Updating Cultural Law and Policy for the Digital Age

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1. Introductory remarks

States have protected their cultures both defensively and offensively for centuries now. Next to this widespread cultural nationalism, as an expression of cultural internationalism, the international community has also tried to protect components of common human culture,[1] of the past and present, in times of war and peace. As a result of these efforts, which span over decades, we have witnessed the emergence of a vast and complex network of treaties of international cultural law.[2] Cultural matters are however not neatly organized in one single legal domain – indeed, it can be argued that culture as an object of legal norms is perhaps the hardest one to contain and naturally spills over multiple other areas of governance, willingly or unwillingly so.

Globalization as the process of intensifying the movement of goods, services, capital, people and ideas across borders, has only made things more complex and contentious. The intrinsic duality of cultural goods and services as such that have economic value and can be traded, and are at the same time by their very nature "vehicles of identity, values and meaning",[3] has meant that both economic and non-economic interests are constantly affected. In this context, it should be stressed that law-making, in particular at the international level, has not progressed with similar speed in these two areas. The institutionalization of economic globalization has advanced much more swiftly and led to closer, more binding forms of international co-operation, epitomized above all by the rules of the World Trade Organization (WTO). In this evolution, there have been only scant attempts to reconcile the two sides of cultural goods and services and the policies respectively targeted at them.

The theoretical and practical underpinnings of free trade have been strong but they have only led to a partial disintegration of the generic protectionist formula in the sense of restraining trade between states through measures, such as import tariffs or quotas. Indeed, perhaps slightly

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[1] John Henry Merryman, "Two Ways of Thinking about Cultural Property", *The American Journal of International Law* 80:4 (1986), 831–853.

[2] See e.g. Craig Forrest, *International Law and the Protection of Cultural Heritage* (Abdington, UK: Routledge, 2010)

[3] Article 1(g), UNESCO, Convention on the Protection and Promotion of Diversity in Cultural Expressions, 20 October 2005 [hereinafter *the UNESCO Convention* or *the 2005 UNESCO Convention*].

surprisingly to the cosmopolitan observer, cultural protectionism has persevered and may even have increased in recent time. Over the years, cultural protectionism has however become subtler, as it has taken upon different expressions. In the last decade, it has also undergone, as we discuss later on, an important ideological revamping and moved from "cultural exception" to "cultural diversity" policy formulas.

In the following, we briefly look at the evolution of the cultural protectionism discourse, in particular in the matrix of trade and culture. This only sets the scene for the more ambitious goal of the chapter, which entails an enquiry of the possibly failing or changed rationales of cultural protectionism in the digital age and seeks to identify the adjustments needed, so that cultural policy could still serve its benevolent goals and effectively contribute to sustaining a cultural environment that is diverse and vibrant.

2.   Lessons learnt from the global cultural diversity discourse

Although the policies of protecting cultural property, the cultural industries and the related institutions are primarily national, changes have often been triggered from beyond state's borders. A core reason for this is, as noted earlier, that cultural products are also tradable matters that have come under the sweeping currents of globalization.

Although many have argued that international law is in crisis and there is little if no movement ahead,[4] the last decade has been marked by significant developments in international cultural law. It suffices to mention three recent and key acts of this proactive treaty making: in 2003, delegates of 190 countries adopted the *Convention on the Safeguarding of Intangible Cultural Heritage*;[5] in 2005, also under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), agreement was reached on the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, and in 2007, the General Assembly of the United Nations adopted the *Declaration on the Rights of Indigenous Peoples*.[6] In the following, we focus in particular on the 2005 UNESCO Convention, as it is the most comprehensive and binding of these latest acts. It is also symptomatic for the emergence of a global agenda in cultural matters under the proclaimed objective of cultural diversity.

One could think that the developments at the international level that led to the adoption of the UNESCO Convention on Cultural Diversity could provide some guidance as to the suitable tools to be applied at all levels of governance in order to better serve the global public good of a diverse

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[4] See e.g. Hilary Charlesworth, "International Law: A Discipline of Crisis", *The Modern Law Review* 65:3 (2002), 377–392; Rafael Domingo, "The Crisis of International Law", *Vanderbilt Journal of Transnational Law* 42 (2009), 1542–1593; Joel P. Trachtman, *The Future of International Law: Global Government* (Cambridge: Cambridge University Press, 2013).

[5] United Nations, Convention for the Safeguarding of the Intangible Cultural Heritage, U.N. Doc.MISC/2003/CLT/CH/14, 17 October 2003.

[6] United Nations, Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295, 13 September 2007.

cultural environment. Unfortunately, this is only partially true – at least for two reasons.

The first has to do with the longer narrative about the prominence of cultural diversity as a policy objective. This goes back to the "trade versus culture" clash during the Uruguay Round of trade negotiations (1986–1994). During these talks, which ultimately led to the establishment of the WTO, several countries with the European Union (EU) and Canada at the forefront fought the so-called "*exception culturelle*"[7] battle. As the name suggests, it aimed at exempting any product or service that is culture-related from the rules of the negotiated WTO Agreements.[8] The prime focus of the campaign was on the exclusion of audiovisual services – i.e. films, television programmes, video and sound recordings.[9] These were conventionally highly protected sectors[10] and at the same time under significant competition from abroad, especially from the US entertainment industry.

Eventually the "cultural exception" agenda only partly attained its goals, as none of the services sectors were excluded from the scope of the WTO rules. At the same time, however, a number of flexibilities were built into the law of the WTO, in particular into the General Agreement on Trade in Services (GATS),[11] allowing few or no commitments for audiovisual

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[7] The idea that some measures protecting national cultural industries may be justified found reflection also in bilateral and regional fora. In 1988, the cultural proponents celebrated a victory when Canadian negotiators introduced a "cultural exclusion" clause in the Canada–United States Free Trade Agreement (CUSFTA, 4 October 1988, 27 I.L.M. 281). Five years later, such an exclusion found its way into the North American Free Trade Agreement, which incorporated by reference CUSFTA in Annex 2106 (NAFTA, 17 December 1992, Can.-Mex.-U.S., 32 I.L.M. 289). The practical use of these provisions was however small as the exception was coupled with a retaliation provision.

