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The Trade-ification of Copyright and Its Digital Dilemma: Cultural Products, Digital Platforms, and the TRIPS Agreement

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Abstract. The TRIPS Agreement incorporates copyright into the multilateral trading system and realizes the commercialization of copyright through the WTO Single Undertaking, minimum standards of protection and cross-retaliation mechanisms. However, this system faces the structural dilemma in the digital platform era: the normative presuppositions based on tangible carriers are difficult to apply to online communication models such as streaming media, and strict rights restrictions have compressed the institutional space for member states in public policy areas such as cultural diversity and fair use. The public value of cultural products has been marginalized, and developing countries are facing regulatory mismatches and regulatory chilling. In the face of the stagnation of multilateral treaties, this article advocates seeking rebalancing within the existing framework of TRIPS through the reconstruction of interpretative principles: activating the objective and principal provisions such as Article 7 and Article 8, and reserving necessary institutional experimental leeway and compliance flexibility for cultural policies in the digital age in the three dimensions of transparency, balance of interests, and territoriality.

Keywords: TRIPS agreement, digital platforms, cultural diversity, public interest.

1. Introduction

Since the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995, copyright protection has been incorporated into the multilateral trading system for the first time, marking a transformation from a single legal framework for copyright protection to a multilateral trade regulation system. This transformation has significantly enhanced the international enforcement of copyright protection by linking intellectual property obligations to trade sanctions, but it has also sparked ongoing controversy over whether the public value of cultural products has been weakened. Most of the existing research has focused on the improvement of protection levels or institutional injustice but has not fully responded to the structural challenges in the context of digital platforms: that is, the copyright regulations originally designed by TRIPS based on traditional trade are being transformed into a technological trade logic through algorithmic law enforcement on platforms. This transformation has led to the substantial marginalization of the public interest space originally reserved by TRIPS (such as Articles 7 and 8) in the digital environment. This article

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precisely takes this as the entry point, attempting to establish a research framework that integrates normative analysis and institutional criticism concerning the institutional logic of the TRIPS Agreement and cultural governance in the digital age.

To answer the above questions, this paper takes the TRIPS Agreement as the core text and comprehensively employs methods such as normative analysis, treaty interpretation, and comparative institutional research to systematically examine how it completes the trade-oriented transformation of copyright through institutional designs such as the Single Undertaking, dispute settlement mechanism, and minimum standards of protection. Furthermore, it analyzes the adaptation crisis of this system in the digital context, with a focus on the impact of streaming media on the traditional rights system, as well as the contradictions between algorithmic law enforcement and cultural diversity and the interests of developing countries. This article aims to explore the path of institutional rebalancing within the TRIPS framework, focusing on the activation potential of principle-based provisions and the reconstruction of interpretive principles. This article strives to provide a critical framework for understanding the evolution logic of the international copyright system in the dual contexts of trade and digitalization, and to offer normative references for reserving cultural policy space within hard law constraints.

2. Institutional innovations of the TRIPS agreement

2.1. The transition from the berne system to TRIPS

2.1.1. Limitations of the WIPO framework

Since its conclusion in 1886, the Berne Convention has indeed laid an important foundation for international copyright protection. Principles such as national treatment and automatic protection remain the cornerstones of the international copyright system to this day. However, the system faces significant challenges in terms of implementation.

The convention itself lacks an effective enforcement mechanism. Its dispute settlement procedures are cumbersome in theory, have never been used in practice, and lack substantive sanctions [1]. More importantly, the Berne Convention is independent of the international trade system, meaning that a country's laxness in copyright protection will not directly affect its interests in trade in goods or services [2]. This institutional arrangement has led to the long-term coexistence of high standards and low enforcement. Entering the 1980s, as the proportion of the copyright industry (films, software, sound recordings) in foreign trade in economies such as the United States rose rapidly, the demand for linking intellectual property rights with trade and using trade sanctions to ensure compliance gradually moved from behind the scenes to the forefront [3].

