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# Keeping promises: Implementing the UNESCO Convention on Cultural Diversity into EU's internal policies

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Irrespective of the diverse stances taken on the UNESCO Convention's bearing in the external relations context, since its wording is fairly open-ended, it is clear to all observers that the Convention's impact will largely depend on how it is implemented. The discussion on the domestic implementation of the Convention, both in the political and in the academic discourses, is only just emerging. The implementation model of the EU and its Member States could set an important example for the international community and for the other State Parties that ratified the Convention, as the Community and the Member States acting individually, played a critical role in the approval of the Convention, and in the longer process of promoting cultural concerns on the international scene. Against this background, it is the objective of the present article to analyse in how far EU's internal policies are taking account of the spirit and letter of the UNESCO Convention on Cultural Diversity, to critically assess these policies and make some recommendations for adjustment.



# Keeping promises: Implementing the UNESCO Convention on Cultural Diversity into EU's internal policies

Mira Burri\*

## 1. Introduction

In October 2005, the 33rd General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter “the UNESCO Convention” or simply “the Convention”). The Convention’s adoption was remarkable in international treaty lawmaking for its almost unanimous acceptance<sup>1</sup> and very rapid ratification.<sup>2</sup> As of 18 March 2007, the UNESCO Convention has become part of the international legal system and states that have ratified it are committed to implementing it into their domestic law and policies, understood as both national and external relations affairs. This commitment is valid for the European Union (EU) and its Member States, who have become State Parties to the Convention.<sup>3</sup>

In most of the debates subsequent to the Convention’s adoption and in the body of literature that has evolved in parallel, little attention has been paid so far to the internal dimension of the UNESCO Convention, i.e. to the actions that the State Parties need to undertake in order to fulfil their obligations under the Convention and contribute to the attainment of the goal of protecting and promoting cultural diversity. The discussion has predominantly focused on the external dimension of the Convention’s impact<sup>4</sup> and above all on its capability to act as a counterbalance to the

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<sup>1</sup> 148 states voted for the Convention’s adoption. Only Israel and the United States voted against it and 4 states (Australia, Honduras, Nicaragua and Liberia) abstained.

<sup>2</sup> Pursuant to Article 29(1) UNESCO Convention, it will enter into force 3 months after the date of deposit of the 30th instrument of ratification, acceptance, approval or accession. The UNESCO Convention entered into force on 18 March 2007. As of 1 April 2010, 110 countries have ratified the Convention (<http://portal.unesco.org/la/convention.asp?KO=31038&language=E>).

<sup>3</sup> Council Decision 2006/515/EC of 18 May 2006 on the Conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ L 15, 25 July 2006.

<sup>4</sup> A pertinent note in this regard: “While Arab governments have adopted the Convention, they have a tendency to regard it more as a means through which they can gain recognition in the global arena rather than as a guiding document for internal policy-making, particularly

international trade regime governed by the World Trade Organization (WTO).<sup>5</sup> This focus is perfectly understandable as the main driving force, in a political context, behind the adoption of the Convention has been to react to the reality of strong and enforceable international trade rules that treat cultural goods and services in the same way as any other tradable items and arguably do not provide sufficient policy space for national regulators to adopt measures in the cultural domain. In contrast, the Convention suggests a broad need “to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning” and reaffirms “the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”.<sup>6</sup>

It is fair to say that the opinions on the Convention's legal significance and its real and potential impact on the international governance system diverge, ranging from a mere declaratory to a real counteracting function. After the WTO Appellate Body decision in *China – Publications and Audiovisual Products*, however, at least as far as the WTO law and practice are concerned, the influence of the Convention seems limited.<sup>7</sup>

Irrespective of the diverse stances taken on the UNESCO Convention's bearing in the external context, since the wording of the Convention is open-ended, it is clear to all observers that its impact will largely depend on how it is implemented. The discussion on the domestic implementation of the Convention, both in the political and in the academic discourses, is only just emerging. The implementation model of the EU and its Member States could thus set an important example for the international community and for the other State Parties that ratified the Convention, as the European Community (EC) and the Member States acting individually, played a critical role in the

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because they are conscious that opening the door to cultural pluralism will naturally lead to a political pluralism that they would much rather delay”. See Leila Rezk, “Negotiating Diversity: The Meaning of the Convention for the Arab World” 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, pp. 245-254, at p. 250, as referred to by European Parliament, *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU's External Policies*, Briefing note, IP/B/CULT/IC/2010\_065, 2010, at p. 20.

<sup>5</sup> 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; 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; 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; 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.

<sup>6</sup> Article 1(g) and 1(h) respectively.

<sup>7</sup> 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. The EU acted as a third party to the case (submissions available at: [http://trade.ec.europa.eu/wtodispute/show.cfm?id=407&code=3#\\_eu-submissions](http://trade.ec.europa.eu/wtodispute/show.cfm?id=407&code=3#_eu-submissions)).

approval of the Convention, and in the longer process of promoting cultural concerns on the international scene, which ultimately led to the UNESCO Convention.

Against the above background, it is the objective of this article to analyse how far the EU's internal policies are taking account of the spirit and letter of the UNESCO Convention on Cultural Diversity. The term "internal policies" is understood broadly here and captures the single market, intellectual property and competition law, as well as "soft law" instruments, such as the funding programmes on culture and education, as well as diverse policy guidelines (recommendations and communications).<sup>8</sup>

Building upon this, the article provides some ideas on how the EU may calibrate current practices and take up new ways to apply the Convention in its internal policies in the future. This second, forward-looking, aspect is particularly important as the available literature indicates that the EU has in fact taken few concrete measures in the wake of the Convention. This is a situation that can be perhaps explained by the existence of manifold instruments to preserve cultural diversity put in place prior to the Convention's coming into force in 2007<sup>9</sup> and relates to the EU's long-term engagement in the cultural domain.<sup>10</sup> That is why elements of the following analysis of the implementation of the UNESCO Convention in the EU's internal policies will consider the EU's respect for the protection and promotion of cultural diversity *avant la lettre* – i.e. prior to the emergence of this notion as advanced by the UNESCO Convention on the international level.

## **2. EU's internal policies related to cultural diversity protection and promotion**

### ***2.1. Scope of actions at the national Level as stipulated by the UNESCO Convention***

Before examining whether the EU has appropriately implemented the UNESCO Convention, it should be clarified what actually is expected from the Convention's State Parties in terms of transposing this international act. This enquiry does not need to be lengthy, as the Convention entails few real obligations but mostly best endeavour duties. There are only two provisions that can be said to be of binding nature. The first relates to the preferential

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<sup>8</sup> As far as a separation between the internal and external policies of the Union is possible, it is the purpose of this article to focus on the former. External aspects will only be looked at in context and where their impact on the internal ones is essential, such as for instance in the field of intellectual property.

<sup>9</sup> See section 2.3 below.

<sup>10</sup> Some authors even argue that it is the EU policy, in particular in the field of audiovisual media, that has led to the emergence of the notion of cultural diversity. See Sophie de Vinck and Caroline Pauwels, "Cultural Diversity as the Final Outcome of EU Policymaking in the Audiovisual Sector: A Critical Analysis" in Hildegard Schneider and Peter van den Bossche (eds.), *Protection of Cultural Diversity from a European and International Perspective*, Antwerp: Intersentia, 2008, pp. 263-316.

treatment that developed countries must grant to cultural workers and cultural goods of developing countries,<sup>11</sup> while the second creates an obligation for international cooperation in situations of serious threat to cultural expressions, understood in particular as assistance from developed to developing countries.<sup>12</sup> Both of these obligations would fall under the external policies of the EU.

In terms of internal policies, the Convention contains precious little. Articles 6 and 7, which are relevant with regard to national measures to protect and promote cultural expressions, are formulated in such an open-ended manner that the choice of measures is virtually unlimited. Article 6(2) of the Convention, although meant to provide some additional guidance in this respect, in fact contains only a non-exhaustive list of measures that the State Parties may adopt. It is also evident from the listing that a vast variety of policies and activities, which may or may not take a legislative form, could be subsumed under the categories available.<sup>13</sup> The only example that appears somewhat concrete is the mention of public service broadcasting as a means to enhance diversity of the media.<sup>14</sup> The Operational Guidelines<sup>15</sup> issued subsequent to the adoption of the Convention and approved by the Conference of Parties provide no additional help as to the designing of appropriate instruments for the protection and promotion of cultural diversity and remain fairly open, leaving substantial flexibility for the State Parties to act or indeed not to do so.

It is in this sense very much up to the EU and its Member States to decide on the ways of implementing the Convention, in particular in their internal affairs (as there are some, although scant, guidelines and obligations

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<sup>11</sup> Article 16 of the UNESCO Convention.

<sup>12</sup> Article 17 of the UNESCO Convention.

<sup>13</sup> Article 6(2) of the UNESCO Convention lists as possible measures 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.

<sup>14</sup> Article 6(2)(h) of the UNESCO Convention.

