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Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition

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ABSTRACT
Following the recent UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the first wave of scholarly work has focused on clarifying the interface between the Convention and the WTO Agreements. Building upon these analyses, the present paper takes however a different stance. It seeks a new, rather pragmatic definition of the relationship between trade and culture and argues that such a re-definition is particularly needed in the digital networked environment that has modified the ways markets for cultural content function and the ways in which cultural content is created, distributed and accessed. The paper explores first the significance (or the lack thereof) of the UNESCO Convention and subsequently outlines a variety of ways in which the WTO framework can be improved in a "neutral", not necessarily culturally motivated, manner to become more conducive to the pursuit of cultural diversity and taking into account the changed reality of digital media. The paper also looks at other facets of the profoundly fragmented culture-related regulatory framework and underscores the critical importance of intellectual property rights and of other domains that appear at first sight peripheral to the trade and culture discussion, such as access to infrastructure, interoperability or net neutrality. It is argued that a number of feasible solutions exist beyond the politically charged confrontation of trade *versus* culture and that the new digital media landscape may require a readjustment of the priorities and the tools for the achievement of the widely accepted objective of cultural diversity.

KEY WORDS
Cultural diversity, trade, digital technologies, audiovisual media, intellectual property rights, UNESCO, WTO.

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TRADE *VERSUS* CULTURE IN THE DIGITAL ENVIRONMENT: AN OLD CONFLICT IN NEED OF A NEW DEFINITION

Mira Burri-Nenova

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1. INTRODUCTION

The pair "trade *and* culture" has always been described as a "trade *versus* culture" one, in particular in the domain of international rule-making, and a plethora of enquiries has attested to the impossibility of mitigating this conflict.[1] The international community itself has been literally torn apart in its approaches to these matters and we have observed the emergence of diverse international instruments, both binding and non-binding, for tackling trade *or* culture issues.

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the 33rd Session of the General Conference of the United Nations Educational, Cultural and Scientific Organization (UNESCO) in 2005 and

[1] See Lisa L. Garrett, *"Commerce versus Culture: The Battle between the United States and the European Union over Audiovisual Trade Policies"* (1994) North Carolina Journal of International Law and Commercial Regulation 19, pp. 553-557; Jonas M. Grant, *"'Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from GATT"* (1995) Indiana Law Journal 70, pp. 1333-1365; Mary E. Footer and Christoph Beat Graber, *"Trade Liberalisation and Cultural Policy"* (2000) Journal of International Economic Law 3:1, pp. 115-144; Bruno de Witte, *"Trade in Culture: International Legal Regimes and EU Constitutional Values"* in Gráinne de Búrca and Joanne Scott (eds.), The EU and the WTO – Legal and Constitutional Issues, Oxford: Hart, 2003, pp. 237-255; Patrick A. Messerlin, Stephen E. Siwek and Emmanuel Cocq, *The Audiovisual Services Sector in the GATS Negotiations*, Washington, DC: American Enterprise Institute Press, 2004; Ivan Bernier, "*Trade and Culture*" in Patrick F.J. Macrory, Arthur E. Appleton, Michael G. Plummer (eds.), The World Trade Organization: Legal, Economic and Political Analysis, New York: Springer, 2005, pp. 747-793.

in force since 18 March 2007,[2] is the latest piece of international rule-making in the category of "cultural" measures. Although it is a recent act, its prehistory is long[3] and if one cares to follow it, it is obvious that the foremost justification of the Convention lies in its opposition to trade.[4] Trade is to be understood here broadly as the epitome of economic globalisation, whose advancement has been significantly furthered by the emergence of enforceable multilateral trade rules. These very rules, whose bearer is the World Trade Organization,[5] represent the (perceived) antipode to "culture" and have commanded the formulation of counteracting norms that may sufficiently "protect" and "promote" culture.

While the fragmentation of law[6] has been widely acknowledged when construing the pair "trade and culture",[7] the focus of the enquiries has remained constrained to the particular rules and policies related to either trade or culture, ignoring the other "fragments" of the puzzle, which are less immediately trade- or culture-related. We will argue in the following that this might be unfortunate and substantially reduce the chances of creating coherent regulatory models, which could be trade-conducive while sufficiently accommodating public interest objectives.

This hypothesis is not only a critique of the current approaches but is directly related to our premise that the practical reality of contemporary cultural content creation, distribution and consumption may be such that a broader understanding beyond the conflict "trade *versus* culture" is needed. We will argue that the digital networked environment, which has now become pervasive, has radically altered the modes of creation, distribution of and access to cultural content, as well as the conditions for creativity and innovation, and calls for a re-evaluation (and/or

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[2] 148 countries voted for the adoption of the Convention, while 4 countries (Australia, Honduras, Nicaragua and Liberia) abstained. Two countries, the US and Israel, opposed. As of 16 July 2008, 89 countries had ratified the Convention. See http://portal.unesco.org/la/convention.asp?KO=31038&language=E.

[3] See Ivan Bernier, *"A UNESCO International Convention on Cultural Diversity"* in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.), Free Trade *versus* Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services, Zurich: Schulthess, pp. 65-76; Tania Voon, *"UNESCO and the WTO: A Clash of Cultures?"* (2006) International and Comparative Law Quarterly 55:3, pp. 635-652; Tania Voon, *Cultural Products and the World Trade Organization*, Cambridge: Cambridge University Press, 2007, at pp. 173-216; Americo Beviglia-Zampetti, *"WTO Rules in the Audio-Visual Sector"* in Paulo Guerrieri, P. Lelio Iapadre and Georg Koopmann (eds.), Cultural Diversity and International Economic Integration: The Global Governance of the Audio-Visual Sector, Cheltenham, UK: Edward Elgar, 2005, pp. 261-284.

[4] See e.g. Christoph Beat Graber, *"The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO"* (2006) Journal of International Economic Law 9:3, pp. 553-574.

[5] The WTO was established in April 1994 as part of the final act embodying the results of the Uruguay Round of multilateral trade negotiations and building upon the General Agreement on Tariffs and Trade (GATT) 1947. See Agreement Establishing the World Trade Organization with Understanding on the Rules and Procedures Governing the Settlement of Disputes and Trade Policy Review Mechanism, Marrakesh, 15 April 1994, TS 57(1996) Cm 3277; (1994) 33 ILM 15, entered into force 1 January 1995.

[6] See, among others, Andreas Fischer-Lescano and Gunther Teubner, *"Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law"* (2004) Michigan Journal of International Law 25, pp. 999-1046; Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law" (2004) Michigan Journal of International Law 25, 849-863; Martti Koskenniemi and Päivi Leino, *"Fragmentation of International Law? Postmodern Anxieties"* (2002) Leiden Journal of International Law 15, pp. 553-579; Joost Pauwelyn, *"Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands"* (2004) Michigan Journal of International Law 25, pp. 903-916; Pemmaraju S. Rao, *"Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation"* (2004) Michigan Journal of International Law 25, pp. 929-961; Kalypso Nicolaïdis and Joyce L. Tong, *"Diversity or Cacophony? The Continuing Debate over New Sources of International Law"* (2004) Michigan Journal of International Law 25, pp. 1349-1375.

[7] Jan Wouters and Bart De Meester, *"The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law"* (2008) Journal of Trade Law 41:1, pp. 205-240.

readjustment) of the policy tools for the achievement of the fundamental public interest objectives, including cultural diversity.

While looking at these hypotheses, the paper also seeks to address the following questions: To what extent does this juxtaposing of trade and culture hold true in reality, especially in the digital ecology? To what extent is the creation of rules carving out cultural issues and/or protecting cultural matters from global trade flows justified? And if the creation of such rules is not justified, why has the international community invested substantial amounts of time and energy in undertakings, such as the UNESCO Convention, which one may argue are futile (or even harmful)? Can the Convention nonetheless work? Are there any more advantageous things to be done? Where should we start?

We take up this daunting task in four stages. First, we briefly look at the specificities of the UNESCO Convention on cultural diversity and its potential impact. Setting the scene for our analysis, the second step is to outline some of the salient features of the digital networked environment with specific regard to its effects upon cultural content and cultural policy measures. Third, we discuss some of the suggestions put forward for a feasible interface between trade and culture, in particular in the light of the UNESCO Convention and its relation to the WTO Agreements. Assuming the unlikely realisation of any of these options and criticising their flawed focus in the digital environment, we seek more pragmatic solutions within the WTO system. Fourth, and outside the WTO, we look at other "fragments" of the fragmented culture-related regulatory framework to exemplify their critical importance for creativity, production, distribution of and access to cultural content. Finally, we pull all these strings together and attempt to outline an appropriate *modus operandi* for safeguarding cultural diversity in the new digital ecology.

2. THE UNESCO CONVENTION ON CULTURAL DIVERSITY

Without lengthy elaborations because the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions has been discussed aptly elsewhere,[8] in this section we outline its contours in order to discern its significance (or lack thereof) in the present context, i.e. the "trade/culture" clash in a digital setting.

At the heart of the "trade *versus* culture" quandary is the specific dual nature of the object of regulation, namely cultural goods and services. The latter are, on the one hand, commodities that can be traded and must thereby comply with the applicable rules for trade in services and goods. On the other hand, and as the UNESCO Convention notes, cultural goods and services have a distinctive nature as "vehicles of identity, values and meaning".[9] They intrinsically "embody or

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[8] Michael Hahn, *"A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law"* (2006) Journal of International Economic Law 9:3, pp. 515-552; Graber, supra note 4; Rachael Craufurd Smith, *"The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?"* (2007) International Journal of Communication 1, pp. 24-55; Wouters and De Meester, supra note 7; Christoph Beat Graber, *"Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity"*, NCCR Trade Regulation Working Paper 2008/08, May 2008 (forthcoming in Peter Van den Bossche and Hildegard Schneider (eds.), Protection of Cultural Diversity from an International and European Perspective, 2008), as well as the contributions to Nina Obuljen and Joost Smiers (eds.), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, Zagreb: Institute for International Relations, 2006.

[9] Article 1(g) UNESCO Convention.

convey cultural expressions, irrespective of the commercial value they may have".[10] The UNESCO Convention identifies as cultural "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content",[11] which is understood as "the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities".[12]

The explicit recognition of the inherent *dual* nature of cultural goods and services in a binding international legal instrument is a major contribution of the UNESCO Convention towards filling "a lacuna in public international law regarding cultural values".[13] Directly related to and stemming from this acknowledgment is the recognition of the sovereign right of the Parties to formulate and implement cultural policies and to adopt measures to protect and promote the diversity of cultural expressions.[14]

These lines drawn on the international law landscape, although undeniably novel in their explicitness and binding nature, should however not be seen as completely original: the UNESCO Convention is not an isolated undertaking but rather the distinct and further-reaching expression of the multiple existing efforts[15] in the field of culture and trade,[16] cultural heritage[17] and more broadly, of human rights, such as the Universal Declaration of Human Rights,[18] the International

[10] Article 4(4) UNESCO Convention.

[11] Article 4(3) UNESCO Convention. On the concept of culture underlying the UNESCO Convention, see Graber, supra note 8, at pp. 2-4.

[12] Article 4(2) UNESCO Convention. During the drafting of the Convention, a more comprehensive definition of cultural goods and services was used, in the sense that: (i) they are the outcome of human labour and creativity, contrasting them with works of nature; (ii) they express some form of symbolic meaning, which endows them with a cultural value or significance distinct from whatever commercial value they may possess; and (iii) they generate intellectual property, whether or not they are protected by intellectual property legislation (Appendix 2 to the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Consolidated Text prepared by the Chairperson of the Intergovernmental Meeting, CLT/CPD/2005/CONF.203/6 – Add., Paris, 29 April 2005, at Article 4(3)).

[13] Graber, supra note 4, at pp. 564-565.

[14] UNESCO Convention, at Article 5(1). "Cultural policies and measures" are defined in Article 4(6) as "those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services".

[15] Craufurd Smith, supra note 8, at pp. 28-29.

[16] See UNESCO, Agreement on the Importation of Educational, Scientific and Cultural Materials, adopted by the General Conference at its 5th Session, Florence, 17 June 1950 ("Florence Agreement"). The Agreement was updated with the Nairobi Protocol (adopted by the General Conference at its 19th session, Nairobi, 26 November 1976), which extended the free circulation principles to other cultural goods, particularly those using the technologies developed at that time, such as audiovisual materials. The Florence Agreement and Nairobi Protocol seek to remove customs charges on the import of certain educational, scientific and cultural materials and prohibit the imposition of discriminatory internal charges. The Florence Agreement also contains an early example of a "cultural preservation" clause. The reservation to the Agreement allows, solely in relation to trade between the US and another party, either side to suspend the operation of the Agreement where the scale of imports threatens "serious injury to the domestic industry […] producing like or directly competitive products" (Nairobi Protocol, at para. 2(a)). More recent acts are the Council of Europe Declaration on Cultural Diversity, adopted in December 2000 and the UNESCO Universal Declaration on Cultural Diversity, UNESCO Universal Declaration on Cultural Diversity, adopted by the General Conference at its 31st Session, Paris, 2 November 2001.

[17] Such as UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003, and Council of Europe, European Landscape Convention, European Treaty Series No 176, Florence, 20 October 2000.

[18] Universal Declaration of Human Rights, UN General Assembly Resolution 217A(III), U.N. Doc. A/810, 10 December 1948.

Covenant on Economic, Social and Cultural Rights,[19] and the International Covenant on Civil and Political Rights.[20] As noted above, the UNESCO Convention can also be seen as the crystallisation of the political efforts in the context of counterbalancing the effects of economic globalisation.

While these developments are largely to be judged positive, the UNESCO Convention deserves a great deal of criticism, in particular as far as the obligations of the Parties, the implementation criteria, the enforceability of the duties and the dispute settlement are concerned. We briefly[21] look into these in order to verify whether the gravity of these flaws is such that it renders the entire instrument blunt.

2.1. RIGHTS NOT OBLIGATIONS

As an act of international law, the UNESCO Convention contains certain rights and obligations[22] with diverse degrees of binding intensity upon which the Parties have agreed.[23] The UNESCO Convention has however precious few obligations and these are primarily formulated as mere stimuli for the Parties to adopt measures for the protection and promotion of the diversity of cultural expressions at the national[24] and international[25] levels, rather than as genuine duties.[26] The only provision of binding nature[27] resembles the WTO's enabling clause[28] and relates to the preferential treatment for developing countries, whereby developed countries must facilitate cultural exchanges with developing countries by granting preferential treatment to artists and other cultural professionals and practitioners, as well as to cultural goods.[29]

Thus, whereas the Parties could do plenty of things, they are not obliged to undertake any concrete and specific actions. The vagueness of the core obligation embodied in Article 7(1) to "endeavour to create […] an *environment* which encourages individuals and social groups: (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups,

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[19] International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3.

[20] International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171, in particular at Article 27.

[21] We only briefly discuss these points of critique since they have been widely acknowledged by the first wave of scholarly work done during the drafting and after the adoption of the UNESCO Convention. See supra note 8. See also Keith Acheson and Christopher Maule, *"Convention on Cultural Diversity"* (2004) Journal of Cultural Economics 28, pp. 243-256, and the following Comments by Frederick Van der Ploeg, (2004) Journal of Cultural Economics 28, pp. 257-261; Françoise Benhamou, (2004) Journal of Cultural Economics 28, pp. 263-266; Lelio Iapadre, (2004) Journal of Cultural Economics 28, pp. 267-273.

[22] Articles 5-19 UNESCO Convention.

[23] For a well-structured overview of the Convention's rights and obligations, see Graber, supra note 8, at pp. 5-6.

[24] UNESCO Convention, at Articles 7-11.

[25] UNESCO Convention, at Articles 12-19, excluding Article 16, which is of binding nature.

[26] Graber, supra note 8, at p. 6.

[27] Graber, ibid. at p. 8, footnote 59. Another provision that qualifies as an obligation relates to the cooperation in providing assistance, in particular to developing countries, in situations of serious threat to cultural expressions (Article 17 UNESCO Convention).

