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Enquiry into the notion of cultural protectionism in the media and its dimensions in cyberspace

Mira Burri

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1. Introduction

Cultural protectionism has been an element of national and foreign policies, as an extension of state sovereignty¹ expressed both in a defensive and offensive manner. While the generic protectionist formula in the sense of restraining trade between states through measures such as import tariffs or quotas and through privileging domestic production has somewhat disintegrated over time under the rationale for free trade and the strong practical evidence of its benefits, the particular case of cultural protectionism has persevered. As we reveal in this paper, however, it has been modified, or at least its rhetoric has changed. The enquiry into the notion of cultural protectionism or cultural diversity, as the current political jargon would have it, is but one of the paper's objectives. Its second and certainly more ambitious goal is the search for the normative dimensions of cultural diversity policies in the global digital space, asking what adjustments are needed and how feasible the entire project of diversity regulation in this environment may be. The complexities of the shift from offline to online and from analogue to digital, and the inherent policy challenges explored will be illustrated with some (positive and negative) instances of existing media initiatives. Taking into account the specificities of cyberspace and in a forward-looking manner, we propose some adjustments to current media policy practices that could better serve the goal of a sustainably diverse cultural environment.

2. The changed and changing dynamics of cultural protectionism: Thinking about the concept of cultural diversity in global law

The discourse of cultural protectionism is dynamic and changing. Although the policies of protecting the cultural industries and the related institutions are national per se, changes have often been triggered from beyond a state's borders. The reason for this is plain as cultural products and services are not only "vehicles of identity, values and meaning"² but also tradable matter that has come under the sway of globalisation. The latest

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¹ Danielle S. Petito, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139 (2001).

² UNESCO Convention, art. 1(g).

great shift in cultural protectionist policies on the international level has been from the leitmotiv of “cultural exception” to that of “cultural diversity”. Indeed, “cultural diversity” has become truly popular in recent international policy- and law-making. The immediate reason for this and for the positioning of “cultural diversity” as one of those intuitively positive goals that humankind should pursue is in fact an act of international law – the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, commonly referred to as the *Convention on Cultural Diversity*. The longer narrative about the prominence of cultural diversity as a concept and as a policy objective goes back to the “trade versus culture” clash. This conflict escalated in particular during the Uruguay Round of trade negotiations (1986–1994) that ultimately led to the establishment of the World Trade Organization (WTO). At that time, several countries, with the European Union (EU) and Canada at the forefront, fought the so-called “exception culturelle”³ battle that aimed at exempting any product or service that is culture-related from the rules of the negotiated WTO Agreements.⁴ The focus was specifically on the exclusion of audiovisual services (i.e. films, TV programmes, video and sound recordings⁵). These were conventionally highly protected industries where the peril of foreign impact was thought the greatest. Eventually, the “cultural exception” agenda only partially attained its goals. While no services sector was excluded from the scope of the General Agreement on Trade in Services (GATS), a number of flexibilities were built-in,⁶ allowing in effect the lesser opening of certain sectors, which were sensitive to domestic constituencies.⁷

³ The idea that some measures protecting national cultural industries may be justified has also been reflected in bilateral and regional fora. In 1988, the cultural proponents celebrated a victory when Canadian negotiators introduced a “cultural exclusion” clause in the Canada-US Free Trade Agreement (CUSFTA). Five years later, such an exclusion also found its way into the North American Free Trade Agreement (NAFTA), which incorporated by reference CUSFTA in Annex 2106. However, this cultural exception was coupled with a retaliation provision that limited by design its practical use.

⁴ The law of the WTO is contained in several agreements, attached as annexes to the WTO Agreement, which encompass the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). We refer to these as the *WTO Agreements*.

⁵ Pursuant to the WTO Services Sectoral Classification List (Doc.MTN.GNS/W/120, 10 July 1991), audiovisual services encompass: motion picture and video tape production and distribution services; motion picture projection services; radio and television services; radio and television transmission services; sound recording and others.

⁶ In contrast to the GATT, where obligations regarding national treatment and quantitative restrictions apply across the board, under the GATS states can choose the services sectors and sub-sectors in which they are willing to make market access or national treatment commitments (arts XVI and XVII GATS, respectively), and can define the modalities of these commitments. Even the most-favoured-nation (MFN) obligation, which is fundamental to the entire trade system, can be subject to constrictions in the framework of GATS (art. II:2 and Annex on Article II Exemptions).

⁷ Frederick S. 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*, 3 WASH. U. GLOBAL STUD. L. REV. 909, 914 (2004).

Despite this compromise and the very few real commitments for audiovisual services,⁸ the WTO system has continually been criticised for being solely economically oriented⁹ and insufficiently considerate of the pursuit of cultural objectives.¹⁰ Cultural proponents sought better accommodation of these in a “non-trade” forum and reconceptualised their efforts under the notion of “cultural diversity”.¹¹ The latter had the potential for casting aside some of “the negativism and the latent ‘anti-Americanism’ of the ‘cultural exception’ rhetoric”.¹² It set a more positive but also a more proactive agenda.

The project of creating an international legally binding instrument on cultural matters, as a counterforce to economic globalisation and in particular to the enforceable rules of the WTO, was taken up under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO)¹³ and eventually resulted in the Convention on Cultural Diversity. Clearly, this project was very ambitious. With the benefit of hindsight and considering the complexities in the matrix of trade, culture, media, intellectual property and human rights and the starkly different sensibilities of the negotiating parties,¹⁴ the project was also doomed from

⁸ Almost all Members, with the notable exception of the US, Japan and New Zealand, have been reluctant to commit and have listed significant MFN exemptions. See Martin Roy, *Audiovisual Services in the Doha Round: Dialogue de Sourds, The Sequel?*, 6 J. WORLD INVESTMENT & TRADE 923, 941 (2005).