2.1.2. Incorporating intellectual property into the WTO dispute settlement mechanism

The TRIPS Agreement was able to make the leap from the Berne system to the trade system mainly because it was embedded in the WTO Single Undertaking framework. Unlike the loose model in the traditional WIPO era where countries could selectively join and comply, TRIPS constitutes a mandatory prerequisite for joining the WTO [4]. Any country that hopes to enjoy the dividends of multilateral trade liberalization must accept the intellectual property protection standards set by TRIPS as a whole. There is no room for opting out of individual provisions or accepting them conditionally. This all-or-nothing institutional design has enabled intellectual property protection to possess formal uniformity and enforceability on a global scale for the first time [5].

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But the more disruptive change lies in the dispute settlement mechanism. Under the WIPO system, the adjudication of copyright disputes lacks effective enforcement guarantees, and it is difficult for breaches of obligations to be subject to substantive sanctions. TRIPS, relying on the dispute settlement mechanism of the WTO, has introduced the possibility of cross-retaliation. If a member is sued for inadequate copyright protection, they may eventually face equivalent sanctions in the fields of trade in goods or services. This mechanism transforms intellectual property obligations from legal text commitments into cost calculations in terms of trade benefits. When protecting copyright is no longer merely a legal obligation but a strategic choice concerning overall trade interests, TRIPS has completed the trade-oriented transformation of copyright.

2.2. The core mechanisms of TRIPS

2.2.1. The incorporation of the berne convention and obligations

Article 9.1 of the TRIPS Agreement stipulates that Members shall abide by the provisions of Articles 1 to 21 of the 1971 text of the Berne Convention. The technical significance of this clause lies in the fact that it has transplanted the substantive provisions of the Berne Convention as a whole into the framework of the WTO. But the intention of TRIPS goes far beyond repeating existing obligations. Through the proviso of Article 9.1, that is, not creating an obligation to protect moral rights (i.e., excluding Article 6bis of the Berne Convention), TRIPS has selectively absorbed the Berne Convention, focusing the protection on the economic rights level. This trade-off reveals the institutional essence of TRIPS, which is not concerned with the personal interests of authors but rather the commercial nature of copyright as a tradable asset.

If the inclusion in the Berne Convention established the basic framework for copyright protection, then the higher standards added by TRIPS on this basis, often referred to by the academic community as the Berne-Plus obligations, have truly completed the trade-oriented transformation of copyright. These newly added obligations mainly focus on two directions: First, in terms of rights types, the scope of protection is expanded to areas not covered by the Berne Convention, such as rental rights; Second, in terms of the scope of objects, it is clearly stipulated that emerging types of works such as computer programs and databases will be included in the protection. These seemingly technical expansions actually transform copyright from a right mainly coordinated by domestic laws of various countries into an enforceable obligation that can be enforced through the WTO dispute settlement mechanism. Once the legislative protection of member states fails to meet the standards, they may face the consequence of trade sanctions. It is precisely in this sense that TRIPS has achieved the trade-oriented transformation of copyright.

2.2.2. Specific provisions on copyright

Articles 9 to 14 of TRIPS do not represent a comprehensive reconstruction of copyright. Instead, they selectively commercialize the core content of the Berne Convention and add three obligations highly relevant to digital cultural products. Computer programs have been explicitly included in the protection of literary works (Article 10), which institutionally transforms software, the foundation on which digital platforms rely, from a technical solution into a tradable copyright object.

Although the protection of audio-visual works follows the Berne Convention, TRIPS, with its enforceability, has enabled cultural products such as films and TV series to have a more stable expectation of protection in cross-border circulation. More significant is the rental right (Articles 11 and 14.4), which respectively grant the right holders of films, computer programs and sound

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recordings the right to control commercial leases. This clause was drafted with a high degree of reliance on the logic of goods trade and was aimed at the physical rental of video tapes and CDs. Although TRIPS and its subsequent WCT and WPPT have established the rental right (such as Article 7 of the WCT and Article 9 of the WPPT), according to the Treaty's Agreement Statements and the latest interpretation of WIPO in 2025 (SCCR/45/7), this right is strictly limited to physical copies. This normative logic for tangible objects has created a significant legal tension with the online access mode in the streaming media era, which is classified as public dissemination rather than rental under current law. This has led to a predicament for digital cultural products like streaming media, which frequently flow across borders, within the current trade-oriented copyright enforcement system centered on TRIPS: despite the protection of the right of dissemination, the inability to directly invoke TRIPS' strong trade sanctions mechanism—due to the qualitative difficulty of applying tangible-carrier rules to streaming—makes it difficult for member states to initiate the trade compensation mechanism for commercial infringements clearly stipulated in TRIPS.