[8] The law of the WTO is contained in several agreements, attached as annexes to the Agreement Establishing the World Trade Organization, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] that encompass the General Agreement on Tariffs and Trade 1994, 15 April 1994, 1867 U.N.T.S. 187 [hereinafter GATT], the General Agreement on Trade in Services, 15 April 1994, 1869 U.N.T.S. 183 [hereinafter GATS] and the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS]. We refer to these collectively as the *WTO Agreements*.

[9] Pursuant to the WTO Services Sectoral Classification List, audiovisual services encompass: motion picture and video tape production and distribution services; motion picture projection services; radio and television services; radio and television transmission services; sound recording and others. See WTO, Services Sectoral Classification List, WTO Doc.MTN.GNS/W/120, 10 July 1991.

[10] Different types of support mechanisms were used in different states. Commonly, these included subsidies; domestic content rules; market access restrictions, in particular measures that control access to film markets; regulatory/licensing restrictions, especially measures that control access to radio or television broadcasting; tax measures; foreign investment and ownership measures; border measures; and film co-production agreements. See Mary E. Footer and Christoph Beat Graber, "Trade Liberalisation and Cultural Policy"*, Journal of International Economic Law* 3 (2000), 115–144.

[11] In contrast to the GATT, where obligations regarding national treatment and quantitative restrictions apply across the board, under the GATS states can choose the services sectors and sub-sectors in which they are willing to make market access or national treatment commitments (arts XVI and XVII GATS respectively), and can define the modalities of these commitments. Even the most-favoured-nation (MFN) obligation, which is fundamental to the entire trade system, can be subject to constrictions in the framework of GATS (Article II:2 and Annex on Article II Exemptions).

services.[12] So, in effect was the wiggle-room for states to adopt measures in the media sector fully preserved.

This solution was not however found satisfactory by the cultural proponents. The trade versus culture conflict has remained politically and emotionally charged. Despite the fact that the media landscape has profoundly changed in the last decade, the majority of WTO Members have been adamant in preserving the status quo and not prepared to give up their "all-or-nothing" approach and make finer tuned commitments even in domains, which have long been deregulated at the domestic level.

While keeping the status quo is widely politically supported, practically with the US only opposing it, it may come at a cost. Some of its implications may be negative and going beyond the opening of global media markets. A particular concern that one may have is digital trade.

The trade versus culture deadlock appears to have negative consequences for the WTO and its capacity to address trade in the Internet age – not so much because of a failure in the organization's legal architecture and mechanisms but much more so because of lack of political agreement.[13] As the WTO Programme on Electronic Commerce has shown, while all Members recognize the importance of digital trade and the great economic gains to be reaped from it, there is no consensus on how to solve a number of concrete issues. Particularly contentious are the classification issues between goods and services and within different categories of services and move forward, which would trigger different levels of liberalization and commitments made by the WTO Members.[14] As cultural proponents are determined to use the GATS flexibilities to the fullest, they are careful that digitally transmitted products are qualified as services rather than goods and as audiovisual services rather than as telecommunications or computer related services.[15] The US and a handful of other states insist on the other hand for the deepest mode of liberalization, which ideally would combine the rules for trade in goods (under the General Agreement on Tariffs and Trade, GATT) and the Information Technology Agreement (ITA).[16]

The spillovers of the trade versus culture dilemma cause profound legal uncertainty and upset the potency of the WTO to react in a forward looking manner to the deep changes in international trade caused by digital technologies.[17] They also and naturally lead to forum shifting to the bilateral

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[12] Almost all Members, with the notable exception of the US, Japan and New Zealand, have been reluctant to commit and have listed significant MFN exemptions. See Martin Roy, "Audiovisual Services in the Doha Round: *Dialogue de Sourds*, The Sequel?", *Journal of World Investment and Trade* 6:6 (2005), 923–952.

[13] Mira Burri and Thomas Cottier, *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012).

[14] Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products* (Oxford: Hart, 2006), at 201–232.

[15] Rolf Weber and Mira Burri, *The Classification of Services in the Digital Economy* (Berlin: Springer, 2012).

[16] See Mira Burri, "Should There Be Multilateral Rules for Digital Trade?", e15 expert paper, September 2013.

[17] Anupam Chander, *The Electronic Silk Road* (New Haven, CT: Yale University Press, 2103).

or regional venues, the impact of which may be precarious, if not to say detrimental, to achieving any public interest objectives.[18]

The second source of hope for policy guidance lied in the very act of the 2005 UNESCO Convention on Cultural Diversity, as the key and very successful effort of the international community.[19] Yet, this hope has also been dashed. Clearly, the project of creating an international legally binding instrument on cultural matters, as a counterforce to economic globalization and in particular to the enforceable rules of the WTO, has been fairly ambitious.[20] With the benefit of hindsight and considering the complexities in the matrix of trade, culture, media, intellectual property and human rights[21] and the starkly different sensibilities of the negotiating parties,[22] the project was also doomed from the outset. Now that the hype caused by the adoption and the swift ratification of the 2005 UNESCO Convention has settled, its flaws have become readily apparent.

The UNESCO Convention's weak binding power and its substantive and normative incompleteness involve no real advance towards the goal of sustaining a diverse cultural environment but rather approximate a political declaration.[23] We do not (as yet) see any legal or policy reform. On the one hand, the Convention's own implementation into the law of the Contracting Parties is of modest significance.[24] On the other hand, the Convention will

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[18] See e.g. Ivan Bernier, "The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy Regarding the Audiovisual Sector", occasional paper, April 2004, available at http://www.coalitionsuisse.ch/doss_sc/unesco_ccd/bernier_us_ftas_and_av_sector1.pdf (last accessed 18 November 2013).

[19] Only Israel and the US voted against the Convention and four states (Australia, Honduras, Nicaragua and Liberia) abstained. As of 9 August 2013, 132 countries have ratified the Convention. See http://portal.unesco.org/la/convention.asp?KO=31038&language=E (last accessed 18 November 2013).

