the United States had failed to make a *prima facie* case with respect to the first three of these categories of works, having failed to provide sufficient evidence that would have substantiated that Chinese law and practice considered them to be “prohibited by law” for the purposes of article 4 of China’s copyright law.23 This is somewhat ironic; to the extent that the “as such” complaint had been designed to circumvent evidentiary minefields, its failure was not in matters of legal interpretation but in questions of evidence.24 In contrast, the panel found that copyright protection was indeed being denied by law to works that had failed content review (and by extension, to deleted portions of works edited for content review). This is the United States’ main claim to success in the entire dispute.

Now, as the panel unequivocally (and correctly) found,25 to the extent that China’s copyright law explicitly denied its protection from certain classes of works, it is clearly inconsistent with the international obligations set out in article 5(1) of the Berne Convention as incorporated by article 9.1 of TRIPS. This finding, however, would be limited to those classes of works in which it had been demonstrated that the law did not extend its protection, and would be potentially subject to exceptional defences, specifically article 17 of the Berne public order exception, discussed below.

The additional question to be considered in the present context—a question neither addressed to the panel nor addressed by it—is whether the denial of copyright to certain works on the basis of their content constituted a restriction of the freedom of expression, concurrent with its violation of the Berne and TRIPS IPR obligations? The freedom of expression is broadly construed as a basic international human right. The preamble of the Universal Declaration on Human Rights (UDHR)30 lists it as one of those freedoms that are among the “highest aspirations of the common people”; article 19 of the UDHR provides that everyone has “the right to freedom of opinion and expression”, including the freedom “to seek, receive and impart information and ideas through any media and regardless of frontiers”. The freedom of expression was further concretized in article 19(2) of the International Covenant on Civil and Political Rights (ICCPR),27 whereby:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

China has signed the ICCPR but not ratified it; it would nonetheless be bound by international customary law.

In the copyright context, of particular additional interest is the right to participate in cultural life enshrined in article 27(2) of the UDHR and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),28 which includes the rights of authors to benefit from the moral and material interests resulting from their works,29 and is strongly related to the freedom of expression. Although core obligations incumbent upon states for the purpose of fulfilling this right are ultimately very similar to international copyright commitments, in its General Comment on the subject, the Committee on Economic, Social and Cultural Rights has emphasized that authors’ rights to benefit from the moral and material interests in their work are an expression of “the inherent dignity and worth of all persons”, and therefore are distinct from IPR and have a separate legal existence.30 Notably, China has ratified the ICESCR.

International human rights law therefore establishes a separate normative framework for assessing the international legality of the denial of copyright from unauthorized works. Has this framework been violated? The denial of copyright protection is undeniably part of China’s overall system of censorship; it directly refers to the rules and regulations that establish which expressions are considered illegal in China and defers to the governmental system of approval. It is, of course,
these primary content bans and “content review” mechanisms that constitute the first instruments of repressing expression. However, the non-enforcement of copyright augments them by additionally delegitimizing unauthorized content. It denies it the moral and material benefits of copyright protection and private enforcement, directly in conflict with article 15(1)(c) of the ICESCR. From a human rights perspective, copyright protection serves the purpose of providing authors with the potential to enjoy an adequate standard of living;

copyright denial prevents this. The freedom of expression includes the freedom of imparting information. Authors and holders of exclusive information might not be deterred by the criminal wrath of the censors, but the denial of copyright might deter them from disseminating works and information, if they fear that their economic interest will not be upheld. Indeed, this might even cause a chilling effect, deterring potential authors from creating works due to the material uncertainty involved.

That article 4 of China’s copyright law was in fact aimed at reinforcing the repressive effect of Chinese censorship is made abundantly clear by China’s claim that the denial of copyright from unauthorized works is covered by the defense provided by article 17 of the Berne Convention, which states that the Convention:

cannot in any way affect the right of governments to permit, to control, or to prohibit 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.

