

Comparative Legal Study of Intangible Cultural Heritage in the UK and China

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Abstract: In order to protect intangible cultural heritage (ICH), the United Kingdom (UK) and China have issued a series of laws in recent years. By comparing these two legal systems, this article analyses the merits and demerits of the two systems and explores a beneficial path to optimize the legal system of ICH in China.

1. Introduction

The concept of ICH has become the focus of international discussion, which has been augmented by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and reflects growing concerns about the cultural impact of economic, technological and political forces associated with globalization.¹The UK and China have a long history and rich cultural heritage. In order to protect ICH, both countries have issued a series of laws in recent years. Due to the differences in legal tradition and development in the status of economy and society between the two countries, there are many obvious differences existing in their legal systems. In this context, the article compares the two legal systems from various aspects such as protecting philosophy, legal technologies and supporting systems, to law enforcement. It analyses the merits and demerits of each legal system on ICH and try to explore the best path to optimize the Chinese ICH legal system.

2. Legal protection systems of ICH in China

Influenced by the tradition of Continental Law System, China mainly relies on the functions of guidance and restriction of statute laws for legal practices. In the field of ICH protection, 3 kinds of legislations have been enacted.

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¹ Frank Hassard. (2009). Intangible heritage in the United Kindom- The dark side of enlightenment?Laurajane Smith, Natsuko Akagawa. Intangible Heritage. Routledge, Taylor & Francis Group. p.270

2.1 The ICH Law

After more than ten years preparation, the 11th Standing Committee of the National People's Congress (NPC) promulgated the ICH Law of the People's Republic of China² on 25th February 2011 (came into force on 1st June 2011). This law includes 45 articles categorized as 6 chapters entitled as: General Provisions; Investigations of ICH; Catalogue of the Representative Items of ICH; Inheritance and Spread of ICH; Legal Liabilities; and Supplementary Provisions, respectively. The ICH Law is the basic law in the field of Chinese ICH protection and is a milestone achievement. The law explicitly stipulates the definition and range of ICH, the protection mode and powers of governments.

Firstly, Article 2 of the ICH Law defines the definition and range of ICH in China and states that: "For the purposes of this Law, intangible cultural heritage shall mean various traditional cultural manifestations which are handed down by the people of all ethnicities from generation to generation and regarded as a constituent part of their cultural heritage, and physical objects and premises related to the traditional cultural manifestations, including:(1) Traditional oral literature and the language as a carrier thereof;(2) Traditional fine arts, calligraphy, music, dance, drama, folk art and acrobatics;(3) Traditional artistry, medicine and calendar;(4) Traditional rituals, festivals and other folk customs;(5) Traditional sports and entertainment; and (6) Other intangible cultural heritage."The definition is resembled with that in the UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage (2003).³ At the same time, it explains that the relevant provisions of the Law of the People's Republic of China on the Protection of Cultural Relics shall apply to the physical objects and premises that are a constituent part of the ICH and falling under the category of cultural relics.⁴

Secondly, as to the protection mode of Chinese ICH, there is a general provision in Chapter 1 of the law. "When protecting ICH, it should focus on its authenticity, integrity and inheritance and such protection shall be conducive to strengthening the recognition of the culture of the Chinese nation, maintaining the unification of the country and the unity of the nation and promoting social harmony and sustainable development."⁵On the other hand, Chapter 2 to 4 of the law provides the basic principles about the investigations of ICH, the catalogue of the representative items of ICH, and the inheritance and spread of ICH.

Thirdly, the ICH Law especially focuses on how to establish the leading role of governments in ICH protection. There are 32 articles related to the powers of governments.⁶ In the General Provisions of Chapter 1, the law designates the department in charge of culture under the State Council shall be responsible for the work concerning the protection and preservation of ICH throughout the country. The departments in charge of culture of the local governments above the county level are responsible for the work concerning the protection and preservation of ICH within their

² ICH Law. Available online at: http://www.gov.cn/jrzq/2011-02/26/content_1811128.htm. (Accessed 20 June 2013)

³ The Convention for the Safeguarding of ICH is a UNESCO treaty adopted by the UNESCO General Conference on 17 October 2003. Available online at: <http://www.unesco.org/culture/ich/en/convention>. (Accessed 20 June 2013)

⁴ ICH Law, Article 2.

⁵ ICH Law, Article 4.

⁶ The ICH Law includes 45 articles in total, with more than 70% relating to governments' powers.

own administrative regions.⁷ In the subsequent Chapters, the law provides governments various powers. For instance, the governments above the county level shall organize investigations of ICH based on the need of the work concerning the protection and preservation of ICH. The departments in charge of culture are responsible for conducting investigations of ICH.⁸ The State Council shall establish the catalogue of the representative items of ICH at the national level and include items of ICH that reflect the distinguished traditional culture of the Chinese nation and have significant historical, literary, artistic or scientific value in the catalogue for protection.⁹ The department in charge of culture under the State Council and the departments in charge of culture at the level of the provinces, autonomous regions and municipalities directly under the Central Government may determine the representative inheritors of the representative items of ICH approved by the governments at their same levels for publication.¹⁰ The departments in charge of culture above the county level shall, based on their needs, adopt measures to support the representative inheritors of the representative items of ICH and to carry out the activities of the inheritance and spread of ICH.¹¹

2.2 Acts of Intellectual Property Rights (IPR)

Chinese IPR legal system include 4 main legislations, they are: Copyright Law¹², Patent Law¹³, Trade Mark Law¹⁴, and Anti-unfair Competition Law¹⁵.