⁹ The further liberalisation commitment incorporated in the GATS was impending and the MFN exemptions made were at least theoretically limited in time. The general exceptions available under arts XX GATT and XIV GATS that could justify measures otherwise violating the WTO norms were deemed insufficient to provide an appropriate consideration of the pursuit of cultural objectives. A particularly hard blow to the cultural exception backers was the *Canada–Periodicals* case (WTO Panel Report, *Canada–Certain Measures Concerning Periodicals*, WT/DS31/R, adopted March 14, 1997 and Appellate Body Report, WT/DS31/AB/R, adopted June 30, 1997), decided to the benefit of the US and despite CUSFTA’s cultural exception clause.

¹⁰ Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *New Strategies for Culture and Trade: Canadian Culture in a Global World* (1999), paras 1-2.

¹¹ European Commission, *The EU Approach to the WTO Millennium Round*, COM(1999) 331 final, July 8, 1999.

¹² Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO*, 9 J. INT’L ECON. L. 553, 555 (2006). On anti-Americanism, see PETER J. KATZENSTEIN & ROBERT O. KEOHANE, *ANTI-AMERICANISMS IN WORLD POLITICS* (2007).

¹³ The idea of a legally binding instrument on cultural diversity did *not* emerge from UNESCO. Two organisations, neither of which was directly related to the UN agency, were instrumental in the process – the International Network of Cultural Policy (INCP) and the International Network for Cultural Diversity (INCD). For details, see Keith Acheson & Christopher Maule, *Convention on Cultural Diversity*, 28 J. CULT. ECON. 243 (2004); Mira Burri, *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 2 DIVERSITY 1059 (2010).

¹⁴ Rachael Craufurd Smith, *The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?*, 1 INT’L J. OF COMM. 24, 30-2 (2007). See also Caroline Pauwels, Jan Loisen & Karen Donders, *Culture Incorporated; or Trade Revisited? How the Position of Different Countries Affects the Outcome of the Debate on Cultural Trade and Diversity*, in UNESCO’S CONVENTION ON

the outset. Now that the hype caused by the adoption and the swift ratification of the UNESCO Convention has settled,¹⁵ its flaws are apparent: the Convention's weak binding power and its substantive and normative incompleteness offer no real advance towards the goal of sustaining a diverse cultural environment but spread a manifesto with mere rhetorical charge.¹⁶

In legal terms, the status quo is to be preserved. On the one hand, the Convention's own implementation into the law of the Contracting Parties is of modest or even nonexistent significance.¹⁷ On the other hand, the Convention will not influence the implementation of the WTO Agreements and the obligations of the WTO Members – a situation that has been confirmed by the recent *China-Publications and Audiovisual Products* case.¹⁸ Furthermore, while the Convention's contracting parties should take it into consideration “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations”,¹⁹ few changes are expected in the ongoing Doha round of trade talks. States seem happy to maintain their low level of commitments (especially in audiovisual services) and the UNESCO Convention offers “justification” in this regard.²⁰ Despite the impressive number of states that have ratified the Convention, it is unlikely that a negotiating bloc would form within the WTO to push for more “cultural” solutions.²¹ There has been no one single voice behind the Convention that can be translated into action

THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS: MAKING IT WORK, 125 (Nina Obuljen & Joost Smiers eds., 2006).

¹⁵ Only Israel and the US voted against the Convention and four states (Australia, Honduras, Nicaragua and Liberia) abstained. As of Sept. 28, 2010, 115 countries had ratified the Convention (<http://portal.unesco.org/la/convention.asp?KO=31038&language=E>, last visited Feb. 11, 2010).

¹⁶ For detailed critique, see Craufurd Smith, *supra* note 14; Mira Burri-Nenova, *Trade and Culture in International Law: Paths to (Re)conciliation*, 44 J. WORLD TRADE 49 (2010).

¹⁷ European Parliament, The Implementation of the UNESCO Convention into EU's Internal Policies, Briefing Note, IP/B/CULT/IC/2010_066, May 2010 (available at <http://www.europarl.europa.eu/studies>, last visited February 11, 2010).

¹⁸ 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 Dec. 21, 2009, confirming in most essential points WTO Panel Report, WT/DS363/R, adopted Aug. 12, 2009, in particular para 4.207.

¹⁹ UNESCO Convention, art. 20(1)(b).

²⁰ Craufurd Smith notes in this context: “Arguably, the Convention was never intended by its promoters to be an innovative measure; it was primarily designed to maintain the status quo in the field of trade and culture. In particular, developed countries such as Canada and France promoted the Convention on the basis that it would provide high level political endorsement for their culturally motivated trade restrictions. It serves to justify not only their existing measures but also their refusal to make commitments in new and developing communications sectors in the future”. See Craufurd Smith, *supra* note 14, 53-4.

²¹ For an overview of the different options, see Mira Burri-Nenova, *Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12 J. INT'L ECON. L. 17, 45-54 (2009).

in the WTO: different states have ratified it for different reasons following their own specific agendas.²²

The preservation of the status quo may have some negative implications that go beyond the mere opening of media markets and concern in particular digital trade. As cultural proponents are more than willing to use the GATS flexibilities to the fullest, they are careful to ensure that digitally transmitted products are qualified as services rather than goods. As the WTO Programme on Electronic Commerce has shown, while all Members recognise the importance of digital trade and the huge economic gains to be reaped from it, there is no consensus on how to solve the classification issues between goods and services, and within different categories of services, and to move forward.²³ These spillovers of the trade versus culture dilemma are to be considered negative effects, as they cause legal uncertainty and lead to forum shifting to the bilateral or regional levels.