This is accepted as including the prerogative of states to apply censorship for reasons of public order, as acknowledged by the panel. Moreover, through this claim, China acknowledged that it viewed the denial of copyright as an element of its legal system of censorship. The United States and the panel agreed that article 17 of the Berne Convention has the effect of interfering with certain rights with respect to protected works, but, in the words of the panel, “there is no reason to suppose that censorship will eliminate those rights entirely with respect to a particular work”. In other words, in the copyright context, whether a government chooses to ban the circulation of certain works is not relevant to the question of whether those works are eligible for copyright protection, and vice versa.

When one turns to the human rights assessment of the denial of copyright, the question of public order exceptions also arises, but it is noteworthy that article 15 of the ICESCR—the protection of authors’ moral and material rights—is not subject to any exception. Under the ICCPR, the exercise of the rights found in article 19(2) “carries with it special duties and responsibilities” and may be subject to restrictions that conform to article 19(3), that is, restrictions provided by law and necessary for “respect of the rights and reputations of others” or “for the protection of national security or of public order (ordre public), or of public health or morals”. However, as the Human Rights Committee stated in its General Comment 10, “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself”. It is not necessary, in the limited scope of this article, to explore the boundaries of these exceptions. The following two observations should suffice. First, in contrast with article 17 of the Berne Convention, the human rights exceptions to the freedom of expression are not self-judging; in order to comply with obligations of the freedom of expression (to the extent provided for by customary international law), China’s substantive content rules would have to be positively found to conform to the substance of these exceptions, even on an “as such” basis. Second, the denial of copyright—not the content ban—would have to be shown to be “necessary” for the protection of the interests enumerated in article 19(3). As the panel did not find that the prerogative to ban content can interfere with the obligation to protect and enforce the negative rights protected
by copyright, it might be said that copyright denial is *a fortiori* not “necessary” for the protection of public order and so on in the human rights context either.

Hence, it would appear that article 4 of China’s copyright law is certainly a case of parallel violation, of both an IPR covered by TRIPS and the bundle of human rights that constitute the freedom of expression (although, certainly, the exact extent of the violation of human rights and hence the degree of overlap would vary according to different factual variables).

To demonstrate further this overlap—and to escape momentarily the limitations of the WTO’s somewhat insular jurisdiction—let us consider a hypothetical author of a work who decides to make a private claim in a domestic court against a denial of copyright caused by a national statute similar to China’s copyright law. Assume that all the relevant international law—WTO, Berne Convention, ICCPR, ICESCR, customary law—applies in the domestic courts one way or another. The author-claimant’s copyright is not eligible for protection because her work has not received content approval. This can occur under differing circumstances, in accordance with the different stages of content authorization. The work, in whole or in part, might have failed to receive the approval of the censors, and the author would like to challenge the outcome of their decision, at least insofar as it affects her copyright. The work might have been submitted for approval, and not yet received it, and the author is anxious to have the work reach the public (not least for material reasons), and, at the same time, to prevent the dissemination of infringing works. Perhaps the author has not yet submitted the work for approval, but is concerned that after submission the approval process will simply take too long or even result in a prohibition. Indeed, the work might not even exist yet in a form that can be approved or disapproved, and the prospective author feels constrained in her creativity by the possibility that her opus will languish in the bureaus of the censors or, in the end, not be approved and be denied copyright. The author-claimant might choose between a number of routes of attack in domestic litigation (or a combination thereof).

First, because her ultimate interest is to receive content approval (so that she may distribute her work legally and prevent its copyright infringements by others), she might launch a direct challenge under human rights law against the censors or the censorship criteria, claiming that her work, in substance, must receive content approval. Depending on the circumstances, this could be a direct complaint against a censorship decision to ban a work (or against a non-decision), or a broader challenge to the censorship’s content criteria, but it would not challenge the derivative deprivation of copyright. Here, the domestic court would have to grapple directly with the application of the human right and its exceptions, examining the decision (or lack thereof) of the censors, and the criteria that guide them. Should the challenge succeed, the work will be authorized and the copyright protected therein.