However, there are rare provisions in Chinese IPR laws directly related to ICH. Article 6 of the Copyright Law states that measures for the protection of copyright in works of folk literature and art shall be established separately by the State Council¹⁶, hitherto “the measures” haven’t been issued. Nonetheless, it could be considered to utilize IPR system for protecting ICH if taking into account the following elements: ICH and the objects of IPR has same character: intangibility; the modern IPR system is international and full-fledged, and many such examples can be found in the world. For instance, copyright law is used to protect those eligible works of folk literature and art; certificate trademark may be applied to protect the symbols related to ICH; patent law is utilized to protect the authorized traditional medicine and skills; the anti-unfair competition act is used to prevent the malicious competitions which aim to suppress the manufacture and sale of ICH goods. In general, IPR protection involves complicated procedures and high requirement of novelty on objects and ICH could hardly get through the IPR investigation and be empowered.

⁷ ICH Law, Article 7.

⁸ ICH Law, Article 11.

⁹ ICH Law, Article 18.

¹⁰ ICH Law, Article 29.

¹¹ ICH Law, Article 30.

¹² Promulgated by the 7th Standing Committee of the NPC on 7th July 1990, twice amendments occupied respectively on 27th October 2001 and 26th February 2010.

¹³ Promulgated by the 6th Standing Committee of the NPC on 12th March 1984, tri-amendment occupied respectively on 4th September 1992, 25th August 2000, and 27th December 2008.

¹⁴ Promulgated by the 5th Standing Committee of the NPC on 23rd August 1982, twice amendments occupied respectively on 20th February 1993 and 27th October 2001.

¹⁵ Promulgated by the 8th Standing Committee of the NPC on 2nd September 1993.

¹⁶ Copyright Law, Article 6. Available online at: http://www.law-lib.com/law/law_view.asp?id=6938. (Accessed 18 June 2013).

2.3 Contract Law

Contract Law¹⁷ contains a series of basic principles about equality, fairness, voluntariness and good faith. According to these principles, ICH holders and users as contract parties could enjoy equal legal standing, may fully negotiate and finally sign a contract to set out their rights and duties clearly. In the contract, the usage modes, duration and range of ICH should be definite. The amount of fee and mode of payment should also be stated. Furthermore, contract should include articles about default liability and dispute resolution. With such contract, the economic benefit and human dignity of ICH holders could be safeguarded, and the unfair usage or appropriation of ICH would be resisted. In this regard, contracts are considered to be one of the major means to ensure fair benefit-sharing based on mutually agreed terms between ICH holders and users.¹⁸

3. Legal protection systems of ICH in UK

As a representative country of Common Law System, UK defines Common Law and Case Law as the main parts of her legal system. But a new trend of adopting statutory law has taken its shape in recent years. In the field of ICH protection, different from China, UK has not issued a general law. Instead, a series of regulations have been enacted to protect specific ICH, such as Scotch whisky and Tartans.

3.1 Regulations on Scotch whisky

Scotch whisky (often referred to simply as “Scotch”) is malt whisky or grain whisky made in Scotland. According to the Scotch Whisky Association (SWA), Scotch whisky evolved from a Scottish drink called “uisge beatha”, which means “lively water” or “water of life”.¹⁹ The earliest record of distillation in Scotland occurred as early as 1494, as documented in the Exchequer Rolls, which were records of royal income and expenditure.²⁰ The record shows that distillation was well-established by the late fifteenth century.²¹

¹⁷ Contract Law. Promulgated by the 9th NPC on 13rd March 1999, came into force on 1st October 1999.

¹⁸ Katie Bates. (2007). A Penny for Your Thoughts: Private and Collective Contracting For Traditional Medicinal Knowledge Modeled on Bioprospecting Contracts in Costa Rica.41 Ga.L.Rev.961. Quoted from Marina Tsikun, Kuei-Jung Ni. (2011). Using licensing contracts to protect holders of traditional knowledge related to genetic resources - a reflection on ICBG projects. International Review of Intellectual Property and Competition Law.p.1

¹⁹ History of Scotch whisky. Available online at:

<http://www.scotch-whisky.org.uk/understanding-scotch/history-of-scotch-whisky/>. (Accessed 18 June 2013).

²⁰ Exchequer Rolls of Scotland (1494–95).Vol.10, p.487

²¹ History of Scotch whisky. Available online at:

Whisky production was first taxed in 1644, causing a rise in illicit whisky distilling in the country. Around 1780, there were about eight legal distilleries and 400 illegal ones. In 1823, Parliament eased restrictions on licensed distilleries with the Excise Act, while at the same time making it harder for the illegal stills to operate, thereby ushering in the modern era of Scotch production.²²

In 1988, The Scotch Whisky Act 1988²³ and The Scotch Whisky (Northern Ireland) Order 1988 were enacted, clearly provided the conception, categories, criteria of production, and marketing policies on Scotch whisky. Afterwards, the Scotch Whisky Act 1988 (Commencement and Transitional Provisions) Order 1990²⁴ was issued, to provide the commencement and transitional provisions for the Scotch Whisky Act 1988. In 2009, above mentioned three regulations were repealed by the Scotch Whisky Regulations 2009²⁵, in which geographical indication system has been used to protect manufacture, marketing, movement and sale of Scotch whisky.

The new regulation includes 41 articles prescribing the definitions, categories and criteria of production of Scotch whisky; marketing and movement policies, compulsory sales descriptions, locality and region geographical indications; designating a competent authority and appointing officers, powers of authorized officers and the procedures of powers' usage; responsibilities of violation and remedies, more explicitly than before. For instance, it provides in the regulation that "Scotch Whisky" means a whisky produced in Scotland, that has been distilled at a distillery in Scotland from water and malted barley; that has been distilled at an alcoholic strength by volume of less than 94.8 per cent so that the distillate has an aroma and taste derived from the raw materials used in, and the method of, its production; that has been matured only in oak casks of a capacity not exceeding 700 litres; that has been matured only in Scotland; that has been matured for a period of not less than three years; that has been matured only in an excise warehouse or a permitted place; that retains the colour, aroma and taste derived from the raw materials used in, and the method of, its production and maturation; to which no substance has been added except water or plain caramel colouring; that has a minimum alcoholic strength by volume of 40%.²⁶ Furthermore, the regulation states that a person must not manufacture a whisky distillate in Scotland unless it is manufactured in the manner described above, and a person must not manufacture any whisky in Scotland except Scotch whisky.²⁷

According to the regulation, there are 5 categories of Scotch whisky, including "Single Malt Scotch Whisky", "Single Grain Scotch Whisky", "Blended Malt Scotch Whisky", "Blended Grain Scotch Whisky" and "Blended Scotch Whisky". During the

<http://www.scotch-whisky.org.uk/understanding-scotch/history-of-scotch-whisky/>. (Accessed 18 June 2013).