2.2.3. The three-step test in article 13

If the minimum standards of protection are the floor set by TRIPS for rights, then Article 13, the three-step test rule, is the ceiling for rights restrictions. This clause stipulates that when member states set copyright exceptions, they must simultaneously meet three conditions: (1) they shall be confined to certain special cases; (2) they shall not conflict with a normal exploitation of the work; and (3) they shall not unreasonably prejudice the legitimate interests of the right holder.

The institutional logic of this set of rules lies in preventing member states from overly expanding the scope of exceptions on the grounds of public interest, thereby indirectly weakening the level of copyright protection. Under the trade-oriented framework of TRIPS, exceptions are no longer cultural policy tools at the discretion of sovereign states but have become compliance elements that must undergo unified testing [6]. This arrangement enhances the predictability of intellectual property protection, but it also imposes rigid constraints on the flexibility of countries in adjusting exception systems when facing new technologies and new business models — a problem that has become particularly prominent since the rise of digital platforms [7].

3. Trade-ification vs. public interest

3.1. Theoretical defenses for the cultural exception status of cultural products

The particularity of cultural products lies in the fact that they are not only tradable commodities but also carriers of meaning and value. A film can be converted into copyright export value, but it also shapes the cultural identity and aesthetic taste of the viewers. It is precisely this dual attribute that makes cultural products not simply classifiable under the trade logic of ordinary goods. The United Nations Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides the most systematic theoretical support for this: Cultural products carry identity, values and social significance, and their circulation cannot be completely determined by market mechanisms. This convention affirms that states have the right to adopt policy measures to protect local cultural expressions, even if such policies may constitute restrictions on trade liberalization. This logic forms a fundamental institutional conflict with the TRIPS Agreement's approach of universalizing cultural objects. Under the TRIPS framework, copyright is reduced to a series of exclusive economic rights, resulting in the institutional filtering of its inherent cultural dimension [8].

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The core value of theoretical defense lies in the fact that this process of restoring cultural heritage to pure property rights is not a technology-neutral legal arrangement, but rather a value choice that prioritizes the efficiency of trade. As UNESCO (2024) has warned, this choice in the digital age has evolved into a substantial compression of the cultural policy space of various countries, forcing the goal of cultural diversity to give way in the face of trade compliance.

3.2. Objectives clause in article 7 of TRIPS

In the text of the TRIPS Agreement, which is filled with technical rules, Article 7 clearly stipulates that the protection and enforcement of intellectual property rights should contribute to technological innovation, transfer and social welfare, and achieve a balance of interests between rights holders and users. This provision is not an empty rhetoric but a target clause within the system, which has a guiding role in hermeneutics. Although the WTO Dispute Settlement Body rarely uses it as a direct basis for adjudication, in many representative cases involving patents, trademarks and even Copyrights, the expert panel has regarded it as an important background norm for understanding substantive provisions (such as exceptions and limitations).

Despite this, during the trade-ification process of TRIPS, the actual regulatory force of Article 7 has been severely suppressed [9]. Even though it has been formally reaffirmed in some Regional Trade Agreements, in the practice of TRIPS-plus that pursues high protection standards, Article 7 is often marginalized and lacks a substantive activation mechanism. Its existence is more like a shelved institutional plan. Although it has theoretical potential for checks and balances, under the logic of trade interests being supreme, it has always lacked the institutional impetus to be systematically activated.

3.3. Cultural industries in developing countries

The minimum standards of protection established by the TRIPS Agreement are highly binding and have substantially narrowed the institutional space for developing countries to formulate differentiated cultural policies. On this basis, the TRIPS-plus clause has implemented regulatory spillover through Regional Trade Agreements (RTAs), further deepening institutional constraints on the local cultural industry in terms of extending the protection period and intensifying law enforcement procedures. On the one hand, the strengthened copyright protection has led to the enclosure movement of cultural public domains, causing folk literature and educational materials that could have been public resources to be included in the category of exclusive property rights, thereby raising the marginal cost of local creation. On the other hand, in the fields of streaming media and UGC, domestic platforms are forced to adopt copyright licensing thresholds that do not match their own development stage (such as prematurely introducing automatic filtering obligations similar to those in developed countries), falling into a structural regulatory mismatch and putting them at a natural disadvantage in terms of content distribution and compliance costs.