Second, the author-claimant could make a less direct claim, still under human rights law, not against the censors, but against non-enforcement of her copyright, as a self-standing restriction of her freedom of expression, for the reasons explained above. Here, the court would first have to establish that deprivation of copyright is a restriction of the freedom of expression (including the right to participate in cultural life), but, subsequently, it would also have to decide whether the restriction was justified under exceptions from human rights law—again requiring it to look into the substance of the decision or the criteria not approving the content, and the necessity of copyright denial. If the author-claimant were to prevail, the immediate result would be the protection of copyright in an unauthorized work, but the rationale of the decision would indirectly relate to the human rights compatibility of the censorship regime as a whole.

Third and finally, the author-claimant could make a claim not under human rights law, but under copyright law, along the lines of the United States’ claim in the *China-IPR* Case. The
government respondent would of course raise its prerogative to censor as based on article 17 of the Berne Convention. The author-claimant could then be in a position to raise two distinct arguments. One argument would be that the censor’s Berne-based prerogative is broad and self-judging, but it is nevertheless limited by human rights law. The authority to preclude copyright is, at the very most, applicable to works that human rights law would sanction their prohibition under the various exceptions to the freedom of expression. The second argument would be that, in any case, regardless of the work’s content and the status of its approval, copyright protection cannot be denied because of the authority to censor. There is no reason to think that a private claimant would forego either of these arguments, which are cumulative and mutually reinforcing. Here too, we see that a domestic court, even if charged with a copyright law-based petition, would be faced with a human rights claim.

Indeed, in this hypothetical domestic, normatively integrated setting, there appears to be a general confluence between copyright law and the human right, who would meet one way or another within the same judicial proceeding. Let us now turn to the panel report in China-IPR to examine whether trade-related intellectual property law and human rights law had a similar meeting in Geneva.

Unpacking the China-IPR Report and Its Effect on the Freedom of Expression

It should come as no surprise that the China-IPR panel did not rely on or refer to any international human rights instruments in its report. This could be attributed to the fact that the United States, unlike the hypothetical private claimant presented above, did not raise any human rights arguments in its complaint or in its written and oral submissions nor, evidently, did any third parties. Clearly, China could not have been expected to justify its censorship-based denial of copyright on the basis of human rights exceptions. This silence does not mean, however, that the dispute did not involve human rights-related issues and that the report does not have human rights implications.

Consider the panel’s decision, whereby article 17 of the Berne Convention does not justify the denial of copyright. Some academic writing has suggested the opposite, either generally (Derclaye, 2008; Ricketson, 1987; Ricketson and Ginsburg, 2006) or with partisan reference to the specific dispute (Qingjiang, 2008), but overall, the panel’s approach seems to be doctrinally sound. Ostensibly, this part of the decision is also pro-free speech. By removing the violation of Berne/TRIPS and ensuring that copyright is enforceable, all the negative effects of copyright denial on the freedom of expression and the right to participate in cultural life described above might also be cured. However, even if this were the case—and the discussion below shows that it is not—the analytical disengagement from the human rights context of censorship and the denial of copyright would make this a partial, even pyrrhic victory for freedom of speech. On the one hand, the ruling means that the vilest of pornographic material or hate speech—indeed, even content whose censorship would have been justified by the human rights exceptions of article 19(3) of the ICCPR—can still enjoy copyright, even if the state (China, in this case) determines that it is illegal to publish and disseminate it. On the other hand, however—and here there is rub—even the most pedestrian educational content, or the most elevated and universally accepted moral content can be absolutely banned, as far as the narrow Berne/TRIPS framework is concerned, so long as its copyright is protected—even if the ban were not justifiable under human rights law.