<sup>15</sup> UNESCO, Operational Guidelines: Measures to Promote and Protect Cultural Expressions, approved by the Conference of Parties at its second session, June 2009, available at: [http://www.unesco.org/culture/culturaldiversity/articles\\_7\\_8\\_17\\_en.pdf](http://www.unesco.org/culture/culturaldiversity/articles_7_8_17_en.pdf).

as far as international co-operation and relationships with developing countries are concerned). It should be borne in mind however that any failure to act in any of these directions will not be sanctioned by the institutions set up under the UNESCO Convention.<sup>16</sup> The damages, if any, would be of political, reputational nature. Still, as noted, the EU can set an example as to appropriate and innovative paths towards protecting and promoting cultural diversity, especially considering its long-term commitment to culture and creativity and its recently formulated aspiration even to strengthen this in the future.

## 2.2. EU competence in cultural affairs

The core competence of the Union in the field of culture flows from Article 151 of the EC Treaty. The Lisbon Treaty brought about no changes as to the scope and substance of these competences apart from two minor technical details – renumbering (now, post-Lisbon, Article 167 TFEU) and a deleted reference in paragraph 5 to Article 251 EC on the co-decision procedure, which is of no practical effect.<sup>17</sup>

Article 151 was introduced with the Maastricht Treaty in 1993 (then as Article 128) and culture became therewith an explicit but limited competence of the Community with the main prerogatives remaining with the Member States.<sup>18</sup> This being said, it is clear that the cultural field interacts by its very nature with other areas of EC competence. European legislation, policies and programmes in a wide range of domains have direct

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<sup>16</sup> At worst, a state can be criticised by the Intergovernmental Committee or Conference of Parties on the basis of the state's own four-yearly reports. Article 9(a) of the UNESCO Convention. See also Craufurd Smith, above n. 5, at p. 39.

<sup>17</sup> Article 167 now reads:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.

<sup>18</sup> On the adoption of Article 151 and the role of the EC institutions on cultural matters prior to its adoption, see Rachael Craufurd Smith, "Community Intervention in the Cultural Field: Continuity or Change" in Rachael Craufurd Smith (ed.), *Culture and European Union Law*, Oxford: Oxford University Press, 2004, pp. 19-80.

or indirect impact on the cultural and creative sectors. Particularly worth mentioning are the European activities in the fields of the internal market, in taxation, competition and commercial policies. Clearly, the implementation of these policies, combined with the presence of very diverse and even diverging interests may often result in contradictions and tensions. There is thus an inherent necessity for the EU institutions to constantly strike a balance and attempt to reconcile competing policy ambitions and Treaty objectives.<sup>19</sup> When one looks back, it is apparent that this balance has not been easy and that the cultural domain has frequently been a battlefield between EU integrationists and intergovernmentalists, interventionists and liberalisers.<sup>20</sup> It is also a discourse saturated with complex and controversial concepts, such as national and European identity, Europeanisation and culture,<sup>21</sup> that have rendered solution-finding highly politically and even emotionally charged.

One of the Treaty texts fuelling these battles is paragraph 4 of Article 167. Pursuant to it, the Union has been and continues to be obliged to “take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”. The fulfilment of this obligation has not been an easy task because, as already noted, Member States are still the ones exercising full competence in the cultural domain (which is, needless to say, also a very sensitive area). With the benefit of hindsight, it can be said that the impact of the fourth paragraph of Article 167 “appears to have been rather patchy, with evidence of its operation in certain areas of competition law, but rather less evidence to suggest that it has affected pre-existing approaches in the judicial or legislative contexts”.<sup>22</sup> Although subsidiarity is uncontested, the EU institutions have often been criticised in this respect. What is alleged is that despite the rhetoric at the European level about the importance of culture and the strong evidence that the cultural and creative industries are contributing significantly to economic and social welfare and specifically to the Lisbon

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<sup>19</sup> Examples of situations involving stakeholders and/or policies having contradictory interests, are the assessment of the compatibility of national film support schemes with EC state aid rules; the issue of territoriality requirements in the exercise of copyright; the standing of cultural goods and services within multilateral trade negotiations; the status of public service broadcasting; or the assessment of market concentration in the cultural sector. KEA European Affairs, *The Economy of Culture in Europe*, Study prepared for the European Commission (Directorate-General for Education and Culture), October 2006, at p. 198.

<sup>20</sup> Lesley P. Hitchens, “Identifying European Community Audio-Visual Policy in the Dawn of the Information Society” in *Yearbook of Media and Entertainment Law 1996*, Oxford: Oxford University Press, 1997, at pp. 71-72, as referred to by David A. L. Levy, *Europe's Digital Revolution: Broadcasting and Regulation, the EU and the Nation State*, London: Routledge, 1999, at p. 40. See also Mark Wheeler, “Supranational Regulation: Television and the European Union” (2004) *European Journal of Communication* 19:3, pp. 349-369.

<sup>21</sup> de Vinck and Pauwels, above n. 10.

<sup>22</sup> Craufurd Smith, above n. 18, at p. 64. On the impact of Community rules on national cultural policies, see Joshua Holmes, “European Community Law and the Cultural Aspects of Television” in Craufurd Smith, above n. 18, pp. 169-203. For a slightly more optimistic opinion, see Evangelia Psychogiopoulou, “The Cultural Mainstreaming Clause of Article 151(4): Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?” (2006) *European Law Journal* 12:5, pp. 575-592.



Agenda, culture has remained relatively low in the hierarchy of the Commission's concerns.<sup>23</sup>

Yet, there is a new aspiration of the Commission to change this and put substantial effort into mainstreaming culture in all relevant policies – an aspiration that has been stressed by and specified in the 2007 Communication on “A European Agenda for Culture in a Globalising World”.<sup>24</sup> The UNESCO Convention on Cultural Diversity clearly only strengthens this trend and demands targeted action.

### **2.3. EU internal policies of relevance to culture and cultural diversity**

As noted above, although the exclusive competence of the EU in the cultural domain appears constrained, there are a vast number of other policies and programmes that impact – at times profoundly, at other times less so – on cultural affairs and on cultural diversity. The Commission has prepared a very useful document in this regard, which creates an inventory of Community actions in the field of culture.<sup>25</sup> Under the category of internal programmes and policies, the Commission refers to the following existing and ongoing activities (presented here in the order applied by the Commission):

- (i) *Culture, education and youth:*  
including the Culture (2007–2013) programme; Active Citizenship; Lifelong Learning programme (2008–2013); the Youth in Action programme (2007–2013);
- (ii) *Communication:*  
including Commission's modernised approach to communication as laid down in the Action Plan to Improve Communicating Europe and the White Paper on a European Communication Policy;<sup>26</sup>
- (iii) *Regional policy:*  
including the Cohesion Policy (2007–2013);
- (iv) *Agriculture and sustainable development:*  
including the second pillar of the Common Agricultural Policy, i.e. in particular the rural development policy;
- (v) *Employment, social affairs and equal opportunities:*  
including the European Social Fund, the work of the Culture and Live Performing Arts Social Dialogue Committee; the Community programme for employment and social solidarity, PROGRESS;
- (vi) *The audiovisual sector:*  
including the Audiovisual Media Services Directive and its

<sup>23</sup> European Parliament, Briefing Paper on the Implementation of Article 151.4 of the EC Treaty, IP/B/CULT/FWC/2006\_169, 18 June 2007, at p. iii.

<sup>24</sup> European Commission, European Agenda for Culture in a Globalizing World, COM(2007) 242 final, 10 May 2007.

<sup>25</sup> European Commission, Inventory of Community Actions in the Field of Culture, Accompanying Document to the Communication on a European Agenda for Culture in a Globalizing World, SEC(2007) 570, 10 May 2007, in particular pp. 7-24.

<sup>26</sup> COM(2006) 35, 1 February 2006.

- predecessor, the Television without Frontiers Directive; the MEDIA programme; and other initiatives, such as those aimed at Content Online and Media Pluralism;
- (vii) *Information society and research:*  
including Information Society; eContentplus; eTEN (Trans-European Telecommunications Networks) programme; the 6th and 7th Framework programmes for research and development;
  - (viii) *Competition policy:*  
including antitrust policy; merger control and control of state aid;
  - (ix) *Internal market:*  
very notable here are the initiatives regarding harmonisation of intellectual property rights protection, in particular of copyright and related rights; and (lastly and perhaps a bit surprisingly)
  - (x) *Maritime policy.*

It is evident from simply listing these activities and programmes that they are extremely miscellaneous, very different from one another in terms of structure, stakeholders, impact and the Community's involvement. It is also clear that some of these activities are more central to the pursued goal of cultural diversity, while others are marginal in their effect and relation to this objective. While one could argue that this is very much in line with the idea of mainstreaming culture in all the EU's activities (as articulated in Article 167(4) TFEU and as specified in the *European Agenda for Culture in a Globalising World*), it also raises important questions of good governance, i.e. of coordination, efficiency and efficacy within this overall system.

One equally needs to acknowledge the often dynamic, fluid character of all these policy frames. Depending on the evolving (economic, social and political) circumstances, for instance, as CAP may lose in importance as to its contribution to cultural diversity, media literacy can substantially gain in significance. It could also be that as the exogenous environment changes, for instance in the sense of changing habits and needs of consumers and citizens with regard to digital media consumption, themes that have previously appeared "foreign" (e.g. because of their too technical nature) to the topic of protecting cultural diversity, such as ensuring interoperability of hardware, software and content access systems, suddenly come to the fore and demand attention and possibly regulatory intervention.