²² History of Scotch whisky. Available online at:

<http://www.scotch-whisky.org.uk/understanding-scotch/history-of-scotch-whisky/>. (Accessed 18 June 2013).

²³ Scotch Whisky Act 1988. Available online at: <http://www.legislation.gov.uk/ukpga/1988/22>. (Accessed 24 June 2013)

²⁴ The Scotch Whisky Act 1988 (Commencement and Transitional Provisions) Order 1990. Available online at: <http://www.legislation.gov.uk/uksi/1990/997/made>. (Accessed 24 June 2013)

²⁵ The Scotch Whisky Regulations 2009. Available online at: <http://www.legislation.gov.uk/uksi/2009/2890/made>. (Accessed 24 June 2013)

²⁶ The Scotch Whisky Regulations 2009. Article 3(1)(a)-(i).

²⁷ The Scotch Whisky Regulations 2009. Article 5(1)-(2).

period until (and including) 22nd November 2012, a person must not move any of categories of Scotch whisky from Scotland to another country in a wooden cask or other wooden holder. On and after 23rd November 2012 a person must not move any Single Malt Scotch Whisky from Scotland to another country except in a bottle (made of any inert material) that is labelled for retail sale (In this regulation “retail sale” means any sale except a sale for use or resale in the course of a trade or business).²⁸

As to the law implementation, the regulation designates the Commissioners for Her Majesty’s Revenue and Customs as a competent authority.²⁹ At the same time, each food authority and port health authority must enforce the regulations within its area.³⁰ Each food authority and each port health authority must appoint officers for the purposes of the enforcement, and must give assistance and information to any other enforcement authority.³¹ The regulation provides the powers of the officer in detail, and include the following: right to enter any premises at any reasonable hour for the purpose of ensuring that the regulations are being complied with, to inspect the premise, take samples, carry out any inquiries, examinations or tests, (etc.); may seize and detain any item or document or record that officer has reason to believe may be required as evidence in proceedings under the regulation.³² The power enforcement procedure and related remedy measures have been provided too. At last, the regulation establish Schedule 1-4 to list the distilleries to which regulation applies, circumstances in which regulation does not apply, and factors to be taken into account in determining the amount of a penalty.

3.2 Regulations on Tartans

The word “Tartan” is derived from the French *tartaine*, a name that was given originally to a certain kind of material regardless of its colour. It was only at a later date, when all Highland tartan grew to be checked, that it acquired its more specialized modern meaning.³³ It is a design which is capable of being woven consisting of two or more alternating colored stripes which combine vertically and horizontally to form a repeated checked pattern.³⁴

Traditionally, tartan is originated from Highland of Scotland. Local people wear Kilt in normal life which is made by weaving with dyeing wools in a repeated checked pattern. According to the textile historian E. J. W. Barber, the Hallstatt culture of Central Europe, tartan is linked with ancient Celtic populations and flourished between 400 BC and 100 BC, produced tartan-like textiles.³⁵ The first written reference to Highland dress occurs in the Saga of Magnus Barefoot in 1093, where it is stated that when the king returned from an expedition to the west, he adopted the costume of the western lands, and thereafter went about barelegged “having a short tunic and also upper garment”.³⁶ Nowadays, it has been estimated that there are about 7,000 different

²⁸ The Scotch Whisky Regulations 2009. Article 3(2); Article 7(1)-(5).

²⁹ The Scotch Whisky Regulations 2009. Article 15.

³⁰ The Scotch Whisky Regulations 2009. Article 16.

³¹ Scotch Whisky Regulations 2009. Article 17-18.

³² Scotch Whisky Regulations 2009. Article 19-20.

³³ Christian Hesketh. (1972). Tartans. Octopus books limited. p.3

³⁴ Scottish Register of Tartans Act 2008. Article 2.

³⁵ Quoted from Jeffrey Banks, Doria de La Chapelle, Rose Marie Bravo. Tartan: Romancing the Plaid. Rizzoli. 2007, p.30

³⁶ Christian Hesketh. (1972). Tartans. Octopus books limited. p.5-6

tartans, with around 150 new designs being created every year.³⁷ Many people only own tartan with which they feel associated, be it through a clan, family, surname, or military unit. In such sense, tartan has the function to distinguish different clans, families, or regions, etc.

To establish a register which helps to promote and preserve tartans, the Scottish Parliament passed the Scottish Register of Tartans Act 2008³⁸ on 9th October 2008 (received Royal Assent on 13th November 2008). And then the Scottish Register of Tartans Fees Order 2009³⁹ (Came into force on 5th February 2009), the Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010⁴⁰ (Came into force on 1st March 2010) were enacted. The three regulations provide the related definitions, the explicit procedure of register, and supporting systems.

