Cultural Protectionism 2.0: 
Updating Cultural Policy Tools for the Digital Age

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1. Introduction

Cultural protectionism has been an element of national and foreign policies as an extension of state’s sovereignty1 and expressed both in defensive and offensive manners. 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. Over the years, it has developed many and different expressions and has undergone an important ideological revamping, moving from “cultural exception” to “cultural diversity” policies.

The enquiry into the cultural protectionism discourse is however not the core objective of this chapter. It only intends to set the scene for its certainly more ambitious goal of exploring cultural protection 2.0, i.e. the normative dimensions of cultural diversity policies in the global digital space, asking what adjustments are needed and in fact, 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 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 in order to better serve the goal of sustainably diverse cultural environment.

2. What the global discourse on cultural diversity teaches us?

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 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

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tradable matters that have come under the sway of globalization. The latest 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 a recent 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.

One could think that the intense developments at the international level that led to the adoption of the first legally binding instrument on cultural matters (the said Convention) could provide some guidance as to the suitable tools to be applied at all levels of governance in order to better serve the global public good of a diverse cultural environment. Unfortunately, a closer look confirms the contrary, at least for two reasons.

The first has to do with the longer narrative about the prominence of cultural diversity as a policy objective that goes back to the “trade versus culture” clash during the Uruguay Round of trade negotiations (1986-1994). During these talks that ultimately led to the establishment of the World Trade Organization (WTO), several countries with the European Union (EU) and Canada prominently featuring at the forefront fought the so-called “exception culturelle” battle that aimed at exempting any product or service that is culture-related from the rules of the negotiated WTO Agreements. The prime focus of the campaign was the exclusion of audiovisual services (i.e. films, TV programmes, video and sound recordings), which were conventionally highly protected industries. While eventually the “cultural

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1 Thomas Cottier, Multilayered Governance, Pluralism, and Moral Conflict, 16 IND. J. GLOBAL LEGAL STUD. 647 (2009).
4 The idea that some measures protecting national cultural industries may be justified found reflection also in bilateral and regional fora. In 1988, the cultural proponents celebrated a victory when Canadian negotiators introduced a “cultural exclusion” clause in the Canada-United States Free Trade Agreement, Oct. 4, 1988, 27 I.L.M. 281 [hereinafter CUSFTA]. Five years later, such an exclusion also found its way into the North American Free Trade Agreement, 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. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993) [hereinafter NAFTA].


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

5 Different types of support mechanisms were used in different states. Commonly, these included subsidies; domestic content rules; market access restrictions, in particular measures that control access to film markets; regulatory/licensing restrictions, especially measures that
exception” agenda only partially attained its goals,⁸ a number of flexibilities were built into the law of the WTO, in particular into the General Agreement on Trade in Services (GATS),⁹ allowing in effect precious few real commitments for audiovisual services.¹⁰

The trade versus culture conflict has been and remains so politically and emotionally charged that although the media landscape has profoundly changed in the last decade, WTO Members are adamant in preserving the status quo and not even prepared to give up their “all-or-nothing” approach and make finer tuned commitments in domains, which have long been deregulated at the domestic level. Keeping the status quo may have some negative implications that go beyond the mere opening of global media markets and concern in particular digital trade. As cultural proponents are determined to use the GATS flexibilities to the fullest, they are careful that digitally transmitted products are qualified as services rather than goods. As the WTO Programme on Electronic Commerce has shown, while all Members recognise the importance of digital trade and the great 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 move forward.¹¹ These spillovers of the trade versus culture dilemma cause legal uncertainty and lead to forum shifting to the bilateral or regional levels, the impact of which is precarious, if not to say detrimental, to achieving any public interest objectives.¹²

The second (and higher) hope for policy guidance lied in the very act of the UNESCO Convention on Cultural Diversity, as the key and very