Generally (beyond the UNESCO Convention and the WTO framework), there are worrisome observations to be made about the concept of cultural diversity as it is evolving in the policy discourse. First, we need to be reminded that indeed from the very outset, it has been marked by a deeply convoluted understanding of the effects of trade, and more broadly of economic globalisation, on culture.²⁴ In the trade and culture discourse, the common (and particularly loud) statements are that cultural diversity is becoming impoverished and almost extinguished as the globalised flow of easy entertainment coming from Hollywood dominates and homogenizes it.²⁵ The perceived peril for small art productions and local and indigenous culture is deemed immense and worthy of the state's counteraction.

This picture is conventionally painted either black or white and the many nuances of the complex interlinks between commerce and culture are missed out. Parties on both sides find examples to support their positions. The cultural protectionism exponents tend to pick up their facts from the film markets, where the US clearly dominates and where the power of big budget and marketing is self-evident. The free market proponents make their

²² For instance, Brazil, Japan and India have all ratified the Convention but remain equally willing to engage in further liberalisation of the audiovisual sector. See Pauwels at al., *supra* note 14. See also 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 (available at <http://www.europarl.europa.eu/studies>, last visited Feb. 11, 2010).

²³ SACHA WUNSCH-VINCENT, THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS 201-32 (2006).

²⁴ For an overview of the different positions, see Pierre Sauvé & Karsten Steinfatt, *Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?*, in ACHIEVING BETTER REGULATION OF SERVICES 323-46 (Productivity Commission & Australian National University, 2000); Ian Slotin, *Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination*, 111 YALE L.J. 2289 (2000); Sean Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Production to Promote Diversity through Trade*, 31 NW. J. INT'L L. & BUS. (forthcoming).

²⁵ See e.g. CHRISTOPH BEAT GRABER, HANDEL UND KULTUR IM AUDIOVISIONSRECHT DER WTO (2003).

case by using examples of local musicians gone global or the success of documentary productions.²⁶

While the truth certainly lies somewhere between the two extremes,²⁷ the discussion on “trade” and “non-trade” values is so extremely politicised that it renders any solution impossible. In the specific sense of cultural policymaking, the debate is additionally burdened with notions of cultural and national identity that lead to national sovereignty susceptibilities. In the sub-context of policymaking in audiovisual media, the discussion is further complicated since “one’s view on the role of media in society is intimately bound up with one’s view of democracy and the proper bounds of governmental power”.²⁸ Ultimately, all these interrelated discourses are in a profound state of transition: on the micro-level, as the media environment changes, and on the macro-level, as liberalisation, migration and other forces of globalisation²⁹ induce sweeping societal shifts that make modern society increasingly homogeneous across cultures and heterogeneous within them.³⁰

Under these circumstances, it is becoming outdated and increasingly inappropriate to apply notions of cultural diversity, which “tend to favour ‘billiard ball’ representations of cultures as neatly bounded wholes whose contents are given and static. These understandings downplay ‘the ways in which meanings and symbols of culture are produced through complex processes of translations, negotiation and enunciation’, as well as by contestation and conflict”.³¹ To be sure, these are precisely the perceptions of the UNESCO Convention, whose premise is that it is cultural diversity *between* nations and not *within* nations that needs to be protected and promoted. This is one of the inbuilt features of the presently shared concept of cultural diversity. Other noteworthy tendencies visible in the application of the notion are:

(i) while there cultural diversity is increasingly adopted as a legitimate policy goal in a state’s internal and external policies, it seems that “diverse” or “multicultural” is often used as opposed to national;³²

(ii) there is a growing disconnection in the discussion of the different types of “diversities”, such as those with respect to language, religion or minorities; this may lead to policy fragmentation and an extreme narrowing of the focus of cultural diversity strategies;

²⁶ J.P. Singh, *Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond*, 8 INT’L STUDIES PERSPECTIVES 36 (2007).

²⁷ See ANTONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALISATION IS RESHAPING OUR LIVES* (2002); TYLER COWEN, *CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD’S CULTURES* 146 (2002); TYLER COWEN, *IN PRAISE OF COMMERCIAL CULTURE* 15-43 (1998).

²⁸ Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products*, 40 INT’L L. & POL. 351, 432 (2008).

²⁹ Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498 (2001).

³⁰ See e.g. ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* 48 (1996).

³¹ Yudhishtir Raj Isar, *Cultural Diversity*, 23 THEORY, CULT. & SOC. 371, 372 (2006).

³² See e.g. Himani Bannerji, *The Paradox of Diversity: The Construction of a Multicultural Canada and ‘Women of Color’*, 23 WOMEN’S STUDIES INT’L FORUM 537 (2000).

(iii) cultural diversity is mobilised as a national competitiveness argument, most often against the US productions and services,³³

(iv) the concept of cultural diversity appears so absurdly “all-encompassing” that it is “empty”. This gives plenty of space for handsome rhetoric and there is an associated danger of losing the real sense of an environment with diverse cultural expressions as a global public good. Cultural diversity is then simply added after a comma as just another of the regulatory objectives to be pursued.