There are 18 articles in the Scottish Register of Tartans Act 2008 and are divided into 4 chapters, named as: “The Scottish Register of Tartans”, “Applications to register tartans”, “Amendment of Register”, and “Miscellaneous and general”. The regulation has established an independent, accessible and sustainable register which provides a definitive reference source for existing recorded tartans and a system for recognizing new tartans. It also helps to promote and preserve tartan, as well as tourism and general genealogical research. The National Records of Scotland (NRS) operates and maintains the Register. NRS is an Executive Agency of the Scottish Government. The Keeper of the Records of Scotland (chief executive of the NRS) is also the Keeper of the Scottish Register of Tartans (hereafter the Keeper).⁴¹

According to the regulation, any person may apply for registering a tartan to the Keeper in writing. Where the applicant has the right to authorize the Keeper to register the tartan, the applicant must so authorize the Keeper, certify that the applicant has such a right, and where another person who has such a right has given the applicant written consent to the inclusion of that person's name and address on the Register, certify that such consent has been given. Where the applicant does not have the right to authorize the Keeper to register the tartan, the applicant must certify that the applicant does not have such a right, and so far as can reasonably be ascertained by the applicant, there appears to be no other person who has that right.⁴² Furthermore, the applicant must submit the appropriate fee and indemnify the Keeper in respect of any liability to meet any damages or expenses incurred as a result of, or in connection with, the registration.⁴³

The Keeper will investigate the application according to the above-mentioned criteria and may request an applicant to submit further information or documents as the Keeper considers necessary or expedient.⁴⁴ The Keeper must refuse an application if

³⁷ Holyrood Supports Tartan Register. Available online at: <http://news.bbc.co.uk/1/hi/scotland/7461981.stm>. (Accessed 26 June 2013).

³⁸ Scottish Register of Tartans Act 2008. Available online at: <http://www.legislation.gov.uk/asp/2008/7>. (Accessed 25 June 2013)

³⁹ By the Scottish Ministers, The Scottish Register of Tartans Fees Order 2009. Available online at: <http://www.legislation.gov.uk/ssi/2009/6/made>. (Accessed 26 June 2013).

⁴⁰ By the Secretary of State of Scotland, The Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010. Available online at: <http://www.legislation.gov.uk/uksi/2009/2890/made>. (Accessed 25 June 2013)

⁴¹ Guidance to The Scottish Register of Tartans. Available online at: <http://www.tartanregister.gov.uk/guidance.aspx>. (Accessed 26 June 2013).

⁴² Scottish Register of Tartans. Article 6 (1)-(4).

⁴³ Scottish Register of Tartans. Article 6 (5),(10).

⁴⁴ Scottish Register of Tartans. Article 7 (1).

any of the requirements above mentioned has not been met, or the application relates to a design which is not a tartan, or the application relates to a tartan which is the same as, or too similar to, a tartan in respect of which an entry in the Register already exists, or the applicant's association with the name of the tartan is insufficient or insubstantial, or the name of the tartan is undesirable, or the application gives rise to a question which it would be appropriate for the applicant to have resolved or clarified elsewhere (such as by a court), or the applicant has not provided any information or documents requested within a reasonable period.⁴⁵ In any other case, the Keeper must accept an application.⁴⁶ The Keeper must notify the applicant in writing as to whether the application has been accepted or refused. Where an application is refused, the Keeper must provide the applicant with reasons for the refusal, and may provide the applicant with advice in relation to any further application.⁴⁷ Where an application is refused, the applicant may request the Keeper to reconsider the application.⁴⁸ Any person (a "requester") may request the Keeper to amend an entry in the Register.⁴⁹ The Keeper may, at any time, amend an entry in the Register to correct any typographical, clerical or other administrative error.⁵⁰

Inclusion of a tartan in the Register indicates that the tartan and its name are unique to the Register and meet the registration criteria of the Scottish Register of Tartans Act 2008. No other rights are conferred.⁵¹

4. Comparison and analysis on ICH laws in UK and China

4.1 China

At present, the fundamental law of ICH, i.e. the ICH Law, has been enacted in China. As a milestone in China's protection of ICH, the new law basically provides the purpose, range, principles, methods, and subject of ICH protection, and has thus brought the Chinese ICH legal protection into a new era. Thereby, every step should be governed by law. But due to various reasons, such as the legal tradition of procedure law neglect, and low level of economy and society, etc., the legal system of Chinese ICH protection still can't satisfy the practical needs and some crucial issues remain to be solved.

Firstly, the ICH Law tries to have national and local governments play dominant roles at every stage of ICH protection work and have thus over-emphasized governmental responsibilities. In contrast, the rights of the ICH holders are not provided in the law, which means no one has civil right to fight against the misusing of ICH. Beyond all above, governments can play very important role in the general survey and recording, cataloguing the representative items of ICH, etc. especially under the current economic status in China. But if ignoring the feelings and profits of ICH holders, failing to differentiate the different situations of different ICH items, governments will fail on the task of protection. The reasons are: (1) According to the statistics of Chinese

⁴⁵ Scottish Register of Tartans. Article 7(2).

⁴⁶ Scottish Register of Tartans. Article 7 (3).

⁴⁷ The Scottish Register of Tartans. Article 7 (4)-(5).

⁴⁸ The Scottish Register of Tartans. Article 8.

⁴⁹ The Scottish Register of Tartans. Article 10.

⁵⁰ The Scottish Register of Tartans. Article 12.

⁵¹ Guidance to The Scottish Register of Tartans. Available online at: <http://www.tartanregister.gov.uk/guidance.aspx>. (Accessed 26 June 2013).

government, more than 870 thousand ICHs have been identified in China.⁵² By 7th December 2013, 298 items of ICHs have been listed by UNESCO and China has 37 items of ICHs in the Lists,⁵³ more than any other country in the world. In fact, neither national nor local governments in China have adequate resources to handle such large number of ICH items. (2) Although emphasizing the dominant role of governments, the ICH Law has not given specific powers to governments for preventing unfair usages of ICH. Nor has the law provided any liability for breach of law. As a result, facing unfair usages of ICH, governments can't find rules on what and how they should do. This is very harmful for ICH protection. Worsely, this may ruin the authority of the ICH Law. (3) Notwithstanding the feelings and profits of ICH holders, such issues may make ICH holders lose enthusiasm and interest to protect and inherit ICH. Further, no one will be liable for the damages made by unlawful infringement.⁵⁴