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⁸ While no services sector was excluded from the scope of GATS.
⁹ 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).
¹⁰ 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). See also 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. GLOB. STUD. L. REV. 909, 914 (2004).
¹¹ Sacha Wunsch-Vincent, The WTO, the Internet and Trade in Digital Products 201-32 (2006).
successful effort of the international community. Yet, this hope has also been dashed. Clearly, the project of creating an international legally binding instrument on cultural matters, as a counterforce to economic globalisation and in particular to the enforceable rules of the WTO, was fairly 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, the project was also doomed from the outset. Now that the hype caused by the adoption and the swift ratification of the UNESCO Convention has settled, its flaws are apparent: The Convention’s weak binding power and its substantive and normative incompleteness involve no real advance towards the goal of sustaining a diverse cultural environment but spreading a manifesto with mere rhetorical charge. Here too, 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 inexistent significance. On the other hand, the Convention will not alter the rights and obligations of the WTO Members – a situation that has been confirmed by the recent China–Publications and Audiovisual Products case.

To sum up, although the discourse on trade and culture and on cultural diversity has a long history and has been politically strongly boosted, the real effects are few and the guidance on what is cultural diversity and how it is to be attained is practically nonexistent.


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


Generally (beyond the UNESCO Convention and the WTO framework), there are worrisome observations to be made about the concept of cultural diversity as evolving in the global policy discourse. First, we need to be reminded that 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. 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. The perceived peril for small art productions and local and indigenous culture is deemed immense and worthy of the state’s counteraction. This picture is conventionally painted black or white only and the many nuances of the complex commerce and culture interlinks are missed out. Parties on both sides find examples supporting their positions. The cultural protectionism exponents tend to pick up their facts from the film markets, where the US clearly dominates and where the power of big budget and marketing is self-evident. The free market proponents make their case by using examples of local musicians gone global or the success of documentary productions. While the truth is surely somewhere between the two extremes, the discussion on “trade” and “non-trade” values is so extremely politicised that renders any solution impossible.

This path-dependence is deeply carved in the presently shared concept of cultural diversity as it has been advanced in global political discourse. Other noteworthy tendencies visible in the application of the notion of cultural diversity are:

(i) while there is an increased adoption of cultural diversity as a legitimate policy goal in state’s internal and external policies, it seems that “diverse” or “multicultural” is often used as opposed to national;
(ii) there is a growing disconnection in the discussion of the different types of “diversities”, such as those with respect to language, religion or...
minors. This may lead to policy fragmentation and to an extreme narrowing of the focus of cultural diversity policy strategies;26

(iii) cultural diversity is mobilized as a national competitiveness argument, most often against the US productions and services. 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 as early as in 1998, “[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 digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports”;27

(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.28 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 2004.29 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”.30 Indeed, both the more relaxed rules on advertising and the introduction of product placement were seen as “further instruments safeguarding cultural diversity”.31 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

26 See e.g. Jon Garon’s chapter, this volume.
29 COMPARATIVE STUDY ON THE IMPACT OF CONTROL MEASURES ON THE TELEVISUAL ADVERTISING MARKETS IN EUROPEAN UNION MEMBER STATES AND CERTAIN OTHER COUNTRIES 60-61 (2005).
31 Id.
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”. 32

The above setting-the-scene highlights the ambiguities in the concept of cultural diversity. The questions “diversity of what?” and “diversity how?” remain unanswered and no guidance as to the appropriate measures in achieving a diverse cultural environment is offered. In the next sections, we look beyond the UNESCO Convention and the WTO framework and discuss the proper “fillings” of a cultural diversity policy in particular in light of the advent and widespread of digital media, which strongly impact on the processes of cultural content production, distribution and access, as well as on the efficiency of the applied regulatory toolboxes.

3. Beyond the UNESCO Convention, the WTO and out in 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”33 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. 34 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

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


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? While some may argue that it prompts a panacea for the goal of cultural diversity by (almost magically) creating a digitally empowered mix of commercial and non-commercial, professional and amateur, mainstream and niche content that is readily available and whose supply and demand are perfectly driven by the market, we consider a finer-grained assessment appropriate. We think that in some cases, the features of the digital network environment may hint at opportunities for better, more efficient and flexible accommodation of diversity concerns. In other cases, they may equally be viewed as challenges, perhaps calling for additional regulatory intervention. Overall, change is needed — sometimes 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”. The EU Audiovisual Media Services Directive (AVMS), 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”, illustrates this path-dependence.