Against the canvas of these diverse measures applied in multiple fields of governance (some of which were put in place long before the concept of cultural diversity gained prominence as a legitimate regulatory objective and before its explicit formulation as such through the UNESCO Convention), one needs to acknowledge the contemporary position of the Commission towards culture. As noted above, this has been articulated by the Commission in its Communication on "*A European Agenda for Culture in a Globalising World*",<sup>27</sup> which is indeed the first comprehensive policy document on culture at the EU level. The UNESCO Convention is fully

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<sup>27</sup> European Commission, above n. 24.

integrated into the European Agenda for Culture, which pursues three shared strategic objectives:

- (i) cultural diversity and intercultural dialogue;
- (ii) culture as a catalyst for creativity and innovation; and
- (iii) culture in international relations.

In terms of *modus operandi* and corresponding to the above-raised questions regarding governance in the field of culture, it is particularly noteworthy that the Agenda introduces two key tools. The first is the *Open Method of Coordination (OMC)* as a non-binding, intergovernmental framework for policy exchange and concerted action suitable for a field such as the cultural one, where competence remains at the Member State level.

Five priority areas, articulated around the three objectives of the Agenda, were set by the Council in November 2008 as suitable for the implementation of the OMC. These areas provide the basis for the *Work plan 2008–2010* through which the *Agenda for Culture* becomes operational:

- (i) improving the conditions for the mobility of artists and other professionals in the cultural field;
- (ii) promoting access to culture, especially through the promotion of cultural heritage, cultural tourism, multilingualism, digitisation, synergies with education (in particular arts education) and greater mobility of collections;
- (iii) developing data, statistics and methodologies in the cultural sector and improving their comparability;
- (iv) maximising the potential of cultural and creative industries, in particular that of small and medium sized enterprises (SMEs);
- (v) promoting and implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

The second tool identified as key by the *European Agenda for Culture* is the *reinforced structured dialogue with the civil society*. This dialogue is in fact also specified as an essential dimension of the UNESCO Convention,<sup>28</sup> and in this sense could be taken as a channel for its implementation. Yet, it is not necessarily an easy and straightforward channel. The Commission specifically recognises here the idiosyncratic characteristics of the cultural sector, notably its heterogeneity (professional organisations, cultural institutions with different degrees of independence, non-governmental organisations, EU and non-EU networks, foundations, etc), as well as the lack of communication in the past between the cultural industries and other cultural actors, which in their totality have led to a diminished voice of the cultural sector at the European level. At least until now.

Overall, while the Commission's initiatives ought to be welcome, it remains to be seen how, precisely, the Agenda will be implemented, both in terms of its ambitious goals and its methods. The areas of action, as

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<sup>28</sup> Article 11 of the UNESCO Convention reads: "Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention".

presently formulated (compare listing above), are as different from one other as chalk and cheese. It is also uncertain how the Agenda will interact with the already existing EU internal policies that bear upon culture. The dangers of becoming not fully associated with the complex environment of the creative industries is real and present and it is only sensible that the Commission has subscribed to an evidence-based policymaking approach, which through sharing existing data, case studies, cooperation on evaluation and impact analyses provides the necessary checks and balances and when needed, can lead to readjustments. The first results on the implementation are due in summer 2010 and intended to provide the basis for a discussion at the Council about priorities for the *Work plan for culture 2011–2013*. It will be interesting to see whether concrete and more concentrated efforts will emerge in the new plan and what the real impact of the UNESCO Convention on this exercise will be.

### **3. Assessment of the existent EU internal policies of relevance to culture and cultural diversity**

Accounting for the above brief taxonomy of the EU's internal policies that reflect the objective of protecting and promoting cultural diversity in the sense envisaged by the UNESCO Convention, it is essential to discuss them and attempt to assess their impact. To be sure, the simple number of initiatives is not decisive, although the idea of mainstreaming culture can clearly demand intertwining it in all domains, and would thus amount to a greater number of EU culture-oriented activities. What should be deemed critical, however, is the effectively functioning causal link between the policies applied and the achievement of a sustainable culturally diverse environment.

As noted above, the multiple EU activities that impact on culture can be well described with a core–periphery model, where those activities that have the most immediate effect are at the centre and others with less influence on culture spread across the different concentric circles. The precise construction of this model and the enquiry into all EU activities that bear upon culture (including, for instance, as the Commission asserts, maritime policy) is certainly beyond the scope of this article. If we are however to concentrate on those domains that make the most direct contribution to the protection and promotion of cultural diversity, we are bound to talk about *media*. We should not forget that it is precisely in the context of audiovisual media services (not just any cultural goods) that the UNESCO Convention came into being because of the lack of appropriate accommodation of these media under the auspices of the WTO and its multilateral agreements.<sup>29</sup> While the mandate of the UNESCO Convention is now admittedly broader and able to capture a vast number of activities, media do remain at the core of any cultural diversity policy because of the specific role they play in society. Indeed, with the contemporary ubiquity of digital media, this role is

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<sup>29</sup> See e.g. Mira Burri, “Trade and Culture in International Law: Paths to (Re)conciliation” (2010) *Journal of World Trade* 44:1, pp. 49-80.

magnified. It is also in the field of media, most notably in the domain of audiovisual policy, that the EU can be said to have coordination tasks that go beyond subsidiarity, as we show further below.

Needless to say, media are not a neatly contained policy domain but in fact many of the Community activities (similarly to those relevant to culture) influence media regulation, both in the sense of “hard” legislative acts and “soft” measures and programmes. The Commission acknowledged this practical reality by creating, in December 2009, an inventory of measures affecting the media, which extends to some 46 pages.<sup>30</sup> In the following, we concentrate our enquiry on the EU regulatory framework for audiovisual media services and critically assess its contribution to cultural diversity, before and after its 2007 reform. Subsequently and in the sense of moving toward the forward-looking analysis of the implementation of the UNESCO Convention into EU internal policies, we consider the impact of digital media and the post-convergence reality of the information and communication environment. In this context, we discuss the conditions of creating, distributing and accessing cultural content in the EU as one of the most important parameters in providing for cultural diversity and look into several areas where there may be a need for (modified, additional or new) Community action.

### **3.1. EU audiovisual policy: *Television without Frontiers***

Audiovisual works represent a most essential vector for the transmission of cultural, social and democratic values. Broadcasting was not however one of the original EC regulatory domains and was not covered by the Treaty of Rome. It was with the introduction of the “cultural” Article by the Maastricht Treaty (as noted above, now post-Lisbon, Article 167 TFEU) that the Community authority was extended to encourage co-operation between Member States and, if necessary, to support and supplement their action in certain fields, notably, “artistic and literary creation, including in the audiovisual sector”.<sup>31</sup>

The *Television without Frontiers Directive (TWFD)*, adopted in 1989,<sup>32</sup> is a centrepiece of the EU regulatory framework meant to enable “business without frontiers” in the audiovisual sector. It sets, in particular, the conditions for free circulation of television broadcasts within the EU single market. On the basis of the “country of origin” principle, which allows broadcasters to offer audiovisual content complying with the laws of their own State for broadcasting in other Member States, the Directive has led to a

<sup>30</sup> Available at: [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/grid\\_inventory.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/grid_inventory.pdf).

<sup>31</sup> Article 167(2), para 4. The European Court of Justice, however, before Maastricht, had already held that the broadcasting of televised messages falls under the rules of the Treaty relating to the provision of services. See Case 155/73 *Guiseppe Sacchi*, ECR [1974] 409. See also Case 52/79 *Procureur du Roi v. Marc J V C Debaue and others* [1980] ECR 860; Case 62/79 *Coditel v. Ciné-Vog Films (Coditel I)* [1980] ECR 881; Case 262/81 *Coditel v. Ciné-Vog Films (Coditel II)* [1982] ECR 3381.

<sup>32</sup> 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.

vast increase in the number of channels being broadcast, thereby contributing to a flourishing EU audiovisual media services market and to more cultural content made available.<sup>33</sup>

Despite being essentially a liberalisation instrument,<sup>34</sup> it is most noteworthy that the TVWF contains two specific provisions (Articles 4 and 5), which are the only tools at the Community level that are *per se* meant to serve cultural goals, by ensuring a balance of offerings in the EU broadcasting markets. Article 4 provides that Member States shall ensure, where practicable and by appropriate means, that broadcasters allocate a majority of time on TV channels, to European-made programmes (the so-called “European works”). Article 5 is intended to ensure that a minimum proportion of viewing time (10%) is reserved to European works created by independent producers (or alternatively that a minimum programme budget is allocated by broadcasters to independent productions).