Secondly, in respect of legislative language, the ICH Law surprisingly contains many vague words, such as “shall”, “other”, “related”,⁵⁵ especially in the section of enforcement and legal liability. At the same time, no supporting provision has being provided for. This situation gives rise to the difficult enforcement of the law in practice. For instance, on the one hand, the law provides “With regard to the items of ICH that are on the verge of extinction as discovered by investigation or other means, the government departments in charge of culture at the county level shall immediately record and collect the relevant physical objects or adopt other rescue and preservation measures. If inheritance is needed, effective measures that support inheritance shall be adopted.”⁵⁶ On the other hand, it does not mention what legal liabilities will be imposed when the government authorities fail to record and collect the relevant physical objects; and what exactly meanings of “other rescue and preservation measures” and “effective

⁵² Xi Li. (2012). Analysis on the Rescue Mode of Government-leading of ICH. Shandon Social Sciences. Volume 199 (Issue 3), p.77

⁵³ UNESCO has listed 3 types of ICH: the List of ICH in Need of Urgent Safeguarding, the Register of Best Safeguarding Practices, and the Representative List of the ICH of Humanity. Available online at:<http://www.unesco.org/new/en/culture/>. (Accessed 27 June 2013).

⁵⁴ In 2010, the culture bureau of Anshun City, Guizhou province of China, sued Yimou Zhang, the famous filmmaker of China, and Peiking New Picture Film Ltd. in the Court of Xicheng District, Peiking of China for not crediting Anshun's Di Opera in the 2005 film “Riding Alone for Thousands of Miles.” Plaintiff claimed that audience have misaken the opera and those performers from Yunnan province because of the film, the, and asked for injunction of the issuance of the movie and eliminate the adverse effects on infringing the right of signature of “Anshun's Di Opera”. The Court pronounced judgement on 24th May 2011. They held “Anshun's Di Opera” as an ICH item should be protected, but the defendants' behaviors have not constituted an infringement. The plaintiff appealed against the judgement, and the appeal Court rejected the appeal on 14th September 2011. The appeal Court believed that “Anshun's Di Opera” is not a work and should not get the protection of the Copyright Law. After that, more and more people begin to think about the necessity of conferring civil rights to ICH holders. The 11th Standing Committee of the NPC of Guizhou province promulgated the Regulation on ICH Protection of Guizhou Province on 30th March 2012 (came into force on 1st May 2012). The regulation is the first local regulation to provide the protection to ICH rights in China. It states that the enforcing subject of ICH rights are the representative inheritors and the responsible parties of ICH protection (Article 42). But the problems are, (1) Due to the ICH Law has not yet provided the ICH rights, the Regulation on ICH Protection in Guizhou, as a local regulation, has not enough legislative authority to provide the rights; (2) The regulation has not revealed the nature of ICH rights, its contents, and enforcement measures; (3) It may result in unfair situation because no same regulation existed in other regions of China; (4) The regulation has only been enacted in Guizhou province, it's hardly to against the infrigment coming from the other regions.

⁵⁵ There are 40 times using for “shall”, 18 times for “other”, and 18 times for “related” in total.

⁵⁶ ICH Law, Article 17.

measures” are. In this regard, the ICH Law looks more like an appeal than a mandatory rule of law.

Thirdly, with regard to the designation of authorities, enforcement powers’ conferring, and procedures of enforcement, the ICH Law has neither taken into account the quality of authorities and the different characters of different ICH, nor provides anything about the procedures. It will seriously dilute the effect of the law. In this regard, (1) Different ICH has distinguished characters from others.⁵⁷ The law provides: “The government authorities in charge of culture under the State Council shall be responsible for the work concerning the protection and preservation of ICH throughout the country.”⁵⁸ It is an impossible mission to manage all kinds of ICH by the culture department, according to the insufficiency of material resources and the quantity and quality of personnel in the government department. (2) Despite emphasizing the role of governments in ICH protection, ICH law has only one provision setting out enforcement power,⁵⁹ and no related supporting provisions about enforcement procedure of the power and remedy measures are mentioned. Governments are placed in an awkward situation---they have the duties to enact the law, but don’t know how to do that. (3) For the public, the ICH Law provides a negative orientation: although the law lists so many behaviours that people should do or should not to do, but the related legal liability for most of violations have not been provided.

Fourthly, in the ICH legal system, the rare affiliated administrative regulations and local regulations have been issued to support the implementation of the basic law, i.e. ICH Law. China homes plentiful and diversified ICHs. Up to today, only two administrative regulations, the Traditional Arts and Handicrafts Regulation 1997 and the Regulation of Traditional Chinese Medicine 2003 have been issued. In addition, the ICH Law provides: “If other laws and administrative regulations prescribe otherwise concerning the protection of traditional medicine and traditional arts and handicrafts, etc., those provisions shall prevail.”⁶⁰ Obviously, the provision is in violation of the basic theory of law, the effect of new law pre-empts the old one. In addition, such provision also breaks provisions related to the legal effective grades of the Legislative Law 2000.⁶¹ As to local regulations, only ten provinces, autonomous regions, and municipalities⁶² have issued local regulations⁶³ of ICH as far as today. Among these

⁵⁷ For instance, there are obvious differences between folk songs with acupuncture and moxibustion. The former is a kind of folk of cultural expression, and the latter belongs to the field of healthcare.

⁵⁸ ICH Law, Article 7.

⁵⁹ ICH Law, Article 41: An overseas individual who violates the provision of the Paragraph 1 of Article 15 of this Law shall be ordered to make rectifications, issued a warning and have the illegal gains and the physical objects and information obtained in the investigation confiscated by the department in charge of culture. Under serious cases, a fine of no less than RMB10,000 but no more than RMB50,000 shall be imposed.

⁶⁰ ICH Law, Article 44 (2).

⁶¹ Legislation Law of the People’s Republic of China 2000. Available online at: http://www.gov.cn/test/2005-08/13/content_22423.htm (Accessed 28 June 2013). According to Article 56: The State Council enacts administrative regulations in accordance with the Constitution and national law. As a national law, the effect of the ICH Law obviously prior to administrative regulations’.