The AVMS extended in effect the quota system, which traditionally prescribed TV channels operating in the EU to broadcast a majority of European works, to digital media outlets without any specific consideration of the affordances of digital media. Concretely, the AVMS created an obligation for the Member States to ensure that non-linear media service providers under their jurisdiction “promote, where practicable and by

36 A view shared also by Philip Napoli; see Napoli’s chapter, this volume.
38 See supra note 28.
39 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.” AVMS art. 1(g).
40 “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).
appropriate means, production of and access to European works”\(^{41}\). 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. Evidence on the Directive’s implementation so far shows that many EU Member States have indeed chosen to “harden” this soft rule, thus creating artificial demand for European productions. 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.\(^{42}\) Moreover, coming from the EU as one of the major cultural diversity proponents, whose regulatory models are often copied and pasted in other jurisdictions, such a simple transition of offline rules to the online space may not be sending the right signals. It may unnecessarily burden digital media outlets, limit their flexibility and competitive edge, while the efficacy of the scheme – i.e. the actual consumption of diverse (including European) works – is doubtful.

So far, there is little or no innovation in advancing cultural diversity goals that adequately makes use of the potential 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 and often falling outside the traditional media law and policy domain (at least as it was conceived pre-digitization and pre-convergence).

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 platforms to choose from (pay-TV, Internet-TV, YouTube, to name but a few). The new “media-literate viewer”\(^{43}\) 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.\(^{44}\)

The reality of more content and new content, generated and spread individually or by groups,\(^{45}\) 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,

\(^{41}\) AVMS art. 3(i)(1).

\(^{42}\) Burri-Nenova, supra note Error! Bookmark not defined..


\(^{44}\) 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).

localism and non-commercial, although some doubt to what extent UCC contributes to a truly richer media environment, or we are in fact only seeing the same content exponentially distributed. While measurement is still a vexed issue and opinions diverge as to the novelty of the content, its quality and whether the "old" media companies are simply taking over the "new" and independent, UCC could still be an apt channel for fostering diversity.

Considering the fluidity of the digital environment and the often inchoate forms of creativity, it is hard to propose concrete models suitable to address all concerns. 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 public service broadcasters or put in place incentives for other cultural institutions, such as museums or theaters, to innovate around the UCC phenomenon. Critical in these exercises may be the effort to improve the quality of UCC works, and to better integrate amateur and professional production and distribution.

Financial support programmes for the creation and diffusion of local content may need to be revised to take into account the potential of UCC. In such situations, a mere depiction of a French castle from the reign of Louis XIV in an online game would not be a sufficient ground for subsidizing the game provider, as for instance a French tax rebate scheme

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47 Philip M. Napoli, Persistent and Emergent Diversity Concerns in an Evolving Media Environment: Toward a Reflective Research Agenda, this volume.
50 “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 counties (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).
52 Napoli, supra note 47.
now allows. Rather, some forms of better accommodating in-game creativity and UCC as a product will need to be added – forms that enable, for example, telling stories, mixing videos around a particular in-game character, site or scene, and/or linking those to current events, personal websites or blogs outside the virtual world. Or, to put it perhaps a bit romantically here, what is needed overall are supporting efforts that make creativity an interrupted and indeed promoted process.

Despite the controversies surrounding the emergence of public service broadcasting of the next generation (PSB 2.0), mostly because of the now-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. 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 endorsed, “the idea had ‘served its purpose’ in shifting the debate on the future of public service broadcasting by emphasizing the importance of digital media”. BBC iPlayer and BBC Archives are two of the present initiatives of “digitizing” 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 recommendations and social network features. Importantly, the iPlayer, which is widely used in practice, has been made available across many platforms, including also game consoles (Wii and SPS) and diverse mobile devices, which stresses the gravity of interoperability of the entire media experience and user friendliness of any applied new media projects.

