

# Diversity of cultural expressions in the digital era

# Lilian Richieri Hanania

Anne-Thida Norodom  
(editors)



# **DIVERSITY OF CULTURAL EXPRESSIONS IN THE DIGITAL ERA**

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Directed and edited by Lilian Richieri  
Hanania and Anne-Thida Norodom



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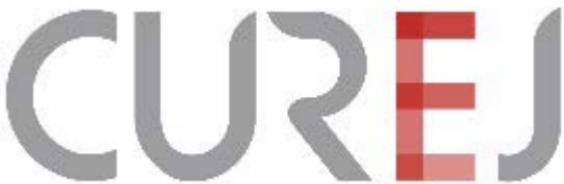
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## Mini-Biographies of the Editors

**Lilian Richieri Hanania** is an attorney (admitted to the Bar in Brazil and France), PhD in International Law from the University Paris 1 – Panthéon-Sorbonne, Collaborator at the *Centro de Estudos Sociedade e Tecnologia* (CEST – University of São Paulo – USP, Brazil) and Associate Researcher at the IREDIES (*Institut de recherche en droit international et européen de la Sorbonne*, University Paris 1 – Panthéon-Sorbonne, France) and the CUREJ (*Centre universitaire rouennais d'études juridiques*, University of Rouen, France). She graduated from the Law School of the University of São Paulo (USP – Brazil) in 2001. She obtained a Master's Degree in International Economic Law in 2003 and a PhD in International Law in 2007 at the University Paris 1. Her PhD thesis and recent publications and lectures address International Economic Law, International Cultural Law and Sustainable Development, with an emphasis on the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Besides her activity as a consultant since 2003, she worked in law firms in São Paulo, Paris and Houston (TX, USA) and as legal counsel in a global technology firm. She taught International Law and International Relations at the University Paris 1 for four years and worked at the International Economic Affairs Division of the French Ministry of Foreign and European Affairs for three years. She is also one of the first members of the RIJDEC (*Réseau international de juristes pour la diversité des expressions culturelles*), an international network of lawyers founded at the Law School of Laval University in Québec, and has been actively contributing to the work provided by the network on the 2005 Convention on the Diversity of Cultural Expressions.

**Anne-Thida Norodom** is a Professor of Public Law at the University of Rouen, with her teachings there centring essentially on International Law. She also offers a seminar on the U.N. System as part of the Master 2 in International Relations at the University Paris 2 – Panthéon-Assas, as well as a lecture on International Public Service Law at the University Paris Descartes. She is co-director of the CUREJ, Headmaster of the Master 2 in Advanced Public Law at the University of Rouen and the Secretary-General of the French Society of International Law. A graduate of *Ecole Normale Supérieure* (in the Law-Economy-Management department), she holds a Master's Degree in International Organisations Law from the University Paris 1 – Panthéon-Sorbonne and an *agrégation* in Economy, with a specialisation in Administrative Management. Following on the doctoral thesis she submitted at the University Paris 1 (2009), her research work has led her to focus on the United Nations Organisation and more generally International Organisations Law. Since 2010, her research field also extends to, and is today mainly centred on, International Law issues related to the Internet (global governance, data protection, the protection of culture, digital sovereignty), which have been the subject of a publication she edited, and of several articles she published in peer-review journals, while contributing to collective publications and rendering expertise services to various public institutions.

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# **Introduction – Diversity of Cultural Expressions in the Digital Era**

*(Original in French)*

LILIAN RICHIERI HANANIA & ANNE-THIDA NORODOM<sup>1</sup>

## **I – The 2005 UNESCO Convention on the Diversity of Cultural Expressions and Digital Technologies**

Adopted on October 20, 2005, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) (in this volume: Vlassis & Richieri Hanania, V.1, text 19) constitutes a normative framework for cultural measures and policies, and for international cultural cooperation. It relates to the governance of the cultural industries and of the exchanges of cultural goods and services. In effect since March 2007, it has already been ratified by 144 Parties, including the European Union, which testifies to the importance of the matters it deals with.

Although its object goes beyond the “trade and/versus culture” debate, this particular issue has been central to the impulse that led to the negotiation and adoption of the Convention, since trade agreements can restrict the policy space enjoyed by States in terms of cultural policy. In brief, trade liberalisation can lead States to commit to non-discriminating against products and services similar to national products and services (obligation of national

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<sup>1</sup> The editors warmly thank Olivier Millot for his comments on a previous version of this introduction.

treatment), as well as between foreign products and services, for a State cannot give preferential treatment to a partner to the detriment of another (most favoured nation clause). This logic applies at the multilateral level (WTO Agreements) but also in the context of regional and bilateral trade agreements. Indeed, from a strictly legal perspective, there is no such thing as “cultural exception” within WTO Agreements and the latter can have multiple effects on trade in cultural goods and services (see, for example, Richieri Hanania 2009 and, in this volume: Richieri Hanania, V.2, text 20).

Regarding goods and services electronically supplied or connected to information and communication technologies, the WTO rules and those contained in the agreements signed in the past few years by the European Union presently seem more concerned with the diversity of cultural expressions than the agreements concluded with the United States (in this volume: Richieri Hanania, V.6, text 23) (RIJDEC 2015). In the agreements negotiated with the United States, a new “digital products” *sui generis* category was created so as to reinforce the parties’ non-discrimination obligations. Within the WTO, the regulatory framework most directly applicable to the digital environment is composed of the Information Technology Agreement (ITA) (in this volume: Neuwirth, V.3, text 21), commitments related to e-commerce (the essence of which laying notably in the obligation for the Members not to apply custom fees to electronic transactions<sup>2</sup>) and commitments related to services, on the part of each Member, adopted as

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<sup>2</sup> There is a Work Programme on Electronic Commerce within the WTO, established in 1998 by the General Council of the organisation (OMC 2016). The Programme is addressed by WTO Members within councils related to the commerce of goods, of services, to intellectual property, and trade and development. Some of the themes discussed include the classification of the content of electronic transmissions, the fiscal impact of electronic commerce, the participation of developing countries to electronic commerce and its effects, as well as the imposition of custom fees on electronic transmissions.

part of the General Agreement on Trade in Services (GATS), inasmuch as they cover the electronic supply of services. As to the trade agreements negotiated by the European Union, they also grant some flexibility to the commercial partners involved, by promoting cooperation within different themes and policies related to e-commerce, while excluding audio-visual services (whether analogue or digital) from non-discrimination commitments adopted by the parties within those agreements.

Because it is technologically neutral, the CDCE offers States political and symbolical support, so a specific legal treatment may be granted to cultural goods and services in trade agreements, regardless of their analogue or digital nature (in this volume: Rogard, chapter 17, text 10). Indeed, the CDCE reaffirms the legitimacy of national cultural measures and policies, which stems from the specificity of cultural goods and services, itself a product of the double, cultural and economic dimension, of these goods and services. By relying on the CDCE when negotiating trade agreements and if they have the political will to do so, the Parties to the Convention can refuse to liberalise cultural sectors in which they wish to maintain their policy space and adopt the cultural policies best adapted to their economic, cultural, political and social circumstances. In the context of the new technologies, maintaining such freedom seems all the more essential as the evolution of the market of digital cultural contents is extremely dynamic, which calls for a fast and flexible intervention from States to respond to the challenges to cultural diversity.

With a view to more balanced and diversified exchanges of cultural goods and services, the States' intervention at the national level, through public policies, must be complemented by international cooperation actions. This is the second large component addressed by the CDCE, with particular focus on the contribution of cultural diversity to sustainable development. Following on the studies and reports produced by UNESCO in the last

few decades with respect to culture and development and reiterating the fundamental role of culture in sustainable development (article 13 of CDCE), the CDCE has been a cornerstone of the efforts aimed at integrating cultural issues within the 2015 Objectives of the United Nations for Sustainable Development (United Nations Sustainable Development Goals (SDGs)) (United Nations 2015). These concerns appear particularly in paragraphs 8<sup>3</sup> and 36<sup>4</sup> of the SDG Declaration, and in Objectives 4.5, 4.7, 8.9, 11.4 et 12.b. The clear link established by the CDCE with the concept of sustainable development – a concept which, since its origins, aims at coordinating distinct or even opposite legal themes and systems – invites a global, integrative and open perspective on its object, able to shed light on the complexity of the questions it raises, in terms of topics as much as actors and action levels affected – ranging from the local to the national, regional and international levels. Indeed, the Convention covers, due to the complexity of its object, a wide array of topics, issues and objectives, which are often dealt with by varied actors and international organisations. Faced with the impression of fragmentation of law and the national and international fora concerned, the CDCE calls for greater coordination and coherence, as these two elements are essential to its useful and effective implementation (Richieri Hanania 2014).

The Convention thus adopts a systemic vision, taking into account numerous topics and issues tangled together (Richieri Hanania 2009; Richieri Hanania 2014: 299-305). With such a perspective, the CDCE makes it possible to

<sup>3</sup> “We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity (...).”

<sup>4</sup> “We pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility. We acknowledge the natural and cultural diversity of the world and recognize that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.”

respond adequately to the complex reality of the creative economy, characterised as it is by new technologies, innovation, but also paradoxes and oxymoronic concepts (in this volume: Neuwirth, chapter 8, text 3). Its implementation demands, first of all, greater coordination and coherence between the different bodies where these issues are debated, at the national as well as international level. Thus, international organisations, while acting in their respective domains of specialised competence, must work together, developing networks and joint actions (in this volume: Vlassis, chapter 24, text 13). The Parties to the CDCE must also confer more with each other, so as to ensure an adequate articulation between the principles and objectives of the Convention and other domains directly or indirectly connected to the international governance of the cultural goods and services sector. At the national level, government representatives must also ensure the coherence of the States' positions as defined in these various areas, which increasingly go beyond the traditional cultural field within the creative economy (Richieri Hanania 2015a; Richieri Hanania 2015b; RIJDEC 2015). The reaffirmation of culture as a fundamental part of the concept of sustainable development reinforces the necessity for articulating and bringing together different domains and requires that the adoption of public policies and their adaptation to the digital era by the Parties to the CDCE occur by weaving connections and bridges between the different fields of action. Educational policies offer a striking illustration of this (in this volume: Carbó & Maceiras, chapter 35, text 16).

The complexity of topics and actors facing the CDCE seems to have increased in the context of new technologies (in this volume: Ranaivoson, chapter 16, text 9), due among other things to the speed and magnitude of the changes undergone by the latter (in this volume: Schwartz, chapter 6, text 2), as well as to the difficulty involved in understanding this new reality (in this volume: Marenghi, Hernández & Badillo, chapter 14, text 7) before any action or reaction

aiming at the diversity of cultural expressions. The whole value chain of the cultural goods and services sector was impacted by digital technologies. The film (in this volume: Film Sector), music (in this volume: Assis, chapter 5, text 1) and book sectors (in this volume: Book Sector) offer the most striking examples of the extremely dynamic evolution of the market. Nevertheless, the other cultural sectors, such as those of performance arts or museums, are also transforming with digital technologies. It is a shifting process which, while not entirely controllable, requires adequate public policies that are reactive but also capable of guiding the transformations affecting the market towards diversity (in this volume: Burri, chapter 15, text 8). Now more than ever, legislators and political deciders must show creativity (in this volume: Neuwirth, chapter 8, text 3) and adopt a prospective approach, turned to the future, open to forthcoming changes while also vigilant and faithful to the objectives followed thus far in terms of public policy.

Since digital technologies touch all aspects of contemporary life and escape national borders, it is becoming increasingly necessary to act on different fields, with the collaboration of other countries and the contribution of all stakeholders, bringing their expert understanding in their respective competence field. This is all the more important as the potential of the creative economy in terms of economic growth, and in building tolerant, pacific societies that are respectful of diversity, is immense. All the actors of the digital content market must be involved and called to make a contribution. All the international organisations working in the field of culture, digital technologies, but also more generally of sustainable development, must work together. Finally, the civil society must be widely mobilised (in this volume: Vallerand, chapter 21, text 12), both by concrete projects in favour of cultural diversity and by its monitoring and coordination action at the national and international levels.

The efforts undertaken within UNESCO in order to implement the CDCE brought about awareness of the various challenges, obstacles, threats and opportunities that new, and digital technologies in particular, constitute for the cultural industries and for the diversity of cultural expressions. The 2005 Convention Secretariat is currently setting up operational guidelines that deal specifically with the digital issue (in this volume: Rioux & Fontaine-Skronski, chapter 20, text 11), so as to impel the Parties to the Convention and civil society to effective actions. This publication aims to contribute to this task, by providing food for thought as well as concrete proposals.

## II – Objectives and content of the publication

Fruit of the cooperation between Lilian Richieri Hanania (see mini-biography) (CEST / University of São Paulo (USP), Brazil) and Anne-Thida Norodom (see mini-biography) (CUREJ / University of Rouen, France), this publication aims at contributing to the understanding of the diversity of cultural expressions in the digital era and to the reflection on the most appropriate measures and policies needed to respond to the challenges and opportunities related to this theme.

It contains theoretical studies, opinion documents, case studies and accounts of several projects and practical initiatives which, based on various disciplines (law, economy, political and social sciences, journalism, information technologies, engineering)<sup>5</sup>, demonstrate how new technologies can be used to protect and promote the diversity of

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<sup>5</sup> See also, for a study on the effectiveness of the CDCE presenting analyses from various disciplines and practices, Richieri Hanania (2014).

cultural expressions. A trilingual multidisciplinary publication (French, English and Portuguese), it also aims at contributing to online linguistic diversity.

It first presents some texts that were selected by the editors after a call for proposals on a large spectrum of topics, covering: the context of creative economy, as well as the challenges and opportunities brought by digital technologies to the diversity of cultural expressions; the State regulation framework of the cultural market in the digital age (initiatives and policies aiming at diversity, from the viewpoint of intellectual property, education, sustainable development, etc.); the contribution of non-State actors to the diversity of cultural expressions online (role of civil society and concrete projects leading to a diversification of the offer of digital contents); and international action and cooperation related to the diversity of cultural expressions on the Internet, including the role of international organisations and their joint action in favour of online diversity.

The selected texts are available in English, French and Portuguese, thanks to the financial support of our partners (see Partners), which enabled us to order the necessary translations. It should be noted that the reference lists at the end of each text were not translated but instead kept in the same language as the original text. The original language of each text was indicated in each translated version. As to the quotes contained in the texts, wherever an official version existed in the target language, it was used in priority. When this was not the case, we offer a free translation, produced by our translation services. The authors have read the translated texts but naturally only take responsibility for the original versions submitted to them. Despite the efforts they have put in reviewing the texts, should any imprecisions or misinterpretations remain, the editors take responsibility for them and shall be grateful for any comment or suggestion readers may wish to send them at the email address [CDEC\\_et\\_numerique@yahoo.com](mailto:CDEC_et_numerique@yahoo.com).

Moreover, the publication contains videos by international experts, selected during three conferences that took place in São Paulo (Brazil) and Rouen (France):

- I Conference on Cultural Diversity and New Technologies organised in São Paulo by the CEST/USP on July 2, 2015 (see programme, text 24) (see report, text 25);
- Rouen Symposium (CUREJ/University of Rouen) on the Implementation of the UNESCO Convention in the Digital Age on December 11, 2015 (see programme and report, text in French, text 26);
- II Conference on Cultural Diversity and New Technologies organised in São Paulo by the CEST/USP on May 19, 2016 (see programme and report, text 27).

The selected videos are only available in one language each, but the editing work performed enabled an optimal improvement of their sound quality, so that some of them at least may be used with the automatic subtitle function resulting from YouTube voice recognition technology. It should however be noted that not all videos issued from the three conferences were edited, but that additional funding in the future might enable us to enrich this publication even further. As a matter of fact, we have opted for a multimedia publication not only to ensure its coherence with the theme (digital technologies), but also to be able to enrich it regularly with new written contributions, videos and comments, best reflecting digital reality and able to adapt to its fast paced evolution.

With this reality being so difficult to comprehend, setting up policies and adopting appropriate actions is problematical and this publication aims at offering an analysis which is better adapted to the complexity of the theme, able to go beyond the fragmentation of the different fields of study and to take into account specificities, priorities and national and local circumstances, while presenting a vision of what the diversity of cultural expressions covers in the

digital age that is integrative, systemic and open to its context and to the future. Complex thinking, as advocated by Edgar Morin since 1970, seems particularly well suited to such an analysis: multidimensional thinking which accepts incompleteness and ambiguity of every piece of knowledge, but nevertheless attempts to unite what is diverse, to turn antagonisms complementary, to bring together empirical and rational experiences (Morin 2005: 11-12). Interculturality, the cultural dialogue, cultural exchanges, tolerance of cultural differences... all these require an integrated diversity, paradoxically conceived both in human unity and diversity and which cannot be understood without its different contexts and the interactions occurring in them.

Redesigning cultural policies within a digital strategy requires going beyond simplifications and polarisations. There is no one solution nor a model to follow. Successful projects and best practices are only useful inasmuch as they can be replicated appropriately to conditions and contexts that are at once specific and changing. As highlighted by Edgar Morin, complexity "is not only quantities of units and interactions that defy our possible calculation; it is also made up of uncertainty, indetermination and random phenomena" (Morin 2005: 48-49). In order to integrate chance while acting within the creative economy in favour of diversity, it is necessary to resort to the inventiveness and creativity that lay at the core of this concept. Rigid programmes must make way to strategies, understood as permitting, "from an initial decision, to envisage a certain number of scenarios of action, scenarios that can be modified according to information arriving in the action and according to chance occurrences that will occur and disrupt the action" (Morin 2005: 106).

Thus, and as argued still by Edgar Morin, "political strategy (...) requires complex knowing, because strategy plays itself out by working with and against uncertainty, chance, the multiple play of interactions and retroactions" (Morin 2005: 21). Technological evolution reinforces

further these uncertainties and chance occurrences. In the cultural field, this calls for taking into account the complexity of objects and actors involved in any political decision linked to the governance of the cultural industries and refers, ultimately, to “the impossibility to homogenise and reduce” (Morin 2005: 141). Thinking diversity in the face of new technologies must integrate this complexity. Regulating the cultural industries in the digital age involves considering, in their individuality as much as in their association, the different political fields and the various branches of law that may impact, directly or indirectly, the operation of these industries, such as, to name just a few examples, international trade law, intellectual property (in this volume: Kauark & Cruz, chapter 10, text 4), competition law, human rights, corporate law, tax law (in this volume: Carvalho & Makiuchi, chapter 12, text 5), contract law (in this volume: Martin, chapter 13, text 6) or the governance of the Internet. The CDCE seems particularly suited to this type of exercise. It offers a systemic and integrative vision of the exchanges of cultural goods and services and of the governance of the cultural industries (Richieri Hanania 2014: 299 et s.; Richieri Hanania 2015a; Richieri Hanania 2015b), based on the incessant articulation between themes that are often dealt with separately (trade, culture, development, international cooperation, creative economy, among others). Such a systemic approach, in which the system must necessarily stay open and in continuous relationship with its ecosystem (Morin 2005: 31-33), calls for transdisciplinarity, for taking both unity and differences into account, as well as complexities in the articulation and association between the various aspects it covers.

While it does naturally not claim to cover exhaustively all the fields linked to the diversity of cultural expressions in the digital era, this publication attempts to organise and articulate the written contributions and videos selected so they may be best exploited to improve the reflection on this theme. The first part deals with the topic of challenges

and opportunities related to digital technologies for the diversity of cultural expressions (Part I), offering various visions focused on multiples aspects of the impact of new technologies on the cultural sector. It leads to a second part that deals with the integration of digital technologies in the development and adoption of cultural policies within the reality of new technologies and the creative economy (Part II). Within Part I, the texts and videos selected focus first on the market of cultural goods and services in the digital age (I.A), before turning to the theme of adapting law and policies to digital technologies (I.B). Then, in Part II, the focus lays first on measuring cultural diversity within the digital context (II.A), which constitutes the premise for a second sub-part on promoting diversity through the implementation of the CDCE (II.B). This second sub-part is focused on the CDCE and its implementation within the digital environment.

Finally, Part III contains concrete initiatives and projects that integrate digital technologies so as to foster diversity. All these contributions, be they available in text or video format, are also categorised by sector (film, music and book sector) and author. Several supplementary texts and interviews (Part IV and V) also add interesting analyses that can help better understand the complexity involved in the CDCE.

