Cultural Diversity

Contribution to the Civil Society Background Paper prepared for the OECD Ministerial Meeting "The Future of the Internet", 17-18 June 2008, Seoul

Mira Burri-Nenova[*]

Cultural diversity has been defined by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,[1] in force as of 18 March 2007, as "the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies".
With the latter Convention, "cultural diversity" was for the first time acknowledged as a legitimate regulatory objective in a legally binding instrument at the international level. While this is certainly an important and positive development, the UNESCO Convention could be critiqued for being ethnocentric in the formulation of the rights of the State parties,[2] barely referring to intellectual property rights (IPR)[3] and providing no meaningful solution to conflict of law situations with other international obligations of the States (most notably, these existing under the World Trade Organization agreements).[4] Since the Convention on Cultural Diversity contains neither specific obligations for the State parties,[5] nor guidelines on what legitimate measures aimed at protecting and promoting cultural diversity are, it may allow the State parties to adopt measures that suspiciously resemble protectionism (such as, for instance, cultural quotas[6]).

Yet, it should be underscored that cultural diversity remains a valid regulatory objective, which could be traced back to the fundamental human right of freedom of expression, and whose pursuit is arguably even more vital in the digitally networked environment. In the global setting of the latter, the hazards of marginalising cultural expressions, in particular those of indigenous peoples and/or of developing and least developed societies, are intensified through the spread of corporate power and the proliferation of mainstream content.

---

[*] Mira Burri-Nenova is a senior research fellow at the World Trade Institute in Bern and alternate leader of the project "eDiversity: The Legal Protection of Cultural Diversity in a Digital Networked Environment", which is part of the Swiss National Centre of Competence in Research (NCCR): Trade Regulation. Contact at mira.burri@wti.org.

[1] Adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005; available at http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

[2] See also Nicole Aylwin and Rosemary J. Coombe, "*Cultural Pluralism Protects Traditional Knowledge*", 2006, available at http://www.wacc.org.uk/wacc/publications/media_development/2006_3/cultural_pluralism_protects_traditional_knowledge (accessed 25 February 2008).

[3] IPRs are mentioned only in the preamble of the Convention.

[4] See Christoph Beat Graber, *"The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO"* (2006) Journal of International Economic Law 9:3, 553-574 and Mira Burri-Nenova, *"Trade versus Culture in a Digital Networked Environment: An Old Conflict in Need of a New Definition"* (2009) Journal of International Economic Law, 12:1, 1-46.

[5] See Articles 5-10 UNESCO Convention on Cultural Diversity. For a critique of the lack of binding obligations, see Keith Acheson and Christopher Maule, *"Convention on Cultural Diversity"* (2004) Journal of Cultural Economics 28, 243-256; 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, 24-55.

[6] Mira Burri-Nenova, *"The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity"* (2007) Common Market Law Review 44:6, 1689-1725.

However, it is also true that the digital environment offers unprecedented ways for creative expression, both individually and collectively, and for their instantaneous and global distribution. Digitisation and the emerged networks reduce the costs of production, interaction and communication, and even lead to a new type of creativity.[7] The internet creates a novel type of information environment, where knowledge, including cultural expressions, is abundant, diverse and accessible.[8]

In order to make appropriate use of these newly formed opportunities and to foster cultural diversity, it is crucial that societies are firstly made fully aware of them and secondly that the barriers, both of legal and of practical nature, relating to the movement of content and to the access of content, are lifted up.

One should also bear in mind that the new knowledge environment is extremely dynamic and complex that exasperates the interrelatedness of effects, making regulatory decisions precarious. In this sense, for instance, the granting of additional IP protection to forms of traditional cultural expressions (as often demanded by indigenous peoples) is to be assessed as negative because it will have harmful repercussions within the larger complex system, amongst other things, reducing creativity and obstructing new cultural content production.[9]

The World Intellectual Property Organization (WIPO) itself has admitted in this regard that certain amendments to the existing IP regimes and a search for new forms are needed because of: (i) the preservation and safeguarding of intangible cultural heritage; (ii) the promotion of cultural diversity; and (iii) the promotion of creativity and innovation, including tradition-based one.[10]

New initiatives, such as the projected *Treaty on Access to Knowledge*,[11] which envisages some general limitations and exceptions to copyright (such as for educational or library institutions); special provisions regarding Internet Service Providers, digital rights management (DRM) and the extension on the term of protection, as well as positive measures for the expansion and enhancement of the knowledge commons and the promotion of open standards,[12] endorsing in effect *maximum standards* of IP protection,[13] are a positive signal in this direction.