This squeeze makes it difficult for developing countries to form institutional arrangements that meet their own cultural needs in the digital age. As a result, the maintenance of cultural diversity has transformed from an ideal vision into an unbearable policy burden.

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4. Seeking institutional approaches toward rebalancing

4.1. Critical reflections on the TRIPS minimum standards

The minimum standard model established by the TRIPS Agreement was originally intended to set a global protection bottom line, but in practice, it has gradually been distorted into an institutional upper limit that restricts the policy space of member states. This one-size-fits-all model, led by developed economies, forcibly anchors the level of copyright protection at a high level that is detached from the industrial foundation of developing countries. Behind this lies a single presupposition that the intensity of protection is institutional progress, ignoring the differentiated demands for flexibility and public interests under different technical conditions and cultural environments. With the evolution of the digital platform business model, this rigid framework that took shape at the end of the 20th century has shown significant lag.

Not only is it difficult to accommodate the exploration of emerging systems such as the fair use expansion, but it also exerts a regulatory chill effect on member states through strong compliance pressure. Based on this, a necessary institutional shift is to elevate Articles 7 and 8 of TRIPS from declarative provisions to effective interpretive guidelines. This will make the principle of balance of interests a superior legal basis for adjudicating digital copyright disputes. This shift in the interpretive path is precisely aimed at breaking the current deadlock where the TRIPS framework has evolved from a trade coordination tool to a structural constraint on institutional innovation, reserving necessary policy experimental space for countries to address digital challenges.

4.2. The possibility of activating the principles clause in article 8

Although Article 8 of the TRIPS Agreement is often overshadowed by subsequent substantive rights provisions, it serves as the interpretive framework of the agreement and is a core norm for maintaining institutional balance [10]. This article authorizes member states to take necessary measures when formulating or amending domestic laws to promote public interests that are crucial to social, economic and technological development.

In the context of digital platform governance, Article 8 provides two key activation paths: Firstly, cultural diversity and users' freedom of speech can be interpreted as public interests in the digital age, thereby providing a legitimate basis for restricting the excessive expansion of copyright; Secondly, in response to the structural exclusivity formed by the right holder's automatic execution through algorithms, member states may invoke Article 8.2 to prevent it from constituting abuse of rights and avoid unreasonable restrictions on trade and technology transfer. Although such measures must pass rigorous necessity tests in WTO dispute settlement, Article 8 still provides an irreplaceable normative handle for reserving policy flexibility beyond a single trade-oriented logic.

4.3. The reconstruction of interpretive principles in the digital age

In the face of the institutional predicament exposed by the TRIPS Agreement in the digital age, relying solely on amending or adding new treaties is no longer realistic. The stagnation of the WTO Doha Round negotiations is sufficient to illustrate this point. A more feasible approach is to, within the existing framework of TRIPS, inject new balanced concepts into the application of systems in the digital age in terms of transparency, interest balance, and territoriality by reconstructing the interpretation principles of copyright.

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First, the reconstruction of the principle of transparency. Copyright enforcement on digital platforms is increasingly relying on algorithms and automated systems, such as YouTube's Content ID and TikTok's copyright filtering mechanism, which in fact exercise the power of private enforcement [11]. However, the opacity of its operational logic leads to creators lacking effective channels for appeal when they are falsely accused of infringement. Although the fair and reasonable requirements of Article 41 of the TRIPS Agreement aim to regulate the official law enforcement procedures of member states, in the algorithmic era, given that member states have substantially authorized the automated review of platforms through copyright safe havens or filtering legislation, this private law enforcement has acquired public regulatory attributes. Therefore, member states should internalize this principle into regulatory obligations for platforms. This requires the platform to disclose the basic standards of the filtering mechanism, establish a traceable infringement record, and provide a substantive manual review channel. Transparency is not an intrusion into trade secrets, but a necessary constraint to ensure that private law enforcement does not deviate from the track of public interests.