[20] For details, see Keith Acheson and Christopher Maule, "Convention on Cultural Diversity", *Journal of Cultural Economics* 28 (2004), 243–256; Mira Burri, "Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects", *Diversity* 2 (2010), 1059–1084.

[21] *See e.g.* Mira Burri, "*Mapping the Fragmented Matrix of Trade, Culture and Intellectual Property in Global Law*", paper presented at the Law and Society Association Annual Meeting, 2–5 June 2011, San Francisco (on file with the author). See comprehensively, Laurence R. Helfer and Graeme W. Austin, *Intellectual Property and Human Rights: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011).

[22] Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?", *International Journal of Communication* 1 (2007), 24–55, at 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 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), 125–158.

[23] For detailed critique, see Craufurd Smith, *ibid.*; also Mira Burri-Nenova, "Trade and Culture in International Law: Paths to (Re)conciliation", *Journal of World Trade* 44:1 (2010), 49–80.

[24] Mira Burri, The Implementation of the UNESCO Convention into EU's Internal Policies, a briefing note prepared for the European Parliament, IP/B/CULT/IC/2010_066,

not alter the rights and obligations of the WTO Members – a situation that has been confirmed by the 2009 *China–Publications and Audiovisual Products* case.[25]

To sum up, although the discourse on trade and culture and on cultural diversity has a long history and has been politically strongly boosted, the real effects are few and the guidance on what is cultural diversity and how it is to be attained is limited. This is no real surprise however as the discourse has been marked from its very onset by a deeply convoluted understanding of the effects of trade, and more broadly of economic globalization, on culture.[26] The common (and often politically loud) statements are that cultural diversity is becoming impoverished and almost extinguished as the globalised flow of easy entertainment coming from Hollywood dominates and homogenizes.[27] The perceived peril for small art productions and local and indigenous culture is deemed immense and worthy of the state's counteraction. This picture is conventionally painted black or white only and the many nuances of the complex commerce and culture interlinks are often missed out. Parties on both sides find examples supporting their positions. The cultural protectionism exponents tend to pick up their facts from the film markets, where the US clearly dominates and where the power of big budget and marketing is self-evident. The free market proponents make their case by using examples of local musicians gone global or the success of documentary productions.[28] While the truth is surely somewhere between the two extremes,[29] the discussion on "trade" and "non-trade" values is so extremely politicized that renders any practical solution impossible.[30]

May 2010, available at http://www.europarl.europa.eu/studies (last accessed 18 November 2013).

[25] WTO Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 21 December 2009, confirming in most essential points WTO Panel Report, WT/DS363/R, adopted 12 August 2009, in particular para 4.207.

[26] For an overview of the different positions, see Pierre Sauvé and Karsten Steinfatt, "Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?", in Productivity Commission and Australian National University (eds.), *Achieving Better Regulation of Services* (Canberra: AusInfo, 2000), 323–346; Ian Slotin, "Free Speech and the *Visage Culturel*: Canadian and American Perspectives on Pop Culture Discrimination", *Yale Law Journal* 111:8 (2002), 2289–2320; Sean Pager, "Beyond Culture vs. Commerce: Decentralizing Cultural Production to Promote Diversity through Trade", *Northwestern Journal of International Law and Business* 31 (2011), 63–136.

[27] See e.g. Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO* (Bern: Staempfli Publishing, 2003).

[28] J.P. Singh, "Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond", *International Studies Perspectives* 8 (2007), 36–53.

[29] See Antony Giddens, *Runaway World: How Globalisation Is Reshaping Our Lives*, (Abdington, UK: Routledge, 2002); Tyler Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures* (Princeton, NJ: Princeton University Press, 2002), at 146; Tyler Cowen, *In Praise of Commercial Culture* (Cambridge, MA: Harvard University Press, 1998), in particular at 15–43.

[30] See e.g. Christopher M. Bruner, "Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products", *International Law and Politics* 40 (2008), 351–436; Madhavi Sunder, "Cultural Dissent", *Stanford Law Review* 54 (2001), 495–567.

Answers to critical questions such as "diversity of what?" and "diversity how?" remain unanswered too. This is regrettable as cultural diversity as a global public good does have its virtues and may offer the unprecedented so far platform to actually address essential cultural concerns at the international level.

In the next sections, we look beyond the 2005 UNESCO Convention and the WTO framework and discuss the proper "fillings" of a cultural diversity policy in particular in light of the advent and widespread of digital media, which strongly impact on the processes of cultural content production, distribution and access, as well as on the efficiency of the applied regulatory toolboxes.

3. Cultural policy toolkits for the digital space

Admittedly, political decisions in the field of culture are not easy and neither is regulatory design. As noted earlier, the key objective of this chapter is not so much to critique the existing cultural instruments in terms of their success so far, potential for success down the road, or their underlying justifications, but rather to see how this system matches the current conditions of the digitally networked environment.

It needs to be stressed that the above-described system of institutional and substantive relationships between issues of trade and culture, as well as most of the presently applied national instruments, have emerged under the conditions of analogue/offline media. We are however now faced with a situation that is "significantly different from the audiovisual sector of the Uruguay Round when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services"[31] and that is even starkly different from the conditions prevailing at the outset of the Doha Round in 2001, when the Internet was in its infancy and its implications were largely unknown.

Although we are still in a world where old and new media co-exist, many of the processes of cultural creation, distribution and consumption have been changed. The technological, economic and societal changes triggered by digitization have been persistent and so profound that they have led to a decidedly different information and communication environment.[32] Essential features of this environment and particularly relevant to our present discussion are the following:

(i)   proliferation of content and its different organization in cyberspace;

(ii)   new ways of distributing, accessing and consuming content;

(iii) empowerment of the user and reduced role of intermediaries; both related to

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[31] World Trade Organization, Communication from the United States: Audiovisual and Related Services, S/CSS/W/21 (18 December 2000).

[32] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006), at 2.

(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 may argue that this new information and communication space prompts a panacea for the goal of cultural diversity and could potentially render the related cultural policies obsolete,[33] we tend to disagree and consider a finer-grained assessment appropriate.[34] We think that in some cases, the features of the digital network environment may hint at opportunities for better, more efficient and flexible accommodation of diversity concerns. In other cases, they may equally be viewed as challenges, perhaps calling for additional regulatory intervention. Overall, change is needed – sometimes perhaps of incremental, other times of more radical nature.