[28] See GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause"). See also Bernard Hoekman, *"More Favorable Treatment of Developing Countries: Ways Forward"* in Richard Newfarmer (ed.), Trade, Doha, and Development: Window into the Issues, Washington, DC: World Bank, 2006, pp. 213-221; Seung Wha Chang, *"WTO for Trade and Development Post-Doha"* (2007) Journal of International Economic Law 10:3, pp. 553-570.

[29] UNESCO Convention, at Article 16.

including persons belonging to minorities and indigenous peoples; [and] (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world",[30] is indeed astounding.

Furthermore, no "punishment" for non-compliance[31] is envisaged. Lack of action to achieve this "environment" or any of the other good faith obligations contained in Articles 7-19, as Craufurd Smith notes, "at worst, could result in a state being criticised by the Intergovernmental Committee or Conference of Parties […] on the basis of the state's own four yearly reports".[32] And, while such reporting exercises have proven advantageous in different settings,[33] they are unlikely to have any value here, since, as we show below, there exist neither any implementation criteria, nor any threat of sanctions.[34]

Despite the extremely limited obligations on the Parties to take action to protect and promote cultural diversity, the Convention formulates an extensive block of rights to that end. Article 6(2) of the UNESCO Convention provides a non-exhaustive list of measures that the Parties may adopt,[35] depicting "with variable clarity"[36] basically all known cultural policy measures that States put in place,[37]

[30] Emphases added.

[31] Acheson and Maule note in this regard: "Enforcement of an international agreement ultimately depends on the ability to exclude members from the gains that it generates because of the absence of effective third-party adjudication. A member that is assessed a penalty will accept an assessed sanction rather than invite expulsion if the discounted value of future benefits is sufficiently high. The creative challenge in a rules-based international agreement is to craft rules that generate significant gains for each member and to establish a fair dispute settlement mechanism (DSM) and related 'punishments' that deter non-compliance". Acheson and Maule, supra note 21, at p. 244.

[32] Craufurd Smith, supra note 8, at p. 39 and UNESCO Convention, at Article 9(a).

[33] Pursuant to the "Television without Frontiers" Directive, Member States are obliged to report every two years on the application of Articles 4 and 5 of the Directive, regulating respectively the inclusion of European works and independent productions in television programmes. Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities ("Television without Frontiers"), OJ L 298/23, 17 October 1989, at Article 4(3). Under the new Audiovisual Media Services Directive (Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AVMS), as amended by Directive 97/36/EC and by Directive 2007/65/EC)), which replaces "Television without Frontiers", this obligation remains (see also Article 26 on the implementation of the Directive). An additional one is foreseen for on-demand audiovisual media services. Pursuant to Article 3(i) AVMS, Member States must report to the Commission no later than 19 December 2011 and every four years thereafter on the promotion of the production of and access to European works.

[34] Craufurd Smith, supra note 8, at pp. 37-38, referring also to Cass R. Sunstein, *"Private Broadcasters and the Public Interest: Notes towards a 'Third Way'"* (1999) John M. Olin Law and Economics Working Paper No 65, pp. 1-71.

[35] Pursuant to Article 6(2)(a) to (h), such measures may include the following: (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions; (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services; (c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services; (d) measures aimed at providing public financial assistance; (e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities; (f) measures aimed at establishing and supporting public institutions, as appropriate; (g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions; (h) measures aimed at enhancing diversity of the media, including through public service broadcasting.

[36] Hélène Ruiz Fabri, *"Reflections on Possible Future Legal Implications of the Convention"* in Obuljen and Smiers, supra note 8, pp. 73-87, at p. 80.

ranging from any "regulatory measures aimed at protecting and promoting diversity of cultural expressions"[38] to the concrete example of public service broadcasting.[39] This "all inclusive" approach signals that the Convention's object has been "to endorse forms of market intervention rather than to preclude them"[40] and as such, it is not necessarily in line with the contemporary theory of regulation seeking the slightest possible intervention.[41]

Admittedly, non-exhaustive lists are not a rare phenomenon in intergovernmental treaty-making. They allow, through some vagueness and constructive ambiguity,[42] the bringing together of an array of (at times diverging) interests and the actual closing of the deal. Yet, what makes the UNESCO Convention peculiar in this regard is the complete lack of criteria and/or mechanisms that would make these definitions workable, separating the licit from the illicit cultural policy measures.

This normative incompleteness is a striking feature of the UNESCO Convention and has been much criticised both by prominent negotiation Parties, notably the US,[43] and by a host of scholars[44] who warn against protectionism, be it disguised or less so. It is indeed odd that while the Convention clearly acknowledges the dual nature of cultural goods and services and celebrates their cultural side, no attempt is made to provide guidance on how states might reduce the trade-distorting effects of cultural policy measures. While a balance between the economic and cultural nature of goods, services and activities is undoubtedly complex and as we illustrate below not easy to achieve even under purely national circumstances,[45] the UNESCO Convention could have at least made "reference to principles such as proportionality or effectiveness, which could guide the application of these measures and serve to prevent more blatant forms of protectionism".[46]

This innate defect of normative incompleteness is aggravated by the lack of institutional or adjudicatory mechanisms that could procedurally clarify and complete the contract, as we show in the following section.

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[37] For an overview of the domestic cultural policy measures, see Footer and Graber, supra note 1, at pp. 122-126.

[38] UNESCO Convention, at Article 6(2)(a).

[39] UNESCO Convention, at Article 6(2)(h).

[40] Craufurd Smith, supra note 8, at p. 40.

[41] See e.g. Richard R. Nelson (ed.), *The Limits of Market Organization*, New York: Russell Sage, 2005; Anthony I. Ogus, *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press, 1994; Johan den Hertog, *"General Theories of Regulation"* in Boudewijn Bouckaert and Gerrit De Geest (eds.), Encyclopaedia of Law and Economics, Cheltenham, UK: Edward Elgar, 2000, pp. 223-270.

[42] See interestingly, Itay Fischhendler, *"When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water"* (2008) Global Environmental Politics 8:1, pp. 111-136.

[43] The US noted in this regard: "This instrument remains too flawed, too open to misinterpretation, and too prone to abuse for us to support". See *"Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions"*, Statement by Louise V. Oliver, US Ambassador to UNESCO, Distributed by the Bureau of International Information Programs, US Department of State, available at http://usinfo.state.gov.

[44] See supra note 8.

[45] See infra Section 3.3.

[46] Craufurd Smith, supra note 8, at pp. 40-41.

2.2. MISSING BITS AND PIECES

Next to the almost entirely missing obligations and implementation criteria, one should note that the framework of the UNESCO Convention is not comprehensive enough to secure the protection and promotion of cultural diversity, leaving some critical bits and pieces outside its otherwise generously defined scope of application.[47]

Some of these missing elements are related to the centrality of State sovereignty which is intrinsic to the UNESCO Convention. Indeed, the sovereignty of the State Parties in the cultural field is included as one of the eight guiding principles underpinning the Convention (Article 2(2)[48]) and all rights and obligations stemming from the Convention are attributed to states. While this is understandable for an intergovernmental treaty of international law, cultural rights do not correspond to national boundaries.[49] The subscription to human rights and fundamental freedoms[50] may remedy this situation to a substantial extent but it is nonetheless disappointing that specific cultural rights, which states must respect (such as access to education or use of language of choice) did not make it into the text,[51] in particular since they were acknowledged by the earlier but non-binding UNESCO Declaration on Cultural Diversity.[52] Furthermore, while the Convention does mention indigenous peoples and traditional cultural expressions a few times,[53] the relevant provisions remain declarative in nature and again address not the rights of the indigenous peoples themselves but those of the states whose territory is affected. Besides this ethnocentricity in the formulation of the rights,[54] the UNESCO Convention establishes no specific rights for media

[47] Article 3 of the UNESCO Convention defines the scope of its application stating: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions".

[48] Principle of sovereignty: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory". See also Craufurd Smith, supra note 8, at p. 37.

[49] In the narrow sense we mean here, above all, Article 27 CCPR and Article 15(1)(c) CESCR. See Asbjørn Eide, "Cultural Rights as Individual Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), Economic. Social and Cultural Rights, 2nd edn., The Hague: Kluwer Law International, 2001, pp. 289-301; Elsa Stamatopoulou, *Cultural Rights in International Law*, Leiden: Brill, 2007.

[50] UNESCO Convention, at Articles 2(1), 2(3) and 7. On the relationship between the Convention and human rights, see Graber, supra note 4, at pp. 560-563.

[51] Craufurd Smith, supra note 8, at pp. 28 and 37.

[52] UNESCO Declaration on Cultural Diversity, at Article 5: "Cultural rights as an enabling environment for cultural diversity" states: "Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms".

[53] UNESCO Convention, Preamble at recitals 8, 13 and 15, Articles 2(3) and 7(1)(a).

[54] See Nicole Aylwin and Rosemary J. Coombe, *"Cultural Pluralism Protects Traditional Knowledge"*, 2006, available at http://www.wacc.org.uk/wacc/publications/media_development/2006_3/cultural_pluralism_ protects_traditional_ knowledge. Craufurd Smith notes in this regard: "For developing countries or minority groups the Convention offers nothing by way of concrete entitlement. Given that cultural diversity may be threatened as much, if not more, by forces operating internally within states, the underlying pre-occupation of the Convention with inter-state relations and international trade represents a clear limitation. Although Article 7 of the Convention recognizes that all peoples, including indigenous peoples and minority groups, should be able to create, disseminate and have access to their own cultures, it falls short of framing such interests in terms of rights and imposes merely an obligation of endeavour, rather than result, on State Parties to promote

organisations, journalists or individuals. Under the Convention, their interests are to be realised only through State action, if at all.[55]

A vital piece omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble,[56] is intellectual property rights (IPRs). This omission is particularly unfortunate since IPRs have as their core objective the protection and promotion of creativity and innovation and are thus an indispensable element of all processes related to the creation, distribution of and access to cultural content.[57]

Closing our critical glimpse of the UNESCO Convention, we concur with Craufurd Smith in saying that, what we have "is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms. As a political manifesto, with little legal substance, it is hardly an advance on the international declarations on cultural diversity which preceded it".[58] Alternatively, and less sharply, one can plainly say that what made the adoption of the UNESCO Convention possible also emptied it of some of its valuable content. This shows on the one hand the complexity of the issues that arise whenever cultural diversity is to be addressed and on the other hand, in a political context, the starkly different sensibilities and motivation of the Parties when putting in place a legally binding international instrument on the protection and promotion of diversity of cultural expressions.[59]

2.3. MAKING IT WORK

Yet, the UNESCO Convention is here – it has been adopted, ratified by a great and increasing number of countries and has entered into force.[60] In this sense and looking beyond the criticism of the treaty's textual basis, the question is how, if ever, the Parties can make it work. How can a system that has "inborn" flaws be repaired, possibly even casting aside the "serious concerns" expressed by the US that the Convention is "to be misinterpreted in ways that might impede the free flows of ideas by word and image as well as affect other areas, including trade".[61]

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such interests. Its dispute resolution procedures are closed to individuals and interest groups, most likely to take up such cases, and its use of the term 'interculturality' rather than 'multiculturalism' appears designed to diffuse potential tensions with Parties over their internal policies of integration or assimilation". See Craufurd Smith, supra note 8, at p. 54.

[55] Craufurd Smith, supra note 8, at pp. 26 and 28.

[56] UNESCO Convention, at Preamble, recital 17, recognises "the importance of intellectual property rights in sustaining those involved in cultural creativity". Intellectual property rights used to be part of the definition of cultural goods and services during the drafting of the Convention (supra note 12). Article 7(2)(b) of the Preliminary Draft (CLT-2004/CONF.201/CLD.2, Paris, July 2004) provided further that Parties "shall ensure that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy". For a full account of the existing IPR references during the negotiation of the UNESCO Convention, see Laurence R. Helfer, *"Towards a Human Rights Framework for Intellectual Property"* (2007) UC Davis Law Review 40, pp. 971-1020, at pp. 1004-1006.

[57] We discuss the issues related to IPRs and creativity in more detail below.

[58] Craufurd Smith, supra note 8, at pp. 53-54 (footnote omitted).

[59] Craufurd Smith, supra note 8, at pp. 30-32. See also Caroline Pauwels, Jan Loisen and Karen Donders, *"Culture Incorporated; or Trade Revisited? How the Position of Different Countries Affects the Outcome of the Debate on Cultural Trade and Diversity"* in Obuljen and Smiers, supra note 8, pp. 125-158.

[60] See supra note 2.

[61] In full citation, the US noted during the 33rd session of the General Conference, immediately before the adoption of the UNESCO Convention: "The United States of America is extremely disappointed with the decision that has just been taken. As we have explained in great detail, we have serious concerns about the potential of the Draft Convention to be misinterpreted in ways that might impede the free flows of ideas by

As to the scope of the rights conferred upon the Parties, Craufurd Smith posits that there are two types of "ultimate constraints on State action"[62] since all cultural measures taken must conform to the "universally recognized human rights instruments"[63] and must be consistent with the Convention's own overarching principles and objectives.[64] Although this is true, the nature of human rights and fundamental freedoms is such that they lack concretely framed provisions. Only through some emerging case law and practice could these standards be made effective. In addition, one should note that the UNESCO Convention itself disregards some advances in international human rights law, such as those related to indigenous peoples, which recently found expression in the UN Declaration on the Rights of Indigenous Peoples.[65] There is also the internal and sometimes not easily resolvable tension between state rights as embodied in the UNESCO Convention and the individual nature of human rights.[66]

A far stronger boundary for the culturally related actions of the Parties, spurred on by the Convention, are their commitments under other international instruments, of which, as noted at the outset, the most significant are the multilateral Agreements under the WTO framework.[67] The relationship between the UNESCO Convention and the WTO Agreements has been repeatedly and insightfully discussed.[68] Different constellations have been tested in order to evaluate the potential impact (legal and political) of the UNESCO Convention upon the WTO Agreements, both in a situation of a case brought before the WTO dispute settlement body (DSB) dealing with cultural measures that breach the law of the WTO and the commitments of the Members, and under conditions where no direct conflict occurs.

As a brief note here, it should first be noted that if one observes the evolution of the WTO law, the much hoped for direct clash between trade and culture before a WTO Panel (and subsequently before the Appellate Body) appears quite unlikely. As Craufurd Smith notes, parties to both the WTO Agreements and the Convention "may prefer to resolve their disputes using the less confrontational and constraining dispute resolution procedures in the Convention",[69] although Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) obliges the Members to apply it whenever they seek

word and image as well as affect other areas, including trade". See UNESCO, Records of the General Conference, 33rd Session, 3-21 October 2005, Vol. 1, at p. 221.

[62] Craufurd Smith, supra note 8, at p. 44.

[63] What is to be understood here above all is the so-called International Bill of Rights comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, supra notes 18, 19 and 20, respectively.

[64] UNESCO Convention, at Articles 1 and 2.

[65] United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly, Resolution 61/295, 13 September 2007.

[66] Thomas Cottier, *"Trade and Human Rights: A Relationship to Discover"* (2002) Journal of International Economic Rights 5:1, pp. 111-132, at pp. 120-121.

[67] The law of the WTO is contained in several agreements, attached as annexes to the WTO Agreement (see supra note 5) that encompass the General Agreement on Trade and Tariffs (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). We refer to these as the WTO Agreements. They are contained in Annex 1 of the WTO Agreement. Other Annexes organise additional aspects of liberalisation such as the dispute settlement procedure (Annex 2), trade policy review mechanism (Annex 3) and certain plurilateral agreements (Annex 4).

[68] See Graber, supra note 4; Wouters and De Meester, supra note 7; Hahn, supra note 8.

[69] Craufurd Smith, supra note 8, at p. 47.