An example, which reveals the above trends, is the review of the EU’s Television without Frontiers Directive, which is the major Community instrument in the field of audiovisual media.³⁴ Particularly hotly debated during the review process were the rules on advertising and product placement. The European Commission argued that by providing a clear framework for 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 2004.³⁵ 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”.³⁶ Indeed, both the more relaxed rules on advertising and the introduction of product placement were seen as “further instruments safeguarding cultural diversity”.³⁷ 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”.³⁸

³³ This is an easily observable trend in EU cultural policies, especially for audiovisual media. As the EU High Level Group on Audiovisual Policy put 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”. See High Level Group on Audiovisual Policy, *The Digital Age: European Audiovisual Policy* (1998).

³⁴ 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 (2010).

³⁵ 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, 60-1 (2005).

³⁶ European Commission, “The Commission Proposal for a Modernisation of the Television without Frontiers Directive”, MEMO/05/475, Brussels, Dec. 13, 2005.

³⁷ *Id.*

³⁸ Sophie de Vinck & Caroline Pauwels, *Cultural Diversity as the Final Outcome of EU Policymaking in the Audiovisual Sector: A Critical Analysis*, in PROTECTION OF CULTURAL

Having mapped the grounds of the cultural diversity discourse at the international level, in the next sections, we look beyond the UNESCO Convention and the WTO framework and discuss the proper “ingredients” of a cultural diversity policy in particular in light of the advent and wide spread of digital media, which have had a strong impact on the processes of cultural content production, distribution and access, as well as on the efficiency of the used regulatory toolboxes.

3. Beyond the UNESCO Convention, the WTO and out into the digital space

Admittedly, political decisions in the field of culture are not easy and neither is regulatory design. It needs to be stressed that the above-described system of institutional and substantive relationships between issues of trade and culture, as well as most of the presently applied national instruments, have emerged under the conditions of analogue/offline media. Yet, we are now faced with a situation that is “significantly different from the audiovisual sector of the Uruguay Round when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services”³⁹ and that is even starkly different from the conditions prevailing at the outset of the Doha Round in 2001, when the Internet was in its infancy and its implications were largely unknown.

Since then the technological, economic and societal changes triggered by digitisation have been persistent and ever more profound, and have together led to a decidedly different information and communication environment.⁴⁰ While we distance our analysis from any technological utopianism and web-determinism, it is fair to say that there are *real* changes in the media environment (although their implications are not all clear and definitive). Particularly relevant to our present discussion are:

- (i) the proliferation of content;
- (ii) new ways of distributing, accessing and consuming content;
- (iii) the empowerment of the user;
- (iv) the reduced role of intermediaries; and
- (v) 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.

What does the new digital space mean for cultural diversity policies? Clearly, the features of the digital media space offer no panacea for the goal of cultural diversity. We think that in some cases, they may hint at opportunities for its better, more efficient and flexible accommodation. In other cases, they may equally be viewed as challenges, perhaps calling for

DIVERSITY FROM A EUROPEAN AND INTERNATIONAL PERSPECTIVE 263, 304 (Hildegard Schneider & Peter van den Bossche eds., 2008).

³⁹ WTO, Communication from the United States: Audiovisual and Related Services, S/CSS/W/21, Dec. 18, 2000.

⁴⁰ YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 2 (2006).

additional regulatory intervention. Overall, change is needed – sometimes incremental, sometimes as a true overhaul of existing media policy practices.

3.1. *Designing cultural diversity toolboxes for the digital media*

So far, policies in the audiovisual media (film, television and radio) have focused above all on supply, i.e. on the production and distribution of content, often under the condition that this content reflects certain qualities that are perceived “good” (where “good” is sometimes simply equal to national). As we move towards a digital media space, while the need for adjustment has been widely acknowledged, the prevailing logic has been that “as television moves to other platforms, television regulation should follow”.⁴¹ The EU Audiovisual Media Services Directive (AVMS),⁴² which in a post-convergent environment extended the scope of the EU’s media regulation to cover not only TV programmes but also the so-called “on demand” or “non-linear services”,⁴³ illustrates this path-dependence. The AVMS extended in effect the quota system for European works⁴⁴ to digital media outlets (albeit only as a soft-law rule)⁴⁵ without any specific consideration of the affordances of digital media. As such, the quota system could plainly be equated to a protectionist scheme supporting the European creative industries by securing exposure of the produced works – now also online.⁴⁶

So far, there has been little or no innovation in advancing cultural diversity goals that adequately makes use of the affordances of digital technologies. We argue that three paths are worthwhile considering in this regard: (i) responding to the creative user; (ii) responding to the unlimited “shelf-space” in cyberspace; and (iii) taking into account policies conventionally thought peripheral to achieving cultural objectives.

3.1.1. *Responding to the creative user*

The contemporary media consumer is increasingly empowered not only by the simple device of the remote control but by a broad palette of tools and

⁴¹ Mónica Ariño, *The Regulation of Audiovisual Content in the Era of Digital Convergence*, 7 J. UOC’S L. AND POL. SCI. 3 (2008).

⁴² See *supra* note 34.

⁴³ 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” (art. 1(g) AVMS).

⁴⁴ “European work” is by definition content produced with European money without any particular requirements regarding quality, exclusivity, originality or cultural distinctness. For a critique, see Mira Burri-Nenova, *The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity*, 44 C.M.L. REV. 1689, 1705-10 (2007).

⁴⁵ The AVMS creates an obligation for the Member States to ensure that non-linear media service providers under their jurisdiction “promote, where practicable and by appropriate means, production of and access to European works”. It is further clarified that such promotion could relate to the financial contribution to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes (art. 3(i)(1) AVMS).

