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Digital art and the belt and road initiative: challenges and opportunities

Arte digital e a Iniciativa Cinturão e Rota: oportunidades, desafios e perspectivas

Dan Wei

Ângelo Rafael

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DOSSIÊ TEMÁTICO: ART LAW AND CULTURAL HERITAGE
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Digital art and the belt and road initiative: challenges and opportunities*

Arte digital e a Iniciativa Cinturão e Rota: oportunidades, desafios e perspectivas

Dan Wei**

Ângelo Rafael***

Resumo

A arte digital, seguindo a tecnologia usada para produzir, armazenar, exibir e comercializar, é altamente dinâmica e oferece aos artistas digitais possibilidades criativas aparentemente ilimitadas. A China é hoje o maior importador e exportador de bens e serviços criativos e estabeleceu como um de seus princípios de política a internacionalização de sua indústria cultural e a cooperação internacional. Este artigo explora o potencial transformador da arte digital no contexto da Iniciativa Cinturão e Rota e os desafios potenciais que emergem da perspectiva legal. Suas principais conclusões são que a arte digital pode desempenhar um papel significativo em ajudar a desenvolver a Iniciativa Cinturão e Rota, especialmente ao promover a interação cultural e o intercâmbio entre as pessoas dos países participantes, expandindo assim o alcance da iniciativa para além do nível intergovernamental. No entanto, um desafio significativo é apresentado pelas diferentes abordagens que diferentes governos podem ter em relação à arte (digital) e tecnologias relacionadas. O artigo também reitera a existência de desafios jurídicos, por exemplo, na proteção da propriedade intelectual, proteção de dados e combate à lavagem de dinheiro, que devem ser enfrentados, preferencialmente de forma coordenada, não apenas entre os países da Iniciativa Cinturão e Rota, mas globalmente.

Palavras-chave: arte digital; Iniciativa Cinturão e Rota; China; desafios legais

Abstract

Digital art, following the technology used to produce, store, display, and trade it, is highly dynamic and offers digital artists seemingly limitless creative possibilities. China is today the biggest importer and exporter of creative goods and services and has established as one of its policy principles the internationalization of its cultural industry and international cooperation. This article explores the transformative potential of digital art in the context of the Belt and Road Initiative and the potential challenges that emerge from the legal perspective. Its main findings are that digital art can play a significant role in helping to develop the Belt and Road Initiative, especially in fostering cultural interaction and exchanges between the people of the

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** Associate Dean of Faculty of Law and Full Professor of University of Macau.
E-mail: danwei@um.edu.mo

*** PhD candidate in International Business Law at the Faculty of Law of the University of Macau. E-mail: winangl@gmail.com

participating countries, thus expanding the reach of the initiative beyond the inter-governmental level. However, a significant challenge is presented by the lack of harmony between different jurisdictions' regulatory frameworks and lack of consensus in related multilateral efforts. The article also reiterates the existence of legal challenges, for example, on intellectual property rights protection, on contractual and consumer protection issues, and related to money laundering and other crimes. Regulatory approach towards these challenges will ultimately determine whether digital art will play a major or minor role in the development of the BRI.

Keywords: digital art; Belt and Road Initiative; China; legal challenges

1 Introduction

Digital art, i.e., 'art made with, and for digital media including the internet, digital imaging, or computer-controlled installations',¹ has increasingly gained prominence over the last decades and, supported by dynamic and disruptive technologies, continues to evolve to newer and more complex forms. Due to its particular features, namely the ability to be disseminated to large amount of people at the same time all over the world, and considering the exponential growth of production and consumption of cultural products, including digital art, it is interesting to explore its place in China's internationalization policy and its potential in shaping it. This article explores the place and potential of digital art within the context of one of China's major foreign policy programs — the Belt and Road Initiative (BRI).

But the development of digital art and the activities and technologies connected to it face several challenges, especially in their relationship with the law. This is in part due to the relative rigidity of the law, by nature, which is dissonant with the characteristically dynamic and disruptive nature of digital technologies and their products. The consequence is often the emergence of difficulties in adapting to new conceptual realities and dynamics brought about by technological advances and their products, including digital art. For digital artists,

the highly dynamic nature of digital technologies offers seemingly limitless possibilities for the way they create, display and trade their art. However, on the other hand, such possibilities bring to them several challenges, including legal challenges. These challenges are greater considering the highly universal nature of the digital world but also, paradoxically, due to the relatively lower integration of China's internet realm with the rest of the world due to the so-called 'the great firewall'. Thus, article also explores some of the legal challenges faced by digital art in the context of the BRI development.

Some works have previously addressed the topic of digital art, including by reviewing the history and foreseeing future trends in its development,² studying and classifying different types and forms of digital art,³ presenting the most prominent digital artists and their works,⁴ and analysing intellectual property rights protection and commodification/commercialisation solutions, especially the blockchain.⁵ In relation to China, digital art has also been studied, for example, in relation to public security⁶ and to its interplay with traditional art.⁷ On the other hand, the BRI has attracted

² For example, PAUL, Christiane. *Digital Art*. Third Edition. London: Thames & Hudson World of Art, 2015. Regarding digital art history, there is a dedicated academic journal on the subject — *International Journal for Digital Art History* — with five Issues published at the time of the writing; see <https://dahj.org/>. Accessed on 9 Sept. 2020.

³ For example, SIMANOWSKI, Robert. *Digital Art and Meaning: Reading Kinetic Poetry, Text Machines, Mapping Art, and Interactive Installations*. Minneapolis; London: University of Minnesota Press, 2011; GRAU, Oliver. *The Complex and Multifarious Expressions of Digital Art and Its Impact on Archives and Humanities*. In: PAUL, Christiane (ed). *A Companion to Digital Art*. Wiley, 2016.

⁴ See ANON. *Digital Art Masters*. Volume 1. 3DTot.com, 2005. ANON. *Digital Art Masters*. Volume 2. Burlington; Oxfordshire: CRC Press, 2008. ANON. *Digital art masters*. Volume 3. Amsterdam, Boston: Focal Press, 2008. ANON. *Digital Art Masters*. Volume 4. New York; London: Focal Press, 2010. ANON. *Digital Art Masters*. Volume 5. New York; London: Focal Press, 2010.

⁵ For example, ZEILINGER, Martin. Digital Art as 'Monetised Graphics': Enforcing Intellectual Property on the Blockchain. *Philosophy and Technology*, v. 31, p. 15-41, 2018. ODWYER, Rachel. Limited edition: Producing artificial scarcity for digital art on the blockchain and its implications for the cultural industries. *Convergence: The International Journal of Research into New Media Technologies*. v. 26, n. 4, p. 874-894, 2020.

⁶ MA, Lixin. A Discussion on Public Security of Digital Arts. *Journal of Shandong Normal University*. v. 8, 2012 (in Chinese). Available: http://en.cnki.com.cn/Journal_en/H-H000-SDSS-2012-03.htm. Accessed on 9 Sept. 2020.