"the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements".[70]

Even if a WTO case does emerge, it is likely that the panel and/or the Appellate Body would not dare to radically alter the "delicate and carefully negotiated balance"[71] of the WTO Agreements, but would rather follow the conventional (less imaginative but solid) analysis justifying the legal expectations, and concentrate on the core trade-related questions that fall within the DSB's authority.[72] Accounting for the vagueness of the provisions of the UNESCO Convention, Acheson and Maule note further in this regard that, "Panels of the WTO cannot take into account fuzzy concepts of cultural diversity without losing their legitimacy and ultimately their effectiveness".[73]

Furthermore, in the case of a direct collision applying the UNESCO Convention "conflict of norms" provision,[74] as formulated in Article 20,[75] can achieve little, since no modification of rights and obligations of the Parties under any other treaties follows.[76] Interestingly in this sense, Garry Neil, for instance, plainly shows that the outcome of *Canada-Periodicals*[77] would have been identical even if the UNESCO Convention had been in force at the time the decisions were taken, and whether the US had or had not joined the Convention.[78]

Exploring the interface between the UNESCO Convention and other regimes, the Convention would certainly influence the existing international agreements indirectly, in the process of their interpretation[79] and could even, as suggested by Voon, affect choices between goods and services classification in the WTO context.[80] Above all, the UNESCO Convention is likely to influence the political context of international agreements by changing the power-plays in negotiations and shaping the content of future agreements. The latter with specific regard to the

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[70] See Craufurd Smith, ibid. and Voon (2006), supra note 3, at pp. 642-644.

[71] WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, at para. 177 (referring to the specific context of the SPS Agreement).

[72] Article 3(2) of the DSU reads: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[73] Acheson and Maule, supra note 21, at p. 251.

[74] On the notion of "conflict", see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press, 2003, at pp. 5-11.

[75] Article 20(1) states that, "[p]arties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention". Article 20(2) adds on the other hand that, "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties".

[76] UNESCO Convention, at Article 20(2). See also Graber, supra note 4, at pp. 565-568; Hahn, supra note 8, at pp. 540-546.

[77] WTO Panel Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997 and WTO Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997.

[78] Garry Neil, *"How Effectively Does the Convention Respond to the Cultural Challenges of Economic Globalization?"* 6 March 2006, available at http://www.suisseculture.ch/doss/ridc/x-ridc.php, pp. 1-26, at pp. 19-21.

[79] Graber, supra note 4, at pp. 567 and 571; Voon (2006), supra note 3, at p. 652.

[80] Craufurd Smith, supra note 8, at p. 51, referring also to Pauwelyn, supra note 74, at pp. 403-405.

WTO has been one of the main stimuli for a number of states to pursue the adoption of the UNESCO Convention, [81] in particular as recent free trade agreements (FTAs) of the US with Chile, Singapore, Morocco, Bahrain and the Central American countries[82] have diminished flexibilities in comparison to GATS in the field of services, requiring States to establish a definitive "negative" list of restrictions.[83]

In a broader context and to reiterate this strength rather than the weakness of the Convention, its political charge is undeniably substantial since it is binding and goes beyond the predominantly exhortatory nature of previous acts, elevating "the status of cultural diversity as a matter of international concern, just as international agreements on the environment and health have helped to underline the importance of these considerations in other international fora such as the WTO".[84]

In attempts to construe positively the UNESCO Convention, much hope is invested in the Intergovernmental Committee [85] and the dispute resolution [86] mechanisms. Over time, both could generate guidance as to the appropriate exercise of the Parties' rights and obligations. It should however be borne in mind that these institutions are rather weak in wording[87] and it would require a great effort by the Parties to establish a solid practice. Yet, since both of these institutional mechanisms allow evolutionary advances and, depending upon the willingness of the Parties to engage seriously, they can make the Convention take up at least some of its tasks and contribute to strengthening the position of the UNESCO Convention on the international scene.[88]

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[81] Craufurd Smith notes in this regard: "Arguably, the Convention was never intended by its promoters to be an innovative measure; it was primarily designed to maintain the status quo in the field of trade and culture. In particular, developed countries such as Canada and France promoted the Convention on the basis that it would provide high level political endorsement for their culturally motivated trade restrictions. It serves to justify not only their existing measures but also their refusal to make commitments in new and developing communications sectors in the future". See Craufurd Smith, supra note 8, at pp. 53-54 (footnote omitted).

[82] The Central America FTA (CAFTA) includes Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. In 2004, the Dominican Republic joined the negotiations and the agreement is now known as the DR-CAFTA.

[83] Craufurd Smith, supra note 8, at p. 48. See also Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products: EU-EC Perspectives*, Oxford: Hart, at pp. 201-232; Ivan Bernier, *"The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy Regarding the Audiovisual Sector"*, April 2004, pp. 1-21, available at http://www.suisseculture.ch/doss/ridc/x-ridc.php.

[84] Craufurd Smith, supra note 8, at pp. 29-30. See also Voon (2006), supra note 3, at p. 652.

[85] Article 23 of the UNESCO Convention describes the broad competence of the Intergovernmental Committee. In addition, this competence could be pursuant to letter (f) extended by the Conference of Parties. Together with the statistics and information that the UNESCO Secretariat is committed to compiling under Article 19, this could provide a good basis for the evaluation of domestic cultural measures and for the emergence of clear implementation criteria. See Craufurd Smith, supra note 8, at p. 45; Graber, supra note 8, at pp. 11-12.

[86] Article 25 "Settlement of disputes" reads: "(1) In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation; (2) If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party; (3) If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute".

[87] The dispute settlement is ultimately not compulsory and the tasks of the Intergovernmental Committee defined in Article 23(6) may not provide a solid legal basis for it to engage in interpretation of the Convention beyond commenting on the State reports (Article 23(6)(c)). See Graber, supra note 8, at p. 12 and Hahn, supra note 8, at p. 533, who quite critically notes that the UNESCO Convention's dispute settlement is "worth mentioning only as being reminiscent of the very early days of modern international law".

[88] Craufurd Smith, supra note 8, at p. 54.

The first steps taken after the entry into force of the UNESCO Convention[89] corroborate some of these optimistic expectations in that the Conference of Parties requested the Intergovernmental Committee to prepare operational guidelines[90] giving priority attention to the provisions of Articles 7, 8 and 11 to 17 of the Convention.[91] These guidelines have been elaborated,[92] drawing upon existing UNESCO documents and some specially commissioned "information documents".[93] The guidelines were discussed and adopted during the First Extraordinary Session of the Intergovernmental Committee in late June 2008, and are now awaiting the approval of the Conference of Parties.[94] Judging the current content of the guidelines, in particular the implementation of the key Articles 7 and 8 (i.e. on the promotion and the protection of cultural diversity, respectively), a positive feature is the specific attention paid to individuals and social groups, including women, minorities and indigenous people.[95] Another positive attribute is the further clarification given to the application of cultural policies and measures along the entire cultural value chain (creation, production, distribution/dissemination and access) and the essential interrelatedness of such measures.[96] Nonetheless, at this stage the guidelines remain vague and still draw no clear line between licit and illicit cultural policy measures, nor do they attempt in any way to reduce the trade and competition distortive effects of such measures.

In the next section, we show that while the system of the UNESCO Convention is being "repaired", sweeping changes in the cultural environment are taking place – changes that may transform not only the cultural policy tools but also, and more fundamentally, the rationales for and modalities of intervention with the objective of protecting and promoting cultural expressions.

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[89] All follow-up actions are available at http://www.unesco.org/culture/en/diversity/convention.

[90] As referred to in Articles 22.4(c) and 23.6(b) of the UNESCO Convention

[91] UNESCO, Conference of Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Resolutions of the First Session, Paris, UNESCO Headquarters, 18–20 June 2007, CE/07/1.CP/CONF/209/Resolutions, Paris, 21 June 2007, at Resolution 1.CP 6.

[92] UNESCO, Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Item 3 of the Provisional Agenda: Preparation of Operational Guidelines for the Implementation and Application of the Provisions of the Convention: Measures to Promote and to Protect Cultural Expressions (Articles 7, 8 and 17 of the Convention), CE/08/1.EXT.IGC/3, Paris, 3 April 2008.

[93] See UNESCO, *Vulnerability and Threat: Insights for the Future Implementation of Art. 8*, prepared by David Throsby for the First Extraordinary Session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 24-27 June 2008), CE/08/1.EXT.IGC/INF.3, 14 April 2008; UNESCO, *Article 7: Measures to Promote the Diversity of Cultural Expressions: European Approaches*, prepared by Danielle Cliche for the First Extraordinary Session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 24-27 June 2008), CE/08/1.EXT.IGC/INF. 2, 2 April 2008; UNESCO, *Article 7: Measures to Promote Cultural Expressions: Latin American Approaches*, prepared by Sylvie Durán Salvatierra for the First Extraordinary Session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 24-27 June 2008), CE/08/1.EXT.IGC/INF.5, 20 May 2008; UNESCO, *The Partnering Process*, CE/08/1.EXT.IGC/INF.4, 15 April 2008; UNESCO, *Written Contributions of Parties on the Use of the Resources of the International Fund for Cultural Diversity*, CE/08/1.EXT.IGC/INF.6A, 17 April 2008; UNESCO, *Comparative Table of Parties Contributions on the Use of the Resources of the International Fund for Cultural Diversity*, CE/08/1.EXT.IGC/INF.6B, 17 April 2008. All information documents are available at http://portal.unesco.org/culture/en/ev.php-URL_ID=36528&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[94] UNESCO, Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Decisions of the First Extraordinary Session, Paris, 24-27 June 2008, CE/08/1.EXT.IGC/Dec., 27 June 2008. The Draft Operational Guidelines regarding Article 7 of the Convention have been only provisionally adopted and their final adoption is to occur at the same time as the Draft Operational Guidelines for Article 6 are adopted.

[95] Ibid. at p. 3, Article 7(1)(a) and (b).

[96] Ibid. at p. 4, Article 7, Principle 1.6.

3. THE REALITY OF THE DIGITAL NETWORKED ENVIRONMENT

Although the UNESCO Convention does not state this expressly, its core protection mechanism is aimed at audiovisual media services,[97] which have also been the insurmountable hurdle in the WTO context.[98] Because of the controversies related to audiovisual media and because the technological advances have been most visible and influential in this area, we focus upon them in the next sections. We try to depict the changed landscape of digital media and its repercussions for the markets of cultural content, since the failures of the latter have always been the reason for state intervention at the domestic level and for specific treatment of cultural goods and services at the international level.[99] In describing the modified mechanisms of the markets for cultural content, we also attempt to critique and cast some doubt upon the widely-accepted rationales for intervention. These underlying "axioms" are that some sort of additional regulation is indispensable because of the inherent market failures of media markets[100] and that these market failures may be corrected through state intervention (as the UNESCO Convention evidently purports). As to the former, the common statement is that, "[e]conomic theory as well as reality shows that the market fails to provide culture goods and services".[101] However, statements as sweeping as this contribute little to a fine-grained understanding of the market mechanisms, which is the very basis for designing appropriate intervention instruments.

In a more comprehensive version, failures typical of the markets for cultural goods and services can be identified as: (i) failures due to economies of scale in production and distribution; (ii) failures due to the nature of competition in products with substantial public goods aspects; (iii) failures due to the impact of externalities on the pricing of cultural products; and (iv) failures due to collective action problems.[102] Here one must also acknowledge that these economic rationales have been strengthened in the political context by (at least) two commonplace misapprehensions: the first relates to the (surprisingly) enduring misunderstanding of the nature of globalisation and its effects, including those upon culture.[103] The second (which could also be viewed as part of the first generic

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[97] Graber, supra note 4, at p. 561; Craufurd Smith, supra note 8, at p. 24.

[98] Christoph Beat Graber, "*Audio-visual Policy: The Stumbling Block of Trade Liberalisation?"* in Damien Geradin and David Luff (eds.), The WTO and Global Convergence in Telecommunications and Audio-Visual Services, Cambridge: Cambridge University Press, 2004, pp. 165-214. Martin Roy, "*Audiovisual Services in the Doha Round: Dialogue de Sourds, The Sequel?"* (2005) Journal of World Investment and Trade 6:6, pp. 923-952.

[99] Although arguably digital technologies have also impacted upon other cultural goods and services such as books, their production (e.g. e-books, print-on-demand) and distribution.

[100] The most prominent reference here is C. Edwin Baker, *Media, Markets, and Democracy*, Cambridge: Cambridge University Press, 2001.

[101] See Wouters and De Meester, supra note 7, at p. 217. It is also common for studies not to provide the complete list of market-related specificities and focus only on the size of the market and the economies of scale as reasons for the market to fail (see e.g. Wouters and De Meester, supra note 7, at pp. 217-218; Hahn, supra note 8, at pp. 519-520).

[102] Pierre Sauvé and Karsten Steinfatt, *"Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?"* in Productivity Commission and Australian National University, Achieving Better Regulation of Services, Conference Proceedings, Canberra, 2000, pp. 323-346, at p. 325. For an excellent analysis, see ibid. pp. 326-339.

[103] See Anthony Giddens, *Runaway World: How Globalisation Is Reshaping Our Lives*, London: Routledge, 2002. With regard to culture, for instance, Giddens (at p. xxiv) holds: "Western, and more specifically American, cultural influence is visible everywhere – in films, television, popular music and other areas. Cultural standardisation is an intrinsic part of this process. Yet all this is relatively superficial cultural veneer; a more profound effect of globalisation is to produce greater local cultural diversity, not homogeneity. The United States itself is the very opposite of a cultural monolith, comprising as it does a dazzling variety of

category) is that technological development negatively affects the diversity of cultural expressions and demands more rather than less regulatory intervention.[104]

In concord with the above economic findings and attempting to disregard the politically charged misconceptions, we conjecture that while the market failures have not been entirely rendered obsolete by the digital environment, due to the availability of new modes of creating, distributing and accessing any type of cultural content, these failures may have shifted. In the next sections, we outline some of these transformations and consider their effects.

3.1. CHANGING MARKET MECHANISMS

In the not-so-distant past, the markets for media content were dominated by analogue media. People had access to a limited number of outlets, such as television or cinema, and to a limited variety of content. Technical advances and the liberalisation and deregulation of media markets made the number of outlets substantially larger (e.g. while in 1989, 90 TV channels were available in the EU15,[105] over 860 channels with potential national coverage were broadcasting in 2004[106]). Paradoxically, the availability of so many channels has not led to greater diversity. The opposite was even true: In the European television market, for instance, the quality and the range of programmes have deteriorated.[107] Due to the dominant pursuit of maximisation of profits and minimisation of financial risks, the formats and contents of TV programmes, films and shows have become increasingly homogeneous.[108] The emergence of global media giants transcending national and sectoral boundaries, placing the same content in all available distribution channels, has only aggravated the situation.

Explanations for this bleak picture were sought, as mentioned above, in the market failures inherent to media markets. The scarcity and the nature of distribution of media content in a "push", point-to-multipoint mode were key determinants in these analyses. To convey this figuratively: where storage and distribution costs are high, "shelf-space" is limited and it makes sense (especially to the large profit-maximising media conglomerates) to put up only those products that sell best – the hits, i.e. uniform content that, subject to the lowest-common denominator, appeals at a certain moment in time to the largest possible

different ethnic and cultural groups. Because of its 'push-down' effect […] globalisation tends to promote a renewal of local cultural identities. Sometimes these reflect wider world patterns, but very often they self-consciously diverge from them". Tyler Cowen in his book *Creative Destruction* also insists that global monopolies and imported technologies have also led to promoting local creativity by generating new markets for innovative, high-quality artistic productions. See Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures*, Princeton: Princeton University Press, 2002, at p. 146 and Tyler Cowen, *In Praise of Commercial Culture*, Cambridge, MA: Harvard University Press, 1998, in particular at pp. 15-43.

[104] See e.g. Graber, supra note 4, at p. 570.