Taking this construction a step forward—and to labour the point, it is quite definitely a correct construction in strict and exclusive intellectual property terms—it means that in China-IPR (a) China did not need to justify its substantive criteria for non-authorization of works in any way,
certainly not in a way that relates to human rights; (b) the United States as complainant did not need to challenge these criteria on any basis, least of all on a human rights basis; and (c), consequently, the panel did not need to rule on the criteria. In short, the structure of the arguments on all sides, and the structure of the panel’s analysis, made it entirely unnecessary to acknowledge the existence (and ethereal and ephemeral presence in the vicinity of the case) of human rights law relating to “content review”.

This is not to say that the parties were not actively concerned with China’s criteria for content approval, and that these criteria were not plainly before the Panel. Quite the contrary: China’s criteria for banning content were translated into English and quoted in parties’ submissions and in the report itself and vigorously debated by the parties. However, these criteria were discussed by the parties and the panel only with the object of determining the scope of the term “the publication and/or dissemination of which are prohibited by law” in Chinese legislation, not for the purpose of reviewing the legality of China’s policy on what it prohibits or allows. This might be understandable, given the seemingly self-judging nature of article 17 of the Berne Convention, taken on its own. Such an approach, however, would not have been possible if human rights were introduced into the arena. And they were not, because although the United States and third parties argued that the article 17 of the Berne public order exception cannot justify blanket denial of copyright protection, no one raised the logically prior yet alternative and cumulative argument that some or all of China’s substantive criteria for banning content were not at all justified by any sort of public order exception, whether under article 17 of the Berne Convention or under human rights law. This is in contrast to even the least assertive strategy of argumentation that a private petition would have followed, as explained in the previous section. In China-IPR, the criteria for censorship (and hence, for the denial of copyright) were taken as a black box, impervious to external review. The parties, and the panel following their lead, seem to have accepted China’s censorship criteria as something akin to legal fact.

To put things in the broader, substantive human rights (and political) context—without presuming to undertake any detailed analysis of the international legality of China’s content criteria—let us recall what these criteria actually are, as evident from the panel report. In its first written submission, China stated that “as a matter of law, article 4.1 of the Copyright Law only denies protection to works whose contents are completely unconstitutional or immoral”. In itself, this does not provide much guidance—it is essentially the same as saying that China applies its censorship to matters of public order and public morals. Another source, a statement by the National Copyright Administration of China (NCAC), limited the censors’ cut to works including “reactionary, pornographic, or superstitious contents”. Finally, at the most particular level openly available, specific regulations relating to films and audiovisual publications singled out publications that:

1. are against the fundamental principles established in the Constitution;
2. jeopardize the unification, sovereignty and territorial integrity of the state;
3. divulge state secrets, jeopardize security of the state, or impair the prestige and interests of the state;
4. incite hatred and discrimination among ethnic groups, harm their unity, or violate their customs and habits;
5. propagate cults and superstition;
6. disrupt public order and undermine social stability;
(7) propagate obscenity, gambling, or violence, or abet to commit crimes;
(8) insult or slander others, or infringe upon legitimate rights and interests of others;
(9) jeopardize social ethics or fine national cultural traditions;
(10) other contents banned by laws, administrative regulations and provisions of the State.40

This is clearly a very wide and highly discretionary range of content that can be banned under Chinese law, some of it very sensitive to domestic and international political perspectives. Does “reactionary” include any disagreement with the Communist part of China? Does “superstition” and “cults” include Falun Gong? Is China’s presence in Tibet considered an issue of territorial integrity? Does Moslem unrest due to repression constitute harmful hatred among ethnic groups? What are “social ethics”? These are only the most obviously evident questions. It is not difficult to understand why both the parties and the panel were quite happy to sidestep the review of censorship criteria entirely, a review that might have been the core question in a human rights context. Indeed, in the narrowly construed TRIPS/Berne framework, it was not even necessary for the panel to invoke judicial economy to avoid the human rights issue.41 The parties and the panel acquiesced in their issue avoidance by structuring their arguments and analysis so that freedom of expression was not a legal issue.

