

Catching a Korean Wave: Reinventing the Cultural Exception in a Copyright Ethos

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The status of cultural goods remains one of the big unresolved debates in world trade. Advocates of a “cultural exception” argue that culture should be exempt from the norms of free trade because cultural goods embody externalities that market pricing fails to capture. In particular, they contend that: (1) cultural diversity is an inherent global good; and (2) national democracies are enhanced by a robust airing of perspectives mediated through domestic cultural expression. Cultural protectionists therefore advocate policies that favor domestic producers of expressive goods and services over foreign (read American) competitors.

Translated into trade law, the contours of the “cultural exception” debate may seem daunting to non-specialists, turning on arcane technicalities of GATT (the General Agreement on Trade & Tariffs) and GATS (General Agreement on Trade in Services). By contrast, most IP scholars, to the extent they pay attention to the WTO at all, focus solely on TRIPS. Yet, the connections between cultural protectionism in trade and the protection of intellectual property offer instructive lessons that merit closer attention.

The most obvious parallels are with copyright law. Both copyright and the cultural exception posit a need for state action to protect designated categories of expression; both seek to overcome market failures that would otherwise lead to the undersupply of a public good. Moreover, both justify such interventions, in part, as intended to increase the diversity of expression and underwrite the means for democratic governance.

These two policy domains often function symbiotically. In stimulating domestic cultural production, the cultural exception can indirectly facilitate the uptake of global IP norms by motivating local stakeholders to support stronger copyright laws. The converse may also be true to the extent that more effective copyright protection encourages greater indigenous expression.

At the same time, the two policies sometimes work at cross purposes. Some have suggested that cultural protectionism could directly conflict with copyright’s right to use. Overly strong copyright laws can also hinder indigenous expression and reduce diversity by reinforcing the dominance of Big Media corporations. More generally, there are ideological tensions at play in so far as the globalization of copyright law is seen as a handmaiden of Western cultural hegemony, while the cultural exception is positioned in opposition to the “market” and “globalization.” Such ideological posturing translates directly into divergence at the policy level. While both copyright and the cultural exception rely on state interventions to perfect the market, copyright law places a greater reliance on market mechanisms overall. Copyright law also functions in a much more decentralized manner and has an increasingly global reach.

This paper argues that cultural protectionists could learn from copyright’s use of decentralized, globalized market mechanisms to regulate cultural production. Arguing that trade liberalization need not be inconsistent with cultural diversity, it presents the “Korean Wave” as an exemplar of a cultural renaissance founded on a copyright-like ethos of openness, rather than autarchy. Contrasting the Korean experience with *dirigiste*

models of cultural protectionism based on state patronage, the Article calls for a re-imagining of the cultural exception using copyright as a template.