[105] Stylianos Papathanassopoulos, *European Television in the Digital Age*, Cambridge: Polity, 2002, at p. 14.

[106] European Commission, Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers", COM(2006) 49 final, 10 February 2006, referring to European Audiovisual Observatory, 2004 Yearbook.

[107] Papathanassopoulos, supra note 105, at pp. 18-19, referring to Jay G. Blumler, *"Vulnerable Values at Stake"* in Jay G. Blumler (ed.), *Television and the Public Interest*, London: Sage, 1992, pp. 22-24; Yves Achile and Bernard Miège, *"The Limits of Adaptation Strategies of European Public Service Television"* (1994) Media, Culture and Society 16, pp. 31-46. On the "multi-channel paradox", whereby despite the diversity of channels, there is no actual diversity of content, see Mónica Ariño, *"Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps"* (2004) Communications and Strategies 54, pp. 97-128, at pp. 98 et seq.

[108] On the homogeneity of content, see Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, Bern: Staempfli, 2003, at pp. 18 et seq.

audience.[109] As a result of this scarcity intrinsic to analogue media markets, the sales and correspondingly the consumption have been concentrated on a miniscule part of all the available content. Thereby, 20% of the produced content (be it a film, a song or a TV show) generates about 80% of all the sales in that market. The remaining 80% of existing content never actually makes it to TV or cinema screens, the CD or DVD shop shelves, or finds only a marginal public in unpopular outlets.[110]

The digital environment has assuredly given new dimensions to this underlying 80/20 rule and, most importantly in our context, has modified the rules of supply and demand for content, making a whole lot more of it available and accessible. The reasons for this so-called "long tail" effect[111] lie in some salient characteristics of the digital networked environment:

(i) On the supply side, the cost of inventory storage and distribution for the materialisation of the "long tail" is critical. Where the latter is insignificant, as it is in the digital space, it becomes economically viable to sell relatively unpopular products. As mentioned above, there are substantial storage and distribution costs in the offline world, where the shelf space (be it TV prime time or a Christmas cinema weekend) is limited and so is the choice.[112]

(ii) On the demand side, the costs of searching and finding are crucial for the "long tail" effect (especially as variety becomes greater). On the one hand, this means the time invested in search; on the other hand, its efficiency. The Internet is a vast complex nonlinear network that allows searching through a single point of entry. Search engines help us locate content within the huge volume of dynamic information, turning them into "linchpins of the Internet". [113] The increasing availability of new tools, such as samples, feedback and recommendations enables

[109] "For too long we've been suffering the tyranny of lowest-common-denominator fare, subjected to brain-dead summer blockbusters and manufactured pop. Why? Economics. Many of our assumptions about popular taste are actually artifacts of poor supply-and-demand matching – a market response to inefficient distribution." Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York: Hyperion, 2006, at p. 16.

[110] This distribution reflects the well-known 80/20 rule, which was formulated by the Italian economist Vilfredo Pareto in 1896 to describe the allocation of wealth among individuals. The 80/20 rule has been observed in many areas, such as physics, biology, geography, economics and linguistics, and depicts a frequent situation of extreme distribution, whereby a relatively small proportion of elements generates a large proportion of distribution.

[111] Chris Anderson, "The Long Tail", *Wired*, Issue 12.10, October 2004. It later became a more comprehensive book (supra note 109) and builds upon substantiated previous and parallel economic research. See in particular Erik Brynjolfsson, Yu Hu and Michael D. Smith, *"Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers"* (2003) MIT Sloan Working Paper No 4305; Erik Brynjolfsson, Yu Hu and Michael D. Smith, *"From Niches to Riches: The Anatomy of the Long Tail"* (2006) Sloan Management Review 47:4, pp. 67-71; Erik Brynjolfsson, Yu Hu and Duncan Simester, *"Goodbye Pareto Principle, Hello Long Tail: the Effect of Search Costs on the Concentration of Product Sales"*, February 2007, available at http://ssrn.com/abstract=953587.

[112] The comparison between the offline and online availability of content may be quite striking: A large CD shop may hold about 40,000 titles, while an online music store will have about 20 times more. A TV station can broadcast only one particular film in the eight o'clock slot, while its catalogue of digitally stored and distributed films may amount to more than 500 titles. Moreover, one should note that these are contradistinctions relating to only one particular distribution channel, while in the reality of the digital environment, these are multiple and simultaneously accessible.

[113] James Grimmelmann, *"The Structure of Search Engine Law"* (2007) New York Law School Research Paper Series No 23, at p. 2. A survey shows that only the act of sending or reading email outranks search engine queries as an online activity (PEW Internet and American Life Project, *Search Engines*, 2002, all PEW reports available at http://www.pewinternet.org/).

users to find the desired products and even to discover new ones.[114] Furthermore, advanced search tools, such as Amazon customer reviews or Yahoo! Music ratings, based upon collective intelligence,[115] are emerging as new orientation institutions creating effective filters of information. The search and interaction facilitators of the Web 2.0[116] also contribute to sharing experience and intensify the information flow.

One should also acknowledge here that both the supply and demand side factors, as sketched above, are essentially dynamic. Firstly, because with the rapid advances in digital technology, the storage and distribution costs of products, and even the production expenses (e.g. of digital films), are consistently falling; and secondly, because of the learning experience[117] and the expansion of the network[118] on the demand side. All in all, this simple set of economic and technological drivers may have far-reaching implications for businesses, consumers and the economy as a whole[119] – implications that need to be cautiously taken into account when designing templates of regulatory intervention in media markets.

3.2. CHANGING PATTERNS OF CREATION, DISTRIBUTION OF AND ACCESS TO CONTENT

With the sophistication of networks and growing adoption of the Internet (especially broadband[120]), the content layer has become particularly "dense" and mixed. Essentially, everything is online and some things are only online. Different media, such as video gaming, music, radio and newspapers are widely accepted as substitutes for traditional analogue media.[121] The digital processes have not however stopped with the mere creation of parallel communication and information channels but have led (and continue to lead) to the emergence of new

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[114] See Brynjolfsson et al. (2006), supra note 111. Experience with P2P networks shows equally that the initial experience of users focusing on hits is supplanted rapidly by more varied choice of content, and by adaptation and "mashing" of content into new forms. See Chris Marsden, Jonathan Cave, Edward Nason, Andrew Parkinson, Colin Blackman and Jason Rutter, *Assessing Indirect Impacts of the EC Proposals for Video Regulation*, RAND Europe, 2006, at p. 23.

[115] Also called wisdom of the crowds. See James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, and Nations*, New York: Anchor, 2003.

[116] In the context of search, "tagging" may be identified as an important Web 2.0 effect. Tagging, which is basically a process of creating labels for online content by attaching a keyword to a piece of information (a picture, article or video) is "a kind of next-stage search phenomenon", whereby online searching is advanced and personalised and digital material is organised in a tailored manner on top of existing formally defined classification schemes. See PEW Internet and American Life Project, *Tagging*, January 2007; David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder*, New York: Henry Holt, 2007.

[117] See PEW Internet and American Life Project, *The Broadband Difference: How Online American's Behaviour Changes with High-Speed Internet Communications at Home*, 2002.

[118] On positive network effects, see e.g. Carl Shapiro and Hal Varian, *Information Rules*, Cambridge, MA: Harvard Business School Press, 1999, at pp. 173-225.

[119] As Anderson rather prophetically puts it, "[w]hen you can dramatically lower the costs of connecting supply and demand, it changes not just the numbers, but the entire nature of the market. This is not just a quantitative change, but a qualitative one, too. Bringing niches within reach reveals latent demand for non-commercial content. Then, as demand shifts toward the niches, the economics of providing them improve further, and so on, creating a positive feedback loop that will transform entire industries – and the culture – for decades to come" (Anderson, supra note 109, at p. 26). See also Brynjolfsson et al. (2006), supra note 111, at pp. 1, 6-8.

[120] See e.g. OECD, *Broadband Growth and Policies in OECD Countries*, Paris: OECD, 2008.

[121] Edwin Horlings, Chris Marsden, Constantijn van Oranje and Maarten Botterman, *Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive*, RAND Europe, 2005, at p. 6. See also PEW Internet and American Life Project, *More Online, Doing More*, February 2001 and *Internet Penetration and Impact*, April 2006.

types of communication modes among users,[122] new types of creativity and content production.

Firstly, due to the decreased costs of identifying like-minded groups of individuals and of communicating and acting together in the digital environment, [123] innumerable virtual communities and social networks have arisen.[124] Next to these new forms of social interaction and much more critically for our present context, a novel commons-based production of information, knowledge and entertainment has emerged,[125] where "individuals band together, contributing small or large increments of their time and effort to produce things they care about".[126] Data on content creation, both individual and commons-based, when available, is quite impressive.[127] The mere fact that by the second quarter of 2006, 50 million blogs had been created, and new ones were being added at a rate of two per second,[128] exemplifies the dynamism of the processes.

Secondly and beyond what one may call "amateurs", [129] the digital environment has had a deep impact on how artists and culture-makers express themselves, how they communicate with one another and with the public, how cultural content is presented and made accessible and how it is consumed. In short, digitisation, both as a tool of expression and as a new cultural communication space "affects the entire spectrum of culture production, distribution and presentation […] [and] brings with it the promise of cultural renewal".[130]

Only lately have the economic and social virtues of this type of production and common ownership begun to be explored,[131] and they are still far from being fully

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[122] Here one can mention the so-called Web 2.0 phenomenon. Web 2.0 is a phrase coined by O'Reilly Media (http://www.oreilly.com/) in 2004. Proponents of the Web 2.0 concept say that it differs from early Web development (labelled Web 1.0) in that it moves away from static websites, the use of search engines and surfing from one website to the next, towards a more dynamic and interactive World Wide Web. See Tim O'Reilly, *"What Is Web2.0?: Design Patterns and Business Models for the Next Generation Software"* (2007) Communications and Strategies 65, pp. 17-37. See also OECD, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007.

[123] Urs Gasser, *"Social Structures in Cyberspace: The Design and Function of Digital Institutions"*, Discussion Paper, 9th Annual Conference of the International Society for New Institutional Economics: The Institutions of Market Exchange, 22-24 September 2005, Barcelona, at para. 1. See also Marshall Van Alstyne and Erik Brynjolfsson, *"Global Village or Cyber-Balkans? Modeling and Measuring the Integration of Electronic Communities"* (2004) Management Science 51, pp. 851-868.

[124] See most prominently http://www.myspace.com/ or http://www.facebook.com/. To reveal the sheer dynamism of these networks, O'Reilly Radar shows that during the first quarter of 2006, 280 000 new users signed up each day to MySpace and it had the second most Internet traffic. See John Musser and Tim O'Reilly, *Web 2.0: Principles and Best Practices*, O'Reilly Radar, November 2006, at p. 4.

[125] The content covers a wide range of types. OECD identifies eight categories: (i) text, novel and poetry; (ii) photo and images; (iii) music and audio; (iv) video and film; (v) citizen journalism; (vi) educational content; (vii) mobile content; and (viii) virtual content. See OECD, supra note 122, at p. 15.

[126] Yochai Benkler, *"Freedom in the Commons: Towards a Political Economy of Information"* (2003) Duke Law Review 52, pp. 1245-1276, at p. 1261.

[127] See OECD, supra note 122, at pp. 9-12. See also PEW Internet and American Life Project, *Content Creation Online*, 29 February 2004.

[128] See Musser and O'Reilly, supra note 124.

[129] For a critical opinion in this regard, see Andrew Keen, *The Cult of the Amateur: How Today's Internet Is Killing Our Culture*, New York: Doubleday, 2007.

[130] Netherlands Council for Culture, *From ICT to E-Culture: Advisory Report on the Digitalisation of Culture and the Implications for Cultural Policy*, submitted to the State Secretary for Education, Culture and Science, June 2003 (English edition, August 2004), at p. 8. See also PEW Internet and American Life Project, *Artists, Musicians and the Internet*, December 2004; Tom O'Regan and Ben Goldsmith, *"Emerging Global Ecologies of Production"* in Dan Harries (ed.), The New Media Book, London: British Film Institute Publishing, pp. 92-105.

[131] See Yochai Benkler, *"Coase's Penguin, or Linux and the Nature of the Firm"* (2002) Yale Law Journal 112, pp. 369-446; Carol M. Rose, *"The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and*

acknowledged in policy-making circles. An OECD report of 2007 has however already recognised the enormous potential of user created content and states that, "[t]he Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships […]. Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially give rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless".[132]

3.3. ASSESSMENT OF THE IMPLICATIONS IN CONTEXT

The above sketch of technologies, processes and applications is only a miniscule part of the complex puzzle of the digital environment, where numerous forces of economic, social and cultural nature are at play. Yet, it does show that digital technology-induced changes go beyond the mere creation of new distribution channels that exist in parallel to "old" media. We can identify further-reaching salient features of the digital environment that are of the utmost importance to audiovisual media. These include: (i) the proliferation and diversity of content; (ii) its accessibility; (iii) the empowerment of the user to choose and pull the desired content (from the desired platform); and (iv) the new modes of content production, where the user is not merely a consumer but is also an active creator, individually or as part of the community.

While some of these developments are in their infancy and their precise shape and form remain to be seen, it is sufficiently clear that the transformation of the digital environment is likely to continue gradually but with profound effects.[133] Against this backdrop, one can already make a few observations with immediate relevance for the discussion on protecting and promoting the diversity of cultural expressions.

First, we need to acknowledge that the move from a "push" to a "pull" mode of content consumption is likely to become more pronounced and induce even more radical changes in the business models of content providers, distributors and advertisers, continuously fragmenting the media environment.[134]

Second, whichever pattern of access to and use of media content prevails,[135] it is apparent that the split between digital and analogue households, which is

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Ecosystems" (1998) Minnesota Law Review 83, pp. 129-182; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven: Yale University Press, 2006.

[132] OECD, supra note 122, at p. 5.

[133] For evidence in the audiovisual media context, see Horlings et al., supra note 121, at p. 5.

[134] See John Naughton, *"Our Changing Media Ecosystem"* in Ed Richards, Robin Foster and Tom Kiedrowski (eds.), Communications: The Next Decade, London: Ofcom, 2006, pp. 41-50. See also David Graham & Associates, *Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for under Article 25(a) of the TV Without Frontiers Directive*, Final Report prepared for DG Information Society, 24 May 2005, at section 3.5.1.

[135] RAND Europe outlines three plausible scenarios for the digital future of audiovisual media: (i) *Linear Continuum:* where the behaviour of citizens will change at the margins, but media consumption will remain a largely linear experience; (ii) *Digital content divide*: where the digital "haves" will experience greatly increased interactive media use, while an equal number of "refuseniks" will continue exactly as before to rely on offline media and public service broadcasters; (iii) *Time shifting linear consumption*: where the majority of the population will use broadband and mobile or in-home devices to time-shift their media to suit their schedule instead of that of the broadcaster. Horlings et al., supra note 121, at p. 8.

already a reality, will be exacerbated.[136] While this widening gap between the digital "haves" and "have-nots" is palpable within developed societies, it is all the more striking between developed and developing and the least developed societies.[137]

Third, in terms of competition, it is conceivable that the reduced barriers to entry will allow new market players to position themselves and make use of niche markets. However, a concentration among the diverse players in media markets, both horizontally and vertically, may also be expected, because of their pursuit of better utilisation of all available channels and platforms (e.g. by placing a single video on mobile and digital TV networks, on YouTube, MySpace, Facebook, etc.) and the related benefits from economies of scale worldwide. The formation of truly ubiquitous global market players may have a number of grave effects upon cultural diversity, among other things, certainly leading to magnified importance of a very small number of languages (in particular English[138]). On the other hand, the digitally facilitated abundance of content, its dissemination and accessibility without real location restrictions undoubtedly lead to more content and to new content,[139] generated and spread individually or by groups. But this observation should have the caveat that abundance does not necessarily mean diversity, let alone "cultural" diversity, and that the creation, distribution and access to the so-created information environment are strongly dependent on access to infrastructure, hardware, and media literacy among other things. Nonetheless, the unprecedented amount and variety of content available cannot be disregarded or underplayed. It is a new variable to be included as part of the whole equation.