4.   Building elements of future-oriented cultural toolkits

So far, policies in the audiovisual media (film, television and radio) have focused above all on the supply side – i.e. on the production and distribution of content, often under the condition that this content reflects certain qualities that are perceived as "good" (where "good" typically implies high-quality but may be sometimes simply equal to national[35]). As we move towards a digital media space, while the need for adjustment of the cultural policy tools has been widely acknowledged, there has been little innovation. The prevailing logic of change has often been that "as television moves to other platforms, television regulation should follow".[36]

So far, the affordances of digital technologies in advancing cultural diversity goals has not been adequately used. It is right to stress here that digital technologies do have enormous potential, including the potential to foster cultural exchange and diversity by powerfully enabling the individual to create, distribute, access, use and reuse cultural content. Yet, this outcome is not preordained – it could happen only if the rules – be they formal laws, soft norms or policy initiatives – can keep in effect up with the new technologies.

We argue that three paths for policy experimentation are particularly worthwhile considering in this regard: (i) responding to the creative user; (ii) responding to the unlimited "shelf-space" in cyberspace; and (iii) taking into account policies conventionally thought peripheral to achieving cultural

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[33] See e.g. Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (New York: Hyperion, 2006).

[34] A view shared also by Napoli; see Philip M. Napoli, "Persistent and Emergent Diversity Policy Concerns in an Evolving Media Environment: Toward a Reflective Research Agenda", in Sean Pager and Adam Candeub (eds.), *Transnational Culture in the Internet Age* (Cheltenham, UK: Edward Elgar, 2012), 167–181.

[35] See e.g. Mira Burri, "The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity", *Common Market Law Review* 44 (2008), 1689–1725.

[36] Mónica Ariño, "The Regulation of Audiovisual Content in the Era of Digital Convergence", *Revista de Internet, Derecho y Política* 7 (2008), at 3.

objectives and often falling outside the traditional media law and policy domain, as conceived pre-digitization and pre-convergence. The latter strand should also be taken into account within the broader context of advancing culture as an inseparable part of sustainable development, as suggested by Article 13 of the UNESCO Convention on Cultural Diversity.

4.1. Responding to the creative user

The contemporary media consumer is increasingly empowered not only by the simple device of the remote control but by a broad palette of tools and platforms to choose from (pay-TV, Internet-TV, YouTube, to name but a few). The new media-savvy viewer can now decide what and when to see a particular content. Beyond the actively made choices as to content consumption, users have also turned into creators and producers in their own right.[37]

The reality of more content and new content, generated and spread individually or by groups[38] and its accessibility without real location restrictions are important for making regulatory choices. Some of this user created content (UCC) reflects the key media policy components of diversity, localism and non-commercialism,[39] although there is still some doubt as to what extent UCC contributes to a truly richer media environment, or plainly replicates existing content on a large scale. While measurement is still a vexed issue[40] and opinions diverge as to the novelty of the content, its quality and whether the "old" media companies are simply taking over the "new" and independent,[41] we trust UCC that could still be an apt channel for fostering diversity.

Considering the fluidity of the digital environment and the often inchoate forms of creativity, it is hard to propose concrete models suitable to address all concerns. States need to take a fresh look, explore how the goal of a vigorous and diverse cultural environment can best be met and experiment. The state could for instance assign a more diversified role for the public service broadcasters or put in place incentives for other cultural institutions, such as museums or theaters, to innovate around the UCC phenomenon. Critical in these exercises may be the effort to improve the

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[37] See e.g. Philip M. Napoli, *Audience Evolution: New Technologies and the Transformation of Media Audiences* (New York: Columbia University Press, 2011).

[38] Organisation for Economic Co-operation and Development, *Participative Web: User-Created Content*, DSTI/ICCP/IE(2006)7/FINAL (12 April 2007), at 5.

[39] Ellen P. Goodman, "Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markers", *Berkeley Technology Law Journal* 19 (2004), 1389–1472.

[40] Napoli, *supra* note 34.

[41] See Matthew Hindman, "A Mile Wilde and an Inch Deep: Measuring Media Diversity Online and Offline", in Philip M. Napoli (ed.), *Media Diversity and Localism: Meaning and Metrics* (Mahwah, NJ: Lawrence Erlbaum Associates, 2007), 327–348; Matthew Hindman, *The Myth of Digital Democracy* (Princeton, NJ: Princeton University Press, 2009).

quality of UCC works[42] and to better integrate amateur and professional production and distribution.[43]

Financial support programmes for the creation and diffusion of local content may need to be revised to take into account UCC.[44] In such situations, a mere depiction of a French castle from the reign of Louis XIV in an online game would not be a sufficient ground for subsidizing the game provider.[45] Rather, some forms of better accommodating in-game creativity and UCC as a product will need to be added – forms that enable, for example, telling stories, mixing videos around a particular in-game character, site or scene, and/or linking those to current events, personal websites or blogs outside the virtual world.[46] Or, to phrase it in an aspiring manner, what is needed overall are supporting efforts that make creativity an interrupted and indeed promoted process, contextualized in a broader cultural setting.

Despite the controversies surrounding the emergence of public service broadcasting of the next generation, mostly because of the moot issue of financing of potentially competitive internet services through the TV licence fee, the formation of Public Service Media (PSM) is already a reality.[47] Ofcom, the converged British regulator for media and communications, has been a pioneer in moving proactively into new media.[48] While the idea of a

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[42] Natali Helberger, Andra Leurdjik and Silvain de Munck, "User Generated Diversity: Some Reflections on How to Improve the Quality of Amateur Productions", *Communications and Strategies* 77 (2010), 55–78.

[43] Napoli, *supra* note 40.

[44] OECD, *supra* note 38, at 41–42; Office of Communications, *Ofcom's Second Public Service Broadcasting Review, Phase One: The Digital Opportunity* (London: Ofcom, 2008), at 1.23.