⁷ DU, Weiming, et al. Analysis of the Interaction between Digital Art and Traditional Art. 2010 International Conference on Networking and Digital Society. Wenzhou, 2010, p. 441. Available: <https://ieeexplore.ieee.org/abstract/document/5479462>. Accessed

¹ GRAHAM, Beryl. Redefining digital art: Disrupting borders. In: CAMERON, Fiona; KENDERDINE, Sarah. *Theorizing digital cultural heritage: A critical discourse*. MIT Press, 2007. p. 93-112 at 93.

a large amount of academic interest,⁸ although works that explore its linkages to digital art are virtually non-existent.⁹ This article brings contributions aimed at filling this gap, enriching both the literature on digital art and on the BRI. With an analysis on the place and role of digital art in the BRI, the article also brings to the limelight an exploration of non-strictly (geo)economic or (geo)political aspects of the initiative, highlighting its not-often recognized richness and diverse sources of potential.

This article takes advantage of existing literature on digital art, especially for support on its conceptual framework, and explores a diversity of sources including official, private and academic databases to compose the picture of the status of digital art development in China and of the BRI on its various aspects. Legal analysis of relevant laws was also employed, especially in the effort to identify the main legal challenges linked to digital art in the context of the BRI.

The remainder of the article is organized as follows: section 2 presents a brief overview on the status of digital art in China, including on the different forms of digital art and their display and trade, as well as the corporatization and internationalization trends of China's digital industry, and the government's policy towards digital art; section 3 analyses the context and dynamics of/between digital art and the BRI, exploring the place of digital art in the BRI, and its potential role in driving the initiative forward; section 4 explores some potential legal challenges that can affect digital art in a context of fast technological change, aging and diverse laws and cross-border interactions; finally section 5 presents the conclusion.

on 9 Sept. 2020.

⁸ To mention but a few: HUANG, Yiping. Understanding China's Belt & Road Initiative: Motivation, framework and assessment. *China Economic Review*, v. 40, p. 314-321, Sept. 2016. ASCENSÃO, Fernando, et al. Environmental challenges for the Belt and Road Initiative. *Nature and Sustainability*, v. 1, p. 206-209, May 2018. LIU, Weidong; DUNFORD, Michael. Inclusive globalization: unpacking China's Belt and Road Initiative. *Area Development Policy*, v. 1, n. 3, p. 323-340, sept. 2016. WANG, Yong. Offensive for defensive: the belt and road initiative and China's new grand strategy. *The Pacific Review*, v. 29, n. 3, p. 455-463, Mar. 2016. HERRERO, Alicia Garcia; XU, Jianwei. China's Belt and Road Initiative: Can Europe Expect Trade Gains? *China & World Economy*, v. 25, n. 6, p. 84-99, nov. – dec., 2017.

⁹ A notable exception is YANG, Yuan, et al. Design and Production of Digital Interactive Installation for the Cultural Theme of the Belt and Road Initiative. *Journal of Physics: Conference Series*, v. 1627.

2 Overview on the Status of Digital Art in China

The perception of 'acceleration of change' that has been identified in relation to the general dynamic of the world¹⁰ is exponentially higher in the digital realm. Thus, a description of the 'present' digital reality and, in this case, of digital art, will certainly be outdated in a relatively short period of time. Conscious of that limitation, what follows is, more accurately, a brief 'time-lapse' shot of the latest developments in digital art in China. This will set the stage for a better reflection on the transformative potential of digital art both within China and globally, particularly within the context of the BRI.

Digital art, following the technology used to produce, display and store it, is hugely varied and highly dynamic – as one commentator put it, is 'characteristically in a state of flux'.¹¹ In recent years, as technological innovation becomes an increasingly prominent part of China's economic structure, digital technology and digital art have registered an impressive progress. More generally, China's creative economy has also experienced an exponential growth, with the country now standing as the top exporter and importer of creative goods and services.¹² Another notable trend is the corporate expansion of its cultural enterprises to other countries through mergers and acquisitions. In this regard, Tencent's expansion approach is a paradigmatic example, with the company having spent US\$62.5 billion in mergers in acquisitions from 2012 to 2017,¹³ including with many foreign companies. Some of the most important investments in digital art companies abroad include the acquisition of 81.4 percent of Finnish

¹⁰ NEUWIRTH, Rostam J. Global Governance and the Creative Economy: The Developing versus Developed Country Dichotomy Revisited. *Frontiers of Legal Research*, v. 1, n. 1, p. 127-144, 2013 at 137.

¹¹ GRAHAM, Beryl. Redefining digital art: Disrupting borders. In: CAMERON, Fiona; KENDERDINE, Sarah. *Theorizing digital cultural heritage: A critical discourse*. MIT Press, 2007. p. 93-112 at 106.

¹² UNCTAD. *Creative Economy Outlook: Trends in International Trade in Creative Industries 2002–2015; Country Profiles 2005–2014*, 2019. Available: <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2328>. Accessed 9 sept. 2020.

¹³ SOO, Zen. Tencent outspent Baidu, Alibaba in tech mergers and acquisitions, 2017. Available: <https://www.scmp.com/business/companies/article/2098548/tencent-leads-baidu-alibaba-when-it-comes-ma-deals>. Accessed on 9 sept. 2020.

gaming company Supercell for US\$10.2 billion in 2016, the full acquisition of American gaming company Riot Games for more than US\$400 million in 2011 and 2015, and the full acquisition of Norwegian gaming company Funcom for US\$ 148 million in 2019-20.¹⁴

The role of major companies (for example, Tencent, NetEase and iQIYI) especially in video gaming, animation and cinema highlight the dominance of big corporate entities in the production and commercialization of these forms of digital art. Nevertheless, individual artists as well as small and medium enterprises involved, for example, in the production of digital fine art and photography, as well as installation art and virtual reality also mark a notable presence. But the special nature of digital art, which makes it easily editable and disseminatable on the internet pose significant challenges for its valorisation and, thus, commodification and commercialisation. This challenge is especially acute in relation to individual artists and small enterprises, that lack the means to ‘exclusively’ and ‘safely’ sell or exhibit their artwork. A relatively easy alternative commonly used by artists involves breaking the barriers of digital realm and printing and framing their works as it is done with traditional artworks. Those printed versions can be found in sale, for example, in e-commerce platforms such as Alibaba.¹⁵ Another, ‘high-tech’, innovative alternative which is being internationally explored to address the challenge of commodification of artworks and, crucially, to protect the artists’ intellectual property rights is the blockchain technology (see more on section 4, below).¹⁶ However, like elsewhere, the use of blockchain for the protection of intellectual property rights is in its infancy and the data on the use of the technology by digital artists, as well as on their usage experiences, is still unavailable. Notable Chinese start-ups offering blockchain technology services for the protection of intellectual property rights, including in relation

to digital art, include Ziggurat¹⁷ and Yuanben.¹⁸

At the institutional/governmental level, the promotion of and support to the creative industry, including digital art, are significantly entrenched into the central government’s policies. For example, projects incorporating digital art are especially encouraged in the Ministry of Culture and Tourism’s programme (implemented in partnership with several major banks) for the selection and financing of culture and tourism-related projects.¹⁹ Another example is establishment of the China Millennium Monument Museum of Digital Arts in Beijing, which provides interactive platforms, which can be used for exhibitions, education purposes, and start-up incubation.