Regardless of the implementation option chosen by the individual Member States,<sup>35</sup> the impact study prepared for the TVWF review showed that the measures to promote European and independent productions have indeed had considerable impact on the EU media landscape (at least quantitatively). The average ratio of European works in the qualifying transmission time of the channels had risen from 52.1% in 1993 to 57.4% in 2002 and to 65% in 2006. The average proportion of independent productions had increased from 16.2% in 1993 to 20.2% in 2002 and to 37.6% in 2006.<sup>36</sup>

This situation has been a source of satisfaction in the Commission. The then EU Commissioner for Information Society and Media, Viviane Reding, stated that, “[t]his is proof of the high quality of Europe’s home-grown

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<sup>33</sup> Commission reports on the implementation of the TVWF are unambiguous evidence in this regard: whereas, at the beginning of 2001, over 660 channels with potential national coverage were broadcast via terrestrial transmitters, satellite or cable, seven years later in addition to the 352 analogue and digital terrestrial national channels, some 1 742 channels were available over one or more platforms (cable, satellite, terrestrial, IPTV). This should be compared to the fewer than 90 channels existing in 1989. See European Commission, Seventh Report on the application of Directive 89/552/EEC “Television without Frontiers”, COM(2009) 309 final, 26 June 2009.

<sup>34</sup> Including also partial harmonisation: see Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, ECR [1997] I-03843, at para 32. See also Berend Jan Drijber, “The Revised Television without Frontiers Directive: Is it Fit for the Next Century” (1999) *Common Market Law Review* 36, pp. 87-122, at p. 92.

<sup>35</sup> For an overview of Member States’ legislation, see David Graham and 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 The Audiovisual, Media and Internet Unit of DG Information Society, 24 May 2005, at chapter 6. See also Attentional et al., *Study on the Application of Measures Concerning the Promotion of the Distribution and Production of European Works in Audiovisual Media Services (i.e. Including Television Programmes and Non-linear Services)*, Draft Final Report, 21 October 2008, at p. 323.

<sup>36</sup> Graham and Associates, *ibid.* at p. 14 and chapter 7; 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 August 2008.

audiovisual content and of the vitality of an audiovisual industry that draws upon Europe's rich cultural diversity".<sup>37</sup>

It should be clear, however, that these rules were put in place a long time before the UNESCO Convention and have had a certain political context attached to them. The latter has to do with the wish expressed by some Member States to reserve airtime for non-US productions in order to promote markets of sufficient size for television programmes to recover necessary investments, and also to cater for national language and cultural identity purposes. As the High Level Group on Audiovisual Policy phrased it: "[a]t the heart of the matter is the question of whether the predicted explosion in demand for audiovisual material will be met by European productions or by imports. [...] The danger is that the channel proliferation brought about by digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports".<sup>38</sup>

The cultural diversity justification of the quota mechanisms may in fact be questioned in various respects. First, it is necessary to clarify that the definition of what qualifies as "European work" is not based upon originality and quality criteria, nor does it require a particular expression of national and European themes. It 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: (i) the work is made by one or more producers established in a Member State or States party to the CTT; (ii) the production is supervised and controlled by producer(s) established in one or more of those States; or (iii) 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.<sup>39</sup>

By subscribing to this definition of European works, it could be maintained that little is achieved in terms of preventing the homogenisation of content or deteriorating quality of programmes,<sup>40</sup> which have been allegedly brought about by the liberalisation of the media sector and featured

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<sup>37</sup> European Commission, "European Works' Share of TV Broadcasting Time Now Stable Over 60%", Press release, IP/06/1115, Brussels, 22 August 2006. See also European Commission, "New Figures Show: Almost Two Thirds of EU Television Time Is 'Made in Europe'", Press release, IP/08/1207, Brussels, 25 July 2008.

<sup>38</sup> High Level Group on Audiovisual Policy, *The Digital Age: European Audiovisual Policy*, chaired by Commissioner Marcelino Oreja, 26 November 1998.

<sup>39</sup> Article 6(2) in conjunction with 6(1)(a) and (b) TVWF. This definition is largely unchanged under the AVMS.

<sup>40</sup> On the deteriorating quality and reduced range of programmes on offer, see Stylianos Papathanassopoulos, *European Television in the Digital Age*, Cambridge: Polity, 2002, 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. See also Denis McQuail, "Commercialisation and Beyond" in Denis McQuail and Karen Siune (eds.), *Media Policy: Convergence, Concentration and Commerce*, London: Sage, 1998, pp. 107-127 and Mónica Ariño, "Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps" (2004) *Communications and Strategies* 54, pp. 97-128.

as the foremost reasons for regulatory intervention.<sup>41</sup> A “Big Brother” type of show financed with European money qualifies perfectly as both a European work and an independent production. Moreover, the causal link between the high levels of European and independent productions and the quota mechanism is not clear.<sup>42</sup> 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 would have been larger and that the measures to promote the circulation of programmes within the EU have also promoted exports.<sup>43</sup> Data from the most recent report of the Commission on the application of Articles 4 and 5 TVWF also show that the average transmission time devoted to European works in Bulgaria and Romania, i.e. two countries previously unencumbered by the quota duties, were already above the prescribed levels (67.65% in 2005 and 72.83% in 2006 in Bulgaria, and 51.08% in 2005 and 57.95% for 2006 in Romania).<sup>44</sup>

The instance of quotas for European works and independent productions reveals the strong political will to protect the European media industries by securing a certain amount of airtime for them (i.e. by maintaining a high level of demand). It is questionable whether this act of protectionism<sup>45</sup> contributes to the objective of cultural diversity – in fact, it clearly contradicts some of the UNESCO Convention’s own guiding principles, such as those of equitable access and of openness and balance.<sup>46</sup>

The example also shows that there is a constant need for cautiously examining the effects of the applied regulatory tools and their relation to the pursued goal. Changes might truly be needed in response to the emergence of a new information and communication environment due to the wide spread of digital technologies and above all, the Internet and the world wide web. On the other hand, the example of the Television without Frontiers Directive shows that in the field of the media, the EU has substantial leverage to pursue distinct cultural diversity goals that Member States must then implement in their national legal frameworks.

A word of caution can also be added here as to the rhetoric of cultural diversity policy. As cultural diversity becomes a new buzzword in policy parlance, it seems to be added after a comma as just another of the regulatory objectives pursued. For instance, in the process of reviewing the TVWF, particularly hotly debated were the rules on advertising and product placement. The Commission argued that by providing a clear framework for

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<sup>41</sup> See e.g. Peter Hettich, “YouTube to be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet” (2008) *St. John’s Law Review* 82, pp. 1395-1456, at p. 1411, citing the essential references in this context.

<sup>42</sup> For a critique of the methodology applied, see de Vinck and Pauwels, above n. 10.

<sup>43</sup> Graham and Associates, above n. 35, at section 8.5.

<sup>44</sup> European Commission, above n. 36, at p. 6.

<sup>45</sup> 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; Frederick Scott Galt, “The Life, Death, and Rebirth of the ‘Cultural Exception’ in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony” (2004) *Washington University Global Studies Law Review* 3:3, pp. 909-935.

<sup>46</sup> Principles 7 and 8, respectively, of the UNESCO Convention, as enshrined in Article 2.



product placement, new revenues for the European audiovisual industry would be secured. This would increase its competitiveness, especially *vis-à-vis* the US media industry, where product placement accounts for 1.7% of total advertising revenues of free-to-air broadcasters and grew by an average of 21% per year between 1999 and 2004.<sup>47</sup> More oddly, the Commission also believed that the new rules on product placement will “help to boost our creative economy and thus reinforce cultural diversity”.<sup>48</sup> Indeed, both the more relaxed rules on advertising and the introduction of product placement were seen as “further instruments safeguarding cultural diversity”.<sup>49</sup> Although it is understandable that additional financial resources for broadcasters can have a positive influence on their content offerings, the causal link between more advertising and safeguarding cultural diversity is at best weak, if not completely inconsistent. Paying mere lip service to the objective of protecting and promoting cultural diversity is of no value, and as some authors point out, “[q]uite paradoxically, it seems that the largest threat to cultural diversity concerns currently emanates from the vagueness and ambiguity surrounding many of the relevant EU provisions”.<sup>50</sup>

It is fair to say that the UNESCO Convention itself invites ambiguity and gives plenty of room for empty rhetoric. The Convention’s definition of cultural diversity as “the manifold ways in which the cultures of groups and societies find expression” and the circular definitions of “cultural expressions”, “cultural content” and “cultural policies and measures”<sup>51</sup> are broad and could readily cover almost any policy that bears on culture.

It has been the Community’s approach to be wary of definitions. From the very outset of the cultural discussion, the Commission declared itself “unwilling to engage on ‘academic argument over the definition, purpose and substance of culture’”.<sup>52</sup> Rather, the Commission shared the position that it was “not for an institution to define the content of the concept of culture” and that it intended to adopt a “pragmatic approach”.<sup>53</sup> The concept of cultural diversity as a dynamic parameter may indeed be more suitable for such a pragmatic approach but this would mean that the European institutions would have to let go of the handsome rhetoric and concentrate on analysing data and assessing the real impact of the tools applied. In this sense, the approaches suggested by the Commission in its *Agenda for Culture* for applying impact assessment methodologies, as well as the use of

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<sup>47</sup> Carat and Koan, Final Report of the Comparative Study on the Impact of Control Measures on the Televisual Advertising Markets in European Union Member States and Certain Other Countries, prepared for the European Commission, July 2005, pp. 60-61.

<sup>48</sup> European Commission, “The Commission Proposal for a Modernisation of the Television without Frontiers Directive”, MEMO/05/475, Brussels, 13 December 2005.

<sup>49</sup> Ibid.

<sup>50</sup> de Vinck and Pauwels, above n. 10, at p. 304.