⁴⁶ Burri-Nenova, *supra* note 44.

platforms to choose from (pay-TV, Internet-TV, YouTube, to name but a few). The new “media-literate viewer”⁴⁷ can now decide what and when to see, irrespective of the ready-made content offer “pushed” to her or him. Beyond the actively made choices as to content consumption, users have also turned into producers.⁴⁸

The reality of more content and new content, generated and spread individually or by groups,⁴⁹ and its accessibility without real location restriction are important for making regulatory choices. Some of this user created content (UCC) reflects the key media policy components of diversity, localism and non-commercial,⁵⁰ although some question the extent to which UCC contributes to a truly richer media environment, or whether we are in fact only seeing the same content exponentially distributed. While measurement is still a vexed issue⁵¹ and opinions diverge as to the novelty of the content, its quality⁵² and whether the “old” media companies are simply taking over the “new” and independent,⁵³ UCC could still be an apt channel for fostering diversity.⁵⁴

Considering the fluidity of the digital environment and the often inchoate forms of creativity, it is hard to propose concrete models suitable to address all concerns. Nonetheless, states need to take a fresh look and explore how the goal of a vigorous and diverse cultural environment can best be met. The state, for instance, can assign a more diversified role for the

⁴⁷ On the concept of the media-literate viewer and its impact on media regulation, see Natali Helberger, *The Media-Literate Viewer*, in DOMMERING-BUNDEL: OPSTELLEN OVER INFORMATIERECHT AANGEBODEN AAN PROF. MR. E.J. DOMMERING 135-48 (N.A.N.M. van Eijk & P.B. Hugenholtz eds., 2008).

⁴⁸ See PHILIP M. NAPOLI, AUDIENCE EVOLUTION: NEW TECHNOLOGIES AND THE TRANSFORMATION OF MEDIA AUDIENCES (2010); AXEL BRUNS, BLOGS, WIKIPEDIA, SECOND LIFE, AND BEYOND; FROM PRODUCTION TO PRODUSAGE (2010).

⁴⁹ OECD, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/FINAL (2007), at 5.

⁵⁰ Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1395-99 (2004).

⁵¹ Philip M. Napoli, *Persistent and Emergent Diversity Concerns in an Evolving Media Environment: Toward a Reflective Research Agenda*, forthcoming in BITS WITHOUT BORDERS: LAW, COMMUNICATIONS AND TRANSNATIONAL CULTURE FLOW IN THE DIGITAL AGE (2011, on file with author)..

⁵² ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY’S INTERNET IS KILLING OUR CULTURE (2007).

⁵³ MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY (2008).

⁵⁴ “Why is this important for cultural policy? Amateur content is typically very localized and often small-scale: for example, blogs address issues of niche and geographic interest, and by definition are not mainstream media sources. Amateur content is about having a local voice, reflecting the needs and interests of a local audience. The local scale of amateur content is, or should be, extremely important to the large range of countries (and smaller geographic entities like states and provinces) that are not commercial exporters of content. [...] Obviously, in a competition over who is more likely to produce material that reflects the national culture, and appeals to the people of, say, Malta, Hollywood executives are going to be less interested than Maltese amateur content producers. Therefore national regulators, who want to produce a vibrant corpus of material that is directed to the ethnic and cultural needs of their people, are much better off encouraging the amateur content producers within their country by intelligent use of their cultural policy”. John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 252-4 (2008).

public service broadcasters or put in place incentives for other cultural institutions, such as museums or theatres, to innovate around the UCC phenomenon. Critical in these exercises may be the effort to improve the quality of UCC,⁵⁵ and to better interface amateur and professional production and distribution.⁵⁶

Financial support programmes for the creation and diffusion of local content may need to be revised to take into account the potential of UCC.⁵⁷ In such situations, a mere depiction of a French castle of the reign of Louis XIV in an online game would not be a sufficient ground for subsidising the game provider,⁵⁸ but some ways of better accommodating in-game creativity and UCC as a product will need to be added.⁵⁹

Despite the controversies surrounding the emergence of public service broadcasting of the next generation (PSB 2.0),⁶⁰ mostly because of the moot issue of financing of potentially competitive Internet services through the TV licence fee, some developments are already visible. Ofcom, the converged British regulator for media and communications, has been a pioneer in moving proactively into new media.⁶¹ While the idea of a public service publisher, which was supposed to provide competition to the British Broadcasting Company (BBC) by spreading high-quality “public content” over platforms other than TV and radio, was not well received and was not endorsed, “the idea had ‘served its purpose’ in shifting the debate on the future of public service broadcasting by emphasising the importance of digital media”.⁶² BBC iPlayer and BBC Archives are two of the present initiatives for “digitising” the institution of public service broadcasting. The former is an Internet television and radio service, developed by the BBC, to provide access to its shows of the past seven days, involving also

⁵⁵ Natali Helberger, Andra Leurdjik & Silvain de Munck, *User Generated Diversity: Some Reflections on How to Improve the Quality of Amateur Productions*, 77 COMM. & STRATEGIES 55 (2010).

⁵⁶ Napoli, *supra* note 51.

⁵⁷ OECD, *supra* note 49, at 41-2; Ofcom, Ofcom’s Second Public Service Broadcasting Review Phase One: The Digital Opportunity (2008), at 1.23; TIM GARDAM & DAVID A. LEVY, *THE PRICE OF PLURALITY: CHOICE, DIVERSITY AND BROADCASTING INSTITUTIONS IN THE DIGITAL AGE* 125-51 (2008).