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# **Contents**

## **I – Challenges and Opportunities for the Diversity of Cultural Expressions in the Digital Era**

### **A – The Market of Cultural Goods and Services in the Digital Era**

1. Octavio Kulesz – Challenges and Opportunities for Cultural Diversity in the Digital Era (video in English)
2. Rostam J. Neuwirth – Creative Economy, Technological Convergence and Diversity (video in French)
3. Yvon Thiec – Cultural Diversity and Digital Technologies: An Evolution of Human Rights? (video in French)
4. Luis Ferrão – Strengthening Creative Industries with New Technologies (video in French)
5. Paulo Assis – A Brief Overview of the Evolution of Musical Technology: Promises and Risks for the Diversity of Cultural Expressions (text 1)
6. Gilson Schwartz – Economy, Cultural Diversity, and Ludic Monetization on the Internet of Things (text 2)

### **B – Law and Policies in the Digital Era**

1. Anne-Thida Norodom – The Stakes of Digital Technologies and International Law (video in French)
2. Rostam J. Neuwirth – The UNESCO Convention and Future Technologies: A Journey to the Centre of Cultural Law and Policymaking (text 3)

3. Daniel Alvarez Valenzuela – How to Reconcile the Protection of Authors' Rights with Access to Diversity (video in Spanish)
4. Giuliana Kauark & Paula Cruz – Remarks on the Relations between Intellectual Property and Cultural Diversity in Brazil's Digital Environment: An Analysis of the Civil Framework of the Internet (text 4)
5. Rémi Gimazane – The Adaptation of Support Policies to the Digital Book Market in France (video in French)
6. Leandro de Carvalho & Maria de Fátima Rodrigues Makiuchi – The Music PEC: An Analysis of the Law-makers' Position: Tax Waiver to the Benefit of Access to Culture or Market Reserve? (text 5)
7. Justine Martin – The Digital Book and Cultural Diversity: Stakes and Perspectives (text 6)

## II – Integrating Digital Technologies in Cultural Policies

### A – Evaluating the Diversity of Cultural Expressions Online

1. Patricia Marenghi, Marina Hernández Prieto & Ángel Badillo – Diversity of the Audio-visual Industry in the Digital Age: The Challenges Entailed in its Measurement (text 7)
2. Mira Burri – Exposure diversity as a new cultural policy objective in the digital age (text 8)
3. Heritiana Ranaivoson – The Internet platforms' impact on the Diversity of Cultural Expressions: to the Long Tail, and beyond! (text 9)

## B – Promoting Online Diversity through the Implementation of the CDCE

1. Pascal Rogard – Is Cultural Diversity Adapted to the Digital Era? (text 10)
2. Lilian Richieri Hanania – The Convention and the Opportunities and Challenges to its Application Brought about by the New Technologies (video in Portuguese)
3. Lilian Richieri Hanania – Digital Technologies in the CDCE (video in French)
4. Michèle Rioux & Kim Fontaine-Skronski – Transversal Operational Guidelines as a Road towards a Diversified Networked Culture (text 11)
5. Charles Vallerand – Will Digitisation Help Remobilise Civil Society? (text 12)
6. Pascal Rogard – The CDCE Implementation, Internet and Authors' Rights (video in French)
7. Antonios Vlassis – Cooperation between International Organisations for the Implementation of the CDCE in the Digital Age (video in French)
8. Antonios Vlassis – Inter-organizational networking in the digital age: Lessons from international organizations' purposes and practices in the cultural sector (text 13)
9. Toussaint Tiendrébéogo – The promotion of the CDCE in the Digital Era by the International Organisation of La Francophonie (video in French)
10. Charles Vallerand – The Role of Civil Society in the Promotion of the Convention in the Digital Age (video in French)

### III – Initiatives

1. Gabriela Agustini – “Makerspace” Project (video in Portuguese)
2. Luis Mauch – “More Differences” Project (video in Portuguese)
3. Vincent Carelli – “Video in Indigenous Villages” Project (video in Portuguese)
4. Paule Maillet – “My French Film Festival” (video in Portuguese)
5. Giselle Dupin – Challenges and Opportunities of the New Technologies for Democracy: The Example of the *Pontos de cultura* and the Facebook vs. MinC Case (video in Portuguese)
6. Cristiano Ferri – Hacker Laboratory in Brazil’s Chamber of Deputies (video in Portuguese)
7. Nílio Teixeira – The Contribution from the Music Collection of *Instituto Moreira Sales* Site to Diversity. A Case Study: Brazilian Christmas Carols (text 14)
8. Luis A. Albornoz & Azahara Cañedo – The Audio-visual Technology Hub Programme and TV Diversity in Argentina (text 15)
9. Gemma Carbó Ribugent & Guillermo Maceiras Gómez – Educational policies and the diversity of cultural expressions in the digital era (text 16)

### IV – Interviews

1. Interview with Luis Ferrão (text in French, text 17)
2. Interview with Rémi Gimazane (video in French)
3. Interview with Rostam J. Neuwirth (video in English)
4. Interview with Lilian Richieri Hanania – Cultural Diversity Online. Between UNESCO, TTIP and net giants (“Kulturelle Vielfalt Online. Im Spannungsfeld zwischen UNESCO, TTIP und Netzgiganten –

Interview mit Lilian Richieri Hanania”, in Österreichische UNESCO-Kommission, Jahrbuch 2015/Annual Report 2015, Agnes & Ketterl GmbH, Mauerbach/Vienna, ISBN: 978-3-902379-03-0) (original text in English; also available in Portuguese, text 18)

5. Interview with Pascal Rogard (video in French)
6. Interview with Yvon Thiec (video in French)
7. Interview with Toussaint Tiendrébéogo (video in French)
8. Interview with Charles Vallerand (video in French)
9. Interview with Antonios Vlassis (video in French)

## V – Additional Material

1. Antonios Vlassis & Lilian Richieri Hanania – Convention on the Protection and Promotion of the Diversity of Cultural Expressions (text in English, text 19)
2. Lilian Richieri Hanania – Table “WTO Rules and the Sector of Cultural Goods and Services” (text in French, text 20)
3. Rostam J. Neuwirth – The Information Technology Agreement (ITA) (text in English, text 21)
4. Lilian Richieri Hanania – Diversity of Cultural Expressions and New Technologies, CEST (original text in Portuguese; also available in English)
5. Luis A. Albornoz – The Audio-visual Industry on the Internet: homogenisation or cultural diversity? (PowerPoint in Portuguese, text 22)
6. Lilian Richieri Hanania – Excerpt of the RIJDEC Report “The Renewal of Cultural Exception in the Digital Era”, presented in Mons, Belgium, at the “International Conference in Celebration of the 10th Anniversary of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions” on October 25, 2015 (text in French, text 23).

7. Report of the First Conference on Cultural Diversity and New Technologies, organised on July 2, 2015 in São Paulo by the CEST/USP (original text in Portuguese; also available in English, texts 24 and 25)
8. Report of the Conference “Cultural Diversity and Digital Technologies: How to Promote the Implementation of the UNESCO Convention on the Diversity of Cultural Expressions, Ten Years after its Adoption”, organised on December 11, 2015 in Rouen by the CUREJ (text in French, text 26)
9. Report of the Second Conference on Cultural Diversity and New Technologies, organised on May 19, 2016 in São Paulo by the CEST/USP (text in Portuguese and in English, text 27)

# Main Text



# 1

## A Brief Overview of the Evolution of Musical Technology: Promises and Risks for the Diversity of Cultural Expressions

*(Original in Portuguese)*

**PAULO ASSIS<sup>1</sup>**

Music and mankind have always existed side by side. In archaeological sites dated from the Palaeolithic era of over 40 thousand years of age, rudimentary forms of flute can be found. Music, which is among man's first cultural expressions, appeared before agriculture or writing and is present in all societies on the planet in different formats and social functions, to follow a religious ritual or simply to break a lonely worker's silence.

We will recall in a very simplified way some of the recording technologies developed in the last 120 years, and how they have influenced the creation of new musical forms. We will also see how the most recent advances have modified creative possibilities, and how industry's mass-produced music affects diversity.

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Until not so long ago, hearing music required the presence of performing musicians. Percussionists accompanied armies marching for the Roman Empire, and in southern USA cotton fields, workers would take turns in slave chants. Throughout history, expansion wars, commercial routes, and religious impositions opened paths for cultural exchanges of all kinds, including musical.

While some automatic instruments, such as player pianos and music boxes, appeared in history, they did not replace *de facto* the musician as the central element – be it a lonely housewife singing or a professional hired to liven up a royal court dinner. The way mankind experiences music started to change after the radio and the record were invented, since they made it possible to distribute and listen to pre-recorded sounds.

## I – The analogic sound

### A – The wax cylinder, shellac and the radio

By the end of the 19th century, people had access to some rudimentary audio recording technologies. One of the most popular pieces of equipment of this time was Tomas Edison's phonograph, introduced in 1877. The phonograph had an acoustic cone with a needle on the tip that scratched a moving wax cylinder. The sound was played back by a mechanical process, in which the grooves on the cylinder caused a needle to vibrate and this vibration was amplified by the acoustic cone. Other similar technologies appeared in the same period, such as gramophones shellac records.

And then comes the cylinder and record business. The reproduction quality of these first models is quite limited, and, initially, their recommended use is the recording of monologues and famous speeches. Recording on these pieces of equipment was a delicate task, requiring that performance take place close to the sound-pickup cone,

and the result was not always very good. The recording quality and sound clarity were important selling points for the cylinder manufacturers: one of the main features they would advertise was their artists' diction (Cummings 2013: 16).

Soon, songs start getting included on this media – but not without many technical difficulties. The acoustic cone had poor sensitivity and was able to pick up only the loudest sounds. To balance the volume of the different instruments, it was necessary, during the recording sessions, to place them around the cone according to how loud they were. The louder the instrument, the further they were. To change the importance of the instruments during the recording the musicians were placed on moving platforms while playing – when it was time for a trumpet solo, the singer had to get out of the way and let the horn come closer in a complicated choreography. The wax recording was a finished piece of work. It was not possible to correct a faulty performance afterwards (Byrne 2012: 81).

Some devices initially sold to the public were more than mere record players, for they could scratch new cylinders, enabling home-made recordings. However, manufacturers soon realized that it would be a lot more lucrative if users could solely listen to what they bought from them. That resulted in a strategy directed to promote music consumption through mass produced cylinders (Byrne 2012: 84).

At the beginning of the following century, a new generation of inventions, based on electric power, changed the access to music again. The development of microphone technology and the discovery of electromagnetic waves made radio popular as a music-and-news broadcasting system in the 1920s. Radio could be listened to by anyone who had a receiver at home, and interestingly enough, it was still based on real-time musical performance inside the broadcasting studio. The sound quality of a live transmission was,

at that time, far superior to that achieved by wax and shellac recording equipment, which created a whole generation of radio musicians.

### B – The magnetic tape, vinyl, and the music industry

Among the technologies developed by the Germans during World War II is the audio recording on magnetic tape. Though some experiments had already taken place in the United States in that particular field, the Nazi had developed such good equipment that people were in doubt whether they were listening to recorded performances or live playing orchestras (Moormann 2003). When the war was over, the technology was studied by the Americans and the first magnetic tape recorder was released in 1948. Broadcasting radios started to use this equipment, expanding its broadcasting possibilities – the live musicians' constant presence was no longer necessary, and the recording studio was born.

Still in 1948, vinyl hits the market. Immediately, it is adopted by the consumers as their preferred medium for sound reproduction. Innumerable sizes and speeds of vinyl records were marketed, changing and evolving along with technology and commercial interests. The first records were 7-inch discs and should be played at 78 rpm's, which provided less than four minutes per side, leading to the single compact format with one piece of music on each side and within this duration margin (Byrne 2012: 92). Moreover, vinyl grooves imposed some serious volume restrictions on bass frequencies, for they caused needle jumps if they were too loud. The form and sound of pop and rock music that we've known through the years was strongly influenced by these limitations.

People soon became accustomed to the idea of acquiring and listening to music on records, and they voraciously started buying this new product. The recording and distribution process, however, lay in the hands of a new kind of

company that, structuring the musical industry, controlled the production and consumption cycles during the second half of the 20th century: the record company.

### C –The studios and their technology

Recording studios were important tools of this new industry. They were acoustically treated places where, in a complex and costly process, experts would place microphones in front of the musicians. The audio picked-up fed several pieces of equipment, such as pre-amplifiers, compressors, equalizers, soundboards, and recording machines. During approximately four decades, the only way to record music professionally was to use one of these spaces, paying a large sum of money. Additionally, the whole procedure was surrounded by secrets. Each studio had unique methods and equipment, creating sounds with their own personality. The producers' ingenuity in overcoming technical limitations and solving problems that appeared in each project resulted in new techniques that expanded the horizons of recorded music and instigated other producers to search for even better solutions (Heylin 2012: 32).

In 1957, American guitar player Les Paul modified a magnetic tape recorder to create the first multiple-layer recorder, making it possible to add new instruments onto the same tape roll, playing one by one. As there was only one recording track, a recording mistake would ruin the former work and the whole process would have to be restarted (Moermann 2003).

The improvement of this technology is the multitrack recorder, in which different areas of the magnetic tape are designated to independent tracks, and they can be recorded or deleted without altering the others. Today, with a computer, a studio can record hundreds of independent tracks, but such evolution was very slow. All the records from the beginning of The Beatles' career to Sgt. Pepper's Lonely Hearts Club Band, in 1967, were recorded using

only four tracks of a magnetic tape (Lewsohn 1988: 146). When it was necessary to insert more instruments, two or three tracks were united in one, freeing space, but also preventing further alterations of previous recordings. In the following decade, the tapes evolved to eight, sixteen, and up to twenty-four tracks.

Another essential piece of equipment in a studio is the soundboard, responsible for organizing the audio tracks in the recording session. The soundboards evolved along recording machines, keeping up with the increasing number of tracks. There are models with hundreds of channels, each one with a dozen control knobs and sliders, housed in cabinets that can exceed three meters long (such equipment can be very intimidating for lay people). A magnetic tape track is attributed to each channel of the soundboard with independent controls. Thus, it is possible to manipulate the sound of each channel before and after picking it up, allowing for adjustments in sound volume and equalization, reverberation, or compression. Such adjustments are part of the mixing.

During mixing, these adjustments are done in each channel so that the instruments recorded separately may sound cohesive when played together. The sounds are normally mixed for stereo, with two channels – left and right. This is the common format for CDs, vinyl records, and music digital files.

There is more to a studio than just acoustic treatment, recording machine, and soundboard. Each kind of audio processing is made by a specific piece of equipment, of a size varying from a remote control to a refrigerator. The main difference between recording studios used to be the equipment they had; having a lot of equalizers or compressors meant having more mixing possibilities, and a higher cost as well. Ultimately, the use of more refined production tools was restricted to those who had access to professional studios, and only those who already controlled the market were able to accomplish greater musical projects.

## II – The Commercial Sound

Since the beginning, the record companies created a closed system for their business. Composers were paid to write new musical pieces. These creations were recorded at the company's own studio by a hired artist, who was made popular thanks to the radio, boosted sales and generated huge profits for his employer. Frank Sinatra was the first artist to have some control over his career. Being more than just a very famous employee, he was able to impose his will during recording sessions as well (Gibney 2105). In the following decades, the singer-composer and rock bands who wrote their own material started to show up on the scene.

However, the whole process was very costly and risky, businesswise. Besides the recording itself, there were costs involved with record manufacture, distribution, marketing and the absorption of losses of unsuccessful projects. The massive success of some artists ultimately generated capital for investments in other projects, allowing the development of new talents. Many of the 1970s most successful rock bands, such as *Queen* or *Yes*, were financed by a record company or a producer for years before they became lucrative. Independent artists always existed, but their sphere of influence was naturally smaller. To make their music cross the planet and influence other cultures, it was necessary to be part of that closed circuit of contract, recording, marketing and massive sales – at least until technology made it possible for performers to exist outside this entire scheme. Punk bands are an early example of this approach, with their albums produced on cassette tape recorders and with very low studio resources.

At the beginning of the musical industry, the performers' material was released on compact singles, usually containing two songs, one on each side. Major careers, such as Elvis Presley's, were built upon singles' sales. The 12-inch record, released a little bit later, was initially used for anthologies and niches such as classical music. During

the 1960s, artists such as *The Beach Boys* and *The Beatles* started to use the bigger format as a means of expression through a cohesive set of songs, the so called “concept albums” (Heylin 2102: 8). After them, pop and rock music started using the album as their main product, with a less artistic motivation: a long play record was sold to the final consumer for a price five times higher than the single.

With this growing economic power, American and European record companies expand their scope throughout the capitalist world, and between the 1950s and 1990s a growing sales unification takes place, with the most profitable products of each location being globally commercialized, and branches of the big record companies appearing everywhere. Cultural exchanges, which always existed, are intensified and directed towards this new force, the recorded music. Foreign sonorities start to strongly influence some local musical characteristics, which absorb them and generate a new language.

Initially, American (and British) music is distributed all over the world as a product and a cultural domination tool. When rock 'n' roll, for example, started to be played in Brazil, it led to the *tropicalista* movement, which adapted some foreign elements of pop music in a brazilianized way. This same movement, further on, would be added to the World Music category, that is, everything that does not originate from the countries where the record companies are originally established. World Music, in its turn, ultimately shapes the sonority of some American and British pop/rock artists in the 1980s and 1990s with Latin-American and African rhythms. Brazilian artist Gilberto Gil gets the *Mutantes* to play electric guitars on his record and two decades later David Byrne is accompanied by an orchestra of Latin musicians (Byrne 2012: 59).

Classical music was also used as a cultural imposition tool. Pieces by European composers from former centuries are brought back and disseminated, solidifying an entire

collective vocabulary of classical works – what is considered today as historically important music was in fact popularized by the radio, records, movies and television.

A musical score was, until recording emerged, information to be transmuted into sound by the musician with his interpretation. The memory of famous recordings now imposes an interpretation bias on new performances. Glenn Gould's interpretation of Bach, for example, exerts a strong influence on the pianists that play this repertoire. The audio recording is ultimately as important to the collective memory as the work of the composers themselves. The sonority of some instruments also changed due to recording: the vibrato technique – vibrating the finger on the string to obtain a soft variation of the frequency played – was considered just a tacky trick to disguise the inconsistencies of the notes played live. Fearing the eternal recording of their mistakes, musicians started to play more and more vibratos, and today it is just unthinkable to interpret classical music without such resource, which would make it sound flat, lifeless (Katz 2005: 85).

New technologies also generated new composition methods. Electroacoustic music, for example, emerges precisely from the use of equipment such as recording tape and electronic effects on conventional instruments.

### III – The Digital Sound

The capitalist world has been consuming a mix of global and local hits since the 1950s. At the end of the 1970s, however, the industry, concerned by the drop in vinyl records sales, had to reinvent itself. One of the main factors that saved record companies at that time was another technological innovation.

Up until 1982, storing and reproducing sounds was essentially made in an analogical manner, by physically printing audio through electromagnetic and mechanical means. In that year, a new technology, the compact disc (CD), introduces digitally represented information. During the 1980s and 1990s, the digital format multiplies industry profits due to decreasing reproduction costs and a booming market for pop music. Not only does the listener accept to pay more than twice as much for the new kind of media, but he ends up reacquiring his favourite albums in digital disc version as well (Hanks 2015).

A little before the CD was released, recording and manipulating audio was still also essentially analogic: magnetic tape, valves and transistors. Since the end of the 1970s, however, digital equipment gets increasingly more space in the studios: processors, board, and recording machines start to be converted to the new technology.

In the analogic studio the microphone converts the picked-up sound into an electric wave, which runs along wires and equipment. It is altered and manipulated by the soundboard, processors, and, finally, recorded onto a magnetic tape. In the digital world, sound is represented by a sequence of numbers that describe the sound wave behaviour. The audio processors are made from algorithms that operate mathematically to modify the sound.

The digital effects emerge with the first synthesizers of the same kind. Sampler, compressor and delay units start being used in the studios as technological novelties. Rooms used only to reproduce reverberation in recordings can be replaced by a small device that simulates their sound. In the place of fragile valves and circuits to alter the equalization of a channel, a chip programmed for such function is used. With the advance of these devices, studios slowly become homogenized and lose their capacity to differentiate themselves from competitors equipment-wise.

More and more powerful, computers start to play an increasingly active role in the recording process. In 1982, a recently released IBM PC-XT had the capacity to perform 20 mathematic operations per second. Thirty years later, a modern personal processor operates over one thousand times faster. This speed makes it possible to use complex algorithms that bring digital effects ever closer to analogic ones, with electronic copies of some famous classical equipment, formerly accessible only to big studios. While the use of a physical piece of equipment is limited to certain number of channels, its digital recreation can be used simultaneously an indefinite number of times for a fraction of the original price and without generating maintenance costs in rare valves or overheated transistors. Even typical hissings and noises can be simulated by the computer and turned off anytime, something impossible with the original equipment.

Support technologies in the studio were also adapted. The soundboard, central piece of an analogic configuration, was an extremely expensive and complex item, through which all channels went and were manipulated by buttons and controls, electrically managing the sounds coming from or directed to the magnetic tape. In the digital studio, the computer is the main tool, and the soundboard becomes a mere controller with its knobs and sliders simply sending digital instructions to the computer. The soundboard can become smaller, and even be considered obsolete, being replaced by a mouse and keyboard shortcuts.

The equipment that used to be almost inaccessible is becoming affordable to even non-professional musicians. Soundboards and magnetic tapes can be all replaced by a single personal computer. Microphones have dropped in price. Today, a big studio has become dispensable in some situations, and it is possible to record entire pieces of music with just a notebook.

Additionally, manipulating digital audio is extremely easy. To put together two recordings in a magnetic tape, it was necessary to find the slices of tape that one wanted to use, and, then, physically cut and glue the pieces. Now, with a computer program one can simply click and drag the digital audio and paste it on a new section without even destroying the original material. Besides, there is no physical degradation of the recorded material, which occurs each time a magnetic tape or a vinyl record is used. Inversions, synchronizations, all is done much faster than it was with the old methods.