<sup>51</sup> See respectively Article 4, paragraphs 1, 3, 2 and 6.

<sup>52</sup> Rachael Craufurd Smith, “Introduction” in Craufurd Smith, above n. 18, pp. 1-16, at p. 10, referring to European Commission, Communication on Stronger Community Action in the Cultural Sector, 15 Bull. EC, supp. 6/1982, at para 4.

<sup>53</sup> European Commission, First Report on the Consideration of Cultural Aspects in European Community Action, COM(1996) 160 final, at p. 3, as referred to by Craufurd Smith, *ibid.*

OMC appear welcome and especially appropriate.<sup>54</sup> The availability of concrete data and evidence may be helpful in trying to overcome the existing strong path dependencies for audiovisual regulation within the EU.<sup>55</sup> As the example of cultural quotas shows, however, this could be politically very difficult.

### 3.2. *The changing media landscape*

Many of the EU's internal and external policies in the field of culture have emerged and have been applied under the conditions of analogue or offline media. The media landscape, however, has not remained static and in the past two decades has experienced profound changes that together have led to a decidedly different information and communication environment.<sup>56</sup> At the core of the sweeping changes to the media canvas is the process of digitisation, which enables any type of information (be it text, audio, video, or image) to be expressed in a line of zeroes and ones. The data thus coded can also be easily stored and transported instantaneously, and this, as the experience of the past fifteen years shows, at an ever decreasing price.<sup>57</sup> This basic matrix combined with the wide spread of optical fibre networks and exponentially increasing computational power, has led to a variety of transformations in the media, which have become palpable in different facets of societal practices.

Filtering in the context these transformations, we can identify as particularly relevant to the present discussion: (i) the proliferation and diversity of content; (ii) its accessibility; (iii) the empowerment of the user; 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 still in their infancy, they are already entering a phase that permits observations with immediate relevance to the discussion on protecting and promoting cultural diversity. Some of these observations hint at opportunities for better, more efficient and flexible accommodation of the goal of cultural diversity, while others are to be viewed rather as challenges perhaps demanding additional regulatory intervention.

In the latter category, one may list the anticipated drastically fragmented media environment, as content consumption moves from a "push" to a "pull" mode (i.e. from broadcasting to on-demand).<sup>58</sup> The split between digital and

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<sup>54</sup> The need to establish a stronger quantitative evidence base for policymakers has also been stressed by the Economy of Culture study. See KEA European Affairs, above n. 19, at p. 209.

<sup>55</sup> Alison J. Harcourt, "Institution-driven Competition: The Regulation of Cross-Border Broadcasting in the EU" (2007) *Journal of Public Policy* 27:3, pp. 293-317.

<sup>56</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven: Yale University Press, 2006, at p. 2.

<sup>57</sup> Chris Marsden et al., *Assessing Indirect Impacts of the EC Proposals for Video Regulation*, RAND Europe, 2006.

<sup>58</sup> John Naughton, "Our Changing Media Ecosystem" in Ed Richards et al. (eds.), *Communications: The Next Decade*, London: Ofcom, 2006, pp. 41-50. See also Graham and Associates, above n. 35, at section 3.5.1.

analogue households, which is already a reality, will be exacerbated.<sup>59</sup> This gap aggravates already existing social fragmentation and inter-generational gaps. In the cultural context, such fragmentation may also mean that the common set of shared cultural content diminishes as there is greater individualisation of the cultural environment, reinforcing the effects of the existing trend towards the multiplicity of media channels and the diminishing societal role of a few national broadcasting channels for political discourse and shared national values.<sup>60</sup>

In terms of competition, the effects of the digital networked environment are multi-directional. On the positive side, it is conceivable that the reduced barriers to entry will allow new market players to position themselves and make use of niche markets, which have become economically viable in the digital ecosystem due to the drastically falling storage, distribution and search costs (the so-called “long tail” effect<sup>61</sup>). The digital setting may have also reduced the significant entrepreneurial risk inherent in launching new cultural goods and services<sup>62</sup> (at least for some of them), while making the visibility of cultural goods and services greater and empowering the consumer in terms of choice and actual consumption.

On the other hand, 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<sup>63</sup> 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). Nonetheless, the digitally facilitated abundance of content, its dissemination and accessibility without real location restrictions will undoubtedly lead to more content and to new content,<sup>64</sup> generated and spread individually or by groups. Some of this user created content (UCC) reflects the key media

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<sup>59</sup> Edwin Horlings, Chris Marsden, Constantijn van Oranje and Maarten Botterman, Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive, Report Prepared for DG Information Society and Media, RAND Europe, 2005.

<sup>60</sup> OECD, Participative Web: User-created Content, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007, at p. 39.

<sup>61</sup> Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York: Hyperion, 2006. The name ‘long tail’ has to do with the image of a demand curve that gets longer and longer and covers more and more niche ‘non-hit’ products. Anderson’s theory builds upon previous and parallel economic research. See 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” (2007) MIT Center for Digital Business Research Paper.

<sup>62</sup> 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.

<sup>63</sup> For instance, by placing a single video on mobile and digital TV networks, on content platforms and social networking websites such as YouTube, MySpace, and Facebook.

<sup>64</sup> David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder*, New York: Henry Holt, 2007.

policy components of diversity, localism and non-commerciality<sup>65</sup> and in this sense harnessing the UCC processes could be critical for cultural diversity objectives.<sup>66</sup> Beyond these “amateur” creations, the digital environment has also had a deep impact upon 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”.<sup>67</sup>

The new dynamics of the markets for digital cultural content may also impact upon the market failures conventionally associated with analogue media markets, mostly because of the changed notion of scarcity in the digital space.<sup>68</sup> 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, it may also become impossible 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.

### ***3.3. Digital technologies’ implications for EU’s internal policies directed at culture and in particular at media***

Without any pretence of exhaustiveness or priority order, embracing the complex picture of “old” and “new” media, as sketched above, the following paragraphs attempt to capture those trends and developments that may demand readjustment of current or even the introduction of new EU policies in the media domain, in particular in view of implementing the UNESCO Convention on Cultural Diversity.

#### *3.3.1. Access to content*

Content (taken broadly in the sense of words, sounds, moving and still images) is now critical. Content is the driver of digital infrastructures, technology and services, of new business and consumer behaviour patterns, and not the other way around. Demand for high-quality, enriched digital

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<sup>65</sup> Ellen P. Goodman, “Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets” (2004) *Berkeley Technology Law Journal*, pp. 1389-1472, at pp. 1395-1399.

<sup>66</sup> For a specific analysis of UCC in virtual worlds, 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: Edward Elgar, 2010, pp. 74-112.

<sup>67</sup> 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, 2003 (English edn, 2004), p. 8. See also Tom O’Regan and Ben Goldsmith, “Emerging Global Ecologies of Production” in Dan Harries (ed.), *The New Media Book*, London: British Film Institute Publishing, 2004, pp. 92-105.

<sup>68</sup> See e.g. Hettich, above n. 41, at pp. 1443-1446.

content is also expected to continue to grow and thus its importance for other fields of governance.<sup>69</sup>

As noted above, while under the conditions of the digital networked environment, content abounds, this does not automatically mean that it is also readily accessible. There are barriers of different types: (i) placed at the infrastructural level (e.g. no access to broadband Internet and 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 obstructions imposed through technological protection measures, such as digital rights management systems [DRM]). The barrier could also be of societal character, such as lack of media literacy, as well as of legal character. All of these barriers impede the real access to cultural content, the engagement in active intercultural dialogue or various creative activities, thus distorting the conditions for a vibrant culturally diverse environment.

Access to content should not only be understood as enabling consumption “here and now” but also as looking into the past and into the future. For the past, this means for instance that access to Europe’s rich cultural heritage, both in terms of the preservation of content and facilitating access to it, must be improved. The EU has already taken important steps in this direction. The eContent*plus* programme, which expired on 31 December 2008,<sup>70</sup> was a notable initiative in this context; it sought to tackle organisational barriers and to promote the take-up of cutting-edge technical solutions for improving accessibility and usability of digital material in a multilingual environment. While the programme dealt with three highly relevant areas (digital libraries; educational content and geographical information<sup>71</sup>), it remained constrained to ICT-oriented policies and failed to consider the cultural content issues. Another noteworthy initiative that has yet to bear real fruit started with the Commission Communication “i2010: Digital Libraries”,<sup>72</sup> which emphasised the political objective of making Europe’s cultural heritage and scientific records accessible to all, while at the same time bringing out its full cultural and economic potential. Various efforts have followed up on this objective leading towards *Europeana*: the European Digital Library, which is intended to serve as a multilingual

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<sup>69</sup> Screen Digest et al., *Interactive Content and Convergence: Implications for the Information Society, A Study for the European Commission*, 2006.

<sup>70</sup> [http://ec.europa.eu/information\\_society/activities/econtentplus/index\\_en.htm](http://ec.europa.eu/information_society/activities/econtentplus/index_en.htm).