⁶² There are 34 provinces, autonomous regions, and municipalities in China.

⁶³ According to the enforcement time, they are: the Regulation on ICH Protection of Jiangsu Province (came into force on 1st January 2006); the Regulation on ICH Protection of Ningxia Hui Autonomous Region (came into force on 1st September 2006); the Regulation on ICH Protection of Zhejiang Province (came into force on 1st June 2007); the Regulation on ICH Protection of Xinjiang Uygur Autonomous Region (came into force on 1st April 2008); the Regulation on ICH of Guangdong Province (came into force on 1st October 2011); the Regulation on ICH Protection of Guizhou

local regulations, four need to be amended as soon as possible for discord with the ICH Law.

Fifthly, if other legal systems are used for ICH protection, there would be following obstacles. (1) IPR laws are not designed for the purpose of protecting ICH, and therefore have not considered the distinctive characters of ICH.⁶⁴ Nor set the thresholds standard which ICH should reach in order to obtain the IP right. In practice, very limited ICH has obtained some kinds of IPRs. However, the effect of protection may not be satisfactory.⁶⁵ (2) The precondition of signing an ICH licensing contract is ICH holders should have obtained legal rights. However, no national law in China has provided such right to ICH holders. At the same time, most of ICH holders are short of knowledge and skills capacity to bargain with ICH users. Thus, ICH holders usually can hardly get full respect and proper compensation, as exemplified by several cases in practice.

Finally, while three legal systems exist in the field of Chinese ICH protection, no explicit legal explanations have been made as to what the relationship between them and how to deal with the potential conflicts among them. It is noted that the ICH Law provides: If the use of ICH involves intellectual property right, the provisions of the relevant laws and administrative regulations shall apply.⁶⁶ However, in this provision, there are two issues at least. (1) The provision is too general and vague to clarify the situations of application of relevant laws and administrative regulations, and how the rules shall be applied. (2) The provision actually gives IPR system higher level than ICH legal system in terms of legal effect. This may very likely result in the crisis of public benefits.⁶⁷

Province(came into force on 1st May 2012); the Regulation on ICH of Chongqing Municipality(came into force on 1st December 2012); the Regulation on ICH of Hubei Province(came into force on 1st December 2012); the Regulation on ICH of Shanxi Province(came into force on 1st January 2013); the Regulation on ICH Protection of Yunnan Province(came into force on 1st June 2013). Interesting details: 6 local regulations own the word “protection” in its’ title, and the other 4 regulations don’t, just same like the ICH Law.

⁶⁴ The creation and development of IPRs are always accompanied with the commercial economy. But ICH is a kind of people-centered, living cultural treasure. It is traditional, regional, and collective, and in most instances, it’s about lifestyle not merchandise.

⁶⁵ For instance, Fengxiang Clay Sculpture of Shaanxi province, as a national ICH item of China, has 3,000 years’ history since Zhou Dynasty. In the inherited region, Liuying Village, Fengxiang County, two famous inheritors, the national inheritor---Mr. Shen Hu, and the provincial inheritor---Mr. Xinmin Hu, respectively work on manufacturing and selling of Fengxiang Clay Sculpture. Both of them enjoy great popularity in China. In 2004, Mr. Xinmin Hu has registered a trademark--- “Clay Sculpture of Xinmin Hu” in the National Trademark Bureau, and has used this registered trademark on his clay sculptures from then on. On the contrary, Mr. Shen Hu just signs his name by hand beneath his clay sculptures. In market, most customers don’t choose Mr. Xinmin Hu’s clay sculptures just because of labeling a registered trademark. They would take into account many factors, such as design, quality, and price, rather than the trademark registered or not

⁶⁶ ICH Law, Article 44 (1).

⁶⁷ For instance, “Paper-cutting of Shaanbei Poyi” is a registered trademark registered by a company, named as “Paper-cutting Association of Shaanbei Poyi”, Yulin City, North of Shaanxi Province, PRC. As an ordinary title for calling married women in the north of Shaanxi province, “Shaanbei Poyi” is more than general in local dialect. At the same time, paper-cutting is a kind of very popular handicraft, has prevailed in north of Shaanxi more than 1,500 years history. Almost every woman living in the region used to cut colour papers in traditional patterns or according to personal tastes to create some new patterns to decorate their rooms and express good wishes in daily life. Part of them, sell their handicrafts to tourists, researchers, and collectors, etc. So, would these women have right to label their

4.2 UK

The UK has not yet ratified the Convention for the Safeguarding of the ICH 2003 (UNESCO) by far. The rationality and necessity of ICH protection have not been formally recognized, and the impact of the concept of ICH on heritage practice in the UK remains limited.⁶⁸ In the field of ICH legal protection, No general law but only some regulations related to certain kind of ICH have been issued. In addition to the tradition of Common Law, a prevailing vision to cultural inheritance is that cultural inheritance resides solely in the materiality of the past, i.e. tangible heritage. This vision is largely supported in the scientific/technical and political-institutional sectors of the West.⁶⁹ As a result, each regulation works separately and no unified legal protection system has been established. At the same time, UK government does not provide support for application of the Representative Items of the ICH of Humanity for UNESCO and to launch on related propaganda works. Even no one ICH item of UK has been listed in the Representative List.⁷⁰ The public of UK is unfamiliar with the concept of ICH, and lack of awareness on the necessity of ICH protection.

Secondly, in all regulations, the definitions of the key words, procedures of legal behaviours, and technical criteria are highlighted. At the same time, various supporting facilities have been built in time. They are the necessary to guarantee the effective enforcement of the regulations. For instance, to ensure the enforcement of the Scottish Register of Tartans Act 2008, The Scottish Register of Tartans⁷¹ was established by the Act in 2008. The Register is maintained by the National Records of Scotland, and through a website which has contained thousands of tartans able to be freely searched, and is used to guide applicants applying for registration. Similarly, the Scotch Whisky Association plays a very important role in the protection of Scotch whisky.