Computer programs designed to create, record, edit, and mix music are becoming increasingly more efficient and able to replace physical equipment, and today most studios are using the computer as their main tool.

The same nostalgia that made consumers go back and buy vinyl records in the 21st century also creates situations in which equipment built before World War II survives within the most traditional studios. And there is still some controversy about the limitation of each kind of technology. A great part of studio recordings, today, is made digitally even though using analogic equipment at some point in the process (Grohl 2013). Only a few specific artistic experiments manage to carry out analogic projects from beginning to end. Other more daring projects even experiment with wax cylinders (Negovan 2011).

## IV – The Virtual Sound

The popularization of the Internet in the 1990s brought about the development of several technologies. Besides the entire communication interface – servers, modems, networks – optimized methods for transmitting information

through the Internet were created. JPG and GIF compressed image file formats became popular. And, before long, audio transfer solutions came up.

Mp3 is an algorithm that drastically changes the audio file size, reducing it to up to 8% of the original size. Much of this reduction only results from an intelligent way of describing the file content, but, depending on the parameters used, the files it generates have a much lower audio quality. In 1995, when such format became popular, such quality loss was, however, a lot less important for the listeners than the capacity of exchanging music online (Witt 2105: 16).

A few years after its beginnings, the Internet became the nightmare of record companies and artists that blamed the drop in CD sales on the beginning of digital piracy, not entirely without reason. In any case, record companies had started to lose their power for other reasons.

Besides piracy, for the first time, the Internet allowed information to be exchanged between consumers in different parts of the world, without an intermediary filtering this content. A Polish musician can now show his work directly to a listener located in Bolivia. And, in an unprecedented two-way path, the consumer can directly feedback the artist from a distance. Websites, blogs, and social media pages have completely changed the way an artist reaches his consumer.

This is also the case for music distribution channels. Before, for our hypothetical Polish artist's album to reach his Bolivian fan, it was necessary to physically reproduce the record somewhere in the world, transport it to the destination country and put it for sale in a shop. On top of that, the consumer had to be informed by some media such as the radio or billboards that a certain record could be of his interest and that it would be available for purchase in his city. Only then our Bolivian could listen to the record, and, if he chose to buy it, finally bear the cost of this entire chain.

All this becomes obsolete when the artist can tell his public directly by email that a new set of songs is available online. But it took more than a decade and many lawsuits for the industry to try reinventing itself and start selling, in addition to the obsolete physical media, electronic files by download, and, more recently, by subscription to music by streaming.

## V – The Present Sound

Information technology plays an essential role in updating studio technologies as well as music distribution and dissemination. The evolution of the studio also generates new tools and creation facilitators.

For a lonely composer, working on a piece of music with only one musical instrument is often insufficient. The computer can be very useful in the composition process. Today, technology can provide rhythmic and harmonic accompaniment in real time – virtual musicians almost. Instruments such as the bass, drums, and keyboards are available. Far beyond providing timbres, these programs *de facto* add factors to the composition, collaborating with the arrangement in a semiautomatic manner. The computer, equipped with ready to use sounds, opens space for the composer's creation.

It is important to note, however, that such freedom is limited by the equipment used. A piano can only play a western twelve-note scale per octave, and a virtual drum player can only play what has been previously programmed. Analogic tools allow some degree of customization, however limited; it is possible to use a piano as a percussion instrument or convert it into a reverberation unit, for example. However, it is much more complex to modify a software so it plays something that was not included in its

initial configuration. A software that suggests harmonies based on the user's melody cannot go beyond the factory parameters.

New technologies can also be used in very effective ways, becoming important sources of artistic innovation. Way back in the 1970s, musician and producer Brian Eno found a unique use for the magnetic tape recorder turning it into a musical device for pioneer sound experiments, developing what is now known as background and generative music, in which the interaction of a musician or a recording with an analogic algorithm (built with the recorder) generates indirect sound consequences (Scoates 2013: 110).

New interfaces also created other interaction possibilities: tablets, such as the iPad, allow for a series of different applications that facilitate music creation, in a totally new way, far removed from the studios' original logic. Presented almost as entertainment, they can suggest chords, musically accompanying the user and creating entire compositions by a few touches on the screen, as well as using cameras and gyroscopes as sound generators. More than three decades after using a tape recorder to distort a string quartet's performance, Brian Eno released a series of iPhone and iPad applications that generate harmonies, melodies, and rhythms from screen touches and movements of the device.

Some creative minds use computers as creation tools for new musical interfaces. Today, there are development platforms, such as Max and Arduino, which permit the creation of unprecedented effects, instruments, and sonorities. It is possible, for example, to use humidity sensors and online databanks to control virtual synthesizer parameters. The limitations finally go from the software creator's hands into the composer's, and also to the listener, thanks to software programs that allow complex interactions between the consumer and creative work.

## VI – The Sound of the Future

The creative crisis occurring in the arts is largely connected to the aversion to risk that is prevalent in times of financial crisis. The current movie industry is producing many independent, innovative, and low-cost productions that share the scene with blockbusters designed to yield profits, with a calculated bet on solutions already accepted by the public. In the music industry, the situation is quite similar. Record companies invest in well-known artists, or in new ones that fit their success model. Innovation happens in the low budget initiatives. The more successful ones wind up absorbed by the mainstream.

A quick look at current market trends can shed some light on this situation. Past decades big names go on world tours and release new albums with relatively modest advertising. Popular rap, hip-hop, and electronic music artists keep their careers going by constant releases and a very strong presence in the media. Meanwhile, independent artists of all styles release their material with whatever marketing they can afford, financing their projects through private initiatives or crowd funding – even the humblest musical work can easily be made available in distribution channels such as Apple Music Store or Spotify. Thus, the public for such production is potentially global, which is another influence on the artists' works. Perhaps the *World Music* category is not comprehensive enough, and all music currently made is somehow World Music!

The virtualization of music, separating content from physical media, led to a curious consequence: the album format itself, as a cohesive set of an artist's music, is falling into disuse. The younger generations listen to playlists, sets of songs from several different artists, organized according to their own taste or by the streaming service.

A creative process with no ties to a physical media also allows the final product to be of any size. Various new artists have launched material in sets called EP – perhaps

many of them do not even know that EP means Extended Play, the vinyl-record format larger than the single but shorter than a long play, comprising five or six pieces of music. It is also possible to disregard the amount of audio that could fit in a CD and release a four-hour virtual album containing only two pieces of music: there are no more limits imposed by physical media. Therefore, format impositions today are a mere leftover from past technical restrictions.

The access to information brought by the Internet creates an immense potential of information exchange between different places, which promotes cultural exchanges never seen before. Today, a young man can carry more music in his pocket than his parents had at home when they were the same age. But the same tool that provides unrestricted access also opens the way to massive dissemination of music. Big record companies are still stronger than small local forces, which results in musical influences in big urban centres being similar all over the planet. The potential for research is huge, but people still tend to concentrate on a few products. What could be unlimited listening of infinite different artists becomes, most of the time, infinite listening of a few similar artists.

The technology that lowers the cost of music creation is even more important when one considers that independence is necessary for innovation to take place. Naturally, even though the development of complex software programs (like those used to make music) is still expensive, as the reproduction cost is extremely low such software ends up being much more accessible than the old equipment full of panels, knobs, transformers, and valves. Again, there is some convergence here, and the best software ultimately goes to most musical content creators.

As a creation support tool, the computer transformed the complex art of an analogic studio into selecting sounds with clicks. This convenience, however, does not come without a price. If, before, producers and musicians had to

work hard and create solutions inside the studios, today everything comes previously programmed, parameterized to work – which means that solutions are pre-existing, not leaving much space for creation and innovation. There is a strong homogenization in the way musicians record their songs today. That pre-programmed virtual drum player will not compose anything new; he will only imitate very well something that has already been made. The iPad software that plays along the user while he or she sings is only repeating an already-developed sequence of chords, sounds, and rhythms. Musical creation, though popularized by those facilitators, becomes dangerously restricted to these software parameters. Musical expression can ultimately become hostage to those pre-programmed sonorities.

Current technologies are extremely welcome, for they open the way to new possible influences, allow the dissemination of the artists' works, and aid musical production, providing composition, recording, and mixing support. However, some measure of caution is necessary so that the tools available today do not become collective limitations, reducing the horizon of creativity and, consequently, of musical diversity.

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## 2

# Iconomy, Cultural Diversity and Ludic Monetization on the Internet of Things

(Original in Portuguese)

GILSON SCHWARTZ<sup>1</sup>

## I – From Theory to Targeting the Economic Shift

The theoretical issues related to cultural diversity in the digital era always stem from some established view, a certain *Zeitgeist* or structural hypothesis about the changes related to the digitization of life. We are continuously connected to social networks that not only reproduce social patterns embedded in people's behaviour (there is no sense in viewing any technology as existing without being "social") but also reorganize the world and impose new forms of thinking, behaving and playing on humankind.

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They are also updating the inherited critique of technical and instrumental rationalities, inviting us to new forms of creative resistance to automation, employment precariousness and alienation by unsustainable consumption, the product of infinite evil and dismal spirits.

Discussing the current bioepistemological shift – which I call “iconic”, as if a new form of being, beyond Being and actors in networks, is on its way to establish an Iconomy – would take more space than we have available here. Yet, such is my objective: digital networks invite us to think differently as well as to think out the difference, the risk of suppressing diversity, and the potential of emancipation into new dimensions of organization and culture.

It is a theoretical and political concern of the highest level, because to say that human beings must think differently does not mean that we need to perform any kind of surgical or pharmaceutical intervention to produce a post-human brain. The brain is the very same that has served us ever since *Homo sapiens* appeared. Humans may walk, ride horses, in wagons, automobiles, rockets, or planes; however, the brain structure and the cognitive skills are those we have always had.

What changes is the relationship of thinking about thinking itself, that is our capacity to critique and self-critique, to think as an individual and collective subject. This research theme has been gaining strength in universities and independent research groups worldwide. We already talk about “Internet science”, and not just Internet technology anymore. Science has demanded new research procedures since the arrival of the Internet. And, if the practice of science changes, research techniques change; challenges of an epistemic nature appear and reappear. We might even come to the conclusion that the reason why we think itself has changed. I will now quickly go over the characteristics of this transformation of thought, that show why a science of the Internet makes more sense every day.

The first characteristic of Western thinking is the Cartesian *motto* that sums our society up at the end of the day: “I think; therefore, I am”. This is the basis of modern science as a whole. I refer to the Enlightenment period, in which the insertion of the individual in the world has to do with individualistic thinking. The ego asserts itself with the ability of controlling existence from its own thought. It is a huge change in comparison with previous periods, marked by religious or mythical thoughts. We move on to rational thinking, no longer magical, but instrumental thinking, through which the individual dominates the world. When we talk about the Cartesian diagram, geometry, calculus, we celebrate the individual's ability to make mental operations called thinking with a view to an end, and existence is translated within the rational relationship between means and ends.

What changes with digital networks, generating both positive and negative effects, is the prevalence of communication in all processes. While the individual subject's thinking continues as important as it ever was to humankind, while it is still as important as it was for Descartes to state that the basis of our existence is our capacity to think, new metaphors have emerged that project the brain's anatomy onto supra-individual dimensions. Thus, as the brain makes synapses, not only establishing a connection among neurons, but the neurological network that each of us has inside our body, a propagation of synapses starts happening in the world going beyond the individual body – now there are millions, billions of people connecting themselves. What does this collective and connective thinking mean? Does it constitute a new kind of subject, or does it ask for identities that escape Cartesian subjectivity? This is the first challenge.

It is true that individuals connect to one another, collaborate, have friends, and participate in “social nets”. However, besides random or circumstantial connections, does a structure or an organism stand out? What sort of “thing”

is the “network-actor”? And to what extent does his ontology (or “ontopower”) dilute in processes, tracks, folds, trace elements and resistances an authentically diverse, free, and creative culture? Spontaneous demonstrations that today inform digital humanities and cultural studies amount to the practical belief that maybe a collective brain, an intelligence that connects itself, a unit that fulfils itself only through the difference with itself – that, therefore, challenges the classical notions of identity and subjectivity – is being formed within us and in spite of us.

The [id]entity thus emerging is rather abstract but we have been dealing with it, and its nature is dynamic and collective but singularly individual, for it is digital, trackable, and sharable.

This social and technical transformation shakes up Cartesianism as well as our certainty that, from what I think I generate a result that I have control on. The new forms of science-making already reflect the existence of a self-conscious digital superstructure. How does it think? Certainly, we are dealing with communicational thinking (I communicate, therefore, I think) and not existential thinking (I think, therefore I am). If I do not communicate, if I am not connected to a dimension that emerges beyond individual intelligence, I am no longer so powerful.

A second characteristic has been the recent emergence of big data (and the new convergences between information science and digital humanities). It is the output of this gigantic global brain that is ceaselessly producing information.

In other words, it is the set of extremely huge data that, for this reason, requires special tools (metrics and metadata) so that all and any information can be found, analysed, and productively used in a timely manner.

This collective intelligence leaves tracks, traces, memories. Sometimes, they are tracks that the secret service will eventually examine, but in the case of Universities we

are not dealing with espionage but research on the future of citizenship. A citizenship that transforms itself into one literally made of knowledge on information clouds.

The patterns that will emerge from there will only be visualized if there is such connection, not only between the digital and the real, but between all the areas of the real with all the areas of the digital mediated by new models of mapping the world, consciousness, and communication itself.

This challenge, holistic in nature, is therefore, hard to implement especially because our universities and research centres are the legacy produced by Cartesianism, that has generated an extraordinary epistemological segmentation.

Each individual asserts him or herself as a powerful subject in the extent that he or she takes ownership of specific knowledge produced in the schools of economics, law, engineering, medicine, and so forth.

It has been immensely difficult to create interdisciplinary universities and programs that unite several universities in consortiums. But it is already happening. Therefore, the way to produce knowledge and share results in science is changing. The very belief in individual rationality is losing strength and increasingly revealing itself as a belief and not a product of reason.

Finally, this big change that is perceived as an emerging Internet science is the overcoming of the positivist, determinist, causal, and mechanical model in favour of a [re]acknowledgment of all that is imaginative, affective, and sentimental. And passion is indissociable from the communication process (love is, too, always [com]passion). The iconic turning point is also part of an affective, post-semiotic turning point.

[Re]acknowledging [com]passion is a paradigm change, since in Cartesianism, in Positivism, and in the determinist and mechanical viewpoint of things, a cause that has been empirically proven is unequivocal. With the networks and this kind of collective communication, the affective

dimension gains importance not for the connection engineering per se, but because connectivity generates this new brain, this collective passion.

The Internet does not exist only because we are connected, but because it is an audio-visual, interactive and immersive interface, mobilizing not only the rational side but feelings as well, the sensibility with which we see and listen to ourselves and others (it becomes more difficult to ignore the distant war, the remote genocide, the epidemics and the environmental pollution suffered by other people).

Besides the passage from the controlling subject to a collective connector, besides the overcoming of rationalism and technical effectiveness in favour of an affective and sentimental technology, a third great transformation is occurring which may give meaning to the two former ones: when we talk of the Internet, we talk about connection and interest, but also about icons, objects towards which we sometimes have an almost religious relationship, I would say, in the extreme of sensorial affectivity (everything may well have started with the emoticons ?).

It is rather common to see mega-businesses emerge and practically monopolize the market (the social networks market for instance), seeming to have discovered a combination of engineering and magic and producing market leadership phenomena that demonstrate the appeal of technology. Yet its appeal really has nothing to do with magic and enchanted beings, but with the nature of this communication process, which is to integrate the most advanced engineering and iconography into marvels of digital design.

The Internet has a technical dimension, but it also has an audio-visual, iconic dimension. This engineering audio-visual connection is what gives it a new meaning that seems surreal. How can we give meaning to objects, decisions, or our relationships other than through objects that pertain at the same time to advanced technology and advanced affectivity?

## II – Economy and the new theory of digital value

From these changes, a new Internet Science arises. This new manner of thinking and playing, subject to dialogical critique and self-critique narratives, which we embraced but also against which we hold out, since we need to be seduced to make new measuring and feeling models viable, is what I have been calling “economy”.

The word economy comes from the Greek terms *oikos* (house) and *nomos* (custom, law), denoting the administration of the house, the home. Domestic economy has always been economists’ favourite metaphor: you shall not spend more than you have; you need to know how to adjust the means to the ends, etc. This is the classical paradigm of the Cartesian equivalence between supply and demand, which leads us to expect or trust in the existence of a balanced price – everything being very objective, mechanical, and determinist.

Economy shows us into an unprecedented universe: we are no longer dealing with the rules of “household management” (or business, public accounts, etc.), but with the rules of icon management. The social networks produce reputation, affectivity, dialogs. This must be expressed, represented by icons; starting with an icon such as *like*, the quickest way to share contents in social networks.

Thus, beyond price or pricing, we are entering a dimension of appreciation. Obviously, there is pricing. In the supply and demand relationship, at some point, the buyer and seller come to an agreement over a price. But on the Internet, in this Economy, the *nomos* is defined by the icon, by something that is intangible, which is a visual, immaterial, real, and symbolic code at the same time.

In brief, we are just in the beginning of a profoundly renewing form of working with dualities that have always tormented the human soul – objective and subjective, individual and collective, symbolic and real, imaginary and factual, effective and affective.

These dualities and antagonist poles start merging and contradiction becomes composition. The main characteristic of this new way of thinking, acting, and measuring – combining the technological with the audio-visual and emotional – is interactivity. With the various levels that are being achieved with new technologies, interactivity is the major characteristic of this cloud – which for now is literally a cloud, something somewhat diffuse. And the main characteristic of interactivity can be summarized in another word: ludicity.

The Economy emerges, above all, in the shape of a “ludic age”. Interacting connotes the idea of playing. I summarized this emergence in the title of my book: *I play, therefore I learn*, as opposed to *I think, therefore I am*.

The book summarizes what economy contributes to this innovating way of thinking, measuring, and feeling. To learn is to permanently renew oneself. This reopens the research, a new reflection, new practices for companies and individuals, for rebuilding the world from a perspective that is not only instrumental but that, as it is eminently communicational and designed by networks, is interactive and immersive and therefore ludic. This is the underlying reason why gamification has become a buzzword, a fashionable word, in the last few years, be it in the educational field, in business management, or in public policies. However, is it just a fad?

Today, it is becoming clear that the Internet is not just an engineering artefact, nor just an instrument to widen the scope of economic, social, and cultural actions. All this, in fact, results from its extraordinary engineering. But what is new is that this economy that messes with our way of thinking, measuring, and feeling, looks like a game.

It is certainly not trivial to define what “playing” is. To play is also to experiment, create. If we access the term “gamification” on Wikipedia, we will see that it refers to something quite simple: the application of game dynamics to any other thing that is not strictly a game.

Behind this simple definition there is a lot of polemic, because, after all, what is a game? What is a competition? What is playing?

There are countless ways of approaching the ludic characteristic that is behind what we call gamification. If you go to a snack bar and see a board saying that an employee won some sort of recognition, this is a form of game. Gamification, in this case, means stimulating a competition among people to see who is the best at this or that.

### **III – Creative Currencies: Monetization and Gamification for the Internet of Things**

I do not want to advocate for some alleged moralism against the entertainment industry, and especially, against videogames. This is a segment of the hegemonic creative industrial market that needs no subsidies. The big companies are earning billions, more than the traditional audio-visual industries such as film. But, what about the gamification of education? And the gamification of social relations? What are the new audio-visual frontiers in the internet of things?

Furthermore, game monetization is appearing. Basically, we could conceptualize the *game* as a monetized social network, which is perhaps the most concise way of defining what game means on the Internet. Of course, Facebook has already got its own form of monetization. How many people have clicked *like* on my post? This is something that can be measured. When the *likes* increase, you say, "Wow! A lot of people liked this!" Sometimes, you post something and nobody says anything. "Strange! Nobody liked that!" This is a form of monetization, i.e., of transforming a chain of meaning into a chain of value, from narrative clusters or local, real, and/or virtual creative arrangements.

Monetization is referred to here as the attribution of value or appreciation to something. Not only the currency pricing that we use, but an appreciation, a sign of appreciation. This fantastic synergy between socialization itself and some gamification mechanism that, ultimately, amounts to creating a currency, an index, a representation of what is appreciated, is increasingly more common on social networks.

This can have a price, too. On Facebook and other networks, mainly in the case of games, new currencies are already being used, including virtual currencies within the game itself. This has been happening for quite some time already. More recently, this monetization dimension of networks has become much more apparent with the *bitcoin*, a currency whose creation and transfer are based on cryptography protocols and independent of any financial institution.

This is a boundary that needs immediate attention, but that is taking a long time to reach the highest levels of our private and public financial institutions. For some time now, I have been insisting on this possibility: the creation of a social game, a game for change, for network monetization, to stimulate the appreciation of culture, education, entrepreneurialism, citizenship, using a monetary indicator that I call "creative currencies".