<sup>71</sup> In more detail, the areas encompassed: (i) digital libraries (cultural and scientific/scholarly content): supporting the development of interoperable digital libraries (i.e. collections and objects held by cultural and scientific institutions) and supporting solutions that facilitate the exposure, discovery and retrieval of these resources; (ii) educational content: encouraging the emergence of the structures and conditions necessary to support pan-European learning services that can significantly increase multilingual access to quality digital content and its use in different educational and academic contexts; and (iii) geographical information, stimulating the aggregation of existing national datasets of core geographic information into cross-border datasets, educational content and cultural, scientific and scholarly content.

<sup>72</sup> European Commission, *i2010: Digital Libraries*, COM(2005) 465 final, 30 September 2005.

common access point to Europe's distributed cultural heritage.<sup>73</sup> *Europeana*<sup>74</sup> was effectively launched in November 2008 and allows Internet users to search and gain direct access to digitised books, maps, paintings, newspapers, film fragments and photographs from Europe's cultural institutions. About 7 million digitised objects are currently available and the number is expected to rise to 10 million in the course of 2010. While these numbers are impressive, there are many unresolved issues too. Some of these relate to the overall model chosen by *Europeana* and the sustainability of its financing, others concern copyright.<sup>75</sup> A sign of the persistent problems is the recent setting up of a Reflection Group on Digitisation,<sup>76</sup> which is expected to come up with new recommendations on how best to speed up the digitisation, online accessibility and preservation of cultural works across Europe, examining various ongoing initiatives involving both public and private partners (notably the Google Books project) and the related complex copyright issues.

As for looking into the future in the context of access to content, it should 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. The EU should ensure that its future actions support and do not restrict this development.<sup>77</sup> It should carefully observe the evolving processes and sometimes subscribe to the principle of "do no harm" rather than adopt legislation that may prove detrimental to creativity. The adoption of "graduated response"<sup>78</sup> regulation in a number of Member States<sup>79</sup> and the general trend towards stronger copyright enforcement (exemplified on the international scene recently with the negotiations on the Anti-counterfeiting

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<sup>73</sup> See [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/background/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/background/index_en.htm) and European Commission, *Europeana: Next Steps*, COM(2009) 440 final, 28 August 2009.

<sup>74</sup> <http://europeana.eu>.

<sup>75</sup> See e.g. European Parliament, *How to Tackle Copyright Issues Raised by Mass-scale Digitisation?*, Briefing Note, PE 419.619, 2010.

<sup>76</sup> European Commission, "Boosting Cultural Heritage Online: the European Commission Sets up a Reflection Group on Digitisation", Press release, IP/10/456, 21 April 2010.

<sup>77</sup> European Parliament, *Cultural and Creative Industries*, IP/B/CULT/FWC/2006\_169, 31 May 2007, at p. 6.

<sup>78</sup> Graduated response, also known as the "three strikes", is an initiative, adopted in several countries, aimed at addressing problems of online copyright infringement. Upon an alleged infringement, users are disconnected from the Internet after a warning in a notification letter. Criminal proceedings may follow in the case of continued infringement. In this exercise, the users' right to due process and the right to privacy may be violated; there are furthermore no guarantees that the filtering system works without any mistakes. See e.g. Peter K. Yu, "The Graduated Response", forthcoming in (2010) *Florida Law Review* 62.

<sup>79</sup> Such laws, which are permitted through the new EU electronic communications regulation, have now been adopted in France and Great Britain through the HADOPI law and the Digital Economy Bill, respectively.

Trade Agreement<sup>80</sup>) are initiatives that go rather in the opposite direction and are worrisome signs of regulatory activism.

While the above discussion focused predominantly on the content layer *per se*, as noted at the beginning, access needs to be enabled at all levels of the information and communication structure. Thus, the EU activities in the field of telecommunications and ICT are also crucial (for instance, the rules on universal service obligations<sup>81</sup> can make a substantial contribution to facilitating access to content and guaranteeing it for the entire EU citizenship<sup>82</sup>), as well as those in the fields of intellectual property protection and of competition law, as we show below.

### 3.3.2. Producing high-quality content

While access to content is certainly vital, as content becomes abundant, it is essential to ensure that there is high-quality cultural content available, which is able to serve fundamental informative and entertainment, public sphere and social cohesion fostering roles within a society. Here the mandate of the public service broadcasters (PSBs) is to be deemed critical. While their regulation takes place at the national level,<sup>83</sup> the EU can encourage experiments, exchange of best practices and joint initiatives. Public service broadcasting does not need to be limited to television, as conventionally expected, and can take new forms, such as the approach to public service content discussed by the BBC, where the so-called public service publisher would engage in providing different types of content to different platforms.<sup>84</sup>

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<sup>80</sup> The Anti-Counterfeiting Trade Agreement (ACTA) is a proposed plurilateral agreement for establishing international standards on intellectual property rights enforcement. The negotiating countries presently are Australia, Canada, the EU, Japan, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore, Switzerland and the United States. The scope of ACTA is broad, including counterfeit goods, generic medicines and copyright infringement on the Internet. Because it is in effect a treaty, ACTA would overcome many court precedents defining consumer rights as to “fair use” and may change or remove limitations on the application of intellectual property laws. The latest draft released in April 2010 is available here: [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf). See e.g. Peter K. Yu, “Six Secret (and Now Open) Fears of ACTA”, forthcoming in (2010) *Southern Methodist University Law Review* 63, available at <http://ssrn.com/abstract=1624813>.

<sup>81</sup> DG Information Society and Media has launched a public consultation on future universal service principles in the area of electronic communications networks and services. This consultation is part of the European Commission’s follow-up to its Declaration on universal service to the European Parliament in the context of the negotiation of the Telecom Package in 2009 and the second periodic review of the scope of universal service in 2008 (COM(2008) 572).

<sup>82</sup> Mira Burri, “The New Concept of Universal Service in a Digital Networked Communications Environment” (2007) *I/S: A Journal of Law and Policy for the Information Society* 3:1, pp. 117-146.

<sup>83</sup> See Irini Katsirea, *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States*, The Hague: Kluwer Law International, 2008. For an overview of PSB in Europe and comparison with the US model, see Hettich, above n. 41, at pp. 1415-1442.

<sup>84</sup> See Ofcom, *A New Approach to Public Service Content in the Digital Media Age: The Potential Role of the Public Service Publisher*, Ofcom Discussion Paper, 24 January 2007. See also Jamie Cowling and Damien Tambini (eds.), *From Public Service Broadcasting to Public Service Communications*, London: Institute for Public Policy Research 2004. The idea of public service publishers was subsequently dropped.

Criticism has been expressed that the present EU framework for state aid for public service broadcasters, which was revised in 2009,<sup>85</sup> may in fact restrict the move towards PSB 2.0 as the public service remit is defined too narrowly.<sup>86</sup>

Another tool in this context, which also falls more directly within the EU's competence, will be to increase the funding for media production. This is an area where the EU has in fact been active for a long time, boosting television and film production in Europe through support schemes. The most important of these have been the four MEDIA programmes: MEDIA I (1990–1995); MEDIA II (1996–2000), MEDIA plus (2001–2006) and the current MEDIA 2007 (2007–2013).<sup>87</sup> MEDIA is well-established and over the 20 years of its existence has played an important role in supporting the development and distribution of thousands of films, as well as in training activities, festivals and promotion projects.

These programmes, while certainly having some positive impact, have also been subject to critique as to their real contribution to culture. One reason is simply the amount of money involved, which has been relatively small when compared with the national subsidies for television and film production or, for instance, with EU research and development initiatives in the field of audiovisual equipment.<sup>88</sup> For political reasons, such funding must also be divided across a number of Member States further diluting the sums involved.<sup>89</sup> Second, “the programmes have primarily been grounded in an industrial policy agenda of overcoming various practical obstacles to cross-border initiatives, with only secondary attention paid to the nature of the content produced”.<sup>90</sup> Both of these aspects can be remedied, especially considering that the present MEDIA 2007 embraces the following objectives: to preserve and enhance European cultural diversity and its cinematographic and audiovisual heritage, to guarantee its accessibility to for Europeans and promote intercultural dialogue, as well as to increase the circulation of European audiovisual works within and outside the EU.

A different path for ensuring production of high-quality content and/or content serving certain public interests will be to calibrate the existing definition of “European works” that is the criterion for qualifying under majority quota of Article 4 AVMS. As noted above, the currently used

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<sup>85</sup> European Commission, Communication on the Application of State Aid Rules to Public Service Broadcasting, OJ C 257/1, 27 October 2009. See also Ulrich Soltész, “Tighter State Aid Rules for Public TV Channels” (2010) *Journal of European Competition Law and Practice* 1:1, pp. 32-36.

<sup>86</sup> See e.g. Benedetta Brevini, “Towards PSB 2.0? Applying PSB Ethos to Online Media in Europe”, forthcoming in (2010) *European Journal of Communication* 25:4.

<sup>87</sup> Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 Concerning the Implementation of a Programme of Support for the European Audiovisual Sector (MEDIA 2007), OJ L 327/12, 24 November 2006. On the present and past programmes, see [http://ec.europa.eu/information\\_society/media/overview/2007/index\\_en.htm](http://ec.europa.eu/information_society/media/overview/2007/index_en.htm).

<sup>88</sup> David A. L. Levy, *Europe's Digital Revolution: Broadcasting Regulation, the EU and the Nation State*, London: Routledge, 1999, at p. 49, as referred to by Holmes, above n. 22, at p. 197.