The second initiative, the BBC Archives, aims at digitizing the entire collections of BBC audio and video material, reaching back to the 1890s. An

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

55 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).


57 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).


60 http://www.bbc.co.uk/archive/ (last visited June 15, 2011).
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. 61 The latter, similarly to a copyleft licence,62 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 only63). This initiative confirms the often acknowledged need for appropriately accommodating the “creative play”64 in copyright, thereby allowing UCC distribution outside of the grey legal area65 and casting aside worries about its chilling effect on user innovation.66

Finally, in this context of responding to the creative user, different policy tools can make sure that this user is indeed there, well-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 industrialized societies, and the global divide between developed and the developing countries.67 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.68

An excellent example in this context is Brazil’s Culture Points programme launched in 2003, which spurs real-life “digital empowerment” in centers scattered throughout the country that serve simultaneously as

62 See e.g. http://creativecommons.org/licenses/ (last visited June 15, 2010).
63 The Creative Archive content is made available to internet users for use within the UK, as UK citizens pay the BBC licence fee (which includes TV, radio, online, as well as other services such new technology investment and collecting the fee). For 2010, the BBC licence fee amounted to £145.50. See http://www.bbc.co.uk/aboutthebbc/licencefee/ (last visited June 15, 2011).
64 Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. DAVIS L. REV. 1151 (2007).
65 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.
laboratory for experimental culture,\textsuperscript{69} community and training hub, as well as entrepreneurial incubator.\textsuperscript{70}

3.1.2. Responding to the unlimited “shelf-place”

By reducing information to zeroes and ones, digital representation radically modifies the characteristics of content. For one it is freed from the need for a tangible medium and it can be swiftly distributed at almost no cost. A second salient feature that has caused much uproar in both the big media conglomerates and small indigenous communities\textsuperscript{71} 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 organized and accessed.\textsuperscript{72}

Under the broader category of digitally-induced market modifications,\textsuperscript{73} 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 globalization, one may also observe a process of localization. In this sense, for instance, while most of the articles in the free online

\textsuperscript{69}Culture Points promote contemporary Brazilian music, indigenous and computer art, rather than high culture. Individual centers are also meant to be linked to an online network that encourages distribution and sharing. See Larry Rohter, \textit{Brazilian Government Invests in Culture of Hip-Hop}, N.Y. TIMES, Mar. 14, 2007.

\textsuperscript{70}Centers receive a standard multimedia kit consisting of computers, video and audio recording equipment, open source software and broadband connectivity. Further equipment purchases and start-up costs can be covered by the government, which also provides ongoing training and technical support. For a fully-fledged analysis of the Culture Points programme, see Sean Pager’s chapter, this volume.

\textsuperscript{71}See e.g. Mira Burri-Nenova, \textit{The Long Tail of the Rainbow Serpent: New Technologies and the Protection and Promotion of Traditional Cultural Expressions}, in \textit{INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT} 205-36 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008).


\textsuperscript{73}We refer here to the so-called “long tail” theory. The name has to do with the image of a demand curve that gets longer and longer and covers more niche “non-hit” products. The “long tail” theory was coined by Chris Anderson, chief editor of the Wired Magazine (Anderson, supra note 35) but builds on previous and parallel economic research. See in particular Erik Brynjolfsson, Yu Hu & Michael D. Smith, \textit{From Niches to Riches: The Anatomy of the Long Tail}, 47 SLOAN MGMT. REV. 67 (2006); Erik Brynjolfsson, Yu Hu & Duncan Simester, \textit{Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales}, MGMT. SCI. (forthcoming), available at http://ssrn.com/abstract=953587. For a critique of Anderson’s book, see Tim Wu, \textit{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, this volume.
encyclopedia Wikipedia are in English (3,658,500), it contains content in 280 other languages, including Fijian, Hindi, Igbo and Māori.\textsuperscript{74} The digital setting may have also reduced the significant entrepreneurial risk inherent in launching new cultural goods and services\textsuperscript{75} (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.