3 Digital art and the Belt and Road Initiative: its place and transformative potential

‘Open development’ and ‘international integration’, to be materialized, inter alia, through international exchanges and cooperation are basic principles of the Chinese government’s policy on the promotion of innovation and development of the country’s digital cultural industry, according to the Guiding Opinions of the Ministry of Culture on Promoting the Innovation and Development of the Digital Cultural Industry, 2017 (see, especially (2)). In turn, China’s digital culture international policy has a special focus on the BRI, which is one of the country’s top foreign policy initiatives, according to the same Guiding Opinions (see (16) and (17)). On the other hand, cultural exchanges, including on several digital art-related aspects, are a key element of the BRI framework and priorities, as laid out in the ‘Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road, 2015’ (Vision and Actions for the BRI) (see ‘III. Framework’ and ‘IV. Cooperation Priorities’). The question is what role can digital art play in the materialization of China’s

¹⁴ TRACXN. Acquisitions by Tencent, 2020. Available: <https://tracxn.com/d/acquisitions/acquisitionsbyTencent>. Accessed on 9 sept. 2020. FUNCON. Funcon Stock Info. Available: <https://investors.funcom.com/stock-info/>. Accessed on 9 sept. 2020.

¹⁵ See, ALIBABA. <https://www.alibaba.com/countrysearch/CN/digital-fine-art.html>. Accessed on 9 sept. 2020.

¹⁶ For a critique on the use of blockchain to enforce intellectual property rights connected to digital artwork see ZEILINGER, Martin. Digital Art as ‘Monetised Graphics’: Enforcing Intellectual Property on the Blockchain. *Philosophy and Technology*, v. 31, p. 15-41, 2018.

¹⁷ See Z-BAAS. <https://baas.zhigui.com/index>. Accessed on 9 sept. 2020.

¹⁸ See YUANBEN. <https://www.yuanben.io/>. Accessed on 9 Sept. 2020.

¹⁹ XINHUA. China enhances financial support for BRI, poverty relief-related tourism, 2019. Available: http://english.www.gov.cn/state_council/ministries/2019/06/19/content_281476723289940.htm. Accessed on 9 sept. 2020.

digital culture international policy and, specifically, what role it can play the development of the BRI. Answers to these questions can be extracted from an analysis of the context and dynamics of and between the BRI and digital art. This exercise will be done by exploring what the BRI is in terms of nature, scope and objectives, and how digital art is included or may find space in them and impact the development of the initiative and China's overall digital culture international policy.

3.1 Nature, scope and objectives of the Belt and Road Initiative

The BRI, also known as 'One Belt, One Road' is an initiative launched by the country's president, Xi Jinping, at the Peripheral Diplomacy Work Conference in 2013.²⁰ It was presented as an initiative aimed at boosting China's economic integration with its neighbouring countries through investment on infrastructure and connectivity, along the 'Silk Economic Belt' and the '21st Century Maritime Silk Road', creating a new regional economic order.²¹

Thus, in terms of nature, the BRI is a Chinese foreign policy initiative. It was conceived, designed and presented by the highest levels of China's central government and the Chinese Communist Party. Of course, its implementation depends on negotiations and cooperation with other countries on a bilateral level.

Geographically, the BRI encompasses the 'Silk Economic Belt', which links the central and western part of China to Central Asia and Europe and the '21st Century Maritime Silk Road', which runs from the southeast part of China to parts of South-East Asia and South Asia, passing through parts of East and North Africa and reaching Italy.²² While these 'routes' served

as basis for the design and naming the initiative, thus leading China to especially focus in concluding agreements with countries along them, it has, in reality, become a virtually global foreign policy strategy. Indeed, as of the time of writing, 138 countries had signed a Memorandum of Understanding with China to join the BRI, including 38 in Sub-Saharan Africa, 34 in Central Asia and Europe, 25 in East Asia and Pacific, 17 in the Middle-East and North Africa, 18 in Latin America and the Caribbean, and 6 in South East Asia.²³ While the real reach of the BRI is difficult to accurately delimitate because there are no clear criteria or database indicating what projects are part of the initiative, the potentially significant global implications of its materialization cannot be understated.

In fact, those global implications may result, directly or indirectly, from the materialization of the BRI objectives, both the officially stated and other widely accepted as implied. While economic objectives, including free trade, regional economic cooperation, and market integration, are officially presented as the objectives of the BRI in the centrally issued Vision and Actions for the BRI (see 'I. Background'), several geostrategic implications are not officially recognized objectives of the initiative, but widely claimed by commentators as (unstated) objectives or at least inherent implications of its materialization.²⁴ Among the often mentioned geopolitical objectives or implications are: securing a more prominent role in the international economic system; the expansion and promotion of the renminbi as an international currency; and protection of its geopolitical and security interests in the Asia-Pacific and South China Sea, inter alia, countering the United States' foreign policy for the region and reducing its reliance on the Strait of Malaca (e.g. by investing in the China-Pakistan Economic Corridor).²⁵

²⁰ CAI, Peter. Understanding China's Belt and Road Initiative. Lowy Institute for International Policy, 2017, at 3. Available: https://think-asia.org/bitstream/handle/11540/6810/Understanding_Chinas_Belt_and_Road_Initiative_WEB_1.pdf?sequence=1. Accessed on 9 sept. 2020.

²¹ MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA. Xi Jinping: Let the Sense of Community of Common Destiny Take Deep Root in Neighbouring Countries, 2013. Available: https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/activities_663312/t1093870.shtml. Accessed on 9 sept. 2020.

²² THE GUARDIAN. What is China's Belt and Road Initiative? 2018. Available: <https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer>. Accessed 9 sept. 2020.

²³ NEDOPIL, Christoph. Countries of the Belt and Road Initiative. IIGF Green BRI Center, 2020. Available: <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri>. Accessed on 9 sept. 2020. As noted in the database, few countries have not confirmed or denied the signature of a Memorandum of Understanding to join the BRI. While that may mean that the number of participating countries is lower than 138, it does not fundamentally impact the (potential) global reach of the BRI.

²⁴ See, for example, CHENG, Leonard K. Three questions on China's "Belt and Road Initiative". *China Economic Review*, v. 40. p. 309-313 at 330, 2016; CAI, Kevin G. The One Belt One Road and the Asian Infrastructure Investment Bank: Beijing's New Strategy of Geoeconomics and Geopolitics. *Journal of Contemporary China*, v. 27, n. 114, p. 831-847 at 837-841, 2018.

²⁵ CAI, Kevin G. The One Belt One Road and the Asian Infra-

The Vision and Actions for the BRI's proposed framework, under which these objectives will be pursued, consists in the improvement of infrastructure and enhancement of connectivity through the establishment of 'secure and efficient network of land, sea and air passages', as well as further facilitation of trade and investment, establishment of free trade areas, and, crucially for this article, enhancement of cultural exchanges and interactions between the peoples of the participating countries (see 'III. Framework').

3.2 The place of digital art in the BRI and its potential role in developing it

Analysing the Vision and Actions for the BRI, it is possible to identify areas in which digital art can play an important role for the materialization and development of the initiative. The proposed framework under which the BRI's objectives are to be pursued contemplates the enhancement of cultural exchanges and interactions between the peoples of the participating countries, as mentioned in the previous subsection. Cultural dialogue is also defined as a core guiding principle of the initiative and a priority aspect of cooperation (see 'II. Principles'). Some actions suggested to materialize such visions include organizing 'arts festivals, films festivals' and 'cooperat[ion] on the production and translation of fine films' (see 'IV. Cooperation Priorities').