<sup>89</sup> *Ibid.*

<sup>90</sup> Holmes, above n. 22, at p. 197, referring to David Goldberg, Tony Prosser and Stefaan Verhulst, *EC Media Law and Policy*, London: Longman, 1998, pp. 79-83.



definition is merely based on the national “investment” link<sup>91</sup> without any conditions attached as to the content of the production, its thematic coverage or its quality.

The availability of high-quality content in the digital environment of indefinitely diverse media may have strong positive effects, as content is not consumed at once (as it normally would have been with traditional “push” media) but remains stored and accessible over a longer period. In this sense, consumers could be stimulated to consume products that would otherwise not be available to them (because of the scarcity of timeslots in TV schedules) and induce markets to offer new types of content, including, for instance, archived European content, original works, documentaries or director’s cuts.<sup>92</sup> This may ultimately lead to a higher share of available and effectively consumed “good” European, African or US American works, which, if realised, will be a genuine expression of cultural diversity.

### 3.3.3. Tools that work

Considering the changing media landscape, regulatory adjustments are often needed. In the reform exercise, the EU policymakers may need to be careful not to subscribe to the prevailing logic that “as television moves to other platforms, television regulation should follow”.<sup>93</sup> A pertinent example is the review of the TVWF Directive, now the Audiovisual Media Services Directive (AVMS),<sup>94</sup> which in a post-convergent environment extended the scope of EU’s media regulation to cover not only TV programmes but also the so-called “on demand” or “non-linear services”.<sup>95</sup> Hotly debated in this context was the question of whether Articles 4 and 5 TVWF (i.e. the quota mechanisms for European works and independent productions) should also be translated into this new media services domain.

What we have at present is 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”.<sup>96</sup> It is further clarified that, such promotion could relate, *inter alia*, to the financial contribution to the production and rights acquisition of European works or to the share

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<sup>91</sup> See above n. 39 and the accompanying text.

<sup>92</sup> Marsden et al., above n. 57, at pp. 22-23.

<sup>93</sup> Mónica Ariño, “The Regulation of Audiovisual Content in the Era of Digital Convergence” (2008) *Journal of the UOC’s Law and Political Science Department* 7, at p. 3.

<sup>94</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 Amending Council Directive 89/552/EEC 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 332/27, 18 December 2007. Codified version now available: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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) (codified version), OJ L 95/1, 15 April 2010.

<sup>95</sup> On-demand or non-linear services 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”. Article 1(g) AVMS.

<sup>96</sup> Article 3(i)(1) AVMS (emphasis added).

and/or prominence of European works in the catalogue of programmes.<sup>97</sup> While striving for cultural diversity in non-linear media services is to be judged a positive goal, the tools applied may not work, and it would be inadequate to modify this soft law provision later into hard law.<sup>98</sup> As noted above, the idea of protecting “shelf-space” makes little sense as space is unlimited in the digital environment. The consumer is the one who decides on which type of content he or she wants to “pull” and this should be the direction where intervention is sought (for instance by producing high-quality European content, as noted above).

The digital media environment may on the other hand offer a number of opportunities to use non-hard law, to strongly and efficiently promote cultural objectives. The initiatives on promoting media literacy being the ability to access the media, to understand and to critically evaluate different aspects of media contents and to create communications in a variety of contexts, clearly fall into this category.<sup>99</sup>

Competition law as a generic EU instrument is also to be deemed important in this context. Without any “political” influence, competition law tools may address changes in a fluid environment. They can effectively confront cartels and exclusionary practices, which may lead to reduced availability of cultural goods and services. Anti-competitive agreements and exploitative abuses may also often result in higher prices not only for consumers of cultural goods and services but also for their producers and suppliers, such as writers, artists or filmmakers. When applying Article 81 EC (now, post-Lisbon, Article 101 TFEU) in the cultural sector, the Commission may also take into account the specific characteristics of cultural goods and services at various stages of the assessment. First, the characteristics of the goods and services concerned will influence the definition of the relevant market. Second, in the assessment of the question of whether an agreement restricts competition within the meaning of Article 101(1), account will be taken of the actual conditions under which it functions, in particular the specific economic and legal context in which the undertakings operate, the products or services covered by the agreement, and the actual structure of the market concerned. Third, under Article 101(3) TFEU, restrictive agreements are accepted that improve the production or distribution of goods including cultural goods (such as books, CDs or DVDs) if the consumers receive a fair share of the resulting benefit, the restriction or conduct is indispensable and competition is not substantially eliminated. Within the framework of Article 82 EC (now, post-Lisbon, Article 102 TFEU), the characteristics of the relevant market and the products and services concerned are relevant, for instance, when assessing whether a type of conduct may be qualified as abusive or whether the alleged abuse can be objectively justified.

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<sup>97</sup> Article 3(i)(1) and Recital 48 AVMS

<sup>98</sup> Which could be the case if the Member States’ four-yearly reports on the implementation of this provision are not satisfactory and the Commission decides to take action to this effect.

<sup>99</sup> See Commission Recommendation on Media Literacy in the Digital Environment for a More Competitive Audiovisual and Content Industry and an Inclusive Knowledge Society, C(2009) 6464 final, 20 August 2009.

EU merger control is also a valuable instrument that could contribute to the protection of cultural diversity, plurality of media and fair market conditions in the cultural sector. More specifically, where mergers take place between companies active in markets where cultural goods and services are traded, the Commission's aim to ensure that such companies do not enjoy excessive market power and do not limit product variety could overlap with the protection of cultural diversity. The Commission also takes efficiencies of a transaction into account in assessing its overall impact on consumers. If such efficiencies lead to improved production and distribution of traded cultural goods, they can be offset against the harmful effects of the concentration on competition. In addition, European merger control does not prevent the Member States from subjecting mergers to measures intended to protect legitimate interests and plurality of the media is explicitly recognised as such a legitimate interest.

Finally, the control exercised over state aid aims to ensure that government interventions do not distort competition and intra-community trade. While there is a general ban on state aid (Article 87(1) EC Treaty; now Article 107(1) TFEU), in some circumstances, government actions are necessary and therefore the Treaty leaves room for a number of policy objectives for which state aid can be considered compatible. Culture is such an objective and following Article 107(3)(d), "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest, may be considered to be compatible with the common market". A wide range of measures have benefited from this exception, in areas such as museums, national heritage, theatre and music productions and printed cultural media, as well as in the cinematographic and audiovisual sectors.<sup>100</sup>

While the Court has underlined that the protection of cultural diversity in general cannot constitute a justification for measures restricting imports within the meaning of Article 30 EC (now, post-Lisbon, Article 36 TFEU), and that Article 151 EC (now 167 TFEU) cannot be invoked in this context,<sup>101</sup> both the Court<sup>102</sup> and the Advocate General<sup>103</sup> have already relied on the UNESCO Convention to underline the importance of respect for and promotion of cultural diversity, in particular linguistic diversity, in order to justify the application of national rules in the area of television broadcasting.

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<sup>100</sup> Cases available at: [http://ec.europa.eu/competition/state\\_aid/register/ii/by\\_primary\\_obj\\_culture.html](http://ec.europa.eu/competition/state_aid/register/ii/by_primary_obj_culture.html). In 2001, based on its experience of assessing various national film support schemes, the Commission published a Communication setting out the conditions for the application of Article 87(3)(d) to the production of "cinematographic and other audiovisual works", thus providing substantial legal certainty. European Commission, Communication on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works, COM(2001)534 final, 26 September 2001; prolonged by COM(2004)171 final, 16 March 2004, and again recently until 31 December 2012 (OJ C 31/1, 7 February 2009).<sup>101</sup> Case C-531/07 *Libro* [2009] ECR I-0000, para 32.

<sup>101</sup> Case C-531/07 *Libro* [2009] ECR I-0000, para 32.

<sup>102</sup> Case C-222/07 *UTECA* [2009] ECR I-0000, para 33.

<sup>103</sup> Opinion of AG Kokott of 4 September 2008, paras 13 ff.

### 3.3.4. Copyright and cultural diversity: A complex relationship

The UNESCO Convention only mentions intellectual property rights (IPRs) in the preamble, recognising their “importance [...] in sustaining those involved in cultural creativity”<sup>104</sup> but clarifies no further intersections, nor does it create any obligations for the State Parties in this regard. This is peculiar since it could be argued that IPRs<sup>105</sup> were the earliest and are now the most advanced system put in place with the ultimate goal of fostering creativity. IPRs can be said to strongly influence the creation, distribution, access and re-use of any cultural content. Moreover, and in subtler ways, the protection of intellectual property impinges upon the entire cultural environment.<sup>106</sup>

While the copyright system is essential to cultural processes, it is not perfect. One of the imperfections has to do with the way IP protection is granted, whereby authors receive a temporary monopoly over their creations and thus exclude the rest of the public from having access to the protected works. It is often uncertain whether the existent IP model appropriately reflects the precarious balance between the private interests of authors and the public interest in enjoying broad access to their productions,<sup>107</sup> and whether in this balance the best incentives to promote creativity are given. We have yet to understand the complex processes of building upon others' work, borrowing, mixing, enriching that eventually leads to manifold cultural expressions, to artistic and intellectual innovation.<sup>108</sup> Especially under the conditions of the digital environment, the existent 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, possibly chilling a great amount of creative activity and creative potential. These deficiencies have been exposed by the emergence of new hybrid models for the protection of authors' rights, such as the Creative Commons (cc) licence,<sup>109</sup> which short of a comprehensive copyright reform, allow managing and spreading content under a “some rights reserved” mode.<sup>110</sup>

<sup>104</sup> Recital 17 of the UNESCO Convention's preamble.