Fourth, it may be that the new dynamics of the markets for digital cultural content impact on the market failures conventionally associated with "analogue" media markets, as alluded to above. Most critically, one needs to account for the changed notion of scarcity in the digital space. In this context, the idea of protecting some "shelf-space" for culturally or nationally distinctive productions makes little sense since the "shelf-space" is virtually unlimited. Furthermore, if the "pull" model is to become the dominant model of consumption of media content, it is also *im*possible to "reserve" space for a certain purpose, since it is the consumer herself or himself who decides about the content, its form and time of delivery. Furthermore, we also need to think about the changed dimensions of markets: while not all markets for media content, be it music, video, or film, will be considered global in the competition law sense, the digital environment does allow searching, finding and accessing information without linking to the real-life location of the user.[140]

Fifth, and here lies our main argument in the present context, it is likely that most of the existent and conventionally applied cultural policy measures, which

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[136] If Internet penetration stabilises at 65-75% by household and mobile phone penetration at 85%, this means that a substantial proportion of people will remain offline − a minority, which is "both the most vulnerable in society and least likely to change (typically comprising the most elderly, non-formally qualified and/or poorest quartiles)". See Horlings et al., ibid, at p. 6.

[137] See e.g. E.S. Nwauche, *"African Countries' Access to Knowledge and the WIPO Digital Treaties"* (2005) The Journal of World Intellectual Property 8:3, pp. 361-382.

[138] The free online encyclopaedia Wikipedia, for instance, currently contains 2,418,960 articles in English. Albeit in much smaller numbers, it does however also include articles in 261 other languages. See http://meta.wikimedia.org/wiki/List_of_Wikipedias#Additional_resources_and_statistics.

[139] OECD, supra note 122; Weinberger, supra note 116.

[140] Here one should however acknowledge the possibilities of filtering information on the Internet, mostly done for political reasons. See Ronald J. Deibert, John G. Palfrey, Rafal Rohozinski and Jonathan Zittrain, *Access Denied: The Practice and Policy of Global Internet Filtering*, Cambridge, MA: MIT Press, 2007.

are only "analogue-based", do not sufficiently take into account the changed regulatory environment, nor do they have the potency to address appropriately the new digital conditions. If such measures are maintained, we hold that they serve either protectionist interests or are the remnants of an ill-conceived (but politically widely accepted) perception of globalisation and its effects upon culture.

To strengthen this argument, we offer the concrete example of quotas as a form of reserving a certain amount of time for content that corresponds to pre-determined criteria (most commonly national origin), and meant to support domestic production and limit market access.[141] Such quotas in film, television and radio broadcasting have been an often implemented tool of cultural policy for quite some time now, which is clearly confirmed by the existence of Article IV GATT 1947. The latter provision is the only explicitly formulated rule, next to Article XX(f) GATT,[142] with purely cultural bearing, giving leeway to states to protect and promote their domestic film production against the principles of national treatment and most-favoured nation (MFN).[143]

The most notorious case of screen quotas is that of South Korean quotas, which were established in 1967 and have long been a thorn in the side of the US trade representative (USTR) and a contentious issue in the US-Korea FTA negotiations.[144] We look however at a different case[145] – the quotas for European works and independent productions that the European Community (EC) prescribes for TV channels. The reason for choosing this example is that the EC regulatory framework for audiovisual media services has recently undergone a reform with the precise intention of making it fit for the changing media landscape. The TV market is also more dynamic than that of the film industry, so it could exemplify more pronouncedly the transformations that the digital environment has brought about.

[141] Footer and Graber, supra note 1, at pp. 122-123.

[142] Article XX(f) GATT provides for an exception for measures "imposed for the protection of national treasures of artistic, historic or archaeological value". This exception is however of a static nature and unable to cater for contemporary cultural concerns.

[143] Article IV GATT relates to "internal quantitative regulations relating to exposed cinematograph films", which must take the form of "screen quotas" conforming to certain requirements, Article IV, paras (a) to (d)). Such quotas "may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized" (Article IV(a) GATT) and may "reserve a minimum proportion of screen time for films of a specified origin other than that of the Member imposing such screen quotas" (Article IV(c) GATT). On Article IV GATT, see Rostam J. Neuwirth, *"The Cultural Industries and the Legacy of Article IV GATT: Rethinking the Relation of Culture and Trade in Light of the New WTO Round"*, paper presented at the Conference "Cultural Traffic: Policy, Culture, and the New Technologies in the European Union and Canada" (Carleton University, 22-23 November, 2002), pp. 1-23.

[144] The South Korean screen quota has contributed to the rapid growth in the film market in Korea. The quality of Korean films has increased, with an inflow of capital funds into the Korean film market since 2000. The Korean government decided to reduce the screen quotas from 146 days to 73 days in 2006. As a result of the FTA between Korea and the US, agreed upon on 2 April 2007, the screen quotas are to be increased to more than the current 73 days. See Won-Mog Choi, *"Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and Convention on Cultural Diversity"* (2007) Asian Journal of WTO & International Health Law and Policy 2:2, pp. 267-286.

[145] The opinions on the pros and cons of the Korean quotas diverge. We note however, that recent economic analyses, such as the empirical study of Lee et al., shows that the effectively enforced Korean screen quota system did not contribute to the box office performance of domestic films. Rather, it was the production budget, critical reviews and the number of screens that played a significant role and heightened the success of Korean movies. See Shi Young Lee, Eun-mee Kim and Young Il Kim, *"The Effect of the Korean Screen Quota System on Box Office Performance"* (2008) Journal of World Trade 42:2, pp. 335-346.

The main instrument of media regulation at the Community level is currently the Audiovisual Media Services Directive (AVMS),[146] which amended the well-known Television without Frontiers Directive (TVWF),[147] adopted in 1989 to ensure the freedom of services under the specific conditions pertaining to television and the consolidation of the single market for media services.[148] Within the framework of the TVWF, next to the predominantly economically motivated provisions, there were two rules expressly formulated to serve cultural goals, assuring a balance of offerings in the EC broadcasting markets. The first, Article 4(1) TVWF prescribed that Member States ensure "where practicable and by appropriate means, that broadcasters reserve for European works *a majority proportion of their transmission time*, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping".[149] The second rule, contained in Article 5(1) TVWF, provided that broadcasters reserve at least 10% of their transmission time (or alternatively, 10% of their programming budget) for European works created by producers who are independent of broadcasters. Regardless of the implementation option chosen by the individual Member States,[150] the impact study prepared for the TVWF review[151] showed that the measures to promote European and independent productions did indeed have considerable impact. The average ratio of European works in the qualifying transmission time of the channels rose from 52.1% in 1993 to 57.4% in 2002 and to 63% in 2006. The average proportion of independent productions increased from 16.2% in 1993 to 20.2% in 2002 and to 36% in 2006.[152] The impact study suggested further that, taking into account these developments, there was no need to change either the majority share for European works or the minimum share for independent productions: Articles 4 and 5 TVWF were deemed already to be achieving their cultural aims "*inasmuch* as […] [they] have increased the proportion of European works and independent productions broadcast by channels in the EU".[153] The EU Commissioner for

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[146] Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), as most recently amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, OJ L 332/27, 18 December 2007.

[147] Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 298/23, 17 October 1989.

[148] See Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, ECR [1995] I-179, at paras 28-29 and Cases C-34/95, C-35/95 and C-36/95 *De Agostini*, ibid. at paras 24-28. See also Mark Wheeler, *"Supranational Regulation: Television and the European Union"* (2004) European Journal of Communication 19, No 3, pp. 349-369, at pp. 351-357.

[149] Emphasis added.

[150] For an overview of the national legislation put in place in the diverse Member States, see David Graham & Associates, supra note 134, at chapter 6. While the majority of Member States have transcribed the definitions directly into national legislation, France and Germany apply stricter definitions. France distinguishes between audiovisual works and cinematographic works. Germany defines what is included as qualifying hours: feature films, television movies, series, documentaries and comparable productions. Six Member States – Finland, France, Italy, The Netherlands, Spain and the United Kingdom – apply higher percentage requirements (e.g. France requires all broadcasters to reserve at least 60% of their qualifying hours for European audiovisual and cinematographic works).

[151] Graham & Associates, ibid. and European Commission, Eighth Communication on the Application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2005-2006, COM(2008) 481 final, 22 July 2008.

[152] Graham & Associates, ibid. at p. 14 and chapter 7. The more prescriptive a Member State is in the way that it implements Articles 4 and 5 TVWF, the higher the average ratio of European works to qualifying transmission hours in that country (ibid. at section 8.1).

[153] Graham & Associates, ibid. at p. 181 (emphasis added) and section 4.6.3.

Information Society and Media, Viviane Reding was delighted by the high share of airtime devoted to European works and stated that, "[t]his is proof of the high quality of Europe's home-grown audiovisual content and of the vitality of an audiovisual industry that draws upon Europe's rich cultural diversity".[154]

However, we may seriously question the conclusion that the higher share of European productions is a sign of increased (or existing) diversity of cultural expressions. If one examines the qualifying criteria for a "European work", it is evident that they are neither based upon originality and quality nor do they require a particular expression of national and European themes.[155] The definition is based merely on the construct that a majority of its authors and workers reside in one or more Member States and comply with one of the three conditions: (a) the work is made by one or more producers established in a Member State or States party to the Convention on Transfrontier Television (CTT);[156] (b) the production is supervised and controlled by producer(s) established in one or more of those States; or (c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by producer(s) established outside those States.[157] Indeed, in this shape and form, the cultural diversity rationale for the promotion of European works is barely distinguishable from a protectionist one, aiming to secure a certain amount of airtime for works produced with European money.[158] It is noteworthy here that the impact study could not prove that, in the absence of Articles 4 and 5 TVWF, the trade deficit with the US[159] would have been larger and that the measures to promote the circulation of programmes within the EU have also promoted exports.[160] One can thus argue that a definition of European works such as the above and the related policy measures do little to prevent the increasing homogenisation of content and deteriorating quality of programmes: A "Big Brother" type of show financed with European money qualifies perfectly as both a European work and an independent production.

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[154] European Commission, *"European Works' Share of TV Broadcasting Time Now Stable Over 60%"*, IP/06/1115, Brussels, 22 August 2006. This statement remains unaltered after the latest report. Commissioner Reding stated that, "Today's figures [showing almost two-thirds of European content] demonstrate the vitality of the EU audiovisual industry and the equal commitment of all EU Member States (old and new) to cultural diversity". See European Commission, *"New Figures Show: Almost Two-thirds of EU Television Time Is 'Made in Europe'"*, IP/08/1207, Brussels, 25 July 2008.

[155] Graber, *supra* note 108, at pp. 253-254.

[156] Council of Europe, European Convention on Transfrontier Television (ETS No 132), Strasbourg, 5 May 1989. The CTT was opened for signature by the CoE Member States and other States Party to the European Cultural Convention (ETS No 018), Paris, 19 December 1954.

[157] Article 6(2) in conjunction with 6(1)(a) and (b) TVWF. Pursuant to Article 1(n)(ii) these criteria remain the same.

[158] Such a rationale is apparent from Recital 20 AVMS. See also John D. Donaldson, *"'Television Without Frontiers': The Continuing Tension between Liberal Free Trade and European Cultural Integrity"* (1996) Fordham International Law Journal 20, pp. 90-180.

[159] Although it was found that, "there is a greater appetite for US programming among European audiences than for programmes produced in other Member States […] [because] US programme storylines have broad appeal, whereas European production has a national cultural appeal which does not travel well". See Graham & Associates, supra note 134, at p. 18 and section 9.3.3. For an interesting comment on the global power of American popular culture (influencing through attraction rather than coercion), see Neal M. Rosendorf, *"Social and Cultural Globalization: Concepts, History, and America's Role"* in Joseph S. Nye and John D. Donahue (eds.), Governance in a Globalizing World, Washington, DC: Brookings Institution Press, 2000, pp. 109-134, at pp. 117 et seq.

[160] Graham & Associates, supra note 134, at section 8.5.

Following a large consensus Articles 4 and 5 remained unaltered[161] in the TVWF review process. Far more contentious was the translation of this quota system to non-linear (on-demand) audiovisual media services.[162] With regard to these, AVMS included only a soft-law provision, which creates an obligation for the Member States to ensure that media service providers under their jurisdiction "*promote*, where practicable and by appropriate means, production of and access to European works".[163] Such promotion could relate, *inter alia*, to the financial contribution to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes.[164] Member States are to report every four years on the implementation of this provision, with a subsequent reporting obligation of the Commission to the Parliament and the Council, which should take into consideration the market, technological developments and the objective of cultural diversity.[165]

Besides the questionable culture-related benefits of the quota system, we argue that in the digital networked environment, its effects are quite unpredictable and may even have diametrically opposed outcomes. A first option is that consumers (being empowered by technology) would plainly *not* choose European works and thus render any quota ineffective. Another, rather different option is an application of the "long tail" phenomenon, as sketched above. This means that in the new environment of indefinitely diverse media, consumers will be stimulated to consume products that would otherwise not be available to them (because of the scarcity of timeslots in TV schedules) and will thus induce markets to offer new types of "good" content, including, for instance, archived European content, original works, documentaries or director's cuts.[166] This may ultimately lead to a higher share of available and most importantly, effectively consumed European works, which, if realised, will be a genuine expression of cultural diversity.

To wrap up the above argument in a straightforward (but also less differentiated) statement, one may legitimately question any cultural policy measure that restricts trade by putting up barriers to incoming foreign cultural goods and services, and may doubt even more strongly the rationale of such measures under the conditions of a digital networked environment.[167] Furthermore, the digital setting may have had the effect of reducing the significant

[161] With the tiny difference that the reference to Article 6 made in Article 4(1) is deleted. Article 6 TVWF used to define what European works are. This definition is now contained in Article 1(n) AVMS.

[162] The scope of application of the AVMS has been extended substantially. It covers all audiovisual media services, within which two sub-categories are defined, treated differently under the AVMS regime. The first sub-category is that of television broadcast or linear service. It covers audiovisual media services "provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule". The second sub-category comprises on-demand or non-linear audiovisual media services, which are offers of audiovisual content "for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider". See Articles 1(e) and 1(g) AVMS, respectively.

[163] Article 3(i)(1) AVMS (emphasis added).

[164] Ibid.

[165] Articles 3(i)(2) and 3(i)(3) AVMS.

[166] Horlings et al., supra note 121, at p. 66; Marsden et al., supra note 114, at pp. 22-23.

[167] We do so fully aware that there exist economic models that show that trade restrictions enhance welfare. Such a cultural trade model involving two countries, the US and France, in which a French tariff on film imports can be optimal, is valid however with the critical assumptions that Hollywood can produce exportable films but the French industry cannot; nationals of one country cannot invest or participate as professionals in the other's film industry, and there is no price discrimination. See Patrick François and Tanguy van Ypersele, *"On the Protection of Cultural Goods"* (2002) Journal of International Economics 56, pp. 359–369, as referred to by Acheson and Maule, supra note 21, at p. 252.

entrepreneurial risk inherent in launching new cultural goods and services[168] (at least for some of them), at the same time making the visibility of cultural goods and services greater and empowering the consumer in terms of choices and actual consumption. These changed modalities of the digital space and the overall transformed regulatory environment need to be cautiously examined to design an appropriate and efficient toolbox.

4. SOLUTIONS WITHIN THE WTO

Our starting point here is that the culture-related norms existing at the national, regional and international levels are profoundly fragmented and function in a manner disadvantageous to the aspired to and otherwise politically celebrated objective of diversity of cultural expressions. Since we do not see any feasible solution for interfacing the UNESCO and the WTO regimes as the law of the WTO now stands (excluding the strong political exchanges between the two), we explore in this section to what extent and how exactly the law of the WTO itself can be "streamlined" to make it more conducive to cultural diversity.