This framework is gradually being incorporated into China's cultural policy. Indeed, as plans to implement the BRI are developed in virtually every level of government in China, it is noteworthy that, under the already mentioned Ministry of Culture and Tourism programme, culture and tourism-related projects to be implemented in the Belt and Road, featuring digital art, are set to receive preferential treatment in the approval and financing process, carried out in collaboration with several major banks.²⁶ Moreover, in line with the Vision and Actions for the BRI and in keeping with the principle of international integration through international ex-

changes and cooperation of China's digital art industry policy (see (2)), the first BRI digital art exhibition was launched in Beijing in September 2019 and continued through October and November, with Chinese digital artists also displaying their works in Italy and Kyrgyzstan.²⁷ While the event was 'one sided' in the sense that it only involved Chinese artists, it may signal the beginning of a process which can catalyse exchanges and interactions between international artists.

Nevertheless, the full potential of digital art in helping to materialize and develop the BRI is intimately linked to the successful implementation of some of its objectives and strategies. In particular, increased market integration and facilitation of investment and trade would boost technological development and integration and would open more doors for the internationalization and integration of digital art enterprises as well as increasing competition between them. As result, the 'quality' of digital art, especially in highly corporatized areas such as the videogaming, animation and cinema industries, would likely be boosted. From China's perspective, international presence and competitiveness of Chinese cultural enterprises is a governmental policy objective and, thus, the international expansion of the country's cultural enterprises, including through the establishment of research and development agencies, investment, and mergers and acquisitions, is actively promoted.²⁸ Under this backdrop, Chinese cultural enterprises, including digital art enterprises, have recently started to put special emphasis on their international expansion and exportation of their goods and services. For instance, besides being intensely involved in international mergers and acquisitions, Tencent is now a major exporter or animation works, and is increasingly becoming a key international player in the digital art market.²⁹

Though the BRI initially appeared to have stronger focus on hard infrastructure, in recent years, digital technology has been increasingly gaining ground as a pivotal aspect of the initiative. The 'Digital Silk Road', as this aspect of the BRI is commonly referred to, is now

structure Investment Bank: Beijing's New Strategy of Geoeconomics and Geopolitics. *Journal of Contemporary China*, v. 27, n. 114, p. 831-847 at 838-841, 2018.

²⁶ XINHUA. China enhances financial support for BRI, poverty relief-related tourism, 2019. Available: http://english.www.gov.cn/state_council/ministries/2019/06/19/content_281476723289940.htm. Accessed on 9 sept. 2020.

²⁷ BELT AND ROAD NEWS. China's First Belt & Road Digital Art Exhibition Kicks off in Beijing, 2019. Available: <https://www.beltandroad.news/2019/09/23/chinas-first-belt-road-digital-art-exhibition-kicks-off-in-beijing/>. Accessed on 9 sept. 2020.

²⁸ THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA. n 19, especially at (17).

²⁹ PEOPLE'S DAILY ONLINE. China's digital culture sector to see robust growth: report, 2019. Available: <http://en.people.cn/n3/2019/0820/c90000-9607555.html>. Accessed on 9 sept. 2020.

one of the priority areas of cooperation of the BRI, the importance of which was highlighted in the Second Belt and Road Forum for International Cooperation, held in Beijing in 2019, including by China's President, Xi Jinping, and in the 'The Belt and Road Initiative Progress, Contributions and Prospects' report.³⁰ Ongoing developments suggest that investment and cooperation in technological innovation in areas such as artificial intelligence, nanotechnology and quantum computing, as well as in big data, cloud computing and smart cities technologies will become key features of the BRI implementation in the next years.³¹ Additionally, the BRI holds significant potential for the international expansion of Chinese fifth generation wireless technology (commonly known as 5G) mainly by Huawei, especially in a moment where such expansion faces resistance/blockade in some Western countries. Moreover, blockchain technology will also continue to grow in importance as its applications are expanded to more areas of use and to more places in the world.

Technological innovation has, of course, been a crucial driver of digital art development. The significant investment in the development and expansion of digital technology in the BRI will create a favourable ecosystem for digital art to thrive. With the increased interactions and integration expected as result of the investment in fostering people-to-people ties, it is reasonable to expect that the flux of digital art along (and beyond) the Belt and Road will increase. Potentially, this would entail also an increase in digital art trade and, crucially, deepen the connectivity aspired with the BRI beyond infrastructure and economy to include meaningful social interactions. In short, the BRI has significant potential to build a favourable ecosystem for the development of digital art, and the development of digital art, together with increased interactions between artists and the general public of participating countries, as well

³⁰ THE SECOND BELT AND ROAD FORUM FOR INTERNATIONAL COOPERATION. Xi Jinping Chairs and Addresses the Leaders' Roundtable of the Second Belt and Road Forum for International Cooperation (BRF), 2019. Available: <http://www.beltandroadforum.org/english/n100/2019/0429/c22-1392.html>. Accessed on 9 sept. 2020. BELT AND ROAD PORTAL. The Belt and Road Initiative Progress, Contributions and Prospects, 2019. Available: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>. Accessed on 9 sept. 2020.

³¹ See BELT AND ROAD PORTAL. The Belt and Road Initiative Progress, Contributions and Prospects, 2019 (at III. Prospects, 5. A road of innovation). Available: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>. Accessed on 9 sept. 2020.

as a potential increase in digital art trade, will in turn contribute to the development of the BRI.

4 Some potential legal and regulatory challenges

The increased interactions that are expected from the development of the BRI, including as a result of an expansion of the digital economy, and digital art trade in particular, in a context of rapid technological change, and aging and diverse laws from different jurisdictions, will bring some legal challenges to all stakeholders, including artists, trading platform operators and regulators. The challenges range from intellectual property rights issues, contractual and consumer rights issues, money laundering concerns, and international cooperation and regulation, to name but a few. The following subsections aim to explore these challenges in order to highlight the main issues that surround the development of digital art trade and its regulation. This enables a more realistic view on the potential and limitations of digital art and its role on the development of the BRI, beyond the more optimistic view based simply on the analysis of the different policy instruments on the BRI and cultural industries in China.

4.1 Intellectual property rights protection and the blockchain technology

A crucial question related to digital art concerns the need for adequate protection intellectual property rights and to ensure that digital artists reap the benefits of their creative work. Unlike traditional forms of art, which are generally tangible and/or fix, digital art is characteristically intangible, easily editable and easily accessible and usable by many people at the same or different times, thus assuming features of non-rivalrous goods.³² These features may create difficulties in verifying the authenticity of digital artworks, identifying the artists, adequately protecting intellectual property rights, and commodifying digital artworks.³³ For example, the va-

³² In this sense, ZEILINGER, Martin. Digital Art as 'Monetised Graphics': Enforcing Intellectual Property on the Blockchain. *Philosophy and Technology*, v. 31, p. 15-41 at 19, 2018.