The project has already been awarded prizes and selected in the Ministry of Education and the BNDES (*Banco Nacional de Desenvolvimento Econômico e Social*, National Bank for Economic and Social Development) calls for proposals. It focuses on a gamification of financial education, that will teach young people how to deal with valorisation processes and to engage into creative processes, being remunerated with a currency created for this purpose. In this model, cultural, technological, and monetary management challenges have become communication, memory, and identity issues.

What is the “reserve” that could be used for these currencies? One possibility is for the Federal Revenue to use the seizure of illegal goods as reserve for these creative currencies. Part of it is destroyed and the other is auctioned, generating more income for the Federal Revenue itself, while a small part is donated.

Why not increase the “Lion”<sup>2</sup> contribution to a positive social impact using part of the seizures as reserve for the currency that will be circulating in the social networks designed for creative projects?

During the *Rio+20* conference, this project was highlighted by the UNESCO. It is an ambitious project, slow and complicated to develop. I think that creating a new currency that would involve the Federal Revenue, BNDES and Banco do Brasil is something that would even have to count with the assistance of the presidency of the Republic in order to happen. The mission of a professor or a researcher is to stimulate reflection, but action depends on collective intelligence, too. Maybe it is really a border where it is more necessary: the reinvention of currency and exchange as starting from culture and communication and mediated by digital networks.

The organizations, both private and public, that can afford to make this happen need to face the challenge of integrating themselves collectively into a creative intelligence.

In short, why monetize the network creatively? Can we “play” with the very concept of money? Reinventing money using social networks technology can also be, *de facto*, a path to reinventing our engagement in the transformation of the world.

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<sup>2</sup> As popularly said of income tax collection in Brazil (NDT).

After all, money is nothing more than a representation of values. If, besides the money used for pricing, we could invent money that we have an appreciation for, I believe that one would complement the other and society would eventually benefit.

With the creative currencies, the financial system itself can be the protagonist, at the vanguard of the emergence of this new Economy ludic order.

#### **IV – Digital Currencies and the Theory of Value: Concepts, Technologies, and Practices**

The essential *locus* of the emergence of the Economy is the core phenomenon of monetary creation. However, the object is approached from an interdisciplinary perspective anchored in software engineering, communications, arts, and humanities, mainly because the test bed for issuing and circulating “creative currencies” will be centred on financial innovation and technological entrepreneurialism within creative industries (solidary economy and culture economy), with strong impacts expected on the field of civil rights and the borders of economic citizenship.

What is suggested here is to rethink the theory of value, starting from a historical and epistemological review opening the dialog with economists, managers, and entrepreneurs, as well as accounting and finance auditors, software and telecommunication engineers, scholars of humanities, and the cities that recognize in digital transformation the central challenge of our times.

The debate is, in the first place, interdisciplinary, though it is theoretically followed by empirical research about monetary creation and digital entrepreneurialism, connecting conceptual and model research to the sphere of public policies and technology transfer to private sectors, society, and entrepreneurs, within the scope of a strategic

public policy of the *Secretaria Municipal de Direitos Humanos e Cidadania de São Paulo* (City Office of Human Rights and Citizenship of São Paulo), the “*Portal da Juventude*” (Youth Portal) ([www.portaldajuventude.prefeitura.sp.gov.br](http://www.portaldajuventude.prefeitura.sp.gov.br)), in partnership with the most important eco-financial information agency in the world, Bloomberg, and one of the major global telecommunication infrastructure company, Huawei.

The opening of this theoretical, empirical and technological development research field leads, in parallel with research, to the creation and launching of a Finance and Entrepreneurialism Innovation Laboratory (*Laboratório de Inovação em Finanças e Empreendedorismo – LIFE*), which will work in a network (as co-laboratory) and benefit from strategic academic partnerships with the University of Paris, University of Warwick, and the international network Games for Change (active in the USA and Europe). The interdisciplinary research, focusing on financial innovation for creative industries entrepreneurship, will be carried out with the collaboration of a network of professors, researchers, students, and citizens associated to LIFE, within a network coordinated by the research group “Cidade do Conhecimento” (“City of Knowledge”).

The theoretical reflection, associated with technological planning and development and with the critical measurement of results stemming from the viralization of a digital social currency creation and management software, configures the creation of a new concept of liquidity for citizenship, beyond the very liquid modernity identified by Zygmunt Bauman (2000). Liquid post-modernity encourages digital convergence between Bauman's liquidity and Keynes' pre-digital conceptual liquidity; such convergence is indicated by disciplines that do not usually mix, such as economics and sociology.

Since Stiglitz (2001), it has become pertinent to respect the emergence of a new economic theory paradigm (as also present in his methodologies for research, metrics, tech-

nologies and practical applications) centred on information value. An information economy that reveals itself, akin to a space-time relation common to radical Keynesianism and the network theory: here too we are dealing with the formation of expectations with different temporal profiles; however, digital networks widen the potential to imagine possible futures or even to live them in the present time, in the flow of the networks, with their innovative strategies of connection, investment, accumulation, and creative destruction, stressing the institutional and Schumpeterian dimension of innovation and entrepreneurship within the economic but also symbolic and ideological dynamics (what Schumpeter called “vision”, and Keynes himself emphasized as being the weight of dead economists’ sacred memory over businessmen and public men).

Later, in a networked post-industrial economy, Yochai Benkler’s view and its microeconomic, behaviourist, and utopic perspective emerged, emphasizing within this new networked information economy the same epistemological change indicated by Stiglitz, to the point of parodying Adam Smith in *The Riches of the Nets* (2006). In 2008, what appeared to be the beginning of a new era is marked by the deceleration and worst crisis in capitalist history since 1929.

Attentive to the relationship between expectations, language, and the gold standard crisis, Keynes, almost a century ago, characterized the economic dynamics as a game of expectations, a limitless language or an economy whose borders were set by language, narrative, and expectational conventions (Schwartz 2000).

The linguistic disruption itself resembles a creative destruction process – the connection protocols, the new visibilities, and the emergence of a global “commons” are promises that already threaten the establishment, accustomed as it is to the intermediation rules anterior to the dissemination of digital net infrastructures.

The digital information economy turned even more infinite the horizon of the economy as a language and business communicational platform, production and sharing model. Value chains become more complex and, at the same time, identities, memories and individual and collective projects gain a new effective and affective iconicity, through which opportunities of inclusion, innovation, and institutionalization (or visibility/audience/scale) can be opened.

Unbalances and threats have also widened, creation and destruction cycles seem shorter, without the future seeming to be promising with the exception of an even more radical deepening of some technological trends that got reinforced since the Great War.

The issues of affective, political and institutional order surrounding the social creation of values were equally shaken up after the 2008 collapse: a cycle comparable to the movement that announced the end of the American dream in Seattle a few years before. The scope of the global crisis is such that watchwords of a more radical nature today integrate the mainstream in democratic societies: in the USA, the agenda is to deconstruct the banking system; in the United Kingdom, the Euro-related voluntary disconnection coincides with the growing protection of social aid systems such as the citizenship income.

By tackling these central issues of the present economic, political, and technological debate, we propose to deepen the debate from the viewpoint of economic thinking history as much as that of the necessary approaches and interdisciplinarity with humanities, with all their ideological aspects, as well as a coming together of the general theoretical perspective of the economy and the emergence of a collective scientific agenda encompassing engineering, architecture and urbanism, health and environment, law, economics, accounting and administration, urban and rural development, social and political psychology, among other areas concatenated by the common affection to the effects of the digital revolution.

In the free software economy, the value chain is different. We go back to reading Marcel Mauss, the anthropological dimensions of exchanges gain visibility; and the movements of solidary, collaborative and open innovation economy alter the sense, density, and sustainability of what we call “market”, now crossed by the currents of information and audio-visual communication networks.

In this context of new icons and widened literacies, monetary creation faces trends of disintermediation and dematerialization of the very notion of value, affected by the intangibility and fugacity of the values formed within networks, the acceleration of expectations by information interfaces in real time, and its rules of access, privacy, and transparency.

Within this technological, social, normative, environmental and cultural space, the last five years have seen the emergence of digital platforms as economic realities that surpass classical dichotomies between market vs. State, public vs. private, individual vs. collective, open vs. closed, effective vs. affective, existence vs. essence (Kenney & Zysman 2015).

This vision of the challenges of the economic theory in the beginning of the 21st century is summarized in the idea of a new theory of value as an icon – the Iconomy.

Experimentally, the relations between economy, technology and communications gain a noteworthy relevance when their object is digital currencies, especially social or complementary currencies.

No object of economy seems to implicate the dimensions of exchange, technology, and culture so reciprocally. When it comes to the emergence and emission of digital currencies in the field of culture itself (as with game and “playable” fantasy worlds currencies), the phenomenon gains even more pertinence and seems to function as a source of inspiration and experimentation for new forms of ludic monetization with affective and effective impacts as powerful as those already verified in the creation, use, and

circulation of the more “conventional” money. In principle, an imaginary currency can be the epicentre of a digital platform; anyway, it is just unthinkable for a platform design not to contemplate the economic and symbolic issues associated with the creation of currency, credit, and audience/visibility.

The idea of social or complementary currencies with a “creative” slant has been the object of reflection, prototyping and debate for years in the projects of the *City of Knowledge* research group (since 2003, at least, when local monetary creation was experimented in a tourist centre of the Brazilian state of Rio Grande do Norte, integrating the actions of the project *Rede Pipa Sabe* (Pipa Knows Network) and the financial support of FINEP (a public Funding Organ for Studies and Projects – NDT), ITI (*Instituto Nacional de Tecnologia da Informação*, National Institute of Information Technology ), Caixa Econômica Federal (a Federal Bank – NDT) and the Culture and Extension Pro-Rectorate of USP (University of São Paulo).

Since 2007 at least, this reflection has been taking shape and has been linked to extension projects, has gained visibility with awards from the Ministry of Culture, BNDES, and UNESCO, which highlighted the initiative as one of the “+20 Ideas to Rotate the World” at the Rio+20 conference.

As from 2014, the initiative has become the object of theoretical research as part of the Interdisciplinary Program for Graduate Studies of Humanities, Law and Other Legitimacies at the Nucleus for Diversities, Intolerances and Conflicts Studies of the *Faculdade de Filosofia, Letras e Ciências Humanas* (Faculty of Humanities) of the University of São Paulo, in the Doctorate Project of Diego Viana.

Also in 2014, the theoretical and empirical research on technological innovation oriented by the perception of an emergent Economy was defined as the structural thematic axle of the Project “World Innovations and Sustainability Helix” (WISH) at the Nucleus for Politics and

Technological Management Research (*Núcleo de Pesquisa em Política e Gestão Tecnológica PGT*), of the Faculty of Economics and Business Administration of the University of São Paulo (FEAC), with the financial support of the USP Pro-Rectorate for Research.

The project can be simultaneously characterized as scientific research, technological development and innovation (of a technological, social and cultural nature). It has to do with conceptually investigating the new borders of value creation, emphasizing the creative and cultural industries under the impact of new audio-visual technologies of digital information and communication, engaging the university into a more socialized and open, as well as collaborative and transparent, creative process.

The maturation of the theme and a new international research community culminated in the creation of RAMICS-CCS, in 2015 – Research Association on Monetary Innovation and Community and Complementary Currency Systems (<http://ijccr.net/ramics/>), associated to the International Journal of Community Currency Research.

Finally, as from 2015, the research group *City of Knowledge* has taken on the Curatorship of the Portal of Youth at the São Paulo City Office for Human Rights and Citizenship. This project will make it possible, in 2016, to experiment with issuing and circulating social, complementary and creative currencies within cultural production initiatives in the outskirts of São Paulo, which will turn it into an exceptional opportunity to evaluate practically the technologies, methodologies and indicators of impact associated to this research program.

The internationalization of this debate gained notoriety with the expansion of the bitcoin, but also with the dissemination of technological solutions that result in financial disintermediation and innovation in payment means and asset management models. During the last five years, this program has been consistently validated and awarded in selective processes, such as Santander Universities,

Researcher Links (FAPESP (Research Support Foundation of the State of São Paulo – NDT) and the British Council), and through my participation as Visiting Researcher at the Institute of Advanced Studies of the University of Warwick. In 2015, its partnership with the University of Paris was consolidated through the excellence laboratory (LabEx) in Cultural Industries and Artistic Creation (*Indústrias Culturais e Criação Artística*, ICCA), and the creation of a French-Brazilian Professorship at the University of São Paulo.

Whether from the viewpoint of theoretical review in the field of monetary and financial economy under the impact of new digital technologies of information and communication, or as an opportunity for empirical modelling and experimentation, the conditions seem very propitious for an investment concentrated on research, international cooperation, empirical validation, and increase in academic productivity boosted by the “digital currencies” and “theory of value” thematic and its interdisciplinary implications in “smart cities” and in the Internet of Things.

Such investment in a research-action program focused on intelligent, social, and creative currencies has its importance in the economy, finance and business areas, but it can also reach compulsory spheres in view of the ubiquitous, immersive, and gamified digitization such as, human rights, privacy, behavioural finance, social and political psychology, urban digitalization models (smart cities) and, more widely, promote the insertion of universities themselves in the distribution conflict contemporary to platform economies (including on the horizon of education, knowledge and culture markets).

Setting up a LIFE associated to the research group *City of Knowledge* at USP will be implemented by means of a viral diffusion of a software able to organize the issuing and management of complementary currencies, with a view to induce innovation and entrepreneurialism in cultural industries. The larger objective is to provide the monetary diversity experience in digital culture.

Inasmuch as the community associated to the practical aspects of the research, development and implementation of creative currencies will be consolidated during the project, its activities will be directed to a specific research group, already accredited by USP Pro-Rectorate – the “Economy”, by means of transferring the head office of LIFE (as a spin-off of *City of Knowledge*). The institutional and juridical design of this spin-off is a strategic target of *City of Knowledge*'s project, Ludic Monetization.

The research, motivation and results disclosure will be anchored in the installation of Bloomberg international agency terminals in the research groups involved, reaching several USP's units and partners at FEAC (Faculty of Economics, Business Administration and Accounting), ECA (School of Communication and Arts), IME (Institute of Mathematics and Statistics), POLI (School of Engineering), FFLCH (Faculty of Humanities), FAU (Faculty of Architecture and Urbanism), EACH (School of Arts, Sciences, and Humanities), ESALQ (School of Agriculture Luiz de Queirós), Faculty of Medical Sciences, Faculty of Law and Innovation Agency.

In each unit the project will count with the support of a Professor, member of LIFE's Scientific Board, who will act as mentor for the pertinent bibliographic and technological review.

### **Figure 1: City of Knowledge Youth Portal: Curatorship and Economic Platform for Monetary Diversity in Digital Culture<sup>3</sup>**

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<sup>3</sup> Meaning of the terms used in this figure (NDT):

Agência de Inovação: Innovation Agency; Cidade do Conhecimento/ Grupo de Pesquisa: City of Knowledge / Research Group; Curadoria: Trusteeship; EACH (School of Arts, Sciences, and Humanities); ECA (School of Communication and Arts); ESALQ (School of Agriculture "Luiz de Queirós") FAU (Faculty of Architecture and Urbanism); FEAC (Faculty of Economics, Business Administration, and Accounting); FFLCH (Faculty of Humanities); ICCA – University of Paris – French-Brazilian Professorship; IME (Institute of Mathematics and Statistics); Infra-Estrutura IoT Huawei: Infra-



(Employment, Income, Innovation, Citizenship, Affection, Sustainability in the Digital Socio-Creative Economy)

The Ludic Monetization Project enables the construction, in the next few years, of a basis for the development of a platform economy<sup>4</sup> type incubator stemming from USP's Innovation Agency, encouraging spin-off projects through

Structure of the Internet of Things (IoT) Huawei; LIFE: Laboratório de Inovação em Finanças e Empreendedorismo / Grupo de Pesquisa – Iconomia: Innovation Laboratory for Finances and Entrepreneurialism (LIFE) / Research Group – Economy; Monetização Lúdica: Ludic Monetization; POLI (School of Engineering); Portal de Juventude / Secretaria de Direitos Humanos e Cidadania Prefeitura de São Paulo: Youth Portal / City Office of Human Rights and Citizenship of São Paulo; Projeto CNPq: CNPq (National Board for Scientific and Technological Development) Project; Pró-Reitoria de Pesquisa da USP: USP Research Pro-Rectorate; Redes, Mercados, Comunidades: Nets, Markets, Communities; Terminais Bloomberg: Bloomberg Terminals.

<sup>4</sup> By Platform Economy, it is understood that the tools and models are based on the power of the Internet. These platforms of digital value creation "will frame and channel our social and economic lives" (Kenney & Zysman 2015). "Platforms" are structures ("frameworks") that allow contributors (users, partners, suppliers) to perform a range of activities, often creating patterns *de facto*, building entire ecosystems to create and capture value (Kenney & Zysman 2015 and Gawer & Cusumano 2013). The platforms are associated to "network effects", that is, their value is a function of the audience or the access frequency by users who generate complementary, collaborative, and affective innovations.

the ludic monetization of activities (courses, events, competitions, mobilization) promoted by the research group *City of Knowledge* and its partners, focused on creative economy and cultural and artistic diversity.

## Conclusion

A new economy results from the accumulation of algorithms. What are its mechanisms to generate value, employment, income, capital and expectations? What icons, literacies and competences, as well as infra-structure determine and condition the development of these platforms? What are their local, territorial, regional and global effects?

What rights are created and destroyed? What limits are overcome or replaced from the viewpoint of access to material comfort and sharing of immaterial heritage?

Who are its protagonists within the entrepreneurial, governmental, social and political spheres?

What is the children's and youth's insertion as the engines of this digital icon economy? How do new generations perceive themselves? And what social, economic and affective futures are being configured?

What are the ruptures of the current order? What are the opportunities in the face of the evident destructive chaos and global massification of mass culture? How should university and research follow these transformations, benefitting cultural diversity through an interference in the mechanism of value representation itself?

Cultural diversity is inseparable from monetary diversity. At a time when monetary, financial, and currency patterns are in global crisis, it is fundamental to perform a conceptual, technological, and socially innovative shift as academic networks and the business, governmental and

civil society sectors come together with the purpose of generating and rebuilding infrastructures, contents, fraternity and diversity.

It is not by chance, therefore, that the project presented above should define as an initial test bed the outskirts of São Paulo, with children and youth as protagonists, mapped out and mobilized by the *Youth Portal* and coordinated by the *City of Knowledge* together with the City Office for Human Rights and Citizenship of São Paulo.

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# 3

## The UNESCO Convention and Future Technologies: “A Journey to the Centre of Cultural Law and Policymaking”

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### I – Introduction: The Light at the End of the World

*En vérité nous sommes certainement à un instant où un nouveau paradigme va devoir se substituer aux anciens* (Vivant 2000: 17).

Culture, law, economics, politics, technology, science, and religion are all general concepts that are used to explain particular aspects of a mysterious process called “human evolution” – the final destiny of which still evades our intellectual grasp and, therefore, continues to be the subject of scientific speculation and spiritual divination. The continuing uncertainty surrounding human evolution and its destiny invites questions about the adequacy of both our senses and our cognitive modes of perception. Put differently, when a number of questions yield divergent responses, it may be time to rethink and reframe the questions themselves. From time immemorial, human efforts have been devoted to unravelling the mysteries enclosing human life, which became known by different names, like the “holy grail” or the “philosopher’s stone”. Many but not

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all of these efforts have become translated into innovative tools, devices, or machines that were designed in acts of ingenious creativity that today are simply referred to as “technologies”. Today, technologies are often falsely separated from the arts, with which they share “creativity” as their central source of inspiration (Heidegger 1979: 318). Certainly many different technologies exist and serve even more numerous purposes. But in the quest for the destiny of humanity, those technologies that were meant to enhance and that did actually enhance our perception and understanding stand out. Compressed in time, some of the principal inventions for sight or visual perception include optics, the *camera obscura*, still photography, cinematography, and the computer and its digital technologies, to mention but a few.

Each one of these inventive steps has, no doubt, enlarged our vision. But, in sum, have they also helped to cast more light on the original mystery of life and the direction of its evolution? Arguably, in recent years tremendous progress in all fields of science has been made, which is especially visible in an ever accelerating pace of innovation and in the development of novel technologies at an exponential speed. Progress is, in fact, considered to be so great that the modern age is now referred to as a new epoch, the Anthropocene epoch, *i.e.* a time when human activities have a significant global impact on the earth's ecosystem (Crutzen 2006: 13). Alternatively, it has been captured by the term “singularity”, that is to say a world where the differences between machines and humans or real reality and virtual reality will gradually vanish (Kurzweil 2005).

Yet, in this acceleration of perception, of history (Nora 1989: 15), or of “everything” (Gleick 2000: 6), despite all the efforts and progress made every “nanosecond”, it appears that – paradoxically – we are no nanometer nearer than were our ancestors to the goal of understanding the process leading towards our final destiny. Or, to put it differently, “the empire of man over himself” has not kept pace with

"the empire of man over nature" (Luzzatti 2005: 376). In this sense, humanity today perhaps even seems to be going backwards in comparison with previous generations. The same regression may also apply to the law and the process of the regulation of these new technologies, as the speed of their regulation seems disproportionate to the speed with which they occur (Picker 2001: 185; Bennett Modes 2011: 768). In other words, the law appears to lag behind technological innovations, thus opening a gap between these technologies and their legal and ethical oversight (Marchant, Allenby and Heckert 2011). One of the reasons for this may be that the objective of the law may be diametrically opposed to the objective of technology, as the former aims to maintain, preserve, and avoid sudden changes in order to guarantee the rule of law in terms of legal predictability and certainty, whereas the latter constantly pushes for change, and for improvement through innovation. Human evolution, however, appears to encapsulate both tendencies. Ultimately, the question is what causes the alienation between the progress in science that is manifest in new technologies and the better understanding of human evolution and its eventual destiny.