⁵⁸ By association to a French tax scheme that enables video game manufacturers subject to taxation in France to deduct up to 20% of the production costs of certain games. The scheme is based on a points system that determines the cultural content of a game pursuant to criteria such as language, levels of artistic expenditure, links to European historical, artistic or scientific heritage. The case was controversial as to its compatibility under EU state aid law. See European Commission, Decision of 11 December 2007 on State Aid C 47/06, *Tax credit introduced by France for the creation of video games*, OJ L 118/16 (2008).

⁵⁹ For further details, see Mira Burri-Nenova, *User Created Content in Virtual Worlds and Cultural Diversity*, in GOVERNANCE OF DIGITAL GAME ENVIRONMENTS AND CULTURAL DIVERSITY: TRANSDISCIPLINARY ENQUIRIES 74-112 (Christoph Beat Graber & Mira Burri-Nenova eds., 2010).

⁶⁰ Benedetta Brevini, *Towards PSB 2.0? Applying PSB Ethos to Online Media in Europe*, 25 EUR. J. OF COMM. 348 (2010).

⁶¹ Ofcom, *A New Approach to Public Service Content in the Digital Media Age: The Potential Role of Public Service Publisher* (2007). See also JAMIE COWLING & DAMIEN TAMBINI, *FROM PUBLIC SERVICE BROADCASTING TO PUBLIC SERVICE COMMUNICATIONS* (2004).

⁶² Ofcom chief executive, Ed Richards, as cited by the Guardian. Chris Tryhorn, *Ofcom Scraps ‘Public Service Publisher’*, THE GUARDIAN, March 12, 2008.

recommendations and social network features. Importantly, the iPlayer,⁶³ which is widely used in practice, has been made available across many platforms, including game consoles (Wii and SPS) and diverse mobile devices, which stresses the importance of interoperability of the entire media experience and user friendliness of new media projects.

The second initiative, the BBC Archives,⁶⁴ aims at digitising the entire collections of the BBC's audio and video material, dating back to the 1890s. An interesting add-on to this was the BBC Creative Archive pilot, which ended in 2006 after releasing more than 500 pieces of content under the so-called Creative Archive Licence.⁶⁵ The latter, similarly to a copyleft licence,⁶⁶ allowed creating around and on top of the content and making it available under similar terms (no commercial use; share alike; give credit; no endorsement; UK only). This initiative confirms the often acknowledged need for appropriately accommodating the "creative play"⁶⁷ in copyright, thereby allowing UCC distribution outside the grey legal area⁶⁸ and casting aside worries about its chilling effect on user innovation.⁶⁹

Finally, in this context of responding to the creative user, different policy tools can make sure that this user is indeed present, thriving and active. Diverse initiatives, not necessarily of legal nature, can contribute to making the media user digitally literate and to overcoming the widening gaps between digital "haves" and "have-nots" in industrialised societies, and the global divide between developed and developing countries.⁷⁰ Active participation as a creator and as a citizen will not however be sufficiently ensured by the mere availability of an Internet-enabled device; it should include a package of sophisticated media, communication and social skills.⁷¹

3.1.2. Responding to the unlimited "shelf-space"

By reducing information to zeroes and ones, digital representation radically modifies the characteristics of content. For one it is freed from the

⁶³ <http://www.bbc.co.uk/iplayer/> (last visited Feb. 11, 2010).

⁶⁴ <http://www.bbc.co.uk/archive/> (last visited Feb. 11, 2010).

⁶⁵ <http://www.bbc.co.uk/creativearchive/> (last visited Feb. 11, 2010).

⁶⁶ See e.g. <http://creativecommons.org/licenses/> (last visited Feb. 11, 2010).

⁶⁷ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007).

⁶⁸ Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008). Tushnet notes that "user-generated discontent" may have a role to play in pushing towards changes since it reflects "fundamental values that we as a society should consciously endorse, such as active participation in cultural and political dialogue. Organized and self-reflective thinking by fair users helps make the case that a consistent, socially beneficial set of practices exists that should be recognized by the law". *Id.* at 501.

⁶⁹ See e.g. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2003); LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

⁷⁰ Mira Burri, *The Global Digital Divide as Impeded Access to Content: Selected Problems of Governance*, paper presented at the World Trade Forum (September 3-4, 2010) (unpublished manuscript, on file with author).

⁷¹ Mark Warschauer & Tina Matuchniak, *New Technology and Digital Worlds: Analyzing Evidence of Equity in Access, Use, and Outcomes*, 34 REV. OF RESEARCH IN EDUC. 179, 213 (2010).

need for a tangible medium and it can be swiftly distributed at almost no cost. A second salient feature that has caused much uproar in both the big media conglomerates and small indigenous communities,⁷² is the ability to make perfect copies. A third, less noted, but perhaps the furthest-reaching, characteristic of digital media is that they have changed the way information is organised and accessed.⁷³

Under the broader category of digitally-induced market modifications,⁷⁴ as the reproduction, storage and distribution of digital media products have a marginal cost close to zero, it becomes economically viable to sell relatively unpopular products. This creates incentives for suppliers to offer a larger and more diverse portfolio including “non-hit” titles that appeal to smaller niche audiences. This may be true for garage band or indigenous music, but also more generally, for offering products and services in a greater number of languages: whereas most websites are still in English, it is a fact that as the Internet becomes ubiquitous, people around the world prefer to read their news, stories and local gossip in their own language. So, in parallel to the intensified globalisation, one may also observe a process of localisation. In this sense, for instance, while most of the articles in the free online encyclopaedia Wikipedia are in English (3,553,722), it contains content in 278 other languages, including Fiji Hindi, Igbo and Māori.⁷⁵

The digital setting may have also reduced the significant entrepreneurial risk inherent in launching new cultural goods and services⁷⁶ (at least for some of them), while making their visibility greater. This is in stark contrast to the substantial storage and distribution costs in the offline world, where the “shelf-space” (be it TV prime time or a Christmas cinema weekend) is limited.