³³ MCCONAGHY, Masha, et al. Visibility and digital art: Blockchain as an ownership layer on the Internet. *Strategic Change*, v. 26, n. 5, p. 461-470 at 463-465, 2017.

lue of a traditional piece of fine art lies in its scarcity and the possibility of it being owned exclusively, on top, naturally, of its perceived artistic quality. If a work can be easily disseminated and manipulated, its value is significantly affected, and the legitimate copyright holder is prevented from adequately reaping economic benefits from their work. This is a significant challenge presently faced by digital artists.

Interestingly, a promising approach to solve the problem did not emerge from the field of law but was brought by a relatively novel computer technology — the blockchain. The blockchain is ‘in essence a publicly accessible electronic database whose content is protected from corruption by a cryptographic system that is exceedingly difficult to break’.³⁴ Key characteristics of the blockchain include decentralization (technically, a third party tasked with validating the transaction is eliminated),³⁵ persistency (validated information is almost impossible to delete or alter), anonymity (the users identities are not revealed), and auditability (transactions can be easily verified and tracked).³⁶ The blockchain enables secure transactions through the cryptographic verification of information inserted into the system, which if it fulfils pre-defined conditions of a ‘smart contract’, will trigger an automatic validation and ‘final’ registration in the relevant block.³⁷ Regarding ‘smart contracts’ technically they are computer programs and not legal contracts, being so misnamed perhaps because they ‘autonomously verify or enforce contractual agreements’.³⁸

The promise of the blockchain technology for the

development of the digital art market is illustrated by the rapid growth of the digital art trade and its supporting platforms and tools. For instance, the digital art trading platform SuperRare³⁹ saw a 365% trade growth in seven months in 2020, accumulating a trade volume of more than \$1.6 million⁴⁰. In February 2021 a unique, remastered version of the famous internet meme ‘Nyan Cat’ was auctioned for around \$580,000 on the trading platform Foundation.^{41/42} Non-fungible tokens (NFT) have emerged as valuable tool in the trading of digital artwork in that, unlike Bitcoin, for example, each token is unique, thus being more suitable to represent each unique piece of art⁴³.

Notwithstanding, the emergence and increased use of blockchain and other ‘disruptive’ technologies or technological tools put several legal challenges for the parties that conduct transactions within it. It also present a regulatory challenge for States, who must (re)define their regulatory approaches to deal with these technological disruptions that create disruptions in the laws, and put in place a legal framework that address conceptual, legal and practical challenges it brings about.⁴⁴

For instance, although one of the defining features of the blockchain is the elimination of intermediaries and third parties and although this feature may have the advantage of speeding up transactions and reducing costs, it may also raise challenges where the involvement of a governmental agency is a requirement, for example, for the registration and/or reviewing of the transaction.⁴⁵ Notwithstanding, in China, as in most

³⁹ See <https://superrare.co/>. Accessed on 09 jan. 2021.

⁴⁰ COINTELEGRAPH. Digital Art Trading Platform ‘SuperRare’ Sees Volume Increase 365%, 2020. Available: <https://cointelegraph.com/news/digital-art-trading-platform-superrare-sees-volume-increase-365>. Accessed on 9 jan. 2021.

⁴¹ THE NEW YORK TIMES. Why an Animated Flying Cat With a Pop-Tart Body Sold for Almost \$600,000, 2021. Available: <https://www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html>. Accessed on 9 jan. 2021.

⁴² See <https://foundation.app/>. Accessed on 9 jan. 2021.

⁴³ MUSAN, Dragos I. NFT.finance: Leveraging Non-Fungible Tokens. Imperial College of London, p. 12-13, 2020. Available: <https://www.imperial.ac.uk/media/imperial-college/faculty-of-engineering/computing/public/1920-ug-projects/distinguished-projects/NFT-finance-Leveraging-Non-Fungible-Tokens.pdf>. Accessed on 9 jan. 2021.

⁴⁴ TWIGG-FLESNER, Christian. Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law. In: DE FRANCESCHI, I. (ed). *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersectia, p. 21-48, 2016.

⁴⁵ DELOITTE. Blockchain: Legal Implications, questions, op-

³⁴ ZEILINGER, Martin. Digital Art as ‘Monetised Graphics’: Enforcing Intellectual Property on the Blockchain. *Philosophy and Technology*, v. 31, p. 15-41 at 22, 2018.

³⁵ Nevertheless, there is the possibility of establishing a ‘centralized’ blockchain also called ‘private blockchain’ or ‘permissioned blockchain’ where there is a ‘central’ operator that grants approvals for users to access the system (SAVELYEV, Alexander. *Copyright in the blockchain era: Promises and Challenges*. *Computer Law & Security Review*, v. 34, p. 550-561 at 551, 2018).

³⁶ ZHENG, Zibin et al. An Overview of Blockchain Technology: Architecture, Consensus, and Future Trends. *IEEE 6th International Congress on Big Data*, p. 557-564 at 558-559, 2017. Available: <https://ieeexplore.ieee.org/document/8029379>. Accessed on 9 sept. 2020.

³⁷ See, for example, GÜRKAYNAK, Gönenç, et al. Intellectual property law and practice in the blockchain realm. *Computer Law & Security Review*, v. 34, p. 847-862 at 848-850, 2018.

³⁸ ZEILINGER, Martin. Digital Art as ‘Monetised Graphics’: Enforcing Intellectual Property on the Blockchain. *Philosophy and Technology*, v. 31, p. 15-41 at 19, 2018

other jurisdictions, copyright registration, including of digital artworks, is not required, although there is voluntary copyright registration system in place.⁴⁶ But since the blockchain does not completely eliminate the possibility of disputes and such disputes may be decided by the courts, which may, in theory, issue a decision to alter the registration information, this may represent a significant challenge, considering the ‘decentralization’ and ‘persistence’ features of the blockchain.

Nevertheless, the area of intellectual property rights protection is possibly where the blockchain holds the most potential, for its ability to keep a reliable record on ownership and transaction history of a work, thus making it difficult for forgeries to be traded in the system. Additionally, the blockchain technology holds strong potential in the area of intellectual property management as it can serve as a reliable, transparent database that can be publicly accessible by the public.⁴⁷ Moreover, non-fungible tokens made it easier for artists to commercialize their artwork and benefit from it.

4.2 Contract Law and consumer protection issues

Digital art trade and the ecosystem which hosts better promise of hosting it — the blockchain, with its related platforms and tools — also face/pose legal challenges and regulatory challenges.

A first question relates to the classification of digital art. Is it a ‘good’, a ‘software’, another kind of ‘intangible’ or novel Contract Law subject matter that begs legal classification, for example, as a ‘digital asset’? However, a deeper exploration into these concepts, considering their general meaning, may show that while they may not be synonymous, they are not mutually exclusive either.

A second question is whether digital art transactions are sales, licenses, or something else. Kim, for example, suggests that these difficult questions were faced

by the drafters of the American ‘Principles of the Law of Software Contracts’ when defining their scope (as covering only ‘software transactions’ and not ‘digital content’) and when choosing certain terminology (such as the more general term ‘transactions’, to avoid having to define software transactions as ‘sales’, ‘licences’ or something else)⁴⁸. Twigg-Flesner has explored different regulatory approaches to deal with disruptions to the law by technological developments, including, for example, the establishment of a new legal category for digital content, introduction of specific digital content-related legal rules, simply extend the definition of ‘goods’ to cover ‘digital content’, or adapt the existing legal rules to account also for the features of digital content.⁴⁹ These approaches may be suitable to deal with the need to address the classification of digital content where the legal system establishes a closed category of contract types (first approach in the previous sentence) or to deal with the need to ensure the existence of legal quality standards and remedies for digital content transactions and thus ensure consumer protection (the remaining approaches listed in the previous sentence).⁵⁰

From a practical point of view, digital art transactions do not involve the transfer of physical property, do not involve the transfer of copyright to the work, nor do they grant necessarily the exclusive right to use the work, but simply (yet crucially) ‘bragging rights’ of possessing the ‘original’ copy of the work.⁵¹ This poses important questions to the parties of digital art transactions as they will need to carefully consider the terms of their transaction considering one or more potentially applicable legal regime of contract categories.