Second, the reconstruction of the principle of balance of interests. Article 7 of the TRIPS Agreement clearly defines social and economic welfare as the objective of intellectual property protection. However, in practice, this clause has long been marginalized. In the digital age, it is necessary to reactivate the principle of balance of interests and transform it from a declarative clause into an interpretive tool. This means that when interpreting Article 13 of the TRIPS Agreement (the three-step test) or determining the compliance of domestic measures of Member States based on this, public policy goals such as cultural diversity and freedom of speech should be taken into account. For instance, when it comes to emerging usage methods such as secondary creation (like remaking and critical use) and Text and Data Mining (TDM), traditional reproduction rights rules should not be simply applied. Instead, under the guidance of the principle of balance of interests, necessary legislative flexibility should be reserved for each country to accommodate innovative uses that are socially valuable and non-competitive [12].

Third, the reconstruction of the principle of territoriality. There is a structural conflict between the territoriality of copyright and the cross-border flow of digital content. Cloud storage, Content Delivery Networks (CDNs), and cross-border streaming media services have made the locations for the replication and dissemination of works increasingly ambiguous, and traditional territorial rules are difficult to adapt to. The direction of reconstruction is not to abandon the principle of territoriality, but to explore new cross-border coordination mechanisms on the premise of recognizing sovereignty. Specifically, the digital collaboration and dialogue framework established by Regional Trade Agreements (such as Chapter 12 of the RCEP) can be referred to as a procedural reference for building cross-border licensing mechanisms, promoting the establishment of mutually beneficial licensing frameworks at the regional or multilateral level, so that licenses completed by right holders in one country can be efficiently disseminated across borders within a specific region. At the same time, corresponding cultural diversity guarantee measures should be included in trade rules to prevent the technical dissolution of regional characteristics from evolving into a simple trade logic, thereby eroding the local cultural policy space of each country.

The above three directions are not a subversion of the TRIPS Agreement. Instead, they are adaptive reconstructions based on the existing objectives and principles (Articles 7 and 8), in combination with the institutional demands of the digital age for copyright exceptions and limitations (Article 13) and due process in law enforcement (Article 41). This reconstruction not only upholds the authority of TRIPS as an international hard law but also provides policy space and

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legitimacy in a normative sense for all countries to address the new issues brought about by digital platforms.

5. Conclusion

This study systematically reveals that the TRIPS Agreement, through the WTO Single Undertaking and cross-retaliation mechanisms, has accomplished the institutional leap of copyright from the Berne System to the trade system. Research has found that while TRIPS establishes global minimum standards of protection, it breaks down copyright into tradable property rights, leading to the marginalization of the public value of cultural products under the logic of trade.

This shift has triggered deep tensions in the digital age. On the one hand, there is a qualitative mismatch between the normative assumptions of TRIPS based on tangible carriers and the online access mode of streaming media, which weakens the deterrent effect of trade sanctions. On the other hand, strict exception restrictions have compressed the policy adjustment space of member states, leading to regulatory mismatch and regulatory chill in developing countries.

The goal of cultural diversity has been forced to give way to trade compliance logic in practice. Facing the predicament of amendment, this paper advocates seeking institutional rebalancing through interpretive reconstruction within the existing framework of TRIPS. Firstly, the principle of transparency should be internalized as a regulatory obligation to the platform, and the enforcement of private algorithms should be incorporated into the due process constraints of Article 41. Secondly, the principle of balance of interests needs to be transformed from a declarative clause into a substantive interpretive tool, providing legislative flexibility for secondary creation and data mining. Finally, under the premise of adhering to territorial sovereignty, explore a cross-border licensing coordination mechanism to resist the erosion of cultural policies by a single trade logic. The above-mentioned path aims to activate the goals and principles of Articles 7 and 8, utilize hermeneutic tension to bridge institutional rifts, and provide normative basis for member states to expand policy space in digital governance. The research limitation lies in the fact that more detailed empirical studies are still needed on the transmission mechanism of TRIPS-plus clauses and the differentiation predicament of local platforms in developing countries, which constitutes the extension direction of subsequent research.

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