It should therefore be clear that, absent any claims to human rights effect, the China-IPR panel could not address the hardcore question of the human rights conformity of China’s content approval rules without facing the charge of unnecessary judicial activism. It is less clear how the panel would have conducted itself had the United States made an explicit human rights claim in the case. But this did not happen. At the very most, under these circumstances, the panel might have considered taking the relatively bold step of acknowledging, as an obiter dictum, the human rights context of the dispute. At the very end of the report, the panel was careful to add this “concluding remark”:

In this dispute, the Panel’s task was not to ascertain the existence or the level of trademark counterfeiting and copyright piracy in China in general nor to review the desirability of strict IPR enforcement. The United States challenged three specific alleged deficiencies in China’s IPR legal system in relation to certain specific provisions of the TRIPS Agreement. The Panel’s mandate was limited to a review of whether those alleged deficiencies, based upon an objective assessment of the facts presented by the parties, are inconsistent with those specific provisions of the TRIPS Agreement.42

One could imagine a similar disclaimer relating to the freedom of expression aspects of China’s “content review”, which the panel’s “task was not to ascertain”.

Now, let us take a step back and consider the actual effects of the China-IPR report on the freedom of expression in China.

First of all, the direct impact on freedom of speech within China is of course nil. Article 5(1) of the Berne Convention as incorporated by TRIPS only relates to the rights of authors “in countries . . . other than their country of origin”, and hence the decision applies only to China’s treatment of non-Chinese rights holders. In other words, with all the importance of the report’s requirement that copyright in unauthorized works must be protected, technically, this would apply only to non-Chinese authors and their works. A banned Chinese work can still be denied copyright on the basis of its content, with all the derivative, negative effects on the freedom...
of expression and ostensible violations of human rights such as the right to participation in cultural life.

Second, the direct impact on the freedom of speech of foreign authors, the freedom of access to information and the right to participate in cultural life in China is nil or even negative. Indeed, China is now bound by a WTO panel report that requires it to respect its commitment to prevent copyright-infringing dissemination of unauthorized content. The full weight of copyright enforcement—criminal and administrative—should now be brought to bear on unauthorized “unconstitutional and immoral works”, as determined by the Chinese censors. In other words, copyright can—indeed, must—now be used to stifle expressions and their dissemination.

This adverse confluence between copyright and restrictions on the freedom of expression is not something that can be noted only in hindsight. In its responses to questions during the panel proceedings, China assured the panel that it would enforce copyright where a work was edited to comply with content review against infringing unedited versions, and that, where no authorized edited version had been created, it would enforce copyright against copies of an unauthorized edited version, because of the authorized portion of the work.43 But now, China also has the direction of an international tribunal to enforce copyright against unedited prohibited copies of an unedited, prohibited work that failed content review. That is, copyright protection is required to become the handmaiden of censorship, not of the freedom of expression.

Indeed, some of China’s statements to the panel indicate that the proceedings had helped it better understand and appreciate the mutually reinforcing effect of copyright protection and censorship. At one point, China argued that a content ban is itself an effective protection against violation of copyright and is “in a sense, an alternative form of enforcement against infringement”, 44 as if to say, we are not in this for the political control, this is exactly what you asked for.45 And in another context, it referred to the negative rights of copyright holders as “private censorship”46—a kind of Freudian slip, perhaps, but one that captures the paradoxical power of copyright enforcement to restrict the freedom of speech.

Third, it is important to emphasize that the complainant and several of the third parties appeared to have embraced not only China’s authority to censor content but also its scope, treating it as virtually unassailable as a public order or public morals exception to the freedom of speech. One can make-believe that this has no implications for human rights, but with the parties’ positions and consequently this report on the record, it will now be more difficult to criticize China’s respect of political and civil rights and much more difficult to challenge Chinese (or any other state’s censorship), whether under trade law or human rights law.