A third crucial question relates to the legal status of electronic contracts (including transactions concluded

portunities and risks, 2018. Available: <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dtl-tax-global-blockchain-wp-march-2018.pdf>. Accessed on 9 sept. 2020.

⁴⁶ WANG, Junyao, et al. A Summary of Research on Blockchain in the Field of Intellectual Property. *Procedia Computer Science*, v. 147, p. 191-7 at 193, 2019.

⁴⁷ SAVELYEV, Alexander. Copyright in the blockchain era: Promises and Challenges. *Computer Law & Security Review*, v. 34, p. 550-561 at 553, 2018

⁴⁸ KIM, Nancy S. Expanding the Scope of the Principles of the Law of Software Contracts to Include Digital Content. *Tulane Law Review*, v. 84, n. 6, p. 1595-iv at 1597-1598, 2010.

⁴⁹ See TWIGG-FLESNER, Christian. Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law. In: DE FRANCESCHI, I. (ed). *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersectia, p. 21-48 at 31-42, 2016.

⁵⁰ TWIGG-FLESNER, Christian. Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law. In: DE FRANCESCHI, I. (ed). *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersectia, p. 21-48 at 31-32, 2016.

⁵¹ See, for example, THE VERGE. Beeple sold an NFT for \$69 million, 2021. Available: <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-every-days-69-million>. Accessed on 14 mar. 2021.

through ‘smart contracts’). In this regard, for digital art transactions conducted in the blockchain, it is well possible that information inserted into the system yields a technically valid transaction on the blockchain yet invalid in the eyes of the law and be a source of legal disputes. Regarding this aspect, the Chinese legal system recognizes electronic contracts as valid, although requirements such as those applicable to electronic signatures apply.⁵² Moreover, there are also restrictions to the use of electronic signatures, as their use is not allowed for documents concerning personal relationships, trade of immovable estates, termination of public services, and other situations as stipulated by laws or administrative regulations.⁵³ Thus, in principle, there is no obstacle for the use of electronic contracts to transfer digital art.

Another not less important question concerns legal status of electronic payment methods, including the legal status of cryptocurrencies, such as Bitcoin.⁵⁴ Countries such as China banned the use of private virtual currencies in the country, while other countries such as Japan and the United States did not.⁵⁵ The question then arises on how digital artists may conduct transactions on the blockchain and other operations without breaking the law, and whether virtual currencies are acknowledged as valid money in the relevant jurisdictions. China has announced the launch of its sovereign virtual currency (Digital Currency Electronic Payment), but radically differs from ‘private’ cryptocurrencies in that it will be based on a centralized system controlled by China’s Central Bank and this authority will not use blockchain to issue the digital currency to the commercial banks, although the latter may use the technology in their operations with the public.⁵⁶ The legal impossi-

bility of using currently circulating cryptocurrencies as means of payment represents a challenge that Chinese digital artists and those that want to conduct transactions with Chinese costumers will have to consider. To be clear, it is understandable why some governments are reluctant to accept such cryptocurrencies as valid money, namely due to their decentralized nature which means that they are out of Central Banks’ control and are vulnerable to being used in the conduction of criminal activities. As one commentator put it:

*[a permissionless/public blockchain] is hardly compatible with the legal framework. (...) only permissioned blockchains can co-exist within the legal framework and augment it instead of competing with it. It can be explained with the matters of sovereignty.*⁵⁷

Nevertheless, it is also difficult to overlook the negative impact of such approach to the development of digital art trade.

4.3 Vulnerability to money laundering and other criminal activities

The art market in general has long been viewed with suspicion, due to its apparent vulnerability to money laundering and other criminal activities. For instance, before the introduction of the Anti-Money Laundering Act of 2020, there were no anti-money laundering regulations in the United States making the market particularly vulnerable to criminal activities, as highlighted in the much echoed Senate Report⁵⁸ published months earlier. The amount of money laundered in the art market is estimated to be around \$3 billion, half of all the illicit money in the art market.⁵⁹ The vulnerability of the art market to illicit activities was further illustrated by the realisation that it has been explored even to finan-

⁵² See, The Electronic Signature Law of the People’s Republic of China, 2005 as amended in 2015, especially Arts. 2, 13 and 34.

⁵³ The Electronic Signature Law of the People’s Republic of China, 2005 as amended in 2015, Art. 3.

⁵⁴ See, for example, DNIPROV, Oleksii, et al. Legal Status of Cryptocurrency as Electronic Money. *Journal of Legal, Ethical and Regulatory Issues*, v. 22, n. 2 (Special Issue), p. 1-6, 2019.

⁵⁵ XIE, Rain. Why China Had to Ban Cryptocurrency but the U.S. Did Not: A Comparative Analysis of Regulations on Crypto-Markets between the U.S. and China. *Washington University Global Studies Law Review*, v. 18, n. 2, p. 457-492 at 457, 2019; GÜRKAYNAK, Gönenç, et al. Intellectual property law and practice in the blockchain realm. *Computer Law & Security Review*, v. 34, p. 847-862 at 851, 2018.

⁵⁶ YEUNG, Karen. Explainer: What is China’s cryptocurrency alternative sovereign digital currency and why is it not like bitcoin? Available: <https://www.scmp.com/economy/china-economy/article/3083952/what-chinas-cryptocurrency-sovereign-digital-currency-and-why>. Accessed on 9 sept. 2020.

⁵⁷ SVELYEV, Alexander. Copyright in the blockchain era: Promises and Challenges. *Computer Law & Security Review*, v. 34, p. 550-561 at 551, 2018.

⁵⁸ UNITED STATES SENATE – PERMANENT SUBCOMMITTEE ON INVESTIGATIONS. The Art Industry and U.S. Policies that Undermine Sanctions. Staff Report, 2020. Available: <https://www.hsgac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf>. Accessed on 13 mar. 2021.