This question will be pursued by a brief look at the role of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the coming decades, notably in the future of the governance of global affairs. This is justified because, legally speaking, the Convention has been found to "only unfold legal effect *pro futuro* and will by no means have retroactive effects" (Neuwirth 2006: 819 and 847). Certainly it will not have direct retroactive effects, but perhaps it will have them indirectly, namely, paradoxically, by instigating a fruitful debate that, by changing the future, will in hindsight put a different complexion on the past. To this end, the present chapter first features a prologue introducing an allegory as a hint at the possible correlation between humanity's striving for scientific discovery and its final destiny. Put differently, the

allegory may contain a clue about the purpose of technologies, by considering not only what they allow us to achieve but also what they tell us about ourselves. Consequently, the chapter briefly revisits the historical origins of the Convention so as to pave the way for a better understanding of its potential shortcomings in the future. To avoid these potential shortcomings, the chapter then looks at clues found in the present scientific and legal debates as well as in daily public discourse, and the key concepts featured in these debates. In the following some existing technologies are briefly listed before some findings and recommendations for the future of the Convention, as well as for UNESCO as a whole, are formulated as concluding remarks. Last but not least, an epilogue unravels the mystery enshrined in the allegory mentioned in the prologue.

## II – Prologue: “From the Earth to the Moon” and the Quest for the Divine Light

*Verne’s future looks backwards, just as his past looks forwards. It is anticipation in reverse. Verne is both a visionary and a nostalgic, and the particular difficulty of his work is that he happens to be both of these at once (Unwin 2000: 31).*

In humanity’s historical quest for “enlightenment”, certain people have, periodically, albeit often only posthumously, been considered to be visionaries in the sense that they have anticipated important developments marking the progressive stages of human evolution. The French writer Jules Verne (1828–1905) is definitely one of these people (Unwin 2000; Evans 2013). With his numerous novels, among them, notably, *From the Earth to the Moon* (first published in 1865) and *Twenty Thousand Leagues Under the Sea* (first published in 1870), he is said to have anticipated technological developments long before they materialized. Interestingly, these two book titles also correspond to

elements of an ancient allegory about humanity's quest for "divine light", which translates into a greater understanding and awareness of the direction and destiny of human evolution. This allegory runs as follows:

There was a time in the history of the race when the gods stole from man his divinity, and, meeting in a high conclave, sought to decide where to hide that which they had stolen. One god suggested that they hide it on *another planet*, for there man could not find it, but another god arose and said that man was innately a great traveller and they had no guarantee that, eventually, he might not find his way there. "Let us," he said, "hide it in the *depths of the sea*, at the bottom of the ocean for there it will be safe." But again a dissenting voice was heard, and it was pointed out that man was a great natural investigator and that he might someday succeed in penetrating to the deepest depths as well as the greatest heights (Bailey 1979: 106-107).

In hindsight, as anticipated by Jules Verne, humans have already travelled to the Moon (although this is not a planet in a strict sense) and to the bottom of the deepest spots in the oceans and would, therefore, most likely have found the divine light there. But the story continues; after the discussion went back and forth, one bright god arose and suggested another hiding place for the "stolen jewel" of human divinity, a place where he was certain humans would never look. After he made his suggestion for a hiding place, the conclave broke up happily as "the gods realized that a truly inaccessible place had been indicated, and for eons it seemed as if the light hidden in man was lost forever" (Bailey 1979: 107).

Thus the question is: what was the place he suggested as being the safest hiding place, where humans would not be able to find human divinity? If one considers another novel by Jules Verne, the answer could well be found in the centre of the Earth (Verne 2011). But in this regard, perhaps even Jules Verne may have used the Earth as a metaphor

for humanity's quest for divine light or greater awareness. Perhaps a clue as to the meaning of the metaphor can be found in the UNESCO Convention and the mandate given to UNESCO in general.

### III – “Culture Against Trade”: A Tale of the UNESCO Convention

*The real phenomena of human economy, as paradoxical as it may sound at first, are to no small extent of an uneconomic nature (...)* (Menger 2009: 218).

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, is itself a child of new technologies. In brief, it was born out of the disagreement over the treatment of cultural, particularly audio-visual, products during the Uruguay Round of negotiations on the establishment of the World Trade Organization (WTO). More concretely, the global increase in the volume of sales of Hollywood movies in the wake of the international trade liberalization undertaken in the 1947 General Agreement on Tariffs and Trade (GATT) were regarded as threatening the diversity of cultures displayed in the world. The underlying conflict goes back to a centuries-old struggle consisting of attempts to meet regulatory challenges derived from the apparently disparate objectives related to culture on the one hand and to international trade and commerce on the other. In line with a broader tendency of fragmentation, culture and trade (in the same way as many other areas of human endeavour) were largely perceived to be mutually exclusive, incompatible and irreconcilable, which also explains why they were assumed to need to be regulated separately. The tradition of their separate regulation can be seen from the Roman legal

concept of "*res extra commercium*" to the adoption of Article IV GATT on cinematograph films, and it still persists in Article 20 of the UNESCO Convention itself.

The regulatory separation between culture and trade, however, came under pressure during the late 19th century with the invention of the cinematograph, which created the novel category of motion pictures or movies. This growing pressure resulted from the dual character of movies, both economic and cultural, which drew the two areas closer. Their dual character but remaining inherent contradiction was also captured in the concept of "culture industry", which was deliberately coined as an oxymoron, *i.e.* a figure of speech combining two apparently antagonistic and hence irreconcilable concepts. Ever since, the said pressure has continued to increase exponentially. This has occurred mainly as a result of the advent of digital technologies, which started a broader trend towards the convergence of different industries and products, and which from that time on has continued to challenge the regulation of international trade and the diversity of cultural expressions alike (Guèvremont et al. 2013; Neuwirth 2015a). Thus, the cinematograph, which literally set pictures in motion, both accelerated and expanded our means of perception, but the expansion came at the cost of blurring numerous regulatory distinctions that had been carefully drawn between concepts and areas in the centuries before.

During the past few decades, the regulatory challenges caused by the acceleration of perception and the blurring of earlier lines of distinction have been increasingly met by the creation of a category of concepts that is able to cope with both trends. This category is called "essentially oxymoronic concepts" and comprises paradoxes, contradictions in terms, and oxymora (Neuwirth 2013c). These concepts mark a shift or move away from a dualistic conception of scientific discourses that, hitherto, relied on a tradition of diverging views or even an opposition between hypothesis and antithesis that was captured by the notion

of “essentially contested concepts” (Gallie 1956). It hardly comes as a surprise that a category of concepts that are inherently contradictory will come to clash with a strictly dualistic method or the classical logic of legal reasoning as exemplified by the legal syllogism. This dualistic conception of the law was superbly summarized by the nomos or legal universe that is constantly created by “a world of right and wrong, of lawful and unlawful, of valid and void” (Cover 1982: 4). However, it is argued that the growing pressures exercised by innovation in technologies and industries are only slowly or inadequately met by appropriate changes in the regulatory and legislative environment, both institutionally and substantively. Instead of critically rethinking the foundations for regulation or law and policymaking, the many drastic changes in the regulatory environment are met mainly by a *fuite en avant* that is manifest in a deluge of norms caused by excessive regulation or a proliferation of norms and regulatory bodies alike (Heldrich 1983; Oppetit 1990: 317). Before it is possible to contemplate the challenges to the existing regulatory approaches that are set by these changes, it is necessary to discuss briefly some of the essentially oxymoronic concepts as they are used today.

#### **IV – The UNESCO Convention and Essentially Oxymoronic Concepts: Logic, the Inflexible?**

*Paradox is a rich source for artistic creation; it is, however, a poor basis for the development of cultural trade policy (Dymond & Hart 2002: 32).*

It was mentioned earlier that the UNESCO Convention itself may perhaps have been born out of the oxymoron of the culture industry. The decision to negotiate it was also triggered by the oxymoron of an “agreement to disagree” between the trade negotiators of the EU and the US (Elliott & Luce 1993: 1). On a broader level, the debate preceding

the Convention's adoption was based on the paradox of culture and trade, which consists in the conundrum of how to best reconcile the seemingly irreconcilable objectives of cultural policies or the protection of cultural diversity on the one hand and trade policies or international trade liberalization on the other. The paradox also became visible in the first draft of Article 20 of the Convention on the relationship with other instruments, which stipulated that the Convention should not affect the rights and obligations of the Parties derived from other international agreements, and that neither should other international agreements affect the rights and obligations of the Parties under the Convention (Neuwirth 2013a: 406). The culture and trade debate itself gave rise to an abundance of culture and trade paradoxes. (Neuwirth 2015b; Dymond & Hart 2002). Even cultural diversity, when understood as *discordia concors*, may be framed as an oxymoron. By comparison, the notion of cultural variety would be easier to reconcile in logical terms, by stating that members of a culture share its values or features but still display a great variety. Even related concepts, like that of cultural property, have been referred to as a paradox given the inherent tensions between property being fixed and culture being unfixed, dynamic, and unstable (Mezey 2007: 2005). The UNESCO Convention itself restates that culture is an evolving concept, taking "diverse forms across time and space", which is why the regulation of culture and the cultural industries has been found to constitute a paradox and an oxymoron (Adorno 1991: 123; Pratt 2005: 31-32).

The concept of cultural diversity is also closely related to the fears associated with globalization and its negative outcomes, such as the "Coca-Colonization" of the world's many distinct cultures (Melnick & Jackson 2002: 429). In response to such fears and to emphasize local differences, it was proposed that the concept of globalization should be replaced by the one of "glocalisation", another seeming oxymoron (Khondker 2005: 187-188). The role of cultural

diversity in development was equally recognized, particularly in the context of sustainable development, which also displays an inherent contradiction akin to an oxymoron (Sachs 1999: 38; Njiro 2002; Redclift 2005). Finally, new technologies and their convergent trends gave rise to many new product categories, often captured by portmanteaus of previously separate products. These products do not only include cosmeceuticals or nutriceuticals, products merged from the cosmetic, pharmaceutical, and food industries (Ulbricht 1993; Dureja et al. 2011), but they also invaded more traditional industries, as can be seen from products like sports utility vehicles (SUVs), ice tea, or Frappuccino, all of which can be described as oxymora. Finally, advertising also embraced these concepts with slogans like “less is more”, “spend more and save more”, or “the world’s local bank”.

The new challenges derived from the management of these new industries were also addressed by oxymora, such as the one of coopetition, which combines elements of cooperation and competition in order to address the consequences of industry convergence (Ancarani & Costabile 2010: 216). Paradoxical thinking was even introduced as a way to enhance profits (Fletcher 1997). Law and regulation soon followed suit and used the oxymoron “coopetition” to combine public and private actors or governmental and non-governmental regulatory processes, as well as processes between the different international regimes (Esty & Geradin 2000: 235, 237 and 253; Neuwirth & Svetlicinii 2015: 369). Generally, law has often been described by reference to paradoxes or contradictions (Cardozo 1928; Fletcher 1985; Perez & Teubner 2006). In sum, there exist many more examples of essentially oxymoronic concepts, but the present listing should suffice to support claims that contemporary times qualify as the age of paradox (Handy 1995). In turn, this should also suffice as support for calls for a new conceptual and possibly cognitive approach to law and policymaking in the future. As will be outlined

below, this should particularly apply to UNESCO and its mandate. First, it will be interesting to take a look at the future, particularly from the perspective of new technologies and their impact on culture or cultural variety.

## V – The UNESCO Convention and New Technologies: In Seconds Around the World

*La gente sin sueños se muere antes (Subiela 1995).*

In his oxymoronic character as a nostalgic visionary, Jules Verne was able to combine the insights from the past creatively with projections about the future. To put it another way, as a writer he possibly “foretold the future, “inventing” modern technology through the power of his imagination” (Unwin 2000: 18). Imagination and creativity may be exactly the same thing and, as a source of inspiration, they also serve scientists as well. Take the example of Peter Higgs, who with colleagues correctly anticipated in 1964 the discovery of the Higgs boson or “God’s particle” in 2013 (Higgs 1964; Alison 2015: 285). It is interesting to add that the discovery was made possible by an oxymoronic method, namely a “creation from destruction” consisting in the collision of particles at high speed in the Large Hadron Collider (LHC). Another such scientist is Leon O. Chua, who in 1971 also anticipated, theoretically, the discovery in 2008 of a fourth physical device alongside the resistor, inductor, and capacitor; he called this the “memristor”, a portmanteau word coined from memory and resistor (Chua 1971: 507; Strukov et al. 2008). Before this paper can delve into the significance of the discovery of the memristor, it must briefly cover the current state of technologies and their potential impact on the Convention.

In this endeavour, as in a game of billiards, it is difficult to predict the future of one technology because of its interaction with other fields. In other words, it may be easy to

predict the future automobile based on current automobile technology but it becomes more difficult to do this in view of possible advances in related technologies like computer technology, materials science, laser lights, and simple human ingenuity. In this complex entwinement of numerous unknown factors, the law (and politics) is also called to play a paradoxical role. This paradox consists in the fact that law and regulation may well alter or direct the development of new technologies (e.g. telecommunication standards) (Gruber & Verboven 2001), while new technologies often prompt the law to react and adapt to them (e.g. medical technology) (Warnock 1998). At the same time, economic factors will also play a significant role, as some inventions, even if sanctioned by the law, will, like supersonic air travel, prove not to be economically viable, and others, like a virtual currency such as Bitcoin, may alter the understanding of the economy drastically (Koller & Seidel 2014).

In concrete terms, this may also mean that the legal role and value of the UNESCO Convention in the future will depend largely on the overall context within which the Convention will be placed. This means that account must be taken of what the global legal and economic order of the future will look like and of who will be its primary actors: private persons, states, regional bodies, international, global, or possibly even “interplanetary” organizations as mentioned by Stanislav Lem (Lem 1985: 34). As these questions go beyond the present context, the main focus here is solely on technological aspects. But even in isolation, technological progress faces a similar challenge of complexity or, actually, “simplexity”, to use both a paradox and an oxymoron (Kluger 2008; Mossman 2014).

To simplify the task, an attempt is made to enumerate briefly a few existing technologies that are expected to innovate further and evolve quickly. A first and broad glance reveals a trend of the convergence between several particular technological subgroups, including nanotechnol-

ogy, biotechnology, and information and communication technologies (ICT). To these categories, the field of cognitive studies is added as bearing enormous potential in the future (Roco & Bainbridge 2003). The field of transport, which is closely connected with communication technologies, should perhaps equally be added to them (Zacher 1996). Jointly and through close interaction, these fields will drastically alter the way we live our lives, and they have already begun to do so. For instance, nanotechnology will alter everything we use in terms of materials, from clothes, food, and cosmetics to machines, weapons, and computers (Baumberg 2007). Biotechnology has already invaded our lives with genetically modified food and other potential applications ranging from the development of new drugs and new chemicals to animal and human cloning (Sager 2001: 109). These two areas, combined into the concept "nanobiotechnology", are also likely to push this process even further (Ramsden 2005: 14). As for information and communication technologies, we can already see how the Internet, having recently merged telecom, audio-visual, and even printing goods and services, changes our lives through its many applications. Other existing technologies, like mobile and video telephony, social and other media, and instant messaging applications, from 2G to 5G networks, which will provide global roaming across different types of wireless and mobile networks or a so-called "www" (wireless worldwide web) (Akthar 2008), will continue to evolve. Foreshadowed by drones, transport too will continue to accelerate, in accessibility, volume, and speed, but it is too early to tell when revolutionary means of transport, like "beaming" or "teleportation", will be available to commuters and travellers alike (Zeilinger 2003). Equally, communication technologies will evolve as speech technology and machine translation improve (Kay 1997), and this can be expected to have interesting effects on linguistic and cultural diversity. As a whole, science will have a major impact on life in the future (Kaku 2011).

In all these fields separately, considerable progress can be expected in the decades to come. What is more difficult to forecast is the arrival of a so-called “tipping point” (Gladwell 2000) or “paradigm shift” (Kuhn 1996), when a major game changer occurs that leaves no stone unturned and drastically alters at least some of the fundamental assumptions (like gravity) that we have about life. Such game changers are hard to imagine, but could be such things as the discovery of alien life forms, new and inexhaustible energy resources, or mind-reading or dream recording devices (Horikawa et al. 2013), or insights into the nature (or non-existence) of death.

In the same way as before the entry into force of the Convention, this brief and incomplete survey of some future technologies that are likely to see the light in the coming decades does not support a greater legal value for the Convention in the future. It is even hoped that some concepts and terms in the operational part of the Convention will lose their meaning and relevance because of changes in the global legal order; these include the developing-developed country dichotomy (e.g. Art. 14 CDCE), or the insistence on a national and territorial right (Art 6 CDCE), or the apparent opposition of cultural considerations with economic considerations (Art. 20 CDCE) (Neuwirth 2013a: 405-406 & 415; Neuwirth 2013b). However, it is more likely that most of the guiding principles listed in Article 2 CDCE will maintain their relevance, albeit in drastically changed conditions, except perhaps for the principle of sovereignty, which should also give way to a new principle in line with a more cosmopolitan conception of the state (Glenn 2013). In sum, these dim predictions for the future legal role of the Convention do not release law and policymakers from one important responsibility. The role of law and regulation is not only to react to changes that have occurred but to prepare proactively for future changes induced mainly by new technologies. As a last example, this responsibility of the law entails another

paradox, namely that the design of future technologies will be the result of a dialectical process of simultaneously influencing and being influenced by law-making.

In this paradoxical task, it can be expected that the computer will continue to assume an important role in our scientific quest for answers. Furthermore, the future computer is likely to play a role in our attempts to enhance our means of perception, that is to say, to enhance our perception in order to create more possibilities based on a so-called “augmented reality”, as an intermediate position between science and fiction or virtual reality and reality. The themes of recent movies like *Inception* (directed by Christopher Nolan in 2010) or *Lucy* (directed by Luc Besson in 2014) already reflect public interest in the possibilities of enhanced perception and augmented reality (Tönnis 2010). In this process, computers are also subject to revolutionary innovations, and one possible such innovation occurred in 2008 with the discovery of the memristor, as mentioned before. The memristor has been hailed as a revolution first because it will allow the building of better, faster, and more energy-efficient computers, which, for instance, will instantly turn on and off without losing data, meaning that the RAM or memory will no longer be erased when the machine is turned off (Itoh & Chua 2008: 3183; Prisco 2015). Second, the memristor has generated so much interest because of the suggestion that it will allow us to build “creative computers”, that is to say “brain-like” or “neural” computers, which may provide robots with the capacity needed “to plan for the future, learn from the past and make intelligent judgements in the present” (Gale, de Lacy Costello & Adamatzky 2013). As an additional interesting facet, memristors will allow computers to escape the boundaries of binary codes (Prisco 2015). Thus, they can apparently implement fuzzy logic (Merrikh-Bayat & Shouraki 2013). Some of the advantages of memristors have been outlined as follows:

The advent of nanoscale memristor devices, which provide high-density multilevel memory, ultra-low static power consumption, and behavioural similarity to biological synapses, represents a major step towards emulating the incredible processing power of biological systems (Kudithipudi et al. 2014: 93).

Is the discovery of the memristor then effectively another major step towards the creation of artificial intelligence, towards the merger of humans and machines and the birth of the “cyborg”, an abbreviate for “cybernetic organism”, which constitutes yet another oxymoron (Siivonen 1996)? Only time will tell, but if machines are using logic more flexibly and perhaps more accurately than their creators, is it not time to rethink even the foundations of our thinking? In this regard, it was stated that we can already build machines or computers using paradoxes, which should call our attention to the following:

These paradoxes are thus far from mere games, and they reach much further than human language. The paradoxical tensions at which I have just hinted occupy much the same place: they are built into the foundation of the world. They are everywhere (Wagner 2009: 3).

If paradoxes and oxymora are indeed ubiquitous, like computing, and they are the result of human creative ingenuity, it may also be time, as John Dewey rightly recommended, for the realm of law and policymaking to consider the “infiltration into law of a more experimental and flexible logic” as a social as well as an intellectual need (Dewey 1924: 27).