⁷² See e.g. Mira Burri-Nenova, *The Long Tail of the Rainbow Serpent: New Technologies and the Protection and Promotion of Traditional Cultural Expressions*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 205-36 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008).

⁷³ DAVID WEINBERGER, EVERYTHING IS MISCELLANEOUS: THE POWER OF THE NEW DIGITAL DISORDER (2007).

⁷⁴ We refer here to the so-called “long tail” theory. The name has to do with the image of a demand curve that gets longer and longer and covers more niche “non-hit” products. The “long tail” theory was coined by Chris Anderson, chief editor of the Wired Magazine (CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006)) but builds on previous and parallel economic research. See in particular Erik Brynjolfsson, Yu Hu & Michael D. Smith, *From Niches to Riches: The Anatomy of the Long Tail*, 47 SLOAN MGMT. REV. 67 (2006); Erik Brynjolfsson, Yu Hu & Duncan Simester, “Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales”, MIT Center for Digital Business Research Paper (2007). For a critique of Anderson’s book, see Tim Wu, *The Wrong Tail: How to Turn a Powerful Idea into a Dubious Theory of Everything*, SLATE, July 21, 2006. For an analysis of the “long tail” theory in the specific context of cultural diversity, see Michal Shur-Ofry’s chapter, forthcoming in BITS WITHOUT BORDERS: LAW, COMMUNICATIONS AND TRANSNATIONAL CULTURE FLOW IN THE DIGITAL AGE (2011, on file with author).

⁷⁵ See http://meta.wikimedia.org/wiki/List_of_Wikipedias (last visited Feb. 11, 2010).

⁷⁶ Germann argues that this specificity of cultural goods is the main one that commands state intervention for the attainment of cultural objectives. See Christophe Germann, *Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity*, 6 ERA—FORUM 109, 116 (2005).

Traditional media companies have also faced (and still face) horrendous promotion costs, which were unbearable for smaller producers or individual artists. In the digital ecology, however, access to a wider audience is facilitated and made cheap. Supply and demand are also somewhat more easily “connected” as the Internet allows searching through a single point of entry. This search process is dynamic and in addition to the conventional search engines, samples, feedback and other advanced search tools based upon collective intelligence,⁷⁷ even enable users to discover new products, eventually widening the diversity of content consumed.

In the longer run, as the consumer becomes more and more empowered to choose as we move from a “push” to a “pull” mode of content consumption, it is conceivable that consumer selection will constantly generate new and/or niche products. This would have the effect of inducing markets to offer new types of content, including e.g. archived or original works, director’s cuts or performances, be they European, American or African. This may ultimately lead to a greater share of available and effectively consumed “good” works, which, if realised, would be a genuine expression of cultural diversity.

Another interesting implication relates to the fact that, in the digital environment, content remains accessible and usable long after its traditional “one-off” viewing at cinemas, on TV, or through DVD rental or sale. “Pulling” content individually from a virtually unlimited selection of titles may in effect change the value attached to cultural content. Romantically put, this value would transcend the mere “one-off” use of content and offer incentives for creating “good” content, be it original, avant-garde or traditional, which people will be willing to consume more than once.

To sum up the above implications, one may say that digital technologies have fundamentally changed the conditions for participation in the communications environment as production and distribution costs fall and as the notion of scarcity is redefined. In this context, it becomes *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. In this sense, building new or keeping the old barriers around national content is futile. Efforts to foster truly diverse consumption of cultural content should focus on making the “head of the snake” smaller and its tail longer and thicker.⁷⁸

3.1.3. *Move from core to the periphery: all policies are Internet policies*⁷⁹

Talking about cultural diversity has been so far logically linked to formulating regulatory responses in the media domain. As digital media have

⁷⁷ JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, AND NATIONS* (2003); CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008).

⁷⁸ Napoli, *supra* note 51.

⁷⁹ “Almost every area of public and social policy is in some respects part of internet policy”. See Oxford Internet Institute, *Towards a Future Internet: Interrelation between Technological, Social and Economic Trends*, Final Report for DG Information Society and Media (2010), at 41.

become ubiquitous, however, and as their effects are felt in all facets of societal life, this premise changes.