[45] This reflects a real life situation. A French tax scheme enables video game manufacturers subject to taxation in France to deduct up to 20% of the production costs of certain games. The scheme is based on a points system that determines the cultural content of a game pursuant to criteria such as language, levels of artistic expenditure, links to European historical, artistic or scientific heritage. The case was controversial as to its compatibility under EU state aid law. See Commission Decision of 11 December 2007 on State Aid C 47/06 Tax credit introduced by France for the creation of video games [2008] OJ L 118/16.

[46] For details, see Mira Burri-Nenova, "User Created Content in Virtual Worlds and Cultural Diversity", in Christoph Beat Graber and Mira Burri-Nenova (eds.) *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Cheltenham, UK: Edward Elgar, 2010), 74–112.

[47] See e.g. Jamie Cowling and Damian Tambini (eds.), *From Public Service Broadcasting to Public Service Communications* (London: Institute for Public Policy Research, 2002); Petros Iosifidis, *Public Television in the Digital Era: Technological Challenges and New Strategies for Europe* (Basingstoke: Palgrave Macmillan, 2007); Gregory Ferrell Lowe and Jo Bardoel (eds.), *From Public Service Broadcasting to Public Service Media* (Göteborg: Nordicom, 2007); Tim Gardam and David A. L. Levy (eds.), *The Price of Plurality Choice, Diversity and Broadcasting Institutions in the Digital Age* (Oxford: Reuters Institute for the Study of Journalism, 2008); Petros Iosifidis (ed.), *Reinventing Public Service Communication: European Broadcasters and Beyond* (Basingstoke, UK: Palgrave Macmillan, 2010); Ellen P. Goodman and Anne H. Chen, 'Modeling Policy for New Public Service Media Networks', *Harvard Journal of Law and Technology* 24:1 (2010), 111–170; Karen Donders, *Public Service Media and Policy in Europe* (Basingstoke, UK: Palgrave Macmillan, 2011).

[48] Ofcom, *A New Approach to Public Service Content in the Digital Media Age: The Potential Role of Public Service Publisher* (London: Ofcom, 2007)*; see also* Cowling and Tambini, *ibid*.

public service publisher, which was intended to provide competition to the British Broadcasting Corporation (BBC) by spreading high-quality "public content" over platforms other than TV and radio, was not well received and endorsed, "the idea had 'served its purpose' in shifting the debate on the future of public service broadcasting by emphasizing the importance of digital media".[49]

BBC iPlayer and BBC Archives are two other initiatives of "digitizing" the institution of public service broadcasting, which respond to the creative user and to the overall changed media space. The first is an internet television and radio service, developed by the BBC, to provide access to its shows of the past seven days, involving also recommendations and social network features. Importantly, the iPlayer,[50] which is widely used in practice, has been made available across many platforms, including also game consoles (Wii and SPS) and diverse mobile devices, which stresses the critical importance of interoperability of the entire media experience and user friendliness of any applied new media projects. Similar models have been implemented in many European countries and have already contributed to creating a new type of cultural experience.

The second initiative, the BBC Archives,[51] aims at digitizing the entire collections of BBC audio and video material, reaching back to the 1890s. An interesting add-on to this was the BBC Creative Archive pilot, which ended in 2006 after releasing more than 500 pieces of content under the so-called Creative Archive Licence.[52] The latter, similarly to a copyleft licence,[53] allowed creating around and on top of the content and making it available under similar terms (no commercial use; share alike; give credit; no endorsement; UK only[54]). This initiative confirms the often acknowledged need for appropriately accommodating the "creative play"[55] in copyright, thereby allowing UCC distribution outside of the grey legal area[56] and casting aside worries about its chilling effect on user innovation.[57]

For a related example at the European level one can look at *Europeana*: the European Digital Library, which is to function as a multilingual common

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[49] Chris Tryhorn, "*Ofcom Scraps 'Public Service Publisher'*", *The Guardian*, 12 March 2008 (quoting Ofcom Chief Executive Ed Richards), available at http://www.guardian.co.uk/media/2008/mar/12/ofcom.digitalmedia (last accessed 18 November 2013).

[50] http://www.bbc.co.uk/iplayer/ (last accessed 18 November 2013).

[51] http://www.bbc.co.uk/archive/ (last accessed 18 November 2013).

[52] http://www.bbc.co.uk/creativearchive/ (last visited 18 November 2013).

[53] See e.g. http://creativecommons.org/licenses/ (last accessed 18 November 2013).

[54] The Creative Archive content is made available to Internet users for use within the UK, as UK citizens pay the BBC licence fee (which includes TV, radio, online, as well as other services such new technology investment and collecting the fee).

[55] Julie E. Cohen, "Creativity and Culture in Copyright Theory", *UC Davis Law Review* 40 (2007), 1151–1205.

[56] Rebecca Tushnet, "User-Generated Discontent: Transformation in Practice", *Columbia Journal of Law and the Arts* 31 (2008), 497–516.

[57] See e.g. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2003); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008).

access point to Europe's distributed cultural heritage.[58] *Europeana*[59] was launched in November 2008 and allows Internet users to search and get direct access to digitized books, maps, paintings, newspapers, film fragments and photographs from Europe's cultural institutions. Presently some 29 million objects from more than 2,200 institutions from 36 countries are made available on *Europeana* with numbers constantly rising.[60] The content is also socially connected in various sites and platforms, available through an iPad app, downloadable and malleable under different copyright licensing regimes (such as the creative commons licence[61]). In this sense, *Europeana* not only aggregates content but builds an open, trusted source of cultural heritage, which is also meant to engage users in new ways of participating in their cultural heritage, facilitate knowledge transfer, innovation and advocacy in the cultural heritage sector.

Finally, in this context of responding to the creative user, different policy tools can make sure that this user is indeed there, that she or he are well-thriving and actively participating. Diverse initiatives in this context, not necessarily of legal nature, can contribute to making the media user digitally literate and to bridging the gap between digital "haves" and "have-nots" in industrialized societies, and the global divide between developed and the developing countries.[62] Active participation as a creator and as a citizen will not however be sufficiently ensured by the mere availability of an Internet-enabled device; it should include a package of sophisticated media, communication and social skills.[63] Digital literacy policy should in this sense become an essential part of cultural policy packages and could ensure their sustained impact over time.[64]

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[58] European Commission, Europeana: Next Steps, COM(2009) 440 final, 28 August 2009; also European Commission, i2010: Digital Libraries, COM(2005) 465 final, 30 September 2005.