## VI – Concluding Remarks: UNESCO in the 21st Century

*Un paradoxe permanent de l'UNESCO réside dans le fait de vouloir rejoindre des objectifs culturels avec des instruments et des structures dans lesquels la politique n'est pas absente (Papini and Cortese 1974: 117).*

Under normal circumstances it is hard to tell precisely what the future will look like and what the state of the diversity of cultural expressions around the world will be. However, in the past, ignorance about the future did not prevent writers and scientists, as nostalgic visionaries or magical realists, from delving into the world of imaginary creation and thereby, paradoxically, simultaneously imagining or glimpsing into, and shaping or creating, the future. The same kind of creativity, it is advocated here, should be envisaged and applied by lawyers and policymakers. Generally, this also means becoming familiar with essentially oxymoronic concepts, *i.e.* paradoxes and oxymora, as the key concepts of our time. This need to become familiar with them is because of the rising number of oxymora being coined to describe the fruits of scientific and technological progress and as such also posing new challenges to regulation through the law. Like computers, essentially oxymoronic concepts are ubiquitous, with their usage increasing in number. An example for their relevance in technology was provided by the memristor, which opens entirely new ways for computing, *inter alia* by transcending binary codes towards more fuzzy forms of logic. An example for their relevance in regulation is provided by culture itself, which was said to constitute a paradox, in the sense that culture cannot be regulated. What can be regulated, however, are the conditions in which “culture” may spontaneously sprout and grow.

Thus, if essentially oxymoronic concepts are the dominant paradigm of our present scientific and technological realm, why not proactively embrace them and, by means of more paradoxical forms of legal reasoning, introduce them to the world of law and policymaking? This means recognizing that technology is about not only what it helps us to perceive and achieve but also what it tells us about ourselves, about our destiny in a process called “evolution”.

Applying this understanding of technology to the realm of the diversity of cultural expressions and future role of UNESCO means that, if Jules Verne was able to prepare his mind for future technologies, the law and UNESCO should be in a position to accomplish the same. UNESCO, especially, holds a privileged role among international organizations in doing this, namely in preparing mindsets for a globalized and noticeably interconnected world in which interdependence reaches unprecedented levels. This role is also in line with UNESCO's past and apparently forgotten legacy as the organization entrusted with “intellectual cooperation”. This is because UNESCO is the successor of the International Commission for Intellectual Cooperation (ICIC), which was created in 1921 by the League of Nations and four years later was transformed into the International Institute of Intellectual Cooperation (IICI) (Bonnet 1937: 467). At that time, intellectual cooperation was found to be a particularly useful tool for addressing the growing complexity in international affairs (Bonnet 1937: 457). Since then, undoubtedly, the complexity of “glocal”, or both local and global, affairs has only increased further. In view of the existing threats to the diversity of cultural expression and further threats to it in the future, which – in the age of the Anthropocene – already also pose a threat to the survival of humanity and the planet as a whole, UNESCO would be well advised to assume the role of a nostalgic visionary. For this role, UNESCO, because it is entrusted with the fields of education, science, and culture, is well prepared for fostering intellectual cooperation and, in particular, for working

out the required cognitive methods for such intellectual cooperation to be efficient and meaningful. For instance, future initiatives by UNESCO in this area could range from paving the way for enhanced tools of perception in terms of an augmented reality based on broader cognitive modes of thinking to convoking a “conclave” consisting of the Directors General of all international organizations so as to confront successfully the growing complexity of global affairs by increasing the coherence of global law and policymaking without the unnecessary duplication of their respective activities.

## VII – Epilogue: Journey to the Centre of the Mind

*Science has fallen into many errors – errors which have been fortunate and useful rather than otherwise, for they have been the steppingstones to truth (Verne 1905: 180).*

Finally, it remains to reveal briefly where the god in the conclave suggested hiding the divine light from humanity. As a last clue, UNESCO’s mandate, enshrined in its Constitution, places the point of departure for its activities in the same place. Without further suspense, the heated discussion mentioned in the allegory ends with one member of the conclave suggesting: “Let us hide the stolen jewel of man’s divinity within himself, for there he will never look for it” (Bailey 1979: 107). By comparison, the UNESCO Constitution stipulates, in Recital 1 of its Preamble, as follows:

That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed (UNESCO 1945: Recital 1, Preamble).

This Recital reflects a kind of paradoxical thinking that can and also should be applied to cultural variety, which means that threats to cultural variety must be addressed

at the level at which they originate. Hence, it is a journey to the centre of the mind that – to use Jules Verne's metaphor of a journey to the centre of the Earth – should inspire the direction of our inquiries in law and policy-making in the future.

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# 4

## **Remarks on the Relations between Intellectual Property and Cultural Diversity in Brazil's Digital Environment: An Analysis of the Civil Framework of the Internet**

*(Original in Portuguese)*

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An internationally valid legal instrument, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) states the purpose, among others, of legitimating the development of public policies related to the protection and promotion of the diversity of cultural expressions. Ten years after its approval, the Parties are still facing the challenge of implementing it and, particularly, of adapting it to the digital age context. This implies taking a closer look at the 2005 UNESCO Convention in relation to the subject of intellectual property rights.

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With the rapid development of information and communication technologies, the production and circulation of new cultural contents have popularized on the Internet, as the reproduction and sharing of contents traditionally protected by author's rights or related rights have become exponentially easier. As a result, the old debate about the just measure between the protection of these rights, on the one hand, and the right to cultural diversity, on the other hand, has gained new frames and significant relevance in the context of the digital age. As authors' and related rights legislation gets extended to the digital environment, the circulation of and the access to cultural contents on the Internet get further restricted, and new forms of online cooperation sometimes end up being criminalized.

Controversies involving the creation of instruments designed to stop online "piracy" have marked the recent history of intellectual property. On the international arena, the Anti-Counterfeiting Trade Agreement (ACTA) is a case in point, as it devoted a special focus to the question of intellectual property infringement taking place in the digital environment. Although today the ratification of ACTA seems to be a goner, its provisions evidence how tensions between the private interests of authors' and related rights holders and the public interest in accessing and participating in cultural life have played out in the Internet space.

We argue that Internet regulation emerges in the digital age as a jurisdiction field that has a more or less direct implication on the "intellectual property rights *versus* cultural rights" debate. Depending on how such regulation is framed, it may either strengthen one side or the other. Alternatively, however, it may offer possibilities for better reconciling the two.

Considering the complexity of these relations, in this article we shed light on the controversy surrounding intellectual property rights and cultural diversity in Brazil's digital environment through a multidisciplinary analysis of the Brazilian Civil Framework of the Internet (*Marco*

*Civil da Internet* – MCI, Law No. 12.965/14) (Brasil 2014), which entered into force in June 2014. Having been called an “anti-ACTA” bill by the international press during its drafting stage (Moody 2011), the MCI establishes principles, guarantees, rights and duties attached to the use of the Internet in Brazil. To which extent, however, does the Brazilian MCI *de facto* oppose the so-called “anti-piracy laws”, and to what extent does it contribute to the promotion of the diversity of cultural expressions in Brazil?

To better understand these questions, we first situate the creation of the Brazilian MCI in the historical context of intellectual property international regulation, and then comment on a few points that help to compare the MCI to some anti-piracy laws. Finally, we analyse the MCI’s provisions concerning the role of the State in promoting digital culture vis-à-vis the current need for rethinking cultural policies in the digital age.

## I – International Regulation of Authors’ and Related Rights

The need to reconcile the private interests of authors’ and related rights holders with the public interest of having broad access to culture is not a new issue in Western history. Strictly speaking, the notion of authorship itself as an individual process, which arises from the author-subject’s originality and creativity, is a social phenomenon particularly connected to the development of Modernity (Alves 2010; Barthes 2004). Initially linked to the invention of the press, the notion of author as a “genius-artist” developed in Europe during Romanticism, establishing the conceptual framework that have underlain the international regulation on authors’ rights since the 1886 Berne Convention to this day. Among the fundamental characteristics of the notion of authorship dominant since then, Alves (2010: 511)

points out “the artist’s elevation, the valorisation of originality, and the new value imputed towards the individual’s affective and emotional experience”. Thus, the value once attributed to copy and imitation was redirected to the figure of the “author-subject”, giving rise to the concept of “author-owner”.

It is important to point out, however, that at its origins, the intellectual property protection system sought to establish a privilege concession system on the *commercialization* of literary works, without the idea of authors’ rights being an object of consideration. The Statute of Anne (1710) is frequently cited as the first instrument created with this purpose. Although it had been designed to ultimately protect English booksellers’ and publishers’ commercial interests, such Statute already established that the concession of their copyrights should be temporary. The validity of those rights was limited to 14 years, and could be extended for other 14 years should the author still be alive by the end of the initial term. Once the longest term had expired, however, the work would immediately fall into public domain, wherein it was supposed to finally fulfil the declared objective of the Statute, that is, to “stimulate learning”. In other words, the need for balancing private and public interests was already present at the origins of the English copyright system, which considered to be fair to grant the copyright holder a maximum term of no more than 28 years.

However, as this system developed internationally, such balance started to lean more and more towards the protection of private interests. The recrudescence of protection standards – either by prolonging validity, broadening the scope, or extending guardianship to interpreters, executors and producers, for instance – can be observed, with few exceptions, in the various revisions applied to the Berne Convention, as well as to other conventions, such as the Rome and Geneva conventions of the World Intellectual Property Organization (WIPO), and the UNESCO Universal Copyright Convention.

It is beyond our objective to detail the extent to which these instruments have contributed to strengthening the intellectual property international system. To mention but one example, ever since the Berne Convention it is recommended that national legislations protect most cultural works under intellectual property rights for at least 50 years after the author's death. *Contra* the Statute of Anne, which established a *maximum* acceptable protection term, the Berne Convention established thus *minimum* international protection standards, with countries being able to increase levels of protection nationally, but not the opposite. In Brazil, the authors' and related rights law (Law No. 9.610/98) stipulates a 70-year period of protection after the author's death. Only then can the work fall into public domain.

Reinforcing this trend, even though the text approved in the last review of the Berne Convention (1971) was kept practically unaltered, the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights) imposed minimum protection standards on the member countries of the World Trade Organization (WTO). However, unlike the Convention, which inherited the modern valorisation of the 'genius-artist', the TRIPS Agreement introduced and consolidated a new justification narrative for the very notion of "intellectual property rights" (May 2010). Such narrative holds that the maximization of the protection of intellectual property rights results in more investments in innovation and, consequently, in greater economic growth and social welfare ("the more protection, the better" thesis).

Moreover, in the WTO, non-compliance with the requirements stipulated in the TRIPS Agreement may give rise to trade sanctions. Depending on the WTO Dispute Settlement Body's rulings, trade sanctions may be applied so as to affect not necessarily the cultural industries of the country accused of infraction, but rather more economically relevant assets in relation to that countries' overall export activities (i.e. cross-retaliation). Apart from restrict-

ing public access to culture with implications on social and human development, the impacts of the TRIPS Agreement therefore extend to the economic realm, and can be felt more deeply in developing countries (Correa 2000).

In contrast to this trend, however, new possibilities of creating and reproducing cultural works emerge and gain strength with the popularization of digital technologies. Perceived as a new dimension of public space, the Internet has become the *locus* of demands for free access to information, knowledge and culture (Lessig 2004). Two main arguments constitute the basis of these demands. The first one attempts to debunk the “the more protection, the better” thesis by differentiating material goods from immaterial goods. While the former constitute scarce goods that can justify higher control of access, the latter bear a non-competitive and non-rival nature. This means that when a person shares and makes use of an immaterial good this does not prevent other persons from making use of it too. In other words, such non-competitive and non-rival nature places immaterial goods in the economic category of public goods. The second argument is conceptual in nature. It criticizes the modern notion of author and its “transfer” to the digital age (Alves 2010), and rather defends the necessity of reviewing the limits of authors’ rights and related rights, so as to take new forms of authorship into account and (re)contextualize the phenomenon of authorship in contemporaneity (Sass 2015).

Despite these arguments, intellectual property lobbying – mainly by major copyright holders (i.e. major corporations), who *de facto* constitute the major beneficiaries of this system – led to the creation of legal instruments designed to fight practices considered to infringe intellectual property rights in the digital environment. National “anti-piracy laws” around the world include the US 1998 Digital Millennium Copyright Act (DMCA), the 2011 draft bills Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA), and France’s 2009 Hadopi (High Authority for the

Dissemination of works and Protection of Rights on Internet) Law. Among the international treaties, the 1971 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; the 1996 WIPO Copyright Treaty; and the 1996 WIPO Performance and Phonograms Treaty, all precede – and inform – the creation of ACTA, which was designed “to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment”.

Negotiated in secrecy by a selected group of countries headed by the United States, the European Union and Japan, it can be stated that one of ACTA's main objectives was to extend the “the more the protection, the better” thesis to the digital environment (Cruz 2014). In Article 27, for example, which dealt with “effective implementation in the digital environment”, the Agreement provided for civil and criminal enforcement, establishing punitive and corrective measures which included injunctions and compensations, as well as imprisonment and monetary fines “high enough to discourage future infractions” (Art. 24).

Although it has not entered into force, ACTA reveals how the discourse on fighting against online piracy is framed today, and the concrete measures some countries are willing to adopt in this regard. It also brings to light the attempt to consolidate a new baseline for intellectual property protection standards internationally, one that ultimately favors the economic interests of major corporations, and moves this system further away from a more just and inclusive balance vis-à-vis cultural rights in the digital environment. As Silva (2015: 137) concludes,

In fact, under the pretext of updating them, the objective of the new treaties ended up extending classical protection to new actors, particularly corporations. (...) The maximization of the protection aimed at favouring the maintenance of powerful multinational oligopolies, which think of them-

selves as holders of cultural control. (...) changes in authors' [and related] rights legislation were deemed necessary, making it increasingly restrictive, not in order to encourage creation, but to maintain the *status quo*. The result was an international legal system at odds with the new culture.

In Brazil, debates on the detrimental effects of ACTA on the safeguard of civil rights and freedom of expression in the digital environment came up in the aftermath of demands for an Internet usage regulation. Against the draft bill on virtual crimes (which became the Brazilian Law No. 12735/12), digital rights advocates argued that "all the efforts of public debate around that draft bill, which aims to regulate the Internet from a criminal point of view, should turn to the *civil* regulation of the network" (Lemos 2007, emphasis added).

## II – The MCI and Authors' and Related Rights in Brazil

Although being approved only after the Brazilian criminal framework of the Internet, the MCI (Law No. 12.965/14) entered into force in July 2014, following a long process of popular consultations and lively debates within the Brazilian society. As already said, the MCI establishes principles, guarantees, rights and duties for the use of Internet in Brazil. For some (e.g. Moody 2011; Moreira 2014), it is actually a counterpoint to the idea of an "anti-piracy law". In this section, we make a few remarks about this interpretation. With no intention whatsoever to provide conclusive thoughts on the matter, our intention here is solely to highlight and analyse some significant points regarding the relations between the MCI and the question of authors' and related rights in the digital age.

## A – The (Non-) Reference to Authors' or Related Rights

Forthwith, one can note that there are only three direct references to authors' and related rights in the MCI: two of them appear where it refers to the responsibilities for damages resulting from contents generated by third parties (Art. 19), and the last one of them appears in the final provisions (Art. 31). We shall deal with these articles further on. For now, what we would like to stress is the non-(explicit) inclusion of the authors' and related rights issue among MCI's basic principles (Art. 3). By not explicitly including the guarantee of these rights among its guiding principles, and by relegating it to a single paragraph<sup>2</sup> (right after Article 3), we argue that the Brazilian MCI indeed seems to oppose to the so-called anti-piracy laws, whose main guiding principle consists precisely in guaranteeing the protection of authors' and related rights.

On the contrary, as the eight principles listed in Article 3 show, the MCI rather prioritizes the principles of guaranteeing freedom of expression, communication and expression of thoughts, and of protecting privacy and personal data. The guarantee of authors' and related rights is hence put in second place. Although the MCI does not at all imply that this principle should not be respected (as reinforced in Art. 31), we argue that the non-reference to these rights among this law's basic principles places the Brazilian MCI away from the international trend of maximizing authors' and related rights protection standards to the detriment of the public interest.

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<sup>2</sup> “The principles expressed in this Law do not exclude others provided for in the Nation's legal framework related to the matter or in international treaties adhered to by the Federative Republic of Brazil”.

## B – Responsibility for Contents and Freedom of Expression

Section III of the MCI addresses the issues that are most directly linked to the regulation of authors' and related rights. From the start, Section III stipulates that Internet connection providers shall not be held accountable civilly for damages resulting from contents generated by third parties (Art. 18). As for Internet application providers,<sup>3</sup> it states that "with the purpose of assuring freedom of expression and preventing censorship," third parties may be held accountable civilly, but only if *after a specific court order*, the provider does not take appropriate action to make the alleged infringing content unavailable online. The only exception to this general provision concerns violations of intimacy resulting from unauthorized disclosure of images, videos or other materials that include private nature nudity or sexual acts (Art. 21).

For the purposes of the present analysis, two points are worth noting in regard to such provisions. First, the MCI assures that *only by judicial order* may the application provider be obliged to take down the content that supposedly infringes authors' or related rights. Moreover, the order "shall contain, under penalty of nullity, the clear and specific identification of the allegedly infringing content, so as to ensure the unequivocal localization of the material" (Art. 19 § 1st). In other words, as Wachowicz and Kist (2014) point out, not only does the MCI provide greater legal certainty to cases involving allegations of intellectual property infringements online, it also discourages the practice known as "notice and take down", which consists in withdrawing the content after simple notice issued by the alleged victim.

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<sup>3</sup> Defined as "the set of features that can be accessed to by means of a terminal connected to the Internet" (Art. 5 VII).

Related to this, the second worthy noting point refers to the MCI's understanding of the "notice and takedown" itself, as can be inferred from the law's text. This practice has been fiercely combated by digital rights activists, who claim that it actually consists in an indirect form of violating freedom of expression, and ultimately of imposing a kind of censorship. Digital rights activists argue that, in the absence of appropriate regulation, Internet providers usually withdraw contents that allegedly infringe intellectual property rights right after simple notification, and without sufficient evidence, as to avoid possible future legal actions that may force them to pay compensations. Without previous legal examination, however, this kind of action can end up favouring arbitrary and unfounded notifications. By requiring the need for court orders in order to protect freedom of expression, and avoid censorship on the Internet, the MCI seems to be in conformity with the understanding that the "notice and take down" practice can produce negative effects on the safeguard of civil rights on the Internet. Since it prioritizes the benefit of doubt vis-à-vis intellectual property infringement claims, the MCI stands in radical opposition to the preventive measures usually prescribed by anti-piracy laws.

This point is further reinforced in the second paragraph of Art. 19. According to it, "[the] application of the provision in this article regarding infringements to authors' or related rights depends on specific legal provision,<sup>4</sup> which shall respect the freedom of expression and other guarantees as provided for in Art. 5 of the Federal Constitution" (italics added).

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<sup>4</sup> In this regard, it is worth mentioning that in February 2016, the Brazilian Ministry of Culture (MinC) launched two public consultations through which Brazilian citizens were able, within a 45-day period, to send suggestions of improvements to two normative instructions. Both these normative instructions aim at regulating the country's author's rights legislation regarding the collective management of those rights on the Internet. As MinC explains, "[the] first of them shall establish specific provisions for the activity of authors' and related rights collecting in the digital environment by collective-management associations and by the collecting entity". The

Furthermore, the MCI advances the protection of civil rights in the Brazilian digital environment as it states that, also in this case, only by court order can Internet providers be obliged to provide users' information to third parties (Art. 10) – a rule that also applies to foreign corporations (Art. 11).

### C – Guarantees against Internet Connection Suspension

Among the rights assured by the MCI to Brazilian Internet users, the right to not have Internet connection suspended – “except by virtue of debt directly resulting from its use” (Art. 7 IV) – stands out. The importance of this provision for the analysis at hand relates to the fact that, when preventing Internet connection from being disrupted due to any reason other than the lack of payment directly resulting from its use, the MCI makes it difficult to Internet providers to resort to that strategy as a means of punishing intellectual property rights offenders. Such retaliation was, for example, provided by the French Hadopi Law, which allowed for the suspension of the Internet connection of users who would make use of online file sharing platforms either to download or to share contents protected by authors' or related rights (Gunther 2009).

Before analysing the MCI's provisions that directly address the question of cultural diversity, two observations regarding its relations to the matter of intellectual property should be made. Concerning the responsibility for contents created by third parties, it should be noted that the MCI does not provide any impediment should the provider decides to take down a given content. That is to say that the Internet provider is not *obliged* by law to keep a given

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second one “concerns users' duties in regard to the reproduction of works and phonograms that are inserted in other works or audio-visual productions” (Ministry of Culture 2016).

content on air until a court order is issued, even though he/she is covered by law *should he/she decides to do so*. As a result, possibilities remain open for the alleged victim to bargain to the provider as to get content prematurely taken down of the Internet. If this is to be successful, then there is no need to present a court order. One can easily suppose that this loophole in the law may possibly be exploited mainly by major corporations in their efforts to restrain free access and criminalize collaborative network arrangements in the digital environment.