Cultural issues have occasionally floated up the "trade" waters of the WTO[169] and revealed the inherent unease between trade and culture. The conflict has not yet found any comprehensive solution but, as Wouters and de Meester note, "[c]haracterizing the WTO agreements as solely trade-oriented and therefore culture-insensitive is not fully deserved".[170]

Next to the leeway for screen quotas expressly devised in Article IV GATT, which we briefly mentioned above,[171] plenty of other norms scattered within the body of the WTO law can be found relevant and allow certain flexibility as far as trade in cultural goods and services is concerned.[172] It is often said that GATS offers substantially more flexibility than GATT,[173] since the GATS framework involves primarily a "bottom-up" (or "positive list") approach, whereby Members can choose the services sectors and sub-sectors in which they are willing to make national treatment or market access commitments, and define the modalities of these commitments. In contrast, obligations under GATT regarding national treatment and quantitative restrictions apply across the board, subject to specified exceptions (a "top-down" or "negative list" approach). It should however be borne in mind that if Members do make unlimited commitments under GATS, they may in fact be more restricted than under GATT since within the fairly new construct of

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[168] Germann argues that this specificity of cultural goods and services is the main one that commands intervention. See Christophe Germann, *"Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity"* (2005) ERA—FORUM 6:1, pp. 109-130, at p. 116.

[169] See e.g. GATT, *EEC-Directive on Transfortier Television: Response to Request for Consultations under Article XXVII:I by the United States*, DS4/4, 8 November 1989; WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Consultations by the United States*, WT/DS43/1, 17 June 1996; WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Establishment of a Panel by the United States*, WT/DS43/2, 10 January 1997; *Canada Periodicals*, supra note 77. For an overview, see Hahn, supra note 8, at pp. 528-530.

[170] Wouters and De Meester, supra note 7, at p. 218.

[171] See supra note 143.

[172] Christoph Beat Graber, *"Audiovisual Media and the Law of the WTO"* in Graber, Girsberger and Nenova, supra note 3, at pp. 47-56.

[173] Graber, supra note 4, at pp. 555 and 569.

the agreement on services no rules on subsidies, safeguards or an equivalent to GATT Article IV for screen quotas exist.[174]

Manifold proposals have been advanced to solve the "culture *versus* trade" conundrum and make it more like "culture *and* trade". One could group these suggestions (without claims for an exhaustive listing) into three categories.

(i) The first attempts the insertion of a link, be it substantive or procedural, that will connect the law of the WTO to the UNESCO Convention on Cultural Diversity, so that it would ultimately be for the WTO panels and the Appellate Body to resolve the conflict (de-paradoxing[175] the underlying incompatible values). This logical construct can be implemented in several ways: One possibility is to introduce a "cultural" exception in the text of the WTO Agreements, similar to the one existing for accommodating health or environmental concerns.[176] One could also suggest amending the text of the Preamble of the WTO Agreement to include the goal of cultural diversity next to that of sustainable development. This would allow a panel or the Appellate Body to interpret contested trade measures having the overarching objective of cultural diversity in mind, thereby balancing the interests at stake in the concrete conflict.[177] Another option within this category, sketched by Graber, is the creation of a procedural link between the WTO and the UNESCO rules, possibly through a Ministerial Decision,[178] which "would oblige Members, in cases of conflict between trade and culture, to take into account the UNESCO Convention when interpreting and applying WTO law or entering into negotiations leading to an amendment of the WTO framework".[179] It is also conceivable that each Member could introduce a reference to the UNESCO Convention into its schedule of commitments, expressly stating in the relevant market access and national treatment columns that the limitations thereof are consistent with the UNESCO Convention. This incorporation of the Convention by reference into the WTO law could arguably allow it to be invoked, even *vis-à-vis* Members not Parties to the UNESCO Convention.[180]

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[174] Tania Voon, *"A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS"* (2007) UCLA Entertainment Law Review 14:1, pp. 1-32, at pp. 5-6. See also Pierre Sauvé, *"Completing the GATS Framework: Addressing Uruguay Round Leftovers"* (2002) Aussenwirtschaft 57, pp. 301-341, at pp. 327-333.

[175] Christoph Beat Graber, *"Der Kunstbegriff des Rechts im Kontext der Gesellschaft"* in Institut suisse de droit comparé et al. (ed.), Liberté de l'art et indépendance de l'artiste / Kunstfreiheit und Unabhängigkeit der Kunstschaffenden, Zurich: Schulthess, 2005, pp. 91-111.

[176] See Article XX(b) GATT and Article XIV(b) GATS with regard to measures "necessary to protect human, animal or plant life or health", and Article XX(g) with regard to measures "relating to the conservation of exhaustible natural resources".

[177] In *US-Shrimp*, the Appellate Body criticised the Panel's decision stating, among other things, that "the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement. Thus, while the first clause of the preamble to the WTO Agreement calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the WTO Agreement should allow for 'optimal use of the world's resources in accordance with the objective of sustainable Development', and should seek 'to protect and preserve the environment'". See WTO Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, at para. 17. See also paras 129-131, 152 and 155.

[178] If the decision is of a nature that would not alter the rights and obligations of the Members, it would take effect for all Members upon acceptance by two thirds of the Members, pursuant to Article X(4) WTO Agreement.

[179] Graber, supra note 4, at p. 572.

[180] Laura Gomez Bustos and Pierre Sauvé, *"A Tale of Two Solitudes? Assessing the Effects of the UNESCO Convention on Cultural Diversity on WTO Law"*, paper presented at the conference "The New Agenda for International Trade Relations as the Doha Round Draws to an End", University of Barcelona, 29-30 January 2007 (on file with the author), at p. 50, referring to an interview with Hélène Ruiz-Fabri, UMR de Droit Comparé, Paris, 12 June 2006.

Next to the obvious difficulty of negotiating and adopting all these proposals, is the concern as to whether the WTO adjudicating bodies are the appropriate ones to decide upon such critically important conflicts and whether they can really offer a solution that is comprehensive enough. Another, more general question, which is also pertinent in this context, is whether such regime extensions are beneficial (to both trade and cultural regimes), since as Fiona Macmillan notes "WTO is not an appropriate body to oversee the protection of human right, nor of rights relating to cultural diversity and self-determination".[181]

(ii) Similarly to the first group of suggestions, the second tries to introduce changes to diverse provisions of the WTO law or to insert new ones, so that it would itself be made more culture-sensitive, i.e. allowing Members to pursue diverse cultural policy measures, including those that would otherwise collide with the existing multilateral trade rules. In this context, a waiver for cultural policies negotiated under Article IX:3-4 is the most radical of options. It is also the least likely to materialise since a waiver demands first a clear identification of the sector(s) concerned and second, the support of three-quarters of the WTO membership.[182] Other, subtler proposals put forward are in essence various types of cultural exemptions – not in the sense of a wide "cultural exception" as France and Canada defined it during the Uruguay Round[183] – but differentiated and justified by distinct (and presumably objective) characteristics inherent to cultural products and services. Bernier has suggested, for instance, an exception "for the preservation of cultural and linguistic diversity, including national cultures",[184] while Graber more concretely argues in favour of a cultural exemption restricted to the protection of arthouse films.[185]

However, as Voon quite rightly notes, all these proposals, besides the obvious difficulty of formulating them in a non-arbitrary and enforceable manner and of obtaining the Members' consent, are "regressive" in that they decrease the already achieved level of liberalisation, especially where GATT is concerned.[186] In contrast, there may be other solutions that are positively framed and indeed most advantageous, such as, the reference paper type of document suggested by Graber, which would be similar to the one applying to basic telecommunications services. Such a reference paper for audiovisual services could provide a safeguard for cultural policy measures in the form of a "universal service" clause, while advancing national treatment and market access commitments,[187] thus achieving a balance between the drive for liberalisation and certain public interest objectives.

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[181] Fiona Macmillan, *"Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of Relationship"* in Christoph Beat Graber and Mira Burri-Nenova (eds.), Intellectual Property and Traditional Cultural Expressions in a Digital Environment, Cheltenham, UK: Edward Elgar, 2008, pp. 73-95, at p. 90, referring also to Fiona Macmillan, *"International Economic Law and Public International Law: Strangers in the Night"* (2004) International Trade Law and Regulation 10, pp. 115-124.

[182] For a detailed analysis of a waiver proposal, see Chi Carmody, *"When "Cultural Identity Was Not an Issue": Thinking about Canada-Certain Measures Concerning Periodicals"* (1999) Law and Policy in International Business 30, pp. 231–320.

[183] For an account of the different positions, see Roy, supra note 98, at pp. 926-928.

[184] Ivan Bernier, *"Cultural Goods and Services in International Trade Law"* in Dennis Browne (ed.), The Culture/Trade Quandary, Ottawa: Centre for Trade Policy and Law, July 1998, pp. 108 et seq., at p. 147.

[185] See Christoph Beat Graber, *"WTO: A Threat to European Film?"* in Enrique Banus (ed.), Proceedings of the V Conference "European Culture", 28-31 October 1998, University of Navarra, Pamplona 2000, pp. 865-878. Graber suggests that such arthouse films could be differentiated, instead of using otherwise subjective qualitative assessment, by applying a quantitative criterion for film budgets of not more than 5 million USD (Graber, supra note 108, pp. 332, 336).

[186] Voon, supra note 174, at p. 27.

[187] Graber, supra note 108, at pp. 333-337.

In a narrower sense, Messerlin and Cocq propose a "reference paper" on audiovisual subsidies allowing "subsidies for cultural reasons, while banning subsidies for mere industrial reasons".[188] Again, these suggestions, albeit positive, need the political will of a number of WTO Members, who must negotiate the clear terms of such an agreement and inscribe it as an additional commitment[189] in their own schedules.

(iii) The third category of suggestions envisages amendments to a number of WTO law norms or the introduction of new ones that are supposed to improve the law of the WTO to reflect more appropriately the changes in the contemporary global space, to be clearer, more transparent and enforceable. By undergoing this "renovation" process, it is also likely that more suitable norms for cultural goods and services will be put in place that allow simultaneous advancement of trade liberalisation goals and consideration of public interests and values of importance to Members and the international community.

This is by far the largest category in our taxonomy and numerous suggestions can be subsumed here. We only outline a few of those that could in our view most directly influence cultural policies. Unsurprisingly, a key proposal in this sense addresses "audiovisual services", which are, as we mentioned above, the hornets' nest in the issues of trade and culture. Audiovisual services is precisely the domain where the political pressure to accommodate different culture-oriented measures has been the strongest, and this has spilled over to other sectors (such as telecommunications services[190]) and to other negotiation themes (such as the WTO Work Programme on Electronic Commerce[191]). Because of the inherent sensitivities of the audiovisual services sector and despite the considerable economic gains to be reaped from its liberalisation,[192] almost all Members, with the notable exception of the US, Japan and New Zealand,[193] have been reluctant to commit and have listed substantial MFN exemptions.[194] In the ongoing Doha Round, although the intensity of the confrontation has been lessened, there is little likelihood that Members will increase their level of commitments to any significant extent, as the negotiating proposals submitted for audiovisual services signal.[195]

A bold solution to the audiovisual services quandary "outside the box" has been outlined by Tania Voon, who suggests "a holistic approach to audiovisual products in the WTO, taking a holistic view of GATT 1994 and GATS rather than

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188 Emmanuel Cocq and Patrick Messerlin, *"French Audio-Visual Policy: Impact and Compatibility with Trade Negotiations"*, in Paulo Guerrieri, Lelio Iapadre and Georg Koopmann (eds.), Cultural Diversity and International Economic Integration, Cheltenham, UK: Edward Elgar, 2005, at pp. 48-49.

189 In the sense of Article XVIII GATS.

190 See Mira Burri-Nenova, *"The Law of the World Trade Organization and the Communications Law of the European Community: On a Path of Harmony or Discord?"* (2007) Journal of World Trade 41:4, pp. 833-878.

191 WTO, Work Programme on Electronic Commerce Adopted by the General Council on 25 September 1998, WT/L/274, 30 September 1998; WTO, Work Programme on Electronic Commerce: Background Note by the Secretariat, G/C/W/128, 5 November 1998.

192 Roy, supra note 98, at p. 941.

193 The rest of the 18 Members that undertook commitments are mostly developing countries and include the Central African Republic, the Dominican Republic, El Salvador, Gambia, Hong Kong China, India, Israel, South Korea, Mexico, Nicaragua, Singapore and Thailand.

194 Roy, supra note 98, at p. 927.

195 See WTO Documents S/CSS/W/21 (US); S/CSS/W/74 (Switzerland); S/CSS/W/99 (Brazil). The proposal of Japan was not specific to audiovisual services and can be found in WTO Document S/CSS/M/8. There is also the Joint Statement by Hong Kong China, Japan, Mexico, Taiwan and the US, TN/S/W/49. For comments on the expressed positions, see Roy, supra note 98, at pp. 931-936.

seeing them as two separate and independent agreements".[196] Voon argues for an overhaul of the existing minimum level of commitments and maximum level of MFN exemptions for audiovisual services. She advocates full commitments for both market access and national treatments, believing that, "[t]rade restrictions in the form of market access limitations should not be allowed on the grounds that they are necessary to preserve or promote culture".[197] Considering the radical nature of this proposal, Voon reflects upon possible "escape routes" for Members based on existing or newly formulated WTO provisions. Under the existing framework, some MFN exemptions for cultural policy measures could remain protected under FTAs under the conditions of Article V GATS,[198] granting services and service suppliers of the FTA Member(s) treatment more favourable than that provided to other WTO Members' like services and service suppliers.[199] The provision of Article XIV(a) GATS exempting measures necessary to protect public morals or to maintain public order, also remains applicable, although it is questionable whether cultural measures will pass the stringent test of the chapeau. Voon thinks also of additional "escape routes", not currently available under WTO law. In this context, she sees a necessity for new rules on subsidies,[200] on preferential treatment of developing countries[201] and redesigning the screen quota rule (in the sense of agreeing that a measure that complies with Article IV GATT would not be regarded as violating GATS and introducing rules to the screen quota rule for radio and television broadcasting, which fall under a services category).[202]

Voon's suggestion despite its almost utopian nature,[203] especially considering the present Doha Round stalemate and the scant attention paid to services, is worth considering because of its objective and evolutionary character, which is in line with the spirit and the letter of progressive liberalisation[204] and with the contemporary media landscape, as sketched in the preceding section.

In view of the changing environment, a second avenue for improving the WTO framework could be the reform of the existing services classification. Classification and scheduling issues have long been acknowledged as problematic since the

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[196] Voon, supra note 174, at p. 4. This is different from the situation where both GATT and GATS apply, without one taking precedence over the other, which is presently the case. See WTO Appellate Body Report, *Canada Periodicals*, supra note 77, at para. 19; Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS/27/AB/R, 9 September 1997, at para. 221. See also Pauwelyn, supra note 74, pp. 399-405.

[197] Voon, supra note 174, at p. 19 (footnotes omitted).

[198] For an overview, see Thomas Cottier and Martin Molinuevo, *"Commentary on Article V GATS: Economic Integration"* in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds.), Max-Planck Commentaries on World Trade Law, Vol. 6: WTO: Trade in Services, Leiden: Brill Publishers, 2008.

[199] Voon, supra note 174, at p. 20.

[200] Voon, ibid. at pp. 20-24. See also WTO, Communication from the United States, Audiovisual and Related Services, S/CSS/W/21, 18 December 2000, at para. 10(iii), where the US stated that, "Members may also want to consider developing an understanding on subsidies that will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture". The US has already accepted some leeway for subsidies in its FTAs with Singapore and Australia.

[201] Ibid. at pp. 24-25.

[202] Ibid. at pp. 25-26.

[203] As Voon herself admits (ibid. at p. 32).