[59] http://europeana.eu (last accessed 18 November 2013).

[60] http://pro.europeana.eu/web/guest/about/facts-figures (last accessed 18 November 2013).

[61] See *supra* note 53.

[62] Mira Burri, "The Global Digital Divide as Impeded Access to Content", in Mira Burri and Thomas Cottier, *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), 396–420.

[63] See e.g. Eszter Hargittai, "Digital Na(t)ives Variation in Internet Skills and Uses among Members of the 'Net Generation'", *Sociological Inquiry* 80:1 (2009), 92–111; Mark Warschauer and Tina Matuchniak, "New Technology and Digital Worlds: Analyzing Evidence of Equity in Access, Use, and Outcomes", *Review of Research in Education* 34:1 (2010), 179–225. See also generally Mira Burri, "The Global Digital Divide as Impeded Access to Content", in Mira Burri and Thomas Cottier (eds.), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), 396–420.

[64] It should be acknowledged that digital literacy has already become key in the national cultural and educational policies of many countries, very often as a subset of a media literacy agenda, which does not discriminate between online and offline media but approaches them in a technologically neutral manner. The EU is a leading example in this regard and has identified media literacy as a priority for the 21st century and taken a number of measures to enhance it across generations. Amongst other things, focus is put on the active involvement of the industry, including all types of media, in the promotion of media literacy initiatives; on the role that the education system can play to promote media literacy as the ability to access media and to understand, critically evaluate, create and communicate media content in the

An excellent example in this context is Brazil's Culture Points programme launched in 2003, which spurs real-life "digital empowerment" in centers scattered throughout the country that serve simultaneously as laboratory for experimental culture,[65] community and training hub, as well as entrepreneurial incubator.[66]

4.2. Responding to the unlimited "shelf-place"

By reducing information to zeroes and ones, digital representation radically modifies the characteristics of content. For one it is freed from the need for a tangible medium and it can be swiftly distributed at almost no cost. A second salient feature that has upset both big media conglomerates and small indigenous communities[67] is the ability to make perfect copies. A third, less noted, but perhaps the most revolutionary, characteristic of digital media is that they have changed the way information is organized and accessed.[68]

Under the broader category of digitally-induced market modifications,[69] as the reproduction, storage and distribution of digital media products have a marginal cost close to zero, it becomes economically viable to sell relatively unpopular products. This creates incentives for suppliers to offer a larger and more diverse portfolio including "non-hit" titles that appeal to smaller niche audiences. This may be true for garage band or indigenous music, but also

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context of EU Member States' lifelong learning strategies; as well as on initiatives to encourage greater consensus on media literacy, by supporting the analysis and exchange of good practices between Member States and the development of better tools to measure levels of media literacy across Europe. See *Council Conclusions on Media Literacy in the Digital Environment*, 2978th Education, Youth And Culture Council meeting, Brussels, 27 November 2009.

[65] Culture Points promote contemporary Brazilian music, indigenous and computer art, rather than high culture. Individual centers are also meant to be linked to an online network that encourages distribution and sharing. See Larry Rohter, "Brazilian Government Invests in Culture of Hip-Hop"*, The New York Times,* 14 March 2007.

[66] Centers receive a standard multimedia kit consisting of computers, video and audio recording equipment, open source software and broadband connectivity. Further equipment purchases and start-up costs can be covered by the government, which also provides ongoing training and technical support. For a fully-fledged analysis of the Culture Points programme, see Sean Pager, "Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?", in Sean Pager and Adam Candeub (eds.), *Transnational Culture in the Internet Age* (Cheltenham, UK: Edward Elgar, 2012), 262–287.

[67] See e.g. Mira Burri-Nenova, "The Long Tail of the Rainbow Serpent: New Technologies and the Protection and Promotion of Traditional Cultural Expressions", in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham, UK: Edward Elgar, 2008), 205–236.

[68] See e.g. David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder* (New York: Henry Holt, 2007).

[69] We refer here to the so-called "long tail" theory. The name has to do with the image of a demand curve that gets longer and longer and covers more niche "non-hit" products. The "long tail" theory was coined by Chris Anderson, chief editor of the Wired Magazine (Anderson, *supra* note 33) but builds on previous and parallel economic research. For an analysis of the "long tail" theory in the specific context of cultural diversity, see Michal Shur-Ofry, "Copyright, Complexity and Cultural Diversity – A Skeptic's View", in Sean Pager and Adam Candeub (eds.), *Transnational Culture in the Internet Age* (Cheltenham, UK: Edward Elgar, 2012), 203–230.

more generally, for offering products and services in a greater number of languages. Whereas most websites are still in English, it is a fact that as the Internet becomes ubiquitous, people around the world prefer to read their news, stories and local gossip in their own language. So, in parallel to the intensified globalization, one may also observe a process of localization. In this sense, for instance, while most of the articles in the free online encyclopedia Wikipedia are in English (4,379,333), it contains content in 286 other languages, including Fijian, Hindi, Igbo and Mãori.[70]

It is important to add that the digital setting may have also reduced the significant entrepreneurial risk related to launching new cultural goods and services,[71] while at the same time making their visibility greater. This is in stark contrast to the 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. Traditional media companies have also faced (and still face) horrendous promotion costs, which were unbearable for smaller producers or individual artists. In the digital ecology, however, access to a wider audience is facilitated and made cheap. Supply and demand are also somewhat more easily "connected" as the Internet allows searching through a single point of entry. This search process is dynamic and in addition to the conventional search engines, samples, feedback and other advanced search tools based upon collective intelligence,[72] enables users to discover even new products, eventually widening the diversity of content consumed.[73]

In the longer run, as the consumer becomes more and more empowered to choose as we move from a "push" to a "pull" mode of content consumption, it is conceivable that consumer selection will constantly generate new and/or niche products. This would have the effect of inducing markets to offer new types of content, including for instance archived or original works, director's cuts or performances, be they European, American or African. This may ultimately lead to a greater share of available and effectively consumed works of a wider variety.