The last point refers to the MCI's penultimate article (Art. 31), which resumes to the provisions established in the second paragraph of Article 19, and specifies that "in the case of authors' or related right infringement", and until a new law is adopted, the liability of the Internet application provider for damages arising from content generated by third parties "will continue to be disciplined by the authors' right legislation applicable on the date this Law enters into force" (Art. 31). The fact that this article actually finalizes the text of the MCI (the following article solely deals with its date of implementation) should not be underestimated. Although it does not invalidate the points we have raised above regarding the discrepancies between the MCI and the so-called anti-piracy laws, to some extend Art. 31 seems to redress the absence of explicit reference to authors' rights in Art. 3, as its final words emphasize the need for compliance with authors' and related rights legislation, and redirect omitted points to the ambit of the reform of that legislation.<sup>5</sup>

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<sup>5</sup> The need for modernizing Brazil's authors' rights law (Law 9.610/98) in face of the popularization of digital technologies has raised extensive debates in the Brazilian society since 2004. As a result, the Ministry of Culture launched two public consultations, one in 2010 and one in 2011, with the aim of improving the draft of the new authors' rights law. After a series of modifications, the Draft Bill is currently being analysed by two committees in the Brazilian Parliament: the Culture Committee (CCULT) and of the Committee on Constitution and Justice and Citizenship (CCJC) (Câmara dos Deputados 2013).

This second loophole in the law makes it possible for intellectual property infringement issues related to civil rights on the Internet to be ultimately regulated in Brazil by its authors' rights legislation – not by the MCI. As an example, it is relevant to mention the debate on the issue of liability in peer-to-peer sharing (P2P) practices, in which users' computers exchange information directly one to each other. After being deleted from the original text of the MCI draft, this debate has shifted to the authors' rights reform agenda. This was mainly due to the fact that Art. 105-A of the new authors' right law intends to make the "notice and take down" practice allowed in cases of P2P sharing. This implies a risk for the consolidation of the understanding that such practice may have negative implications on freedom of expression and civil rights in the digital environment. Depending on future developments of this debate, this may also weaken the applicability of the MCI in relation to the new authors' right law.

### **III – The MCI and the Promotion of Cultural Diversity within the Digital Environment in Brazil**

As we have already suggested, it is impossible to reflect upon authors' rights without connecting them in essence to the right to access to culture. This dimension precisely seeks to guarantee every person the right *to participate freely in cultural life*. Addressing the access to, as well as of promotion of, cultural diversity in the digital environment in Brazil thus implies raising the subject of cultural rights. As Farida Shaheed (*apud* Coelho 2011: 22) defends:

the full respect to human rights and, in particular, cultural rights, creates an environment that allows for and offers the guarantee of cultural diversity. At the same time, the respect for cultural diversity, its promotion and protection is fundamental to guarantee the full respect of cultural rights.

Cultural rights are an integral part of human rights, as pointed out in both Art. 27 of the Universal Declaration of Human Rights (ONU 1948) and Art. 15 of the International Covenant on Economic, Social and Cultural Rights (ONU 1966). According to Art. 27, cultural rights refer to one's freedom to participate in cultural life, to follow or adopt lifestyles of his/her choice, to exercise his/her own cultural practices, to benefit from scientific advancement, and to have moral and heritage protection linked to the artistic or scientific productions of which he/she is the author.

With the exception of authors' rights, which have been extensively studied and codified, the conceptualization and codification of cultural rights are unclear. The UN Committee on Economic, Social and Cultural Rights (2009) advises that, through the conceptual improvement of *the right to participate in cultural life*, it is possible to ensure a comprehensive character to cultural rights in which the dimensions of both *free participation*, and *equal access and contribution* to cultural life of the community are included. Thus,

Cultural rights in their *negative status* are understood as the right for any individual to participate, passively or actively, in equal conditions, and without any previous discrimination, impediment or censorship, in the cultural life of his/her choice, defining his/her own identifications (or identities), provided that his/her participation does not infringe other human rights, nor restrict the fundamental freedoms that are guaranteed to all human beings. In their *active status*, the individual has the right to participate in cultural policy decision-making processes. Finally, in regard to their *positive status*, we affirm that cultural rights shall guarantee: the protection of both tangible and intangible cultural heritage; a reality where the most varied cultural goods and services are offered; freedom of expression in one's own mother tongue with due recognition by society; financial support to produce and disseminate culture; besides the guarantee of moral and patrimonial rights of one's own works (Kauark 2014: 124).

Brazil is a signatory to the abovementioned 1948 Declaration and 1966 Covenant. This is reflected in Art. 215 of Brazil's 1988 Federal Constitution, which reads: "The State shall ensure to all citizens the full exercise of cultural rights and the access to the sources of national culture, and shall support and foster the appreciation and diffusion of cultural expressions." However, cultural rights are still a reality only for the few in Brazil. Minority groups, such as Afro-descendants, indigenous peoples, gypsies, persons with disabilities, homosexuals, and women still face great difficulties in participating freely in the cultural life of their choice. This deep inequality of condition to enjoy cultural rights in Brazil is due to several reasons: persistent regional disparities, discrepancies between private and public education; limited access to higher education; a lack of cultural spaces; insufficient protection of cultural heritage, among others.

In the digital context, new deficits further complicate the guarantee of cultural rights in Brazil, including the limited access to digital technologies, challenges in digital inclusion, insufficient knowledge on civil rights on the Internet, and – before the MCI came into effect in 2014 – a lack of regulatory frameworks in tune with those rights.

#### A – The (Almost Explicit) Reference to Cultural Rights

The MCI comprises 32 articles, seven of which explicitly mention the word "culture". Two of them demand special attention: articles 4 and 27.

Clause II of Article 4 states that "[the] discipline of Internet usage in Brazil is aimed at promoting: access to information, knowledge, and to *the participation in cultural life* and in the conduction of public matters" (emphasis added). We can infer from that that the MCI deals with cultural rights as one of its purposes, recognizing such rights not only in their negative status, but also in their positive status.

Considering that the guarantee of cultural rights – particularly the guarantee of effective participation in cultural life in the digital environment – must be reflected into factual positive actions by the State, it is crucial to understand what the MCI stipulates in the chapter on the role of the public powers.

## B – The Role of the Public Powers in the Promotion of Digital Culture

Article 27 is the only article of the Brazilian MCI that exclusively addresses the cultural realm. It points out that “public initiatives aimed at promoting digital culture must: promote digital inclusion; seek to reduce inequalities, especially regional discrepancies regarding the access to and the uses of information and communication technologies; and foment the production and circulation of national content”. For the purpose of this article, and inspired by the World Report on the 2005 UNESCO Convention, below we analyse the MCI with regard to three main topics surrounding the relations between the diversity of cultural expressions and the digital environment (Kulesz 2015): access to culture; creativity; and cultural industries.

The access to culture is one of the most commented (and celebrated) issues related to the emergence of digital technologies. Its potentials are nevertheless often overestimated by those who believe that the rise of digital technologies would necessarily lead to the expansion and democratization of virtually unlimited access to cultural contents beyond geographic borders, institutional and infrastructural barriers imposed by local cultural policies, and beyond cultural industries’ oligopolistic control. As Silveira (2011) points out, such discourse is to be found among most “techno-utopic” commentators. On the other hand, “realists” emphasize prevailing obstacles in accessing culture online, asymmetries in digital inclusion, limited infrastructure, and market concentration.

According to the *Index on Censorship* (INDEX 2014), Brazil is the fifth most connected country in the world, and the second largest user of Facebook and Twitter. The number of people with access to the Internet in Brazil has exceeded 50% of the country's population, with over 100 million users – a number that has been growing rapidly with the cheapening of smartphones and recent connection improvements. Access to the Internet is, however, still very unequal in Brazil. *Contra* 97% of high-income households (Class A), only 6% of low-income households (Classes D-E, 75% of the population) are connected to the World Wide Web. Besides income inequalities, asymmetries between users' education levels, ethnic groups, professional segments, places of origin (following the urban / rural divide), age groups, etc. are also reflected in the Brazilian Internet access landscape (INDEX 2014).

Regarding the access to and the use of information and communication technologies, the MCI establishes that public initiatives shall seek to reduce inequalities, mainly regional inequalities. The MCI is limited, however, to the territorial distribution dimension, disregarding generational, educational, and economic variables that also impact the access to and the use of digital technologies.

Moreover, when addressing the issue of inequalities in accessing the diversity of cultural expressions in the digital environment, one must look beyond merely quantitative evidence, such as the number of houses with microcomputers or the number of inhabitants with smartphones, and look also at qualitative analyses dealing with the question of digital inclusion.

Digital inclusion is explicitly mentioned in Article 27 of the Brazilian MCI. Put simply, the digital inclusion component refers to people that know how to use the Internet – which some authors consider to be not only an economic or cognitive problem, but also a cultural one. Manuel Castells (*apud* Lemos 2011), for example, classifies Internet users as *interacted* and *interagents*, with the difference between

the two being the user's opportunity to take advantage of the social, economic, and cultural benefits provided by the digital technologies.

Before such a vast range of possibilities, however, very often governmental measures and policies, notably in Brazil, direct their attention to compensatory actions (Bonilla & Oliveira 2011), which results in increased number of *interacted* users, but barely help to form *interagents*. Today, besides guaranteeing Internet connection and training users to become *interagents*, public policies aimed at expanding the access to cultural diversity in the digital environment must focus on some key topics. The concentration of Internet applications in the hands of a few foreign corporations versus insufficient investments in the development of innovative, dynamic national actors on the digital market is a case in point. Equally noteworthy are the issues of little linguistic diversity on the web, the lack of a regulatory framework for recommendation algorithms, and data and information surveillance on Internet users' consumption habits and preferences. All these factors negatively impact cultural diversity online, as they contribute to the homogenization of the supply and circulation of cultural goods and services on the Internet. These central issues are, nevertheless, disregarded by the MCI.

Another crucial topic here is that of artistic creativity. Opportunities resulting from the rise of digital technologies in varied artistic processes are opening up in many different directions. New formats have been created in several sectors. In the audio-visual sector, films for small formats such as tablets and cell phones have been developed; in the performing and visual arts sector, new creations in the digital arts, interactive arts, and in the use of amplified reality tools that complexify aesthetic experiences are now in rapid growth. Simultaneously, production costs have been significantly reduced with the proliferation of computer software and digital platforms that have revolutionized the creation, edition, and dissemination of cultural contents, something

particularly evident in the music sector. Furthermore, digital technologies have expanded the participation of persons with disabilities in cultural life, as they have enabled the creation of cultural products that are already designed to digital applications such as reading, audio description, and translation to sign language applications.

In Brazil, obstacles in this sense relate above all to a lack of technical training and expertise for artists and creators to be able to make plenty use of digital tools both in creative processes and in promoting accessibility. Besides that, there is a serious discrepancy and discontinuity among Brazilian cultural public policies as far as to address the promotion of digital culture in terms of artistic creation. This trend is reinforced by the MCI, which apparently does not take this question into account.

As for the MCI's advances, maybe the most important refers to the principle of net neutrality. This principle aims to guarantee the isonomic treatment of "any data packages, without any distinction whatsoever as to content, origin and destination, service, terminal or application" (Article 9). By establishing that all information shall circulate at the same speed and in the same conditions on the Internet, the MCI thus hinders the possibility of favouring certain web-pages and services. As Wachowicz and Kist (2014) observe, "[the] idea was to prevent large corporations from lobbying Internet servers so as to have their webpages or any form of product offered on the web propagated at a faster speed than their competitors." Preserving and ensuring net neutrality as a principle (Article 3 IV) ultimately involves the will to guarantee universal and unlimited access to the Internet. This has positive implications on the issue of digital inclusion we addressed above. Furthermore, it is worth noting that the violation of the net neutrality principle could put artistic creativity at risk. As Silveira (2011: 56-57) illustrates:

It would have been practically impossible to create a YouTube or even a BitTorrent protocol if, at the beginning of the Internet, Telecom operators had been able to filter the traffic of information or decide to block protocol data packages or applications that were unknown or unauthorized by their commercial policy. The opening towards innovation without authorization by governments or corporations is destroyed when the infrastructure controller has the power to tell what can or cannot go through his network.

Finally, the third topic under our analysis here regards the changes affecting the cultural industries in the digital age. Some of these changes are rather well-known, such as the increased interactivity and direct communication with the public via social networks. Others, however, are more recent and complex, and include the creation of new business models – such as the streaming system that has had a significant impact on the audio-visual sector (through Netflix, for instance) and on the phonographic sector (through Spotify, for instance) – and the opening up of new markets in cyberspace – which in turn leads to extensive revisions of financing policies for cultural productive chains and of intellectual property legislations.

The question of how to stimulate and regulate national cultural industries in face of the challenges brought by digital technologies have triggered the most fruitful debates on the 2005 UNESCO Convention. These debates are closely related to the “intellectual property versus piracy” discussion we addressed above. As far as the analysis of Article 27 of the MCI is concerned, we can see that it is clearly oriented towards stimulating the production and circulation of national content. Initiatives in this sense are still incipient; however, as the recent creation and launch of a kind of “Brazilian Netflix” with the aim of providing nationally-produced audio-visual contents (Ministério da Cultura 2015) signals, there seem to be an attempt to update

cultural and communication policies to account for some of the changes brought by digital technologies and, at the same time, to make them compatible with the MCI provisions.

## Conclusions

In this chapter we made some remarks upon the relations between Internet regulation, intellectual property rights, and cultural rights in Brazil through the analysis of the MCI. Our main goal was to shed light on some impacts of the MCI on the promotion of cultural diversity in Brazil's digital environment.

As we have shown throughout the two previous sections, the advances brought about by the MCI in relation to the search for a better balance and coexistence between authors' and related rights and cultural rights are undeniable. In spite of some loopholes, the MCI does oppose to the so-called anti-piracy laws in various regards, and stands away from the international trend in intellectual property rights governance, which has resulted in the maximization of those rights' protection standards.

As far as the promotion of cultural diversity in a broad sense is concerned, the inclusion of cultural rights among the MCI's fundamental objectives enables a greater State role in Brazil's Internet regulation, as well as mobilizes social pressure towards its implementation. However, its rather limited provisions regarding the access and digital inclusion issues, together with the disregard to other factors impacting the online access and promotion of diverse cultural expressions in Brazil, lead us to fear that both governmental and non-governmental actors of the cultural production chain are still far from a more comprehensive update of cultural policies in the digital age. This is reflected in the weak transversability of the MCI in relation to the objectives of the 2005 UNESCO Convention.

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# 5

## The Music PEC: An analysis of the lawmakers' position: Tax waiver to the benefit of access to culture or market reserve?

(Original in Portuguese)

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### Introduction

This chapter aims to analyse how the arguments in favour of the approval of the Proposed Constitutional Amendment (*Proposta de Emenda Constitucional – PEC*) 123/2011 – known as Music PEC – were built discursively. These arguments are found in the “Justification” section of the referred proposal (Brasil 2013) and served as basis for discussion in public hearings and plenary votes.<sup>2</sup> To achieve this goal,

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<sup>2</sup> The Proposed Constitutional Amendment was drawn up by Congress member Otávio Leite, and went through all the proceedings required by Federal Congress: introducing the proposal before the Committee on Constitution and Justice (CCJ), public hearings in the Chamber of Deputies and the Federal Senate, and plenary vote in both Houses.

we have organized this article around the analysis of three structuring aspects of the Music PEC argumentative orientation: “defence of national culture”, and how the PEC’s text uses a business model to justify the country’s cultural practice; “defence of the adversely affected”, which proposes to discuss one of the bases of the criminalization discourse around music sharing; and the “piracy-profit relationship”, which treats sharing as a source of loss to the musician.

The proposed constitutional amendment, which was introduced in congress in 2007, and enacted at the end of 2013, suggests the following amendment to the Federal Constitution:

Add paragraph “e” to item VI of Art. 150 of the Federal Constitution, instituting a tax waiver on Phonograms and Musical Video phonograms produced in Brazil, containing musical or literary-musical works of Brazilian authors, and/or works generally interpreted by Brazilian artists, as well as the material supports and digital files containing them (Brasil 2013: 2).

In other words, the Music PEC extends the tax waiver already granted to books, to national phonograms and video phonograms as well, thus exempting the levy of the Value-added Tax on Sales and Services (*Imposto sobre a Circulação de Mercadorias e Serviços* – ICMS), the Tax on Services (*Imposto sobre Serviços* – ISS), and the Tax on Financial Operations (*Imposto sobre Operações Financeiras* – IOF). It has been speculated that such exemptions would reduce the

price of the phonograms and videograms by 30%, according to non-official calculations<sup>3</sup> estimated by specialists when consulted by the press.<sup>4</sup>

The proceedings leading to the PEC's adoption was a political process that was on the agenda for over six years. The text of the proposal was discussed in seven public hearings, six in the Chamber of Deputies and one in the Federal Senate; afterwards, it was analysed and voted in both Houses so as to amend the Brazilian Constitution.

The text used to justify the PEC will give us clues as to the argumentative orientation adopted by the legislator, and enable us to discuss the objectives of the tax waiver: does it predominantly aim at broadening access to culture, or does it seek to guarantee a market reserve.<sup>5</sup>

The notion of discourse permeating the present discussion is based on the discourse theory elaborated by Eni P. Orlandi, the Brazilian expert on the theory that was first discussed in France by Pêcheux and Foucault. We are interested in the discourse because we understand that it constitutes a mediation between man and natural and social reality, and "it makes permanence and continuity as well as displacement and transformation possible for man and the reality he lives in" (Orlandi 2005: 15). In this article we propose to look at "meaning and strength relationships

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<sup>3</sup> These calculations were not included in the proposed text of the constitutional amendment because they are estimates that cannot be generalized, since each artist constitutes a basis that is different in regards to the production costs of his/her music.

<sup>4</sup> We can mention two reports that picked up testimonials and estimated those numbers: Tiago Dias (2013), through the website UOL Música, and Raquel Ullhôa and Fábio Brandt (2013), through the newspaper *Valor Econômico*.

<sup>5</sup> The expression "market reserve" can be understood as the government's effort to protect a set of companies of a certain sector. The most common examples are found in the prohibition of importing products already produced in the country. In the case of the present study, the expression refers to the idea of privileging a business model in the phonographic sector and its market profit share, even though, as a consequence, new ways of doing things, lucrative or not, are ignored.

through the traces these leave in the stream of the discourse" in order to understand "how it is said", "who says" and "in what circumstances" (Orlandi 2005: 64).

According to Orlandi, "every discourse is established in relation to a former speech and points towards another one. No discourse is closed on itself. What we have instead is a discursive process from which different states can be cut out and analysed" (Orlandi 2005: 62). Thus, we shall consider the text "not only as linguistic data (looking at its marks, how it is organized, etc.), but as a discursive fact", understanding that it is "the facts which allow us to reach the memory of the language" (Orlandi 2005:70). The text is "the analysis unit affected by production conditions and it is also where we find the connection with language representation: sound, word, space, directed dimension, size" and it is also "play on meanings, work on language, and workings of discursivity" (Orlandi 2005:72). Following the author's guidance, we shall assume that the "meaning" is "a determined relationship of the subject with history", affected by the language, and that "there is no discourse without a subject" and "there is no subject without ideology". Through language, "ideology and unconscious are materially connected" (Orlandi 2005: 47). To Orlandi,

when saying, the subject expresses him or herself in determined conditions, compelled on the one hand by language, and on the other hand by the world, by his or her experience, by facts demanding meaning, as well as by his discursive memory, by a know/can/must say, in which facts make sense because they are incorporated in the discursive formations that represent them in the discourse (Orlandi 2005: 53).

According to this theory, we can understand that, while drawing up the PEC justification, the legislator identified with the same discursive formation most businessmen and artists belong to, as we shall present and analyse in the following sections. As far as we are concerned, we understand that it is interesting to be familiar with facts and

other viewpoints that may expand perspectives and show that piracy points out to new production and cultural consumption arrangements, and that information technologies promote a restructuration of that production chain.

## I – Defence of National Culture

The legislator starts the justification with a passage that introduces the PEC as a defender of Brazilian culture: “The proposed constitutional amendment is, above all, a cry of defence for national culture” (Brasil 2013, p. 3). Although it is just an introductory text, it is not irrelevant to think that the “defence of national culture” would boil down to creating mechanisms intended to reverse the crisis of a business model, eliminating taxes from their price composition and lowering the prices of CDs and DVDs. Can we infer that the legislator understands that the phonographic sector crisis is a threat to national culture? We understand that this is indeed the case upon analysing who was present at the public hearings to discuss this “defence of national culture”.

Apart from the representatives of the metallurgic and electronic industry, who were invited to talk about producing the materials, representatives of both the Brazilian Association of Record Producers (*Associação Brasileira dos Produtores de Discos* – ABPD) and the Brazilian Association for Independent Music (*Associação Brasileira de Música Independente* – ABMI) were present, both arguing that the reduction in record sales volume – supposedly because of high prices – made it impossible for companies to survive in this market, thus threatening the continuity of musical production in the country, the solution to this problem being to eliminate the fiscal burden, which would consequently reduce the price of the products sold by the companies these association represent (Brasil 2008).

We will address the relationship between prices and the reduction in record sales volume but shall first focus on the notion that the phonographic market is the origin and the reason for being of Brazilian musical production. Around 2000, when new technologies started to facilitate uncontrolled music copying and distribution, the presidents and directors of the major record labels operating in Brazil started to associate their business crisis to the inevitable end of Brazilian musical production. This discourse was recorded in an interview granted to the newspaper *Folha de São Paulo* in 2001, when the presidents of the four major record labels operating in Brazil and affiliated to the ABPD were invited to talk about changes on the music market and comment on strategies against what they called *piracy*. Aloisio Reis, president of EMI<sup>6</sup> records at the time, thus summarized his viewpoint on the matter:

Do you know what happens when there is a blackout? People find out that Brazil has run out of electric power and any time now they will discover that Brazilian popular music is over. It's the same thing. But then it will be too late, they will have to ration. What we want is to warn you that this is true, it is not alarmism. We are letting artists go, we are not signing any new ones. It will be over. And when it is over, "oh... it's over!" and there will be no fixing that! (Sanches 2001).