Thirdly, in some regulations no civil right for ICH holders has been provided. This will result in absence of stimulation on protecting and inheriting ICH. For instance, according to the Scottish Register of Tartans Act 2008, any person in any part of the world may apply to the Keeper for registration of a tartan.⁷² But inclusion of a tartan in the Register just means that the tartan and its name are unique to the Register and meet the registration criteria of the Scottish Register of Tartans Act 2008. No other rights are conferred.⁷³ Meantime, however, the regulation provides the applicant must pay the

products with words of “Shaanbei Poyi” and “Paper-cutting”? If they have this right, how about that registered trademark? If they haven’t, what should they call for a paper-cutting actually created by a shaanbei poyi?

⁶⁸ The convention entered into force in 2006, after thirtieth instruments of ratification by UNESCO Member States. As of June 2013, 154 states have ratified the convention. The document and data about the Convention for the Safeguarding of the ICH. Paris, 17 October 2003, available online at:<http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E>. (Accessed 1 July 2013).

⁶⁹ Frank Hassard. (2009). *Intangible heritage in the United Kindom- The dark side of enlightenment?* Laurajane Smith, Natsuko Akagawa. *Intangible Heritage*. Routledge, Taylor & Francis Group. p.270

⁷⁰ The Representative List of the ICH of Humanity. Available online at:<http://www.unesco.org/new/en/culture/>. (Accessed 28 June 2013).

⁷¹ The Scottish Register of Tartans. Available online at: <http://www.tartanregister.gov.uk/index.aspx>. (Accessed 28 June 2013).

⁷² The Scottish Register of Tartans. Article 6 (1).

⁷³ Guidance to The Scottish Register of Tartans. Available online at: <http://www.tartanregister.gov.uk/guidance.aspx>. (Accessed 26 June 2013).

appropriate fee⁷⁴ and indemnify the Keeper in respect of any liability to meet any damages or expenses incurred as a result of, or in connection with, the registration.⁷⁵ As a result, those traditional clans or families, who are not involved in commercial activities, may be lazy to apply for the register. It is harmful for protecting and inheriting the cultures of Tartan.

Fourthly, by using IPR to protect ICH and focusing on the restriction of commercial behaviours. It is useful to protect the commercial profits of ICH users. On the other hand, this may neglect the true cultural values of inheritance. The Scotch Whisky Regulations 2009, is a good example for using geographical indication to protect ICH. The regulations have clearly announced the range of protected localities and regions,⁷⁶ and provided a whisky can be labelled, packaged, advertised or promoted in a way that includes the name of a protected locality or a protected region only when the whisky is Scotch whisky and has been distilled in that locality or region.⁷⁷ A whisky must not be labelled, packaged, advertised or promoted in a way that includes any reference to a name that is similar to the name of a protected locality or protected region if, having regard to the presentation of the product as a whole, the reference may create a likelihood of confusion on the part of the public as to where the whisky or whisky-based drink was distilled.⁷⁸ The Scotch Whisky Association is responsible for working to promote and protect the interests of the Scotch whisky industry at home and abroad. The exact main function of the Association is to protect Scotch Whisky world-wide by taking legal action to restrain the sale of other spirits misleadingly labelled to suggest they are Scotch Whisky.⁷⁹ For instance, in 2005, the Scotch Whisky Association sued Khoday Distilleries Ltd at the Indian High Court for the Indian distillery's registration of the name PETER SCOT alleging that the whisky has infringed the geographical indication rights of Scotch whisky and has constituted passing off.⁸⁰ In 2008, the Association sued Glenora Distillers International Ltd at the Canadian Federal Court for the trade mark GLEN BRETON for a brand of Canadian whisky was deceptively misleading on the ground that the word "glen" was commonly associated with whisky originating from Scotland.⁸¹ Without doubt, using IPR such as geographical indication to protect ICH can effectively block the unfair commercial usages of ICH. However, only a part of ICH is suitable to be protected in this way. In addition, such protection is restricted in the range of commercial purposes rather than cultural.⁸²

Finally, the regulations of ICH have received wide support from other laws. For instance, the Scottish Register of Tartans Act 2008 (Consequential Modifications) Order

⁷⁴ According to the Scottish Register of Tartans Fees Order 2009, the application fee to register a tartan is £70, request to amend the Register need to pay £25, and so on, etc.

⁷⁵ The Scottish Register of Tartans. Article 6 (5),(10).

⁷⁶ Scotch Whisky Regulations 2009. Article 10 (5),(6).

⁷⁷ Scotch Whisky Regulations 2009. Article 10 (1).

⁷⁸ Scotch Whisky Regulations 2009. Article 10 (3).

⁷⁹ SWA Departments. Available online at: <http://www.scotch-whisky.org.uk/who-we-are/swa-departments/>. (Accessed 28 June 2013).

⁸⁰ Gladys Mirandah. (2005). India: Scotch whisky wins GI case. *Managing Intellectual Property*. Issue 6, p.155, 92.

⁸¹ Alexandra Steele.(2008). Canada: whisky trade-mark "on the rocks". *World Intellectual Property Report*. Volume 22 (Issue 7), p.4-5

⁸² Such as folk songs, dancing, and rituals always are related to daily life of traditional communities rather than commercial usage. At the same time, such ICHs always are people-centered, maybe have not be transformed to some kind of merchandise. So IPRs, like geographical indication or trademark, are hardly to be used to protect them.