Another interesting implication relates to the fact that, in the digital environment, content remains accessible and usable long after its traditional "one-off" viewing at cinemas, on TV, only slightly perpetuated through

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[70] See http://meta.wikimedia.org/wiki/List_of_Wikipedias (last accessed 18 November 2013).

[71] Germann argues that this specific characteristic of cultural goods is the main one that calls for state intervention for the attainment of cultural objectives. Christophe Germann, "Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity", *ERA—FORUM* 6:1 (2005), 109–130, at 116.

[72] 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: Doubleday2003); Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations* (New York: Basic Books, 2008).

[73] This process of discovering diversity is admittedly not perfect. One needs to acknowledge the sceptics' views on search engine's role. See Hindman (2009), *supra* note 41; Siva Vaidhyanathan, "The Googlization of Everything and the Future of Copyright", *UC Davis Law Review* 40 (2007), 1207–1231 and Siva Vaidhyanathan, *The Googlization of Everything: (And Why We Should Worry)* (Berkeley, CA: University of California Press, 2011).

DVD rental or sale. "Pulling" content individually from a virtually unlimited selection of titles (e.g. from the BBC Archives or Europeana) may in effect change the value attached to cultural content. Romantically put, this value would transcend the mere "one-off" use of content and offer incentives for creating "good" content, be it original, avant-garde or traditional, which people will be willing to consume more than once.

To sum up the above implications, one may say that digital technologies have fundamentally changed the conditions for participation in the communications environment as production and distribution costs fall and as the notion of scarcity is redefined. In this context, it becomes *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. In this sense, building new or keeping the old barriers around national content seems futile. Efforts to foster truly diverse consumption of cultural content should rather focus on making the "head of the snake" smaller and its tail longer and thicker.[74] This may also require additional regulatory effort, for instance to monitor for search engines' abuse of monopoly power, contain other distribution and access gatekeepers or to enable production and consumption of high-quality content in a fragmented media space.

The challenges related to digitization projects like *Europeana* may also be serious and demand policy action. Some of them may be of technical character relating for instance to compatibility of different formats and standards, or to the availability and quality of metadata. Many others stem from the intellectual property barriers to digitization – to access to contemporary works and dealing with orphan works. These issues are by no means trivial and demand discussions with various stakeholders, so that solutions that serve both public and private interests are found.[75]

4.3. Integrated approach towards cultural issues in cyberspace

Talking about cultural diversity has been so far logically linked to formulating regulatory responses predominantly in the media domain. As digital media have become ubiquitous however and as their effects are felt in all facets of societal life, this premise changes and one may need to look for solutions outside traditional media law and policy. While this need for integrating cultural policy considerations and making them relevant across policy domains has been recognized, there is a need for real action still. In the context of the 2005 UNESCO Convention on Cultural Diversity the adequate framework is given through the goal of integrating culture as a pillar of sustainable development policies.[76]

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[74] Napoli, *supra* note 40.

[75] See e.g. *Europeana Strategic Plan 2011–2015,* available at http://www.pro.europeana.eu/c/document_library/get_file?uuid=c4f19464-7504-44db-ac1e-3ddb78c922d7&groupId=10602 (last accessed 18 November 2013).

[76] Sustainable is such development "that meets the needs of the present without compromising the ability of future generations to meet their own needs". See World Commission Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), part 1, section 2, para. 1. The sustainability framework that emerged from discussions subsequent to those of the Brundtland Commission is made up of three

Article 13 of the UNESCO Convention on the Diversity of Cultural Expressions was meant to create a clear link to sustainable development initiatives. It urges the Convention's Parties to "endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions". In addition, sustainable development features as one of the key principles of the UNESCO Convention and is thus meant to guide and inform all its implementation activities.[77]

In this chapter, we only mobilize the objective of sustainable development, so as to stress the need for thinking in a holistic manner when designing cultural policies for cyberspace.[78]

While under the conditions of the digital networked environment, content may have proliferated, this does not automatically mean that it is readily accessible. There are barriers of different types: (i) placed at the infrastructural level (e.g. no access to broadband Internet or failing networks); (ii) placed at the hardware/software level (e.g. lack of interoperability between different types of platforms or software); or (iii) placed at the content level (e.g. due to copyright protection or other fences imposed, for instance, through technological protection measures, such as digital rights management systems [DRM]). The barriers could also be of societal character. We noted earlier lacking media literacy as a key hindrance in this regard.

All of these barriers impede the access to cultural content, the engagement in active intercultural dialogue or various creative activities, thus distorting the conditions for a vibrant culturally diverse environment. The trouble when designing appropriate measures to dismantle these barriers to cultural content and foster participation is that they fall in different, often disconnected, policy areas. So, while core cultural policy instruments in the field of protecting cultural heritage remain valid and needed, it could be that in the digital age, many of the critical decisions affecting the conditions for

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elements considered to be of equal significance: (i) *economic development* – reducing and seeking to eradicate income poverty, achieving higher levels of prosperity and enabling continued gains in economic welfare; (ii) *social development* – reducing and seeking to eradicate other dimensions of poverty; improving the quality of education, health, housing and other aspects of the welfare of individuals and communities; and enhancing the quality of social interaction, engagement and empowerment; and (iii) *environmental protection* – reducing pollution and other negative impacts on the environment, mitigating the effects of industrialization and human activity, and seeking to achieve sustainable use of resources in the interest of future generations. Two further elements were added subsequently: *cultural diversity* – the continuance of diverse human cultures from past to future within a context of the globalization of communications, economy and society and the more intensive intercultural interactions that result, and *governance* – the institutional mechanisms, rules and norms that encompass decision-making and behaviour by governments, businesses and citizens, the interactions among these stakeholders and among different policy domains.

[77] Article 6(2) of the UNESCO Convention.