⁵⁹ MASHBERG, Tom. The art of Money Laundering: The Loosely Regulated Art Market is Rife with Opportunities for Washing Illicit Cash. *Finance & Development*, v. 56, n. 3, 2019. Available: <https://www.imf.org/external/pubs/ft/fandd/2019/09/the-art-of-money-laundering-and-washing-illicit-cash-mashberg.htm>. Accessed 13 mar. 2021.

ce terrorist organizations. Indeed 2018, Spanish police detained two persons accused of smuggling art pieces stolen by ISIS-affiliated groups in Libya.⁶⁰

The regulatory loopholes that enabled the use of the art market for money laundering and other criminal activities in the United States and also not so long ago in the European Union were the absence of any obligation of reporting of suspicious transactions, such as those commonly found in relation to banks and other financial institutions. Moreover, the absence of mechanisms to ensure that the buyers and sellers of artwork were known, made it particularly appealing for money launderers. These issues have been subject to regulatory efforts, both in the United States and in the European Union.⁶¹

Researchers have also identified that money laundering, as well as other crimes such as counterfeiting, and corruption are also a prevalent feature in the Chinese art market.⁶² Highlighting the seriousness of the situation, one of them wrote:

*Lifting the veil off the flourishing art market in China, we can see corruption, bribery and money laundering. Xiao Ping, a famous artist and former Nanking Museum Appraisal Consultant said that "in medium and small auction companies, 80% of the works of art are fake." This is a contradictory situation since several works of art are dubious or even evidently fake, but managed to be sold at a ridiculously high price. It is ridiculous for a fake to be sold at hundreds of millions of RMB.*⁶³

The digital art market remains particularly vulnerable to money laundering activities. While blockchain technology may be particularly beneficial in addressing issues of provenance and help fight counterfeiting, it is

⁶⁰ CNN. Two Spaniards arrested over smuggling of artifacts looted by ISIS, 2018. Available: <https://edition.cnn.com/2018/03/29/europe/spain-arrests-isis-artifacts-libya-intl/index.html>. Accessed 13 mar. 2021.

⁶¹ See, for example, for the European context, HUFNAGEL, Saskia and KING, Colin. Anti-money laundering regulation and the art market. *Legal Studies*, v. 40, n. 1, p. 131-150, 2020.

⁶² See for example, LI, Jie. An Analysis of Chinese Art Market Mechanism with Supply-side Structural Reform. *Advances in Economics, Business and Management Research*, v. 32, p. 360-362, 2017; ZHOU, Fanyu and Sensel, Ralf. Money Laundering in the Chinese Art Market and its Solutions. 2017 International Conference on Social Sciences, Arts and Humanities, Bangkok, 17-19 mar. 2017. Available: https://webofproceedings.org/proceedings_series/ESSP/SSAH%202017/SSAH_101813.pdf. Accessed on 13 mar. 2021.

⁶³ ZHOU, Fanyu and Sensel, Ralf. Money Laundering in the Chinese Art Market and its Solutions. 2017 International Conference on Social Sciences, Arts and Humanities, Bangkok, 17-19 mar. 2017 at 61.

still vulnerable to money laundering when cryptocurrencies are used, since the true identities of the users are not revealed.⁶⁴ One of the basic principles of anti-money laundering legislation and best practices is called 'Know Your Customer'. Well, in permissionless blockchains, characterized by free access, anonymity and decentralization there is no central authority responsible for monitoring transactions and monitor suspicious activities, so there is no reliable mechanism to identify criminals in the system.

While this is an area to which regulators across the world are looking at and searching for adequate solutions, it can be argued that the use of digital art trade to launder money is detrimental to its development and general acceptance as a legitimate asset, worth of a legitimate investment.

4.4 International cooperation and regulation

The global nature of the internet and of the digital trade demands some level of coordination and cooperation at the international level and coherent regulatory frameworks to foster international digital trade, including digital art trade, without neglecting other related aspects such as consumer rights and cybersecurity. The current multilateral trade regime, mainly composed by WTO's major Agreements (GATT, GATS, TRIPS) built mainly to account for the trade of tangible goods and 'offline' services, and related intellectual property issues, is increasingly of limited application and value for the international trade of digital content, including digital art, despite its 'intrinsic flexibility and resilience'⁶⁵. Specifically, for instance, the WTO's GATS disciplines have already been found to be 'insufficient to deal with new-age issues in electronic commerce'⁶⁶ because, inter alia:

⁶⁴ On the use of cryptocurrencies for money laundering and other criminal activities see, for example, DUPUI, Daniel and GLEASON, Kimberly. Money laundering with cryptocurrency: open doors and the regulatory dialectic. *Journal of Financial Crime* (ahead of print). Available: <https://www.emerald.com/insight/content/doi/10.1108/JFC-06-2020-0113/full/html>. Accessed on 13 mar. 2021; BROWN, Steven David. Cryptocurrency and criminality: The Bitcoin opportunity. *The Police Journal*, v. 89, n. 4, p.327-339, 2016.

⁶⁵ BURRI, Mira. Designing Future-Oriented Multilateral Rules for Digital Trade. In: SAUVÉ, Pierre and ROY, Martin (eds). *Edward Elgar Research Handbook on Trade in Services*, Edward Elgar, p. 331-356 at 334, 2016.

⁶⁶ MITCHELL, Andrew D. and MISHRA, Neha. Modernizing International Trade Law for the Digital Economy. *Vanderbilt Journal of Entertainment & Technology Law*, v. 20, n. 4, p. 1073-1134

they are not adequate to promote the growth of cross-border digital trade; the Services Sectoral Classification List that Member States use as a reference point when making their commitments is outdated and does not adequately represent digital economy business sectors; and they do not properly deal with cross-border data flows (and related issues) — which are the subject on which most of the national regulations limiting digital services are focused.⁶⁷

There have been efforts to approve multilateral rules on digital trade at the WTO, chiefly through the WTO Work Programme on Electronic Commerce. However, ideological differences between major players such as the United States, the European Union and China, and between developed and developing countries, regarding issues ranging from the regulatory approach (whether to create a new system of specific rules on digital trade or to review current rules to adapt them to digital trade challenges), to conceptual aspects, to data issues (including data flows, privacy, data localization, censorship).⁶⁸ Generally, China's ideological approach has been described as 'guarded', i.e., it adopts a cautious approach towards regulation of the Internet and Internet-based services and favours strong control over data issues and protection of domestic interests.⁶⁹ Differently, the United States (and Japan) favour a market-based approach, giving technological companies significant discretion on the adoption of user policies, while the European Union (and Australia, Canada, Korea and Taiwan) tend to favour an interventionist approach on digital commerce regulation, although not being averse to digital trade liberalization.⁷⁰

at 1088, 2018.

⁶⁷ MITCHELL, Andrew D. and MISHRA, Neha. Modernizing International Trade Law for the Digital Economy. *Vanderbilt Journal of Entertainment & Technology Law*, v. 20, n. 4, p. 1073-1134 at 1088-1097, 2018.

⁶⁸ ISMAIL, Yasmin. E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement. International Institute for Sustainable Development and CUTS International, 2020. Available: <https://www.iisd.org/system/files/publications/e-commerce-world-trade-organization-.pdf>. Accessed on 9 mar. 2021.

⁶⁹ MITCHELL, Andrew D. and MISHRA, Neha. Modernizing International Trade Law for the Digital Economy. *Vanderbilt Journal of Entertainment & Technology Law*, v. 20, n. 4, p. 1073-1134 at 1085-1086, 2018. According to the Authors, other countries that embrace the guarded approach include developing countries such as Indonesia and Russia as well as developed countries such as the United Kingdom and France.