2010 is exactly enacted for the purpose of handling the issues of the Scottish Register of Tartans Act 2008 and the Copyright, Designs and Patents Act 1988. The order provides for the modification of certain copyright exceptions, (1) In section 47(6) of the Copyright, Designs and Patents Act 1988 (the 1988 Act) ---material open to public inspection or on official register, in the definition of “statutory requirement”,⁸³ the reference to an enactment includes any enactment contained in the Scottish Register of Tartans Act 2008; (2) In section 50(1) of the 1988 Act---acts done under statutory authority, the reference to “an Act of Parliament”⁸⁴ includes the Scottish Register of Tartans Act 2008.⁸⁵ In fact, the designer of a new tartan, who has created the tartan, is the first owner of the design right,⁸⁶ whether register or not.⁸⁷ Which means although inclusion of a tartan in the Register does not indicate other rights are conferred, it will not affect the designer to get other statutory rights. So if the designer registers the design with the UK or any other Intellectual Property Office, he/she would be supposed to provide the Keeper with the registration number and the date of registration. If the designer registers the design after the tartan has been added to the Scottish Register of Tartans, he/she may submit an amendment to have the design registration number and date of registration added to the tartan details.⁸⁸

5. The suggestions on optimizing of the ICH legal in China

5.1 Amendment of the ICH Law

Firstly, adding the provisions of ICH rights and clarifying the nature⁸⁹, subject⁹⁰, and contents⁹¹ of the rights. It will not only stimulate the protecting and inheriting enthusiasms of ICH holders very effectively, offer legal grounds for local regulations to

⁸³ Copyrights, Designs and Patents Act 1988. Article 47 (6) In this section— “statutory requirement” means a requirement imposed by provision made by or under an enactment. Available online at: <http://www.legislation.gov.uk/ukpga/1988/48/>. (Accessed 28 June 2013).

⁸⁴ Copyrights, Designs and Patents Act 1988. Article 50. Acts done under statutory (1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright. Ibid.

⁸⁵ Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010. Article 2.

⁸⁶ Except where the design was created during the course of employment, in which case the employer is the first owner, or where it has been commissioned, in which case the commissioner is the first owner.

⁸⁷ According to the Registered Designs Act 1949 and the Copyrights, Designs and Patents Act 1988, a new design may be protected in the UK by one, or more, of the following: (1) The design right; (2) Registered designs; (3) Copyright. But a traditional tartan, inherited by a clan, or family for more than hundreds years with unknown creation time and person, may not be protected by any way of above all.

⁸⁸ Guidance to The Scottish Register of Tartans. Available online at: <http://www.tartanregister.gov.uk/guidance.aspx>. (Accessed 26 June 2013).

⁸⁹ As a new kind of civil right, the ICH rights are the basic rights on ICH, prior to other rights related to ICH.

⁹⁰ If based on the characters of ICH, i.e. collective, traditional, and regional, the ICH rights shall belong to the holders---either one or several ethnic groups, clans, villages, or families, who have created and inherited ICH collectively in their life, rather than individuals. The holders can organize commissions or associations to manage their rights, even to authorize governments to enforce the rights.

⁹¹ The ICH rights shall have included the right to indicate the holders' name, the right to know the detail of usage, the right to use, and fairly sharing of benefits with commercial users, at least. Taking into account the indicative function of particular region, ethnic group, clan, or family of ICH, the ICH rights might not be transferred.

set the rights legally, but also will be helpful for figuring out the conflicts between the ICH Laws with other laws.

Secondly, emphasizing the enforcement. On the one hand, the enforcement authorities shall be reasonably designated according to capability of enforcement and characters of ICH. On the other hand, the powers of different authorities, procedures of enforcement, and coordination mechanism should be explicitly defined.⁹²

Thirdly, the legal liabilities and remedy methods shall be exactly provided. Legal liabilities are the necessary guarantee for the enforcement of the purpose of the ICH Law. In addition, remedy methods will protect the legal benefits of administrative counterpart and strengthen the monitor to administrative authorities.

Finally, as a basic law of the ICH legal system of China, the status of the ICH Law shall be announced. It will be good for figuring out the potential conflicts between the ICH Law with other laws.

5.2 Modification and Innovation of separate regulations and local regulations

With regard to modification, (1) Current separate regulations have all been enacted before the ICH Law in China. It is necessary to amend to eradicate the incongruity within them and with the basic law. (2) Local regulations, part of them just copy provisions from the ICH Law without showing the region characters; part of them overemphasizing the local demanding to create new mechanism without legislative authority. In this regard, current separate regulations and local regulations shall be urged to amend, after the optimizing the basic law.

With regard to innovation, some new regulations shall be enacted to integrate the ICH legal system. For instance, as traditional knowledge protection is the most difficult part to protect in ICH, ⁹³the Traditional Knowledge Regulations shall be enacted. Furthermore, the Regulations of ICH Trust Fund for the collection, management, and usage of ICH fund, the Register of ICH Regulations for recording, information sharing, and promoting ICH protection also need be promulgated.

6. Conclusion

Due to its significant economic, healthcare, and cultural contribution to society, ICH shall be worthy for recording, inheriting, and protecting, both in developing and developed countries. To learn from the experience of other countries is necessary for us to improve our legal system of ICH protection. Accurate definitions of key terms,

⁹² Referring to the Scotch Whisky Regulations 2009, the ICH Law might designate the Department of Culture of the State Council as a competent authority of the law, and each ICH authority, each Chinese medicine authority, and each sports authority must enforce the provisions of the Law within its area. Each authority must appoint officers for the purposes of the enforcement of the Law, and must give assistance and information to any other enforcement authority as it may reasonably require for the purpose of its duties under the Law.

⁹³ According to the concept of ICH, defined by the ICH Law, ICH mainly includes three parts, traditional knowledge, physical objects and premises related to the traditional cultural manifestations. Different from the other two parts of ICH, traditional knowledge is a summation of various knowledge passed down and inherited informally in form of arts, science and technology and customs, held by a (or some) traditional community (ies) in a certain territory. It is intangible indeed, and as a result, the protection to it is the most difficult.

elaborating procedures of enforcement, well working supporting systems, and explicit legal liabilities, all of these merits of ICH laws in UK may be learned to optimize the ICH legislations in China.



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