Beyond IP, the sustainability of the digital environment may also become vital for cultural diversity. In this context, developments, which one might characterise as purely technical

---

[7] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven: Yale University Press, 2006.

[8] David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder*, New York: Doubleday, 2007.

[9] See e.g. Urs Gasser and Silke Ernst, *"From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age"* (2006) Berkman Center for Internet and Society Research Publication No 2006-05.

[10] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2 May 2003, Annex, at para. 8. The civil society has already formulated its call for less stringent IPRs in the Declaration on the Future of the WIPO (12 October 2004, at http://www.futureofwipo.org). Stating that "[h]umanity faces a global crisis in the governance of knowledge, technology and culture", the drafters of the Geneva Declaration, sought a new balance of the social and economic costs of IPR, a reform of the existing IPR regimes and an innovative approach using non-proprietary systems, such as "Wikipedia, the Creative Commons, GNU Linux and other free and open software projects, as well as distance education tools and medical research tools". The drafters stressed however, that, they "do not ask that WIPO abandon efforts to promote the appropriate protection of intellectual property, or abandon all efforts to harmonize or improve these laws" but "insist that WIPO work from the broader framework described in the 1974 agreement with the UN, and take a more balanced and realistic view of the social benefits and costs of intellectual property rights as a tool, but not the only tool, for supporting creative intellectual activity". Geneva Declaration, referring to Agreement between the UN and WIPO, 17 December 1974, at Article 1. See also James Boyle, *"A Manifesto on WIPO and the Future of Intellectual Property"* (2004) Duke Law and Technology Review 9.

[11] Draft 9 May 2005, available at http://www.cptech.org/a2k/.

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

[13] Laurence R. Helfer, *"Towards a Human Rights Framework for Intellectual Property"* (2007) UC Davis Law Review 40, 971-1020, at 1014.

and/or "foreign" to the system may seriously influence the cultural ecology as well. At the micro-level, digital sustainability, for instance, in the sense of ensuring that digitised formats, especially in the field of cultural heritage are interoperable, of high quality and future-proof, will certainly be important.[14] In a broader context, the organisation of information by search engines, their precision, positioning and ultimately control, may be critical.[15] Particularly important will also be all decisions and/or developments that influence the interoperability of networks, software and content, the control of the network,[16] as well as the question of net neutrality.[17]

Ensuring sustainable access to cultural goods and sustainable production of culturally diverse content[18] does not simply mean that everything is accessible in the romantic sense of the public domain[19] and involves a complex balance between openness and discretion.[20] In addition, practical efforts of reducing the digital divide(s) in a society (e.g. through media literacy programmes) and between societies (e.g. through building infrastructure and other types of "access facilities") will also be essential.

February 2008

[14] See Netherlands Council for Culture, *From ICT to E-Culture: Advisory Report on the Digitalisation of Culture and the Implications for Cultural Policy*, submitted to the State Secretary for Education, Culture and Science, June 2003 (English edition, August 2004).

[15] Vaidhyanathan, e.g., questions the role of Google as ubiquitous search engine and asks whether public libraries may be more appropriate to administer knowledge. See Siva Vaidhyanathan, *"The Googlization of Everything and the Future of Copyright"* (2007) UC Davis Law Review 40, pp. 1207-1231, at 1220. For a more optimistic vision of Google's role, see Leslie A. Kurtz, *"Copyright and the Human Condition"* (2007) UC Davis Law Review 40, 1233-1252, at 1250-1251.

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

[17] The principle of net(work) neutrality or in its broader sense, the end-to-end principle, essentially hold that the network should be neutral to the passed content and that intermediaries should pass all packets, while the intelligence is located at the edges of the network where necessary. For excellent account of the "net neutrality" discussions, see Susan P. Crawford, *"Network Rules"* (2006) Benjamin N. Cardozo School of Law Working Paper No 159; Tim Wu, *"Network Neutrality, Broadband Discrimination"* (2003) Journal on Telecommunications and High Technology Law 2, 41.

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

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

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