Conclusions

In China-IPR, the freedom of expression and trade-related IPR might have shared the same circumstantial space, but they did not make legal eye contact, let alone conduct a civilized juridical exchange. If there was such a meeting, it is not apparent from the panel report and it is effortlessly denied. The panel did not consider the human rights implications of its decision, either explicitly or implicitly. Indeed, it was not requested to do so by the United States as complainant, nor was it encouraged to do so by any of the third parties. This is reflective of the reluctance of the WTO’s membership’s to integrate with non-WTO law and the dispute-settlement system’s consequent constraints in engaging with it. In this article, I have not set out either to present or advocate an alternative approach; what is striking and noteworthy, however, is the ease with which this indifference to human rights law can be enacted by parties and panels. Certainly, this is not necessarily a bad thing, and this exposition is not a judgemental one. Trade disputes do not exist in
a political vacuum, and the WTO does have to consider its effectiveness in the area of trade law and the continued legitimacy of its dispute-settlement process among members. However, the analysis shows that this indifference is not necessarily benign in its real implications for human rights.

This dispute—as potentially echoed by other disputes related to censorship’s effects on trade—demonstrates that while trade and human rights are not necessarily in conflict, they are not in confluence. They can pass each other like ships in the night, without acknowledging each other’s existence. Human rights will be considered in trade disputes—perhaps—only if a party makes explicit claims to that effect. The United States could have, but refrained from, claiming that article 17 of the Berne Convention should be interpreted in light of article 15(3)(c) of the ICESCR and article 19 of the ICCPR. Indeed, as we have seen, the United States and its stakeholders, for reasons known only to them, lacked the determination to make a detailed “as applied” complaint, and to provide sufficient evidence for making the most of the “as such” complaint actually filed. It would have been naïve to expect the United States to couch its business-based complaint in human rights terms. This particular dispute might not have been the ideal platform for a freedom of speech case, but the above analysis should serve as a cautionary note to any human rights advocates who genuinely believe that a trade dispute can spontaneously promote an international human right such as the freedom of expression. Human rights and trade-related intellectual property can indeed pretend that they never have met: it’s easily done.

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Notes

1 Bob Dylan, I Don’t Believe You (She Acts Like We Never Have Met), © 1964, renewed 1992, Special Rider Music.
3 As distinct from WTO disputes relating to other violations of TRIPS. Previous disputes relating to TRIPS enforcement concluded with mutually agreed solutions (see WT/DS83 Denmark—Measures Affecting the Enforcement of Intellectual Property Rights; WT/DS86 Sweden—Measures Affecting the Enforcement of Intellectual Property Rights; WT/DS124 European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs; and WT/DS125 Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes.
5 This is not to say that previous WTO disputes did not have indirect implications for human rights. For example, all cases relating to food safety could be said to have an indirect connection to the right to health. India’s original complaint in WT/DS246/4 European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries—Request for the Establishment of a Panel by India (9 December 2002) included reference to labour rights, but this claim was abandoned during the dispute.
6 Recently renamed the First Amendment Coalition; see ⟨http://www.firstamendmentcoalition.org⟩. [Accessed July 2010]
7 See Lemon (2007) and Sheer (2009).

9 The Report of the International Law Commission’s Study Group, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (as finalized by Martti Koskenniemi), A/CN.4/L.682, 13 April 2006, noted that in some cases, norms that hold a lex generalis–lex specialis relationship do not conflict with each other but rather “point in the same direction” (see p. 52 of the report). However, distinct international rules can have an equivalent effect and “point in the same direction” beyond the framework of lex specialis; see Broude and Shany (2010).

10 See China-IPR, paragraphs 7.396–7.682; the panel rejected this challenge. See the contribution by Xuan Li elsewhere in this volume for detailed analysis of this claim.