Firstly, 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, failing networks, network discrimination); (ii) placed at the hardware/software level (e.g. lack of interoperability between different types of platforms, software or formats); 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 systems⁸⁰). Each of these barriers may 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. This also means that discrete decisions taken in one policy domain, for instance, on universal provision of telecommunication services,⁸¹ may have repercussions for cultural diversity as well. As we increasingly observe diverse forms of hybrid regulation in cyberspace, the balance between self- and co-regulation and state intervention will also be important in terms of ensuring competition and avoiding concentration of power and control. As we move towards the uncharted territory of cloud computing, these concerns may gain new significance, since due to the high costs of providing cloud platforms and services, there will be fewer players, more vertical and horizontal integration and possibly more control by private companies (e.g. Google or Microsoft).⁸²

In a much broader context, the sustainability of the digital media environment as a whole and the path of its evolution may become critical.⁸³ Taking full account of the burden of the regulatory challenge in this context, the following guiding principles for a needs-based future Internet have been stressed: it should be available and accessible; diverse and inclusive; scalable and sustainable; open and shareable; green and affordable; reliable and resilient; safe and secure; trustworthy and private; appealing and usable; customizable and adaptable.⁸⁴

4. Summing it up

In this paper, we first took stock of the cultural protectionism/cultural diversity discourse at the international level. The picture is not very bright as the discussions stick to outdated concepts of protectionism perceiving open trade as perilous and offer no meaningful recipes for advancing a diverse

⁸⁰ See Daniel Gervais, *Culture, Cloud(s) and IP*, forthcoming in BITS WITHOUT BORDERS: LAW, COMMUNICATIONS AND TRANSNATIONAL CULTURE FLOW IN THE DIGITAL AGE (2011, on file with author)..

⁸¹ Mira Burri-Nenova, *The New Concept of Universal Service in a Digital Networked Communications Environment*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 117 (2007).

⁸² See e.g. CHARLES LEADBEATER, *CLOUD CULTURE: THE FUTURE OF GLOBAL CULTURAL RELATIONS* (2010).

⁸³ Jonathan L. Zittrain, *The Generative Internet*, 119 HARVARD L. REV. 1974 (2006).

⁸⁴ Oxford Internet Institute, *supra* note 79, at 29-35.

cultural environment. The trade versus culture dilemma even appears as an impediment to opening digital media markets and to providing legal certainty for digital transactions of businesses and individuals. The concept of cultural diversity, as endorsed by the UNESCO Convention,⁸⁵ is overly vague, broad, and prone to abuse,⁸⁶ and thus possibly problematic for advancing well-targeted policy action. Digital technologies as a factor markedly changing the regulatory space have not been employed so far as leverage to overcome the existing path-dependence.

In the national context, where one first expects the formulation of regulatory models fostering diversity, there is little or no forward-looking thinking, which admittedly is politically difficult as national/cultural protectionism still finds strong support in domestic constituencies. Existing media policy tools, expanding on old TV-like regulation, still seek to create incentives on the supply side for the production and spread of (presumably) culturally diverse content with no guarantee of its consumption. These measures are essentially based on a model of static point-to-multipoint media with high thresholds for creation and set patterns of distribution. Yet, this model is no longer the only one in existence and is under massive pressure to change from both the demand and the supply side, from the outside and from within. As Yochai Benkler has noted, “[i]n the digitally networked environment, there is a better way to serve the goals that have long justified structural media regulation”.⁸⁷

We sketched three possible avenues for advancing the policy goal of cultural diversity, considering some of the specific characteristics of digital media: (i) responding to the creative user; (ii) responding to the unlimited “shelf-space” in cyberspace; and (iii) taking into account policies conventionally thought peripheral to achieving cultural objectives. Within these categories, we looked at a few concrete tools, such as better UCC accommodation, against the background of some existing European media policy initiatives. We also formulated broader rationales for adjusting regulatory intervention in order to make better use of the affordances of digital technologies and hinted at elements that may be essential in engineering cultural diversity policies (e.g. the sustainability of the digital space).

Finally, one can prognosticate that the old cultural protectionism as we know it from the days of the Uruguay round is going to gradually fade away and disappear. Cultural diversity concerns are here to stay, however. While the promise of “cloud culture”, where there is more culture and it is more available to people than ever before, due to indefinite digital stores of data in the cloud, ubiquitous broadband, new search technologies and access through multiple devices,⁸⁸ is great, it comes with certain challenges attached.

⁸⁵ UNESCO Convention, art. 4(1) (“the manifold ways in which the cultures of groups and societies find expression”).

⁸⁶ As the *China–Publications and Audiovisual Products* case (*supra* note 18) shows.

⁸⁷ Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 567-8 (2000).

⁸⁸ Leadbeater, *supra* note 82, at 36.

Awareness of these and of their multi-directional and interlinked effects, may be critical to appropriately pursuing diversity goals in an environment of no state boundaries and no scarcity. The first rule for any intervention should however be that of “do no harm” since we still need to come to grips with the reality of digital media where complex processes of consumption, communication, creation, sharing, mixing and commercialisation unfold.⁸⁹ In this sense, a rush of untargeted efforts, as a plain act of innovation by government bureaucracies,⁹⁰ should not be greeted too warmly. There must be room for experimentation, for studying existing practices, individual and community experience with new media and testing to find out which patches of intervention work in a particular society, which presupposes flexibility of the state agencies and procedural checks. Multidisciplinary research that could deliver coherent and meaningful messages has an important role to play as promoting cultural diversity in cyberspace mobilises a broad array of technology and social sciences.⁹¹

⁸⁹ See Cohen, *supra* note 67, at 1194, who states that, “the psychology of creativity suggests that attempts to impose a rigid structure on the creative process quickly become counterproductive, and that the success of the creative process hinges in part on the ability to avoid externally imposed distractions”. With regard to regulation of technologies in development, see Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUSTON L. REV. 665 (2010).

⁹⁰ Quiggin & Hunter, *supra* note 54, at 240-1.

⁹¹ The latest study on the future of the Internet sponsored by the European Commission clearly states that, “[m]oving towards an internet at the meeting point of human-centred aspects and technological complexities has emerged [...] as the key research challenge. A recurrent theme is that research in the EU on the internet must be far more multidisciplinary”. Oxford Internet Institute, *supra* note 79, at 7.