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,\textsuperscript{76} enable users to discover even new products, eventually widening the diversity of content consumed.\textsuperscript{77}

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 diverse works.

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

\textsuperscript{75}Germann argues that this specific characteristic of cultural goods is the main one that calls for state intervention for the attainment of cultural objectives. See Christophe Germann, \textit{Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity}, 6 \textit{ERA—Forum} 109, 116 (2005).
\textsuperscript{77}This process of discovering diversity is admittedly not perfect and one needs to acknowledge the sceptics’ views on search engine’s role. See Hindman, supra note 49; SIVA VAIDHYANATHAN, \textit{The Googlization of Everything (and Why We Should Worry)} (2011).
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 rather focus on making the “head of the snake” smaller and its tail longer and thicker. This may also require additional regulatory effort, for instance to monitor for search engines’ abuse of monopoly power, contain other distribution and access gatekeepers or to enable production and consumption of high-quality content in a fragmented media space.

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

Talking about cultural diversity has been so far logically linked to formulating regulatory responses in the media domain. As digital media have become ubiquitous however, and as their effects felt in all facets of societal life, this premise changes and one may need to look for solutions outside traditional media law and policy.

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 systems). 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 service provision of telecommunication services, may have repercussions on cultural diversity as well. As we increasingly observe diverse forms of hybrid regulation in cyberspace, finding the right 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 unchartered territory of cloud computing, these concerns may gain new gravity: Due to the extremely high costs of providing cloud platforms and services, there will be fewer players, more

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78 Napoli, supra note 47.
80 See Daniel Gervais, Culture, Cloud(s) and IP, this volume.
vertical and horizontal integration and possibly more control by private companies (e.g. Google or Microsoft). In a much broader context, the sustainability of the digital media environment as a whole (or what Jonathan Zittrain calls the “generativity” of the Internet\textsuperscript{83}) and the path of its evolution may become critical. In this sense, for instance, the importance of decisions that influence the interoperability of networks and code,\textsuperscript{84} the control of the network,\textsuperscript{85} as well as those pertinent to the principle of net neutrality,\textsuperscript{86} grows.\textsuperscript{87}

4. Summing it up

In this chapter, 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 cultural environment. The trade versus culture dilemma appears even 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,\textsuperscript{88} is overly vague, broad, prone to abuse,\textsuperscript{89} and thus possibly problematic for advancing well-targeted policy action. Digital technologies as a factor strongly changing the regulatory space have not been employed so far as leverage to overcoming the existing path-dependence.

In the national context, where one expects first 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 by 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

\textsuperscript{82}See e.g. Charles Leadbeater, Cloud Culture: The Future of Global Cultural Relations (2010).
\textsuperscript{86}The principle of net(work) neutrality holds that the network should be neutral to the content being passed and that intermediaries should pass all packets, while the intelligence is located at the edges of the network where necessary. See e.g. Susan P. Crawford, Network Rules, 70 Law & Contemp. Pros. 51 (2007).
\textsuperscript{87}In a recent study, prepared for the European Commission, and perhaps a bit futuristically, 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. Oxford Internet Institute, supra note 79, at 29-35.
\textsuperscript{88}UNESCO Convention, art. 4(1) (“the manifold ways in which the cultures of groups and societies find expression”).
\textsuperscript{89}As the China–Publications and Audiovisual Products case (supra note 19) shows.
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”.

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 will 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 than ever before to people, due to indefinite digital stores of data in the cloud, ubiquitous broadband, new search technologies and access through multiple devices, is grand, it comes with certain challenges attached. 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 commercialization unfold. In this sense, a rush of untargeted efforts, as a plain act of innovation by government bureaucracies, 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.

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91 Leadbeater, supra note 82, at 36.
92 See Cohen, supra note 64, 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).
93 Quiggin & Hunter, supra note 50, at 240-1.
Multidisciplinary research that could deliver coherent and meaningful messages has an important role to play as promoting cultural diversity in cyberspace mobilizes a broad array of technology and social sciences.94

94 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.