[204] See Part IV GATS. Article XIX therein states: "In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization".

classification system used for services[205] (the W/120[206] with reference to the United Nations Central Product Classification (CPC)[207]) is rather inconsistent with the purpose of scheduling, is not detailed enough, has overlapping and/or outdated categories, and has not been always followed by the Members. A clearer, better-structured and more up-to-date classification, especially with regard to the sectors pertinent to culture and the rapidly changing audiovisual and telecommunications area,[208] can be put high on the list of desiderata.[209] Such an improved system could, most importantly, allow finer tuned scheduling and facilitate deeper market access commitments [210] not only in the services sectors (such as computer and telecommunications services[211]), where this may reasonably be expected.[212]

In the specific context of the digital environment, a most urgent issue is the classification of digitally transferred products and services. This is a slightly different discussion than the general classification reform and boils down to the question of whether matter traded in digital form should belong to the goods or to the services category and the possible consequences of such a categorization.

The classification debate on digital products and services is nothing new and can be traced back to the GATT 1947.[213] The fact that it is still unsettled relates to a great extent to the audiovisual services quandary and the starkly different positions of the major negotiation drivers, the EC and the US. The EC zealously argues that, "[e]lectronic deliveries consist of supplies of services which fall within the scope of the GATS",[214] and seeks to ensure that all digital media fall within the

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[205] The classification problem is similar for goods and the applied Harmonised System, created and regularly amended by the World Customs Organization. See Dayong Yu, *"The Harmonized System — Amendments and Their Impact on WTO Members' Schedules"* (2008) WTO Economic Research and Statistics Division Staff Working Paper No 2, pp. 1-23.

[206] See WTO, Services Sectoral Classification List, WTO Doc.MTN.GNS/W/120, 10 July 1991.

[207] UN Provisional Central Product Classification (CPC), UN Statistical Papers, Series M, No 77, Ver.1.1, E.91.XVII.7, 1991.

[208] For details on audiovisual services, see Roy, supra note 98, at pp. 947-949; for telecommunications services, see Burri-Nenova, supra note 190.

[209] The CPC has in fact been amended twice since the end of the Uruguay Round (see Central Product Classification – Version 1.0, UN Statistical Papers, Series M, No 77, 1998, E.98.XVII.5 and Central Product Classification – Version 1.1, UN Statistical Papers, Series M, No 77, 2002, ESA/STAT/SERM/77/Ver.1.1. The CPC Version 2 is in draft and pending adoption). These updates have however not been integrated into the current negotiations.

[210] Roy, supra note 98, at p. 947. Roy has examined the existing schedule of commitments and establishes that they are not detailed but rather follow an "all-or-nothing" approach.

[211] Wunsch-Vincent, supra note 216, at p. 25.

[212] It should be noted that the need for careful scheduling has been stressed by the *US-Gambling* rulings (WTO Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/S285/R, 10 November 2004, confirmed by Appellate Body Report, WT/DS285/AB/R, 7 April 2005). This may have however also a chilling effect as Members will be particularly careful to accept commitments considering that they extend to services electronically supplied across borders (Sacha Wunsch-Vincent, *"The Internet, Cross-border Trade in Services, and the GATS: Lessons from US-Gambling"* (2006) World Trade Review, pp. 319-355, at p. 324) and also that there is a presumption that the structure and language of a schedule follow the W/120 and CPC nomenclature (Markus Krajewski, *"Playing by the Rules of the Game? Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations"* (2005) Legal Issues of Economic Integration, Vol. 32, No 4, pp. 417-447, at p. 427).

[213] In 1961, the US requested the establishment of a Working Party to examine the application of GATT 1947 to television programmes. The US argued that TV programmes are goods under GATT 1947 but do not fall under Article IV, which covers only "cinematograph films". The US proposed that Members be required to balance national regulations reserving transmission time to domestic programmes with reasonable access to foreign programmes. See GATT, Application of GATT to International Trade in Television Programmes, L/1615, 16 November 1961; GATT, Application of GATT to International Trade in Television Programmes: Proposal by the Government of the United States, L/2120, 18 March 1964.

[214] WTO, Communication from the European Communities and their Member States: Electronic Commerce Work Programme, S/C/W/183, 30 November 2000, at para. 6(a).

category of audiovisual services, thus retaining its flexibility for MFN exemptions and limited commitments. The US takes the opposite position and has sought the deepest mode of liberalisation available, i.e. that of GATT (coupled with the Information Technology Agreement).[215] These opposing agendas of the EC and the US prompt no straightforward solution, at least not in the short term and leave the vital economic field of digital trade in a haze of uncertainty,[216] although the *US-Gambling* rulings[217] have confirmed that WTO rules are applicable to electronically supplied services.[218]

The lack of a solution within the multilateral context of the WTO has also led Members to take other, bilateral or regional, paths to advance their policy priorities. The US particularly has put in substantial efforts to ensure implementation of its digital agenda [219] through FTAs that contain only minimal restrictions for electronically delivered services and digital products.[220] Interestingly, the US has shown deference to the culturally inspired measures of its FTA partners in the field of audiovisual services, provided that these measures are "frozen" at their present level,[221] while pushing hard to receive full commitments for digital media and their delineation from conventional "offline" audiovisual services.

The EC has in the meantime expanded the scope of application of its media regulation[222] through the 2007 Audiovisual Media Services Directive, which, as mentioned above, added on-demand audiovisual services to its regulatory field, signalling the EC's desire "to retain its competence to introduce culturally motivated measures across the electronic communications field and […] not [to] accept the US 'standstill' agenda" for digitally delivered products and services.[223] On the bilateral track, the EC has sought exclusion of cultural services from trade commitments (including content-related implications of e-commerce), [224] while promising intensified cultural co-operation.[225]

Against this backdrop and although a variety of solutions is imaginable,[226] it is quite unlikely that we will soon see any clear-cut answers with regard to digitally

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[215] WTO, Work Programme on Electronic Commerce: Submission by the United States, WT/COMTD/17; WT/GC/16; G/C/2; S/C/7; IP/C/16, 12 February 1999.

[216] Sacha Wunsch-Vincent, *"The Digital Trade Agenda with of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization"* (2003) Aussenwirtschaft 1, pp. 7-46 and Wunsch-Vincent, supra note 83.

[217] See supra note 212.

[218] Wunsch-Vincent, supra note 212, at p. 323.

[219] On the digital trade agenda, its aims and approaches, see Wunsch-Vincent (2003), supra note 216, in particular at pp. 11-12.

[220] For a detailed discussion of the US-Singapore and the US-Chile FTAs, see Wunsch-Vincent (2003), ibid. at pp. 28-35. See also Martin Roy, Juan Marchetti and Hoe Lim, *"Services Liberalization in the New Generation of Preferential Trade Agreements: How Much Further than the GATS?"* (2006) WTO Economic Research and Statistics Division Staff Working Paper No 7, pp. 1-63, at pp. 38-40.

[221] Wunsch-Vincent, supra note 216, at pp. 15-16. See also See Voon, supra note 174, at pp. 25-26.

[222] See supra note 162.

[223] Craufurd Smith, supra note 8, at p. 49.

[224] For an example, see EC-Chile Association Agreement (signed 3 October 2002), at Part IV "Trade and Trade-related Matters".

[225] See ibid. at Part III, Title II "Culture, Education and Audio-visual", Articles 38-40.

[226] There are some good suggestions on the table, most of which propose the adoption of a negative list approach for digital services and listing very few limitations in these negative lists. See Catherine L. Mann and Sarah Cleeland Knight, *"Electronic Commerce in the WTO"* in Jeffrey J. Schott (ed.), The WTO after Seattle, Washington, DC: Institute for International Economics, 2000, at pp. 253-268, at p. 259; Wunsch-Vincent, supra note 83, at pp. 78-79; Voon, supra note 174, at pp. 17-26. It should be noted however that the WTO delegations have agreed on preserving the present architecture of GATS and following the "positive list" approach (see WTO Economic Research and Analysis Division, *Market Access: Unfinished Business – Post-Uruguay Round Inventory and Issues*, Geneva: WTO, 2001, at p. 119).

transferred products and services, mostly because of the high sensitivity of cultural issues for nation states. Even if all parties agree that the GATS modus is the appropriate one for digital content, it is unclear which service category would apply. Online games, for instance, could be fitted into computer and related services, value-added telecommunications services, entertainment or audiovisual services,[227] which brings us to the need for an improved classification system, as noted above.

To conclude our discussion on the whole exercise of mapping possibilities for making the WTO framework more culture-conducive, one cannot help but notice that there are a number of ways in which this could be achieved. In particular, the third category of suggestions outlined above, which is not in itself culturally motivated but rather seeks to improve the overall WTO structure of rules making it more flexible, comprehensive and transparent, deserves attention. Despite the political charge of the "trade *versus* culture" debate, it may allow for framing both economic and public interest rationales using "neutral" paths such as improved classification, new rules on subsidies for services and an additional element that we have left uncovered, but that is certainly essential, namely inserting competition rules within the WTO legal framework[228] that would cater for market distortions by private undertakings.[229]

Being fully aware of the complexity of the negotiation process, however, we do not fantasise that there is soon to be a substantial advancement in any of the discussed aspects. More focused research is needed to clarify all the options, weigh their associated costs and benefits, and prioritise their negotiation in order to awaken the interest of the policy-making circles and advance concrete and feasible solutions.

5. OUTSIDE THE WTO: SMALL (PERIPHERAL) FRAGMENTS/BIG IMPACT

We have adopted here the rather sceptical position that a direct trade/culture conflict before the WTO would not solve the conundrum, nor would the WTO law itself undergo a reform (at least not in the short- to mid-term) that would make it truly culture conducive.

When one observes the conflict between trade and culture, as we have shown above the discussion almost automatically centres upon the WTO and UNESCO as the key fora in the relevant regulatory field at the international level. However, there are a number of other issues (and corresponding negotiation and regulatory institutions) that are of importance to the production and distribution of and access to cultural content.

Indeed, the mandate of the UNESCO Convention is much broader than cultural policies that are to be carved-out, counterbalanced or otherwise juxtaposed to the WTO rules, in particular those dealing with audiovisual services. Its mandate is to protect and promote the diversity of cultural expressions and the cultural policy measures adopted to this end are defined widely as "policies and measures related to culture, whether at the local, regional, national or international levels, which are either focused on culture as such, or which are designed to have a

[227] Wunsch-Vincent, supra note 83, at p. 71.

[228] Philip Marsden, *A Competition Policy for the WTO*, London: Cameron May, 2003; Merit E. Janow, *"Trade and Competition Policy"* in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer, The World Trade Organization: Legal, Economic and Political Analysis, New York: Springer, 2005, Vol. III, pp. 487-510.

[229] See Germann, supra note 168, at p. 111; Graber, supra note 108, at pp. 327-328, 343.

direct effect on cultural expressions of individuals, communities or societies, including the creation, production, dissemination, distribution of and access to cultural activities, goods and services".[230]

Accounting for this broad mandate, we show in the following section that there are other fragments outside the centre of "trade *versus* culture" and demonstrate the significance of these "other" fragments of the puzzle by revealing some aspects of the key role of intellectual property rights for cultural production, especially in the digital networked environment. We then turn to some other rules that appear at first sight remote from culture but may still affect it.

5.1. INTELLECTUAL PROPERTY

The present IPR model[231] was put in place "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".[232] As such, its foremost rationale is to foster creativity, which is the most important prerequisite for a flourishing and diverse cultural environment, while granting temporary monopoly to the creators.

Over time, modern legal systems have developed a broad palette of sophisticated[233] and flexible IP tools intended "to protect both traditional and new forms of symbolic value produced in particular places as they circulate in global commodity markets".[234] Nevertheless, the IPR system is not perfect and has some deficiencies. The limitations are inherent in the nature and in the mechanisms of IP protection and relate to the centrality of authorship, originality and mercantilism to the "Western" IP model leaving numerous non-Western, collaborative or folkloric modes of production outside the scope of IP protection.[235]

Furthermore, there are complex relationships between the private and the public, and between creativity and the IP incentives to promote it. There is a constant need to strike a balance between the private interests of authors and the public interest in enjoying broad access to their productions[236] – a balance that is in itself a complex high-wire act and one that may be vital for the sustainability of culture and creativity. As for the latter, the content industries are constantly

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[230] Article 4(6) UNESCO Convention.

[231] Under IPR as a general category, one understands the rights granted to creators and inventors to control the use made of their productions. They are traditionally divided into two main branches: (i) "copyright and related (or neighbouring) rights" for literary and artistic works and (ii) "industrial property", which encompasses trademarks, patents, industrial designs, geographical indications and the layout designs of integrated circuits. In the following, we discuss primarily the first category.

[232] US Constitution, at Article I, Section 8, para. 8.

[233] See e.g. Laurence R. Helfer, *"Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking"* (2004) The Yale Journal of International Law 29:1, pp. 1-83.

[234] Rosemary J. Coombe, Steven Schnoor and Mohsen Ahmed, *"Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property"* (2007) UC Davis Law Review 40, pp. 891-917, at p. 916, referring to Wend B. Wendland, *"Intellectual Property and the Protection of Cultural Expressions: The World of the World Intellectual Property Organization"* in F. Willem Grosheide and Jan J. Brinkof (eds.), Intellectual Property Law 2002, Antwerp: Intersentia, 2003, at pp. 101, 103.

[235] Bellagio Declaration, formulated at the Rockefeller Conference: Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era, 11 March 1993, Bellagio, Italy (reproduced in James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society, Cambridge, MA: Harvard University Press, 1996, at pp. 196-200), at Discussion (footnotes omitted).

[236] See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15(1)(c)), UN Doc. E/C.12/2005, 21 November 2005, at para. 35. For an interpretation, see Helfer, supra note 56, at pp. 997-1000.

asserting that IPR are the guarantee of innovation and creativity and thereby, the *sine qua non* for a vibrant culture. While IP protection certainly fulfils essential economic functions in cultural production and distribution,[237] evidence of a direct correlation between IPR (or stronger IPR) and creativity is equivocal, and IP protection may even trigger systemic harm.[238] Furthermore, some copyright scholars observing the process of creativity more closely, argue that it is the "creative play" that is of primary importance for the artistic and intellectual innovation[239] – a play that may very well be obstructed by contemporary (and ever strengthening[240]) IP regimes.

As we discussed above, the digital environment has had (and continues to have) all sorts of impacts on cultural content production, communication and consumption processes. Of these, and a key one in the present context, is the increased economic importance of information, which has correspondingly magnified the value of copyright law[241] and expanded its reach.[242] At the same time, the existing copyright models have been put under pressure. Since these models are often too rigid to allow full realisation of the possibilities of the digital mode of content production and distribution or render them illegal, obstructing the "creative play", some new hybrid models for the protection of authors' rights have emerged. One prominent model is the Creative Commons (cc) licence,[243] which allows managing and spreading content under a "some rights reserved" mode[244]

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[237] See Wendy J. Gordon, *"Intellectual Property"* in Peter Can and Mark Tushnet (eds.), Oxford Handbook of Legal Studies, Oxford: Oxford University Press, 2003, pp. 617-646; William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge, MA: Belknap Press of Harvard University, 2003, at pp. 11-123.

[238] Julie E. Cohen, *"Creativity and Culture in Copyright Theory"* (2007) UC Davis Law Review 40, pp. 1151-1205, at p. 1193-1194. In *Grokster*, the US Supreme Court did recognise the possible harm, noting that, "[t]he more artistic protection is favored, the more technological innovation may be discouraged". See US Supreme Court, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005), referring to *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), at 442.

[239] See recently Cohen (2007), supra note 238 and Julie E. Cohen, *"The Place of the User in Copyright Law"* (2005) Fordham Law Review 74, pp. 347-374. See also Eben Moglen, *"Anarchism Triumphant: Free Software and the Death of Copyright"* in Niva Elkin-Koren and Neil Weinstock Netanel (eds.), The Commodification of Information, The Hague: Kluwer Law International, pp. 107-132; David Lange, *"Reimagining the Public Domain"* (2003) Law and Contemporary Problems 66, pp. 463-483.