[78] "Almost every area of public and social policy is in some respects part of Internet policy". See Oxford Internet Institute, *Towards a Future Internet: Interrelation between Technological, Social and Economic Trends*, Final Report for DG Information Society and Media (2010), at 41.

cultural diversity and its sustainability will fall outside the classic cultural policy domain. Questions of telecommunications networks, of standards, of intermediaries' liability and Internet governance may become immediately relevant. This clearly calls for adopting a holistic approach and interlinking policy domains, so that appropriate instruments and measures are designed. Appropriate governance mechanisms appear in this sense crucial.

When thinking more broadly about creativity as the parameter that would secure sustainable cultural diversity in the long run, the challenge is even bigger. Although it is widely recognized that culture, creativity and innovation are core factors in social and economic development, few countries have managed to integrate these concerns into a single coherent approach, or to incorporate them into mainstream policy-making. This is partly related to the different regulatory histories and different lobbying groups, and the path dependencies associated with each of these domains.[79] As the Economy of Culture in Europe study acknowledges fostering creativity requires thinking and operating in a transversal manner as it touches upon many policy areas, such as education, social policy, innovation, economic growth, and sustainability.[80]

In terms of promoting creativity, it should also be acknowledged that once established, digital capacity is exploited in all sorts of ways, including many that are unexpected. Today's huge expansion of digital creativity, often on a private, personal and non-commercial basis, may have little economic impact, but has a huge social and cultural impact.[81] Policy-makers should make sure that their actions support and do not restrict such developments.[82] In application of the precautionary principle, policy-makers should carefully observe the evolving processes and sometimes adopt a 'do no harm' stance, rather than intervene with consequences potentially detrimental to creativity. At the same time, a level of trust and security is also important for the unfolding of creativity online.[83]

When confronted with such complex, multi-directional developments, it essential that Parties to the UNESCO Convention compare data and instruments, assess their impact, and move towards best practices in discrete policy areas, as well as in cross-domain holistically designed agendas. As an element of uncertainty remains, such policies should also be adaptive and allow for correction mechanisms.[84]

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[79] European Parliament, *Cultural and Creative Industries*, IP/B/CULT/FWC/2006_169, 31 May 2007, at iii.

[80] KEA European Affairs, *The Economy of Culture in Europe*, Study prepared for the European Commission, October 2006, at 199.

[81] See e.g. Benkler, *supra* note 32.

[82] See e.g. European Parliament, *supra* note 79, at 6.

[83] See e.g. Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford, CA: Stanford University Press, 2009)

[84] See e.g. David Souter, Donald MacLean, Ben Akoh and Heather Creech, *ICTs, the Internet and Sustainable Development: Towards a New Paradigm* (Winnipeg, CA: International Institute for Sustainable Development, 2010).

5. Concluding remarks

In this chapter, we first briefly looked at the cultural protectionism/cultural diversity discourse at the international level. We expressed some critique as to existing path dependencies and lack of solutions reconciling economic and non-economic interests. Our central argument was however that the existing cultural policy instruments have not sufficiently or not at all considered the impact of digital technologies. They are in effect still grounded in analogue/offline thinking and do not match the complex contemporary processes of cultural creation, distribution and consumption evolving in the digital environment.

We sketched three possible avenues for updating cultural policy toolkits, in particular those advancing the goal of cultural diversity, in consideration of some of the specific characteristics of digital media. These were: (i) responding to the creative user; (ii) responding to the unlimited "shelf-space" in cyberspace; and (iii) taking into account policies conventionally thought peripheral to achieving cultural objectives in designing integrated approaches for the digital age. While we highlighted those features of digital media, which may enable the attainment of cultural goals more efficiently and effectively, we also voiced some concerns and generally, conceived of digital media not as some sort of a panacea but rather as a powerful factor that changes both the environment where cultural goals are to be achieved, and the tools, which may be put to work.

While one can prognosticate that the old cultural protectionism as we know it from the days of the Uruguay round may fade away, cultural policy concerns are here to stay. The promise of "cloud culture", where there is more culture and it is more available than ever before to people, due to indefinite digital stores of data in the cloud, ubiquitous broadband, new search technologies and access through multiple devices,[85] is grand, but it comes with certain challenges attached. Awareness of these and of their multi-directional and interlinked effects may be critical to appropriately pursuing cultural goals in an environment with no state boundaries and no scarcity.

In this sense, we would like to first stress the need to better understand the impact of digital technologies on the present and future of cultural practices and their effect on the diversity of cultural expressions in sub-national, national, regional and global contexts. It is also critical to raise the awareness of the intrinsic link between cultural diversity and sustainable development, and how it can be enhanced under the conditions of digital media. To be sure, understanding the relationship between digital media and sustainability demands a comprehensive analysis, which "must concern itself with the long-term structural changes that evolve as a result of iterative and recursive interactions between those technologies, societies, economies, power structures and cultural identities".[86]

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[85] Charles Leadbeater, *Cloud Culture: The Future of Global Cultural Relations* (London: Counterpoint, 2010), at 36.

[86] D. Souter and D. MacLean, 'ICTs, the Internet and Sustainability: Where Next?', in D. Souter and D. MacLean (eds.), *Changing our Understanding of Sustainability: The Impact of*

Regulatory action while greeted should be cautious. As states intervene, there must be room for experimentation, for studying existing practices, individual and community experience with new media and testing to find out which patches of intervention work in a particular society, which presupposes also flexibility of the state agencies and procedural checks. The Parties to the UNESCO Convention may foster these debates and the development of best practices, as well as make sure that the acquired know-how is shared with developing countries too. Multidisciplinary research has a role to play as well in that it can strive to deliver nuanced but coherent and meaningful messages on the effects of digital technologies upon society, in particular in the field of culture, and the impact of discrete regulatory tools or broader policy initiatives.[87]

ICTs and the Internet (Winnipeg, CA: International Institute for Sustainable Development, 2012), at 7.

[87] The latest study on the future of the Internet sponsored by the European Commission clearly states that, "[m]oving towards an Internet at the meeting point of human-centred aspects and technological complexities has emerged […] as the key research challenge. A recurrent theme is that research in the EU on the Internet must be far more multidisciplinary". Oxford Internet Institute, *supra* note 78, at 7.