11 See China-IPR, paragraphs 7.193–7.395; the panel rejected most of this challenge, but the United States prevailed on one aspect, relating to China’s custom authorities’ auctioning of counterfeit goods after merely removing the unlawful trademark. On these “border measures”, see the contribution by Henning Grosse Ruse-Khan elsewhere in this volume.


13 See China-IPR, paragraph 7.1.

14 Article 5(1) of the Berne Convention establishes a national treatment obligation and an obligation to respect author’s minimum rights “specially granted” by the Convention, which include the substantive rights of copyright.

15 Article 41.1 of TRIPS requires members to ensure that effective private enforcement procedures are made available to authors.

16 See China-IPR, paragraphs 7.3–7.15.

17 Ibid., paragraph 7.153.

18 See, for example, China-IPR, paragraphs 7.30 and 7.169.

19 China had raised a rather inane argument according to which copyright can somehow be respected while copyright protection is denied (ibid., paragraphs 7.32 and 7.61). The argument was unfortunate not only on its merits (as the panel put it, “the protection of the law is copyright” (paragraph 7.63 [original emphasis]) but also because it served as an effective admission by China that copyright protection was indeed being denied from unauthorized works. However, in the criminal threshold claim, the panel had made a structurally similar and equally unfortunate distinction, restricting its findings to acts of infringement that must be criminalized, “not those which must be prosecuted” (paragraph 7.596), but this distinction can at least be logically justified by the “as such” nature of the claim.

20 With respect to this category, China expressed a distinction between the “illegal” content portions of a work that are unauthorized and the “legal” content portions that are authorized (see ibid., paragraphs 7.87–7.88).

21 See China-IPR, United States’ first written submission, paragraph 198.

22 See ibid., paragraph 7.103.

23 A similar situation arose in the United States' failed claim regarding thresholds for criminal enforcement of intellectual property rights; see ibid., paragraphs 7.632, 7.652 and 7.668.

24 ibid., paragraph 7.11.

25 Universal Declaration of Human Rights, G.A. Res. 217 A (III), article 7, U.N. Doc. A/810, at 71 (10 December 1948); for the view that the UDHR forms part of customary international law, see McDougal et al. (1980) and Humphrey (1976).

26 6 ILM 368 (1966).
29 Article 15(1)(c) of the ICESCR.
30 See Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment 17 (2005). The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (article 15, paragraph 1(c), of the Covenant, E/C.12/GC/17, 12 January 2006). The core obligations, including legislative steps for effective protection, and access to enforcement procedures, are in paragraph 39 of the General Comment. The distinction between the human right and equivalent intellectual property rights is in paragraphs 1–3.
31 See ibid., paragraph 2.
32 See China-IPR, paragraph 7.126.
33 Ibid., paragraph 7.132.
35 See China-IPR, paragraphs 7.72–7.103.
36 See ibid., paragraph 7.72.
37 See, for example, ibid., paragraph 7.82:

[T]he Panel accepts that prohibited works for the purposes of Article 4(1) of the Copyright Law include works that contain content considered illegal under the criteria set out in the law and regulations listed at paragraph above, including the content review regulations.
38 See ibid., paragraph 7.78 (emphasis added).
39 See ibid., paragraph 7.77.
40 See ibid., paragraph 7.79.
41 On the use of judicial economy as an issue avoidance technique in the WTO, see Busch and Pelc (2010).
42 See China-IPR, paragraph 8.5.
43 Ibid., paragraph 7.20.
44 Ibid., paragraph 7.180.
45 See also ibid., paragraph 7.164.
46 See ibid., paragraph 7.61.
47 With specific reference to WT/DS363 China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, a dispute bearing traits similar to China-IPR in its relationship and treatment of censorship issues, under appeal at the time of this writing.

References

*International Organization* 64 (Spring), 257–79.