[240] Vaidhyanathan notes in this regard: "Copyright in recent years has certainly become too strong for its own good. It protects more content and outlaws more acts than ever before. It stifles creativity and hampers the discovery and sharing of culture and knowledge". See Siva Vaidhyanathan, *"The Googlization of Everything and the Future of Copyright"* (2007) UC Davis Law Review 40, pp. 1207-1231, at p. 1210. Sharing this position, see also David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth*, London: Routledge, 2003; Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, New York: New York University Press, 2003.

[241] Julie E. Cohen, *"Pervasively Distributed Copyright Enforcement"* (2006) Georgetown Law Journal 95, pp. 1-48.

[242] Lawrence Lessig, *"(Re)creativity: How Creativity Lives"* in Helle Porsdam (ed.), Copyright and Other Fairy Tales: Hans Christian and the Commodification of Creativity, Cheltenham, UK: Edward Elgar, 2006, pp. 15-22, at p. 19.

[243] See http://creativecommons.org/. There are also some other types of licences designed by the Creative Commons, such as public domain, developing nations, sampling, founder's copyright, GNU, Wiki and music sharing. The "developing nations" licence, for instance, allows a wide range of royalty-free uses of a work in developing nations, while retaining full copyright in the developed world. On the use of cc-licences, see Giorgos Cheliotis, Warren Chik, Ankit Guglani and Giri Kumar Tayi, *"Taking Stock of the Creative Commons Experiment Monitoring the Use of Creative Commons Licenses and Evaluating its Implications for the Future of Creative Commons and for Copyright Law"*, paper presented at the 35th Research Conference on Communication, Information and Internet Policy, 28-30 September, National Center for Technology and Law, George Mason University School of Law, 15 August 2007.

[244] Under a cc-licence, the Creator/Licensor may shape her or his package of rights applying different conditions to the licensed work (attribution; non-commercial; no derivatives; or share alike (see

but there are also other initiatives seeking to re-balance "the social benefits and costs of intellectual property rights as a tool, but not the only tool, for supporting creative intellectual activity".[245]

The above should not be understood as some kind of leftist propaganda advocating the abandonment of existing copyright protection measures or the discontinuation of the efforts for their improvement and harmonisation at the national, regional and global levels. We are merely saying that the initial *raison d'être* for copyright[246] may need to restated in the newly formed environment, and this is not simply a matter of yielding to the media industries' lobbying, but of weighing anew the private interests against the public values.[247] Ensuring sustainable access to cultural goods and sustainable production of culturally diverse content[248] would thus not mean that everything is accessible in the romantic sense of the public domain[249] but would involve a complex balance between openness and discretion.[250]

The World Intellectual Property Organization (WIPO) itself has admitted that certain amendments to the existing IP architecture and a search for new forms are needed because of the need for: (i) the preservation and safeguarding of intangible cultural heritage; (ii) the promotion of cultural diversity; and (iii) the promotion of creativity and innovation, including tradition-based forms.[251] Initiatives, such as the projected *Treaty on Access to Knowledge*,[252] which envisages some general limitations and exceptions to copyright (such as for educational or library institutions); special provisions regarding digital rights management (DRM) and the extension of the term of protection, as well as positive measures for the expansion and enhancement of the knowledge commons and the promotion of open standards,[253] endorsing in effect maximum standards of IP protection,[254] are worth pursuing and may contribute significantly to a sustainable and diverse cultural ecology.

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http://creativecommons.org/about/licenses/meet-the-licenses). Such models have proven also to feed back positively into the user-created content creation and dissemination, thereby enhancing content diversity (see OECD, supra note 122, at p. 14).

[245] Geneva Declaration on the Future of the WIPO (12 October 2004, at http://www.futureofwipo.org), at Article 1. See also James Boyle, *"A Manifesto on WIPO and the Future of Intellectual Property"* (2004) Duke Law and Technology Review 9.

[246] Ronan Deazley, *Rethinking Copyright: History, Theory, Language*, Cheltenham, UK: Edward Elgar, 2008.

[247] For an overview of this position, see Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, London: Penguin, 2004.

[248] Rosemary J. Coombe, *"Protecting Cultural Industries to Promote Cultural Diversity: Dilemma for International Policy-Making Posed by the Recognition of Traditional Knowledge"* in Keith E. Maskus and Jerome H. Reichman (eds.), International Public Goods and Transfer of Technology under a Globalized Property Regime, Cambridge: Cambridge University Press, 2005, pp. 559-614, at p. 613.

[249] See Anupam Chander and Madhavi Sunder, *"The Romance of the Public Domain"* (2004) California Law Review 92, pp. 1331-1373.

[250] See Rosemary J. Coombe, *"Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property"* (2003) DePaul Law Review 52, pp. 1171-1191.

[251] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2 May 2003, Annex, at para. 8.

[252] Draft 9 May 2005, available at http://www.cptech.org/a2k/. For a similar initiative, see also P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exception to Copyright*, study sponsored by the Open Society Institute, 6 March 2008.

[253] Ibid. A2K Treaty, at Articles 3-1, 3-5, 3-6, 3-9, 5 and 6. See also Brian Fitzgerald, et al., *Creating a Legal Framework for Copyright Management of Open Access within the Australian Research Sector*, OAK Law Project Report No 1, August 2006, at pp. 99-102.

[254] Helfer, supra note 56, at p. 1014.

5.2. OTHER BITS AND PIECES

Beyond IP, the sustainability of the digital environment may also become vital for cultural diversity as a prerequisite for the basic cultural processes and communication. It may itself become a "public good".[255] In this context, developments, which one might characterise as purely technical and/or "foreign" to the system may profoundly influence the cultural ecology as well. At the micro-level, for instance, digital sustainability in the sense of ensuring that digitised formats, especially in the field of cultural heritage are interoperable, of high quality and future-proof, could be important.[256] In a broader context, the organisation of information by search engines, their precision, positioning and ultimately control, may become critical.[257] Particularly important will be all decisions and/or developments that influence the interoperability of networks, software and content and the control of the network,[258] as well as the question of technological and net neutrality.[259]

In addition, efforts, not necessarily of a legal nature, towards reducing the digital divide(s) in a society (e.g. through media literacy programmes) and between societies (e.g. through building infrastructure and other types of "access facilities") will be essential.

6. CONCLUSION: ACCOUNTING FOR *ALL* BITS AND PIECES

The area of trade and culture reveals extreme fragmentation and "no homogenous, hierarchical meta-system is realistically available to do away with such problems of [conflicting rules and overlapping legal regimes]".[260] In addition and typically of "trade and culture" issues, it is not only the regulatory framework that is profoundly fragmented but also the policy discussions.

We have hinted at two diverging paths of these discussions. The first has to do with the excessive centralisation of the "trade *versus* culture" debate upon the corresponding international fora of the WTO and UNESCO, on the one hand, and the extreme political charge of this confrontation, on the other. Whereas we have critiqued the divine isolation of the UNESCO Convention and its lack of regulatory potential to provide feasible solutions accommodating cultural policy objectives in a least trade- and competition-distortive manner, we also revealed a variety of ways in which the WTO framework can be made considerably more culture-

[255] See Maskus and Reichman, supra note 248.

[256] See Netherlands Council for Culture, supra note 130.

[257] Vaidhyanathan, for instance, questions the role of Google as ubiquitous search engine and asks whether public libraries may be more appropriate to administer knowledge. See Vaidhyanathan, supra note 240, at p. 1220. For a more optimistic vision of Google's role, see Leslie A. Kurtz, *"Copyright and the Human Condition"* (2007) UC Davis Law Review 40, pp. 1233-1252, at pp. 1250-1251.

[258] John G. Palfrey, Jr. and Robert Rogoyski, *"The Move to the Middle: The Enduring Threat of 'Harmful' Speech to the End-to-End Principle"* (2006) Washington University Journal of Law and Policy 21, pp. 31-65.

[259] The principle of net(work) neutrality or in its broader sense, the end-to-end principle, essentially holds that the network should be neutral to the passed content and that intermediaries should pass all packets, while the intelligence is located at the edges of the network where necessary. For an excellent account of the "net neutrality" discussions, see Susan P. Crawford, *"Network Rules"* (2007) Law and Contemporary Problems 70, pp. 51-90; Tim Wu, *"Network Neutrality, Broadband Discrimination"* (2003) Journal on Telecommunications and High Technology Law 2, pp. 141-175. See also the special issue on the network neutrality debate of the (2008) International Journal of Communication, available at http://ijoc.org/.

[260] United Nations, Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law, Report of the Work of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13 July 2006, at para. 493.

conducive, for example, by completing the GATS regulatory architecture, by increasing the clarity and consistency of scheduling and commitments, including that for digitally transferred products, and by inserting rules on unfair competition. Such a "neutral" path is perhaps the only one possible since the political intensity of anything to do with culture and, by (simplified) extension, with national sovereignty has so far impeded any progress in the matters of trade and culture. It is however not suggested that cultural policy measures should be abandoned and that the free flow of goods and services alone will cater for a diversity of expressions. Yet, the benefits of the existing trade restrictions may very well prove not to outweigh their costs and indeed may be detrimental to the goal of cultural diversity.[261] One may even argue that it is within the mandate of the UNESCO Convention, the scope of which certainly goes beyond the plain reservation of "shelf-space for domestic productions in television programs and cinemas",[262] to encourage the ratifying Parties to dismantle some trade barriers.

Beyond the WTO framework and the confrontation between WTO and UNESCO, we also deemed that there are other elements that appear peripheral to the opposing pair of "trade *versus* culture" but that may have a significant impact upon the processes of cultural content creation, production, distribution and access, and thus need to be cautiously accounted for. Intellectual property rights were the logical example since they have a bearing upon cultural content at every stage of its value chain and have lately been under some pressure due to the far-reaching technological transformations.

The latter lead us to the second strand of isolated discussion and divergence – that of technology.

Today, we are faced with a situation that is "significantly different from the audiovisual sector of the Uruguay Round period when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services"[263] and is even different from the conditions prevailing at the outset of the Doha Round in 2001 when the Internet was in its infancy and the implications of this network of networks were largely unknown. We have illustrated some of these, now advanced, implications that have led to changed market mechanisms for content and to changed conditions for creativity as well as for production, distribution and consumption of cultural content.

Whereas the emergence of a global digital environment and some of its effects have increasingly been acknowledged,[264] it has yet to become an essential issue of policy-making or to be sufficiently integrated in any of the "old" rule-making domains, notably trade or culture. Lately, there has been a flurry of declaratory messages sent at different governance levels stating that digital technologies could

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[261] "[E]ven a cursory look at international trade in cultural products shows two contradictory but important trends. Developed countries at the forefront of efforts to "protect" cultural diversity are at the forefront of cultural trade as well. Developing countries as a whole, band-wagoning on the protections wagon, in fear of losing out from such trade, are actually gaining increased shares, even though they remain marginal". J.P. Singh, *"Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond"* (2007) International Studies Perspectives 8, pp. 36-53, at p. 42. See also the data exemplifying this statement, at pp. 43-45.

[262] Hahn, supra note 8, at p. 533.

[263] WTO, Communication from the United States: Audiovisual and Related Services, S/CSS/W/21, 18 December 2000, at para. 2.

[264] Footer and Graber, supra note 1, at pp. 130-133. See also UNESCO, *Article 7: Measures to Promote the Diversity of Cultural Expressions: European Approaches*, supra note 93. See also UNESCO Convention, at Preamble, recital 19.

and should be operationalised[265] for the pursuit of diverse public interest objectives, including cultural diversity, but a concrete approach encompassing all pertinent regulatory fields is still missing. It is perhaps reasonable to start such an exercise at the national level where a deeper and finer-grained understanding of the effects of the digital network environment upon creativity, cultural content dissemination and consumption can be gained.[266] This knowledge might prompt the formulation of new priorities,[267] which without compromising cultural diversity as a valid regulatory objective,[268] may lead to a readjustment of the tools of cultural policy regulation at diverse levels of governance. As we have argued, this may mean that barriers, both of legal and of practical nature, relating to the movement of content and to access to content, need to be lifted, while well-targeted subsidies systems, for instance (for productions in local languages, for infrastructural support or efforts for bridging the digital divide), are put in place.

Finally, one should bear in mind that the new information environment is extremely dynamic and complex and exacerbates the interrelatedness of effects, making regulatory decisions precarious. The dangers of regulators with "tunnel vision"[269] making decisions upon small bits of the system are thus real and present. In this sense, it may be seen as almost hypocritical that, while the EC fervently supports cultural initiatives, including culturally motivated trade restrictions, at the same time it puts forward a proposal for extending the term of copyright protection for recorded performances and records from 50 to 95 years,[270] locking up a substantial amount of cultural works and thereby obstructing creativity. The

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[265] Very interestingly, this has been noted in the recent guidelines issued following the UNESCO Convention: "Bearing in mind the technological changes underway in the field of culture and which have the potential to bring considerable change in matters related to the creation, production, distribution and dissemination of cultural content, Parties are encouraged to promote the following types of intervention: 3.1 Place specific emphasis on measures and polices aimed at promoting the diversity of cultural expressions that are best adapted to the new technological environment; and 3.2 Foster the transfer of information and expertise to help cultural professionals and the cultural industries, with particular regard for youth, to acquire the knowledge and skills required to benefit fully from the perspectives offered by these new technologies" (UNESCO, supra note 94, at p. 5, para. 3). The World Summit on the Information Society (WSIS) has also stated that, "The creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society, paying particular attention to the diversity of supply of creative work and due recognition of the rights of authors and artists. It is essential to promote the production of and accessibility to all content – educational, scientific, cultural or recreational—in diverse languages and formats". See WSIS, Declaration of Principles: Building the Information Society: A Global Challenge in the New Millennium, Document WSIS-03/GENEVA/DOC/4-E, 12 December 2003, at para. 53. For other initiatives, see Tarlach McGonagle, *"The Promotion of Cultural Diversity via New Media Technologies: An Introduction to the Challenges of Operationalisation"* (2008) IRIS: Legal Observations of the European Audiovisual Observatory 6, pp. 1-8.

[266] Australia, for instance, has emphasised the need for "appropriate inter-agency coordination to guarantee a whole-of-government approach" in relation to the UNESCO Convention. See WTO General Council, Minutes of the Meeting Held on 20 October 2004, WT/GC/M/88, 11 November 2004, at para. 65, as referred to by Voon (2006), supra note 3, at p. 643.

[267] With specific regard to audiovisual media, see Mira Burri-Nenova, *"The Changing Environment of Audiovisual Media: New Technologies, New Patters of Consumer/Business Behaviour and Their Implications for Audiovisual Media Regulation"* (2007) medialex 4, pp. 171-177. On the AVMS, see Mira Burri-Nenova, *"The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity"* (2007) Common Market Law Review 44:6, pp. 1689-1725.

[268] On the emergence of cultural diversity as a concept of public international law, see Graber, supra note 4, at pp. 553-558.

[269] See Gunther Teubner and Andreas Fischer-Lescano, *"Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?"* in Graber and Burri-Nenova, supra note 181, pp. 17-45, at p. 19.

[270] See European Commission, Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the Term of Protection of Copyright and Certain Related Rights, COM(2008) 464/3, 16 July 2008.

consequences of such actions, next to the existing undifferentiated and protectionist cultural policy efforts, are long-term and may not be properly balanced against the digital reality (and future), in which "a generation is growing […] where digital media are part of the taken-for-granted social and cultural fabric of learning, play, and social communication".[271]

[271] Mizuko Ito et al., *"Foreword"* in Katie Salen (ed.), *The Ecology of Games: Connecting Youth, Games, and Learning*, Cambridge, MA: The MIT Press, 2008, pp. vii-ix, at p. vii. See also John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives*, New York: Basic Books, 2008.