<sup>105</sup> 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 copyright.

<sup>106</sup> Tomer Broude, “Conflict and Complementarity in Trade, Cultural Diversity and Intellectual Property Rights” (2007) *Asian Journal of WTO and International Health Law and Policy* (AJWH) 2, pp. 346-368, at pp. 355-356.

<sup>107</sup> 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.

<sup>108</sup> Julie E. Cohen, “Creativity and Culture in Copyright Theory” (2007) *UC Davis Law Review* 40, pp. 1151-1205, at pp. 1193-1194.

<sup>109</sup> See <http://creativecommons.org/>.

<sup>110</sup> Under a cc-licence, the Creator/Licensors may shape her or his package of rights applying different conditions to the licensed work (attribution; non-commercial; no derivatives; or share alike).

The balance between authors' rights and the public interest in having access to information becomes all the more fragile as it is now common for authors' rights to "assigned away to the distributor of the work in order to gain access to the channels of distribution and their audience"<sup>111</sup> and these distributors (normally big media conglomerates) have been the ones who set the terms and determine which works are made available to the public, thus exercising substantial control over existing cultural content. In addition, under the conditions of digital media, intermediaries have striven to keep perfect control over "their property" by means of DRM and other technological protection measures, which under the guise of protecting digital content from uncontrolled distribution and unlawful use, have also had negative effects, eroding some fundamental rights of consumers and restricting usages traditionally allowed under (analogue/offline) copyright.<sup>112</sup>

The above thoughts on copyright, creativity and cultural diversity are of a more systemic character and would need to be considered in the longer term. In the more concrete sense of EU internal policies, however, the challenges of copyright refer above all to the objective of creating a modern, pro-competitive, and consumer-friendly legal framework for a genuine *Single Market for Creative Content Online*. This should be conceived as part of the new European Digital Agenda and aims in particular at:

- (i) creating a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;
- (ii) encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time;
- (iii) promoting a level playing field for new business models and innovative solutions for the distribution of creative content.<sup>113</sup>

The Commission has already identified particular challenges that hinder the emergence of a single market for digital content. These challenges refer to different stakeholders – consumers, commercial users and rightholders and demand solutions that can capture their often diverging interests. At the core of many of the problems is the territoriality of copyright,<sup>114</sup> which means that states grant and recognise copyright in their own territory via their national legal order, so that the author of a single work will enjoy a separate copyright in each of the 27 Member States. Fragmentation of the single market by copyright is thus inherent in the

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<sup>111</sup> Raymond Shih Ray Ku, "Promoting Diverse Cultural Expression: Lessons from the US Copyright Wars" (2007) *Asian Journal of WTO and International Health Law and Policy* (AJWH) 2, pp. 369-398, at p. 377.

<sup>112</sup> Nicola Lucchi, "Countering the Unfair Play of DRM Technologies" (2007) *Texas Intellectual Property Law Journal* 16:1, pp. 91-124.

<sup>113</sup> Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, at p. 3.

<sup>114</sup> There are also other barriers to effective intra-EU electronic commerce, see Natali Helberger, "Access Denied": How Some E-Commerce Businesses Re-Erect Borders for Online Consumers, and What European Law Has to Say about This" (2007/2008) *European Journal of Consumer Law* 4, pp. 472-506.

current state of Community law where there are still 27 national copyright systems, instead of a single European Copyright Law. “Whereas EU law has tackled the problem of territoriality head-one for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, policies in respect of Internet-based services have left the territorial nature of rights of communication basically intact”.<sup>115</sup> This can lead to substantial additional rights management costs, and also to a situation where consumers are often prevented from having online access to content available in another Member State.

The debates on how this situation can be improved are ongoing and the Commission has already sketched a number of options.<sup>116</sup> Solutions, however, are not easy to find as the stakeholders’ interests are profoundly diverging and at times conflicting, and different types of content (e.g. music, film or publishing) call for different models. The impact of these different models upon cultural diversity is also difficult to assess, for instance it has not been certain whether the Online Music Recommendation<sup>117</sup> does indeed promote rather than restrict variety in music catalogues.<sup>118</sup> So, whereas the urgency of moving ahead on these issues should be stressed, as both access to content and creativity are contingent upon them, there is also a need for cautious impact assessment of the prospective tools.

### 3.3.5. *Fostering creativity*

Creativity is the parameter that could secure sustainable cultural diversity in the long run. Although it is widely recognised 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 policymaking. This is partly related to the different regulatory histories, the different lobbying groups and the path dependencies associated with each of these domains.<sup>119</sup> As the *Economy of Culture in Europe* study acknowledges, fostering creativity requires thinking and operating in a transversal manner as it touches upon many EU policy areas, such as education, social policy, innovation, economic growth and sustainability.<sup>120</sup> We only add that in the attempt to design policies fostering creativity, it is vital that not only the new emerging modes of creativity based on strictly corporate models (as assumed by the Lisbon Agenda) but also those based on looser, individual and collaborative modes of creativity are cautiously taken into account.<sup>121</sup> Creativity is also to be understood broadly, so that the present exclusive

<sup>115</sup> European Parliament, Copyright Territoriality in the European Union, Briefing note, PE 419.621, February 2010.

<sup>116</sup> See Creative Content in a European Digital Single Market, above n. 113, pp. 9-20.

<sup>117</sup> European Commission, Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, 21 October 2005.

<sup>118</sup> See e.g. European Parliament, Collecting Societies and Cultural Diversity in the Music Sector, Study, IP/B/CULT/IC/2008\_136, 2009.

<sup>119</sup> European Parliament, above n. 77, at p. iii.

<sup>120</sup> KEA European Affairs, above n. 19, at p. 199.

<sup>121</sup> Eric Von Hippel, *Democratizing Innovation*, Cambridge, MA: MIT Press, 2005.

focus on ICT, almost entirely stripped of cultural aspects, is at least somewhat adjusted.

#### **4. Forward-looking analysis of the UNESCO Convention's implementation in EU's internal policies: Conclusions and recommendations**

The EU has put in place a considerable number of policies that reflect the spirit and the letter of the UNESCO Convention on Cultural Diversity. In this sense, one might maintain that the EU has already sufficiently fulfilled its obligations under the Convention. This is due to the long-term engagement of the EU in the frame of Article 167 (formerly Article 154 EC) and the continued efforts to mainstream culture in all EU activities, and not to some rushed implementation action plan. Even though the cultural domain in itself is a prerogative of the Member States, many of the EU's internal policies impinge upon culture and cultural diversity in a more or less immediate manner. These internal policies can be best depicted with a circular model, where some policies belong to the core and directly and strongly influence the diversity of cultural expressions – such as the Community tools implemented in the field of media, and other policies move to the periphery, whereby their contribution to the attainment of the objective of protecting and promoting cultural diversity is less tangible (such as in the field of agricultural policy).

Another observation as to the EU's internal policies relevant to culture is that they can be profoundly different in legal nature, stakeholders involved, prerogatives of Community, duration and funding, among others. This makes the picture all the more complex as well as raising important questions of good governance, i.e. of coordination, efficiency and efficacy within this overall system. This type of multi-level, multi-party regulation certainly poses some challenges but may also prove superior in a context of rapid market developments.<sup>122</sup>

As a recommendation in this context and with particular regard to cultural diversity policies, we deem it essential that the EU sets clear priorities in its agenda and communicates them appropriately. The *European Agenda for Culture in a Globalising World* is an important step in this direction but the effort must be continued.

While the EU already has an advanced package of internal policies for the protection and promotion of cultural diversity, we have not observed any decisive new action and there is certainly room for improvement. Many of the opportunities to better and more efficiently reflect the regulatory objective of cultural diversity have to do with exogenous factors, namely with the profoundly changed information and communication environment due to the advent of digital media, which have impacted on the ways cultural content is created, distributed, accessed and consumed.

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<sup>122</sup> Ariño, above n. 93, at p. 6. See also Chris Marsden et al., Options for and Effectiveness of Internet Self- and Co-Regulation Phase 2: Case Study Report, Prepared for European Commission, RAND Europe, 2008.

The EU may use the digital shift as an opportunity to reflect upon and calibrate its current policies in the field of media, taken broadly as legislative actions, soft initiatives and funding programmes. Radical changes are not in view but an improvement of the applied toolbox may be well in place.

We have highlighted above a few areas where targeted action seems appropriate, although the EU is in fact already active in most of these domains and the issues are not entirely new. These areas are:

- Facilitating access to cultural content;
- Fostering the production of high-quality content;
- Applying tools that work;
- Mitigating the existing conflicts between copyright and cultural diversity (in particular for the creation of a Single Market for Creative Content Online);
- Fostering creativity as the dynamic dimension of cultural diversity.