⁷⁰ MITCHELL, Andrew D. and MISHRA, Neha. Modernizing International Trade Law for the Digital Economy. *Vanderbilt Jour-*

Nevertheless, WTO jurisprudence on some cases has helped, in the absence of multilateral consensus, to clarify and advance existing norms in relation to digital trade issues.⁷¹ At least two of the cases involved China — *China – Publications*⁷² and *Audiovisual Products and China – Electronic Payment Services*⁷³. In *China – Publications*, the Panel (and the Appellate Body) found that China, by limiting importing rights of State-owned enterprises and prohibiting foreign-invested enterprises in China from importing audiovisual home entertainment products had violated its obligation to grant in a non-discretionary manner the right to trade, under China's Accession Protocol (paragraphs 1.2 and 5.1) and China's Accession Working Party Report (84(a) and (b)), as well as its market access and national treatment commitments under GATS Arts. XVI and XVII, respectively. Moreover, the Appellate Body, confirming the Panel's findings, determined that China had not demonstrated that the contested provisions were 'necessary' to protect public morals, therefore China disagreed with China's position that these provisions were justified under Art. XX (a) of the GATT. This case, irrespective of the Dispute Settlement Body findings, involves an important question when it comes to international digital art trade, namely to what extent countries are willing to open their markets to cultural products from other countries, that may potentially clash with the government's or societal view of what is acceptable. For China, including in the context of the BRI, the materialization of 'international integration' principle that guides its governance on cultural industries,⁷⁴ it may potentially face itself with similar restrictions or resistance abroad as its own towards some categories of foreign cultural products. Ne-

nal of Entertainment & Technology Law, v. 20, n. 4, p. 1073-1134 at 1084-1085, 2018.

⁷¹ BURRI, Mira. Designing Future-Oriented Multilateral Rules for Digital Trade. In: SAUVÉ, Pierre and ROY, Martin (eds). *Edward Elgar Research Handbook on Trade in Services*, Edward Elgar, p. 331-356 at 335-336, 2016.

⁷² WTO Panel Report. *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, 12 aug. 2009; Appellate Body Report. *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 dec. 2009. See also, WTO. *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Joint communication from China and the United States*, WT/DS363/19, 11 May 2012.

⁷³ WTO Panel Report. *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R, 31 aug. 2012.

⁷⁴ See Section 3, above.

vertheless, the international cooperation approach that is presented as avenue to materialize such principle may prove highly valuable to negotiating solutions on those potential differences.

In case *China – Electronic Payment Services*, the Panel determined, inter alia: that China’s Schedule does not market access commitment regarding subsector 7.B (d) that would allow cross-border supply of electronic payment services by foreign service providers; that China has a market access commitment allowing foreign service providers to establish commercial presence in China to supply electronic payment services, provided that they comply with certain requirements related to local currency business; that China made a national treatment commitment for both cross-border supply of electronic payment services and for commercial presence for the supply of electronic payment services. In the context of digital art trade, which relies largely on online trading platforms, electronic payment services and digital currencies (including private cryptocurrencies, currently not recognized as ‘money’ by China) it is apparent by looking at China’s commitments, or rather, absence of commitments (for example, to allow foreign providers of electronic payment services cross-border access to the Chinese market) as a significant limitation for the development of its international digital trade, including in the context of the BRI.

Another avenue being used to address the inadequacy of the multilateral trade regime and the lack of consensus at the multilateral level it is that of preferential trade agreements, which have increasingly incorporated Chapters or provisions on digital trade.⁷⁵ Nevertheless, while potentially a suitable ground for major players to advance their ideological regulatory approaches, the resulting diverging approaches between different groups of preferential trade agreements consolidate and confirm that there is still a long way to go before global consensus on crucial aspects can be achieved. Moreover, the risk of conflict between preferential trade agreements and WTO agreements cannot be overlooked.⁷⁶ China has also concluded several preferential

trade agreements, including with partners under the BRI. However, it has consistently been reluctant to making any significant commitments on digital trade issues, especially on trade liberalization.⁷⁷ However, it remains to be seen whether the country’s growing importance as a major exporter of digital content as well as its ambition of further promoting the internationalization of its cultural industries will force it to change its position. It is submitted that some flexibility would be beneficial to the development of digital trade, including digital art trade, and to the enhancement of cultural exchanges and interactions between the peoples of the participating countries in the BRI, thus contributing to the materialization of its objectives.⁷⁸

5 Conclusion

The constant development of digital technologies presents seemingly limitless opportunities for the development of digital art. China, in particular, has seen significant growth of the digital art industry, in line with a broader trend that has seen China’s growth in production, import and export of cultural products reach humongous levels. A notable feature of China’s digital art industry is the significant role played by giant corporations, especially in the production and commercialization of video games, animation and cinema, and their drive to internationalize themselves through mergers and acquisitions abroad. Nevertheless, individual artists and small and medium enterprises also represent a vibrant section, relying mostly on e-commerce platforms and sometimes the breach of the digital barrier to commercialize their artwork.

The article also noted that digital art will greatly benefit from the development of the BRI, enjoying a favourable ecosystem as a result of technological innovation and expansion and market integration, as well as increased interactions between artists. But digital art

International Trade Law for the Digital Economy. *Vanderbilt Journal of Entertainment & Technology Law*, v. 20, n. 4, p. 1073-1134 at 1103-1107, 2018.

⁷⁵ WEBER, Rolf H. Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism. *Asian Journal of WTO and International Health Law and Policy*, v. 10, n. 2, p. 321-348 at 341, 2015.

⁷⁸ For the importance of cultural exchanges and interactions for the materialization of the BRI objectives, see the Vision and Actions for the BRI at ‘III. Framework’.

⁷⁵ See, for example, BURRI, Mira and POLANCO, Rodrigo. Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset. *Journal of International Economic Law*, v. 23, n. 1, p. 187–220, 2020; WEBER, Rolf H. Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism. *Asian Journal of WTO and International Health Law and Policy*, v. 10, n. 2, p. 321-348, 2015.

⁷⁶ MITCHELL, Andrew D. and MISHRA, Neha. Modernizing

also has significant potential in positively impacting the development of the BRI, raising the level and quality of interactions between the countries involved beyond the government level, to incorporate their people.

However, the 'state of flux' of digital art and the ecosystem in which it thrives, creates disruptions not only in business models but also in laws, creating challenges to all stakeholders. In face of these disruptions, China has so far opted for a 'guarded approach', preferring to impose strong controls on and being reluctant on liberalizing digital trade. However, as China's cultural industries internationalize and seek to access foreign markets, it remains to be seen whether this may push the country to adopt a more liberalized approach to digital trade in general and digital art trade in particular. International cooperation will be key in such developments and preferential trade agreements are likely to play a greater role in future international regulatory frameworks, as comprehensive multilateral consensus is unlikely in the near future. In any event, harmonization of different legal frameworks across jurisdictions along the Belt and Road and beyond would be highly beneficial for digital trade, including digital art trade, by, among other things, reducing transaction costs and legal uncertainty.

Notwithstanding, the development of digital art within the BRI and beyond, is now conditioned by some restrictive policies, such as the ban on private digital currencies by China. While such approach may be understandable due to concerns such as lack of oversight that characterize current decentralized cryptocurrencies and prevalence of cybercrime, the hindering effect of such ban on the development of digital trade, especially digital art trade cannot be overlooked. If such ban were to be lifted, although possibly accompanied by the introduction of significant regulatory controls, digital art trade would benefit greatly and its potential for the development of the BRI could be materialized more effectively.

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