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<sup>6</sup> EMI, Electric and Musical Industries Ltd., was created in 1931 by merging Columbia Gramophone Company and Gramophone Company, two companies whose history goes back to the origins of sound recordings. In 2012, it was dissolved and sold in two parts: one to Universal Music and the other to Sony Music Entertainment, first and second major record companies, respectively. EMI was the fourth company in the oligopoly which controlled the world music market, today dominated by only three companies.

When only four<sup>7</sup> companies dominate the market, they start thinking that any change in their structure would define the business characteristics of the sector. Until the end of the nineties, it was easy to agree with this logic simply because releases were controlled by these companies. Known as *majors*, this oligopoly was controlling the chain vertically, from prospecting talents to producing albums, from media/support fabrication to promotion/marketing. The more they centralized the chain, the more control and profits they obtained. Controlling access had always been a central aspect of the phonographic industry business, and did not demand much effort, since media production was expensive and the marketing involved would rather deal with huge sums, centred on a few contracts.

It so happens that technology challenged the majors' influence, in terms of the means of innovation and launchings of new artists. Even with the majors still controlling two thirds of the music business, they no longer control music production. This is a subtle difference, but the reality is that the four big companies no longer control more than about a hundred artists under contract. Remunerated musical production no longer needs to happen in a single way – now, artists can work independently, without intermediates, and make use of the most varied technologies to reach and interact with their audience. Today, part of the intermediation is done by companies that are specialized as *access platforms*: if the use of their platforms is motivated by an artist or by thousands of artists, not much changes in this business model – what really matters is the final volume of access and the advertisement spaces sold. It is a radical change, when compared to the traditional business model in the phonographic sector, which needs to

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<sup>7</sup> In the beginning of the 2000s, four major companies controlled the whole music market in Brazil and in the world. Nowadays, there are only three (Universal Music, Sony Music, and Warner Music), after a reorganization and merger process in the sector.

concentrate its efforts on a few artists considered as having a big sales potential. From the viewpoint of diversity, access platforms create opportunities for more productions to be known without causing major costs either for the platform or the artists.

The phonographic industry lost the power to dictate which would be the next success. Countless other factors were at stake. If, on the one hand, experience and contracts between record/distribution companies and radio/TV stations guaranteed access to the public and minimized risks for the chosen artists, today there is less certainty but countless new ways to go. The new recording and distribution technologies (mainly the Internet) have a central role in this development and an even bigger one in the transformation process of the access to what is produced.

## II – Defence of those adversely affected

Going back to our initial reading, after presenting the PEC's intentions, the author of the project shows to have some knowledge of the new dynamics at play in the production/recombination/distribution of content through digital means (discussions found in Leão & Nakano 2009, Lessing 2001, Silveira 2009) when he says that "it is urgent that measures to strengthen Brazilian musical production be implemented, in face of the cruel avalanche of piracy and the inexorable reality of the computer global network (the Internet)" (Brasil 2011: 3). As one can see, the use of the word "cruel" gives a defensive tone, but the legislator did not keep the same qualification when mentioning the "computer global network"; this he refers to as "inexorable reality". Although both of them are "avalanches", the author chooses to qualify piracy negatively, and use softer

terms towards “global network”, thus avoiding disassociating it from its progressive image, which would immediately refute his argument.

Further on, in the first part of the PEC statistic substantiation, the legislator presents the fall “in the world ranking of phonographic producers” as a loss that “our authors, composers, producers, artists, and music professionals in general” would have to face.

The figures presented by the APDIF – Protective Association of Phonographic Intellectual Property Rights – demonstrate that Brazil, once holding the 6th position in the world ranking of phonographic producers, today sees its market reduced to the 12th place in the same classification; moreover, it is in the 1st place regarding losses resulting from musical piracy, with our authors, composers, producers, artists, and music professionals in general being the most directly affected by the illegal industry (Brasil 2011: 3).

This excerpt reproduces one of the main phonographic industry strategies, which has been to personify the loss deriving from piracy by using well-known artists in campaigns that relate piracy to crimes against life and the artists’ subsistence. The discourse thus constructed reinforces the notion that every uncontrolled copy amounts to theft and directly affects the artist concerned.

Although personalized, this strategy does not have any effect on the amount pirated, since people have never been included in the production process and do not know how it works (so that they do not question it, among other things). They are equally unaware of the fact that their downloads affect the artist. For them, a pirate CD or DVD or direct download from the Internet represent a way to access culture for a socially fair price.

Further on, the legislator uses the same argumentative resources:

Between 1997 and 2004, the effects of piracy on the phonographic sector were devastating, and the number of contracted artists dropped by 50%, in addition to a loss of over 40% in the number of national releases. Moreover, it is estimated that nearly 2,500 sale points have been closed and over eighty thousand formal jobs have been terminated since then. As from 2004, the situation seemed to stabilize, but at a very critical level already, with over half the market overtaken by illegal products and informal job positions, demonstrating that the interest in the phonographic product hasn't died, but that the huge financial distance between legal and fake products has reached alarming proportions and has to be fought against (Brasil 2011: 3).

The data used in this excerpt of the justification do not, however, mention the fact that the year 1997 was the best year in the history of recording companies, which had been growing by 30% annually and reached their peak in 1997, when they sold approximately 105 million copies. Benefiting from the economic stabilization and the consumers' perception of their higher purchasing power, the phonographic market reached its peak and these good years are used as the parameter for its "fall".

After the golden years, revenue fell from R\$810 million in 1999 to a little over R\$300 million in 2012, according to the Brazilian Association of Record Producers (ABPD 2004: 2012). This drop keeps being understood/announced as a crisis (to be reverted) and not as the structural transformation of the business model. Even if we accepted the scenario presented as reversible, would the recovery be measured against the revenue attained in the best period, that is between 1997 and 1999?

The text that was put together to justify the PEC excludes, deliberately or not, several influential factors for the phonographic industry crisis, other than the so-called *piracy*. Resorting to the tax waiver, in this case, burdens the population with the responsibility of maintaining profits that were way above the average in the other sectors, within

a market that did not worry much about efficiency (using the same marketing terminology), and which was taking advantage of a cycle of growth and confidence in post-inflation consumption.

### **III – The relationship between “piracy” and income**

After associating piracy to a loss for the musicians, the legislator turns his argumentation to the relationship between piracy and income, a discourse that has been well disseminated but which we do not consider duly problematized.

The proposed constitutional amendment intends to interfere with this picture by removing from the equation a factor that effectively makes competition between pirated products and original products almost impracticable: the high taxes that burden the original product make its final cost far higher for the consumer. Independently of the technical quality, known to be far lower in the illegal product, and even of the buyer's possible desire to honor the national artist's genuine work, the low price appeal ends up being irresistible, notably for the part of the population with limited means, which cannot afford to pick a more expensive product when the market offers equivalent ones at lower prices (Brasil 2011: 3).

We believe that instituting a tax exemption on the production and commercialization of music composed and/or recorded by Brazilian artists and commercialized on various supports, as it has already occurred with “books, newspapers, journals and the paper intended for their printing”, can significantly mitigate the economical barrier that weighs over the original product, making it more accessible to consumption and popularizing its access even more to the less privileged classes in the country, disseminating and consolidating this important foundation of Brazilian culture and thereby providing music with the condition of resuming the prominent place it deserves in national economy (Brasil 2011: 4).

The legislator states that it is difficult for a poor family to consume cultural products and that, due to high prices, these families would choose to purchase less quality for lower prices. At this point it is necessary to talk about this discourse: would the consumption of pirated products be a consequence of the budget available in the family? In other words: does the family choose the non-licensed product because they cannot afford to buy the official product? Upon analysing several recent surveys, even those totally against music sharing, it is evident that the pirate behaviour is quite similar in all income groups studied. The 2012 IPEA survey points out that 81% of downloaders could be considered "pirates". In any income and educational level group surveyed, the percentage of "pirates" is above 70% of users, as we shall see next.

The analysis conducted by IPEA's technicians based on *2010 TIC Domicílios* data demonstrates that "out of a total of 10.6 million users surveyed by 2010 TIC Domicílios, who gave valid answers about downloading and purchasing music or films, 8.62 million were considered "pirates" (IPEA 2012: 15). Additionally, it was shown that "75% of individuals were classified as pirates in Class A; 80% in Class B; 83% in Class C; and 96% in Classes D and E. As far as geographical distribution is concerned, piracy rates are higher in the North-east (86%), followed by the South-east (82%), South (79%), North and Midwest (73%)". In the age group category, "pirates" are also the majority in any group surveyed: "piracy is more intense among 10-15-year-old users (91%), 16-24-year-old users (83%), 45-59-year-old users (82%), 35-44-year-old users (81%), and less pronounced amongst 60-year-old users (67%)". The same occurs in relation to the education level: "it can be seen that piracy is higher among those with a lower education level (92%) and lower among those with a higher educational level (77%" (IPEA 2012: 15).

Although terms such as “less pronounced” or “lower” are used, it is evident that this is not a minority or marginal behaviour, but indeed a generalized interest, which leads us to understand that we are facing a structural change and not only a matter of opportunism issue related to prices or non-payment – as demonstrated by the numbers of *pirates* in the income groups that can afford to buy CDs at real prices.

We are not dealing, therefore, with a behaviour exclusively influenced by the price of the cultural product: we are dealing with a new perception of value. By all indications, even if prices were reduced to the equivalent of the pirated copies’, the volume of sales would not increase proportionally.

Piracy represents a business-model issue precisely because it offers the same product while questioning the prices so far established. This is not only a matter of charging lower prices, but of questioning what is being delivered for the amount charged. People are not aware of the expenses involved behind each popular artist, from the definition of the market segment to the adequacy to the target public and up to the best sale channels.<sup>8</sup> If an automobile is sold at a high price, for instance, everybody knows that the material used makes up a significant part of the price and that the design and creation process of a brand does not make up a large percentage of the sale price. What piracy does is to prove, without any shame, that the cost in materials is derisive for each copy, and there is therefore no reason to accept a price that cannot be justified.

It is not a thinking error on the part of the consumer, since he was told to relate a price to a material product. The industry decided to treat music as a material asset and the public accepted this instruction. For a long time, physical supports and music were conflated and that benefited the companies that controlled the market. In addition to this instruction, neither the production process nor the

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<sup>8</sup> We have chosen to use “administrative” terms in this sentence.

profitability involved were addressed. Now that support is no longer the centrepiece and it has cheapened to an unthinkable level, no basis exists for a discussion about “rights” – after all, there are no production or authorship rights on physical products, there are ownership rights. Thus, the same market that had reduced music to its copy and developed a business model based on restriction can no longer justify to its customers that the production involved is not, in fact, akin to the production of a material commodity. From the consumer’s viewpoint, the price reduction provided by the pirated copy is a way of working around the access barrier and does not generate moral issues of any kind because the “how’s” and “who’s” are involved in the production they wanted to access had never been discussed.

The situation is not different in other markets. We do not know of any group of companies who discuss their costs or production processes with their clients. However, material commodities demonstrate in their very form that a minimum of human labour, raw material and means of production were necessary for the product to be produced, and that any other producer of the same item would have similar conditions to produce the same commodity. What we mean is that the music market was able to set prices while it was controlling access, and because it did not communicate with its public, it now finds itself in a new scenario where its production processes are not understood, or worse, they keep on being understood in the material terms according to which demand tends to prefer the lowest price for the product, ignores the production process and disregards copyrights.

It is no longer possible to justify that recording technology requires great expenses to produce a high-quality-sound product. Pirates have proven that high quality and durability, which are characteristics of material products, do not need the access barriers (price) the original ones set. When production technology was no longer controlled by the phonographic sector companies, these lost the power

they had to restrict access and their product then became plentiful again, and it is not possible to set a price on what is plentiful.

The legislators failed to pay attention to this other aspect of the music production process. By listening exclusively to the phonographic industry's representatives, they failed to question what had really changed in this business, where music was the main source of profits. We are not dealing with a new behaviour, presented as illegal and immoral; we are dealing with a renewed perception of music, in which the influence of the material support was minimized and what used to be plentiful becomes plentiful again.

In any case, even if we held the argument that relates income, prices and piracy as accurate, why should the price reduction be paid for by the overall population? If industry really believes that its product has price-elasticity characteristics, would it not make more sense to reduce prices and increase the sale volume, going back to former sale levels? What is evident here is that the industry already knows that its product presents practically inelastic demand characteristics, and that any price reduction financed by the industry itself would have little effect on their income volume. Therefore, it looked wiser to them that the price reduction be transferred to taxes, so that any change in the sale volume resulting from price variation, even disproportional to its reduction, would be seen as an increase in the companies' profits. Thus, public money is used to fund a market that does not know its public, contributes very little to the democratization of culture, and resorts to old, repetitive and implausible discourses to justify maintaining its historical profits.

#### IV – Privileged voices and perpetuated meanings

During the six public hearings<sup>9</sup> held between March 25, 2008<sup>10</sup><sup>11</sup> and April 14, 2009 at the House of Representatives, three associations representing Brazil's record companies, both the majors and independent ones, were heard, and they spoke in five distinct occasions; the musicians' union was invited and spoke in one of the hearings; representatives of metallurgic and electronics associations were heard in six occasions, to talk about the tax waiver in favour of the production of the materials and its possible impact on Manaus free-trade area (Zona Franca, which already benefits from a tax waiver); also, the representative of the Federal Revenue was heard in one of the hearings; and singers/composers spoke eight times to give evidence.

Our understanding is that the composition of the hearings privileged the voice of the market, reinforcing the discourse about the crisis in the national phonographic sector. In the public hearings as in the anti-piracy campaigns, phonographic sector companies defend that music and its supports are synonymous, reducing musical production to production profiting from copy-making. They fail to mention the great proportion of artists that are not amongst those contracted by the record labels, who insure their revenue and sustenance through live presentations, with their CD sales being not a main source of income but a complement.

The discourse in defence of the business model is present in the declarations of the associations representing the musical sector companies, but the question remained whether the same discourse was present in the singers'

<sup>9</sup> The hearings are meant to instruct the deputies and senators about the subjects on the agenda, so that their votes can be more qualified in due course.

<sup>10</sup> The first five hearings were held in a two-month interval, between March 25, 2008 and May 27, 2008. After these first hearings, the PEC was not discussed for a year and only addressed again in April 2009, when it was approved in the House.

individual statements. It will not be possible to analyse the speeches of all eight singers present at the hearings, but we would like to focus on one of them and demonstrate possible meaning shifts for the purpose of our discussion. Singer Leoni, now closely linked to the movements defending the unrestricted circulation of music, was present at the April 15, 2008 hearing and summarized his position at the time in the following manner:

With the crisis we have been through, the market has shrunk by 80% since 1996, and we need a little help to keep on providing the services we have been providing to Brazil.

(...)

Our attitude in relation to piracy has been weird, for nobody warns the consumer that he is receiving a stolen-product. An automobile is expensive and nobody justifies it by saying: "Oh, I've bought a pirated car, stolen right there, and things like that, because a car is very expensive".

(...)

Music deserves a better treatment. (...) What we are asking is that Brazilian music be treated on a par with books. We are not defending the physical product, CDs, record labels; we are defending Brazilian music, which has been providing such important services to the country since forever." (Brasil 2008: 15 – 16).

In this and other occasions of the public hearing, singer Leoni relates the music business to national culture, and echoes the notion that treats the support (phonograms and videograms) as crucial for the national music production. The same singer, a little over a year later, in 2009, would post on his site and sign the manifesto *Movimento Música para Baixar* (MPB) – "Music for Download Movement", which gathered several Brazilian artists in favor of the free circulation of music, not restricted to phonograms, as one can see below:

What used to be a market defined by few agents, owning the monopoly of communication means, has become a huge fauna of cultural diversity, bringing opportunities and wealth to national music – not only from the artist's and producer's viewpoint, but also from the user's.

This is why we are now forming the movement *Music for Download* (MPB): a gathering of artists, producers, internet activists and music users in defence of musical freedom and diversity that circulates freely in all formats and on the Internet.

Whoever downloads music is not a pirate, but a promoter! He spreads musical projects for free!

Our purpose is to debate and act for the loosening of production chain laws, so that they not only ensure our authors' rights, but the free and democratic dissemination of music as well.

(...)

A new age needs new values. Issues such as solidary economy, flexibility of copyrights, free software, digital culture, communitarian and cooperative communication are fundamental aspects in the creation of opportunities of a new reality for those who create, produce and use music.

The MPB will promote debates and take actions that allow the agents of this process to become the creators and managers of the future of music, in a broader and more participative manner. (Movimento... 2009, our emphasis).

We are not aware of the circumstances that motivated this change in perception on our theme; however, the excerpts presented prove that there can be more than one way to understand the changes that have occurred in distribution of music, and that some of them, such as the movement *Music for Download*, can be diametrically opposed to the discourse disseminated by big companies in the sector. It appears that the debate is not only commercial, but political: it deals with the notion of culture and access to culture that we desire for our country.

Considering the limits established for this study, we hope to have achieved our objective of discussing what motivations were expressed in the text used to justify the music PEC. It is our understanding, after analysing the text, that the discourse contained in the PEC is evidently aligned with the defence pushed by the big phonographic companies. Thus, the Music PEC amends the Constitution and generates costs of hundreds of millions of reals, without demonstrating any interest in cultural diversity in its justification, restricting itself to defending that a business model should be preserved, and corroborating the discourse that musical production finds its origin and reason in the companies of this sector. Besides, it spends most of the text trying to picture the State and taxes as the villains behind the bad turn taken by these companies' historical profits.

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# 6

## The Digital Book and Cultural Diversity: Stakes and Perspectives

(Original in French)

JUSTINE MARTIN<sup>1</sup>

*Whichever form or economic value it takes, creation feeds cultural diversity as it is manifested in time and space, thus creating a dialogue between peoples.*

By protecting and promoting the diversity of cultural expressions, the 2005 Convention intends to defend and foster creation in all its forms, regardless of its production, diffusion or distribution mode. Irina Bokova, General Director of UNESCO, thus reiterated that one of the objectives pursued by the Convention is to “create an enabling environment, in which artists, cultural professionals, practitioners and citizens worldwide can create, produce, distribute, disseminate and enjoy a broad range of cultural goods, services and activities” (Bokova 2013).

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<sup>1</sup> Since November 2014, working on a private law thesis in Grenoble-Alpes University. Topic: “The Copyright Revolution as Caused by the Digital Book” (“Les bouleversements du droit d'auteur causés par le livre numérique”), under the supervision of Professor Jean-Michel Bruguière, Academic Education and Research Centre On Intellectual Property (Centre Universitaire d'Enseignement et de Recherche en Propriété Intellectuelle, CUERPI).

*Cultural Diversity is at the Core of the Challenges Faced by Creation in the Digital Age.*

With the development of the Internet and new technologies, cultural diversity is at the core of the challenges faced by creation. Mentioned in different European texts, it becomes a common thread for States and their actions. Article 167, paragraph 4, of the Treaty on the Functioning of the European Union can be quoted in this respect: "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures." The Court of Justice of the European Union also refers to it in the UTECA (CJUE 2009) case, pronounced on March 5, 2009, about a member State that had forced radio broadcasters to finance certain films, in an effort to support cultural production pertaining to a specific language.

*Propelled in a Dematerialised Universe, Creation Must Adapt and Familiarise Itself with the Codes that Govern this New Environment.*

Propelled in a dematerialised universe where "state of the art gadgets" are revered, creation must adapt and familiarise itself with the codes that govern this new environment. From an economic standpoint, the Internet sees the advent of new players, distributors of cultural products. Amazon, online sales giant, notably comes to mind, as does YouTube, a website dedicated to the online sharing of videos. New economic models are therefore appearing on the market, revolutionising the access to cultural products and, to a greater extent, creation. From a judicial point of view, the Internet offers a potential access to culture beyond compare, which, for that matter, does raise legal questions as far as the reproduction and representation of creation are concerned. Finally, the Internet changes our connection to culture, bringing about a democratisation of the access to creation. Community and sharing are the keys to this dematerialised universe.

## *New Cultural Goods and Products in the Digital Age – the Example of the Digital Book.*

It is in this paradigm that new cultural goods and products have appeared and, amongst them, the digital book. The latter elicits many questions of an economic, legal and cultural nature.

Created as an intellectual work, the result of the book's entrance in the digital age, and distributed as a cultural product, the digital book fully falls within the dynamics brought about by cultural products in the digital age and, to a wider extent, contributes to the enrichment of cultural diversity. Its distribution as a cultural product is permitted by the protection it is granted by its qualification as an intellectual work. Without protection, the digital book cannot be distributed without risks for its creators and, consequently, for cultural diversity. This is why, before studying the digital book as a cultural product (II), it is fitting to review the protection framework it benefits from, which leads us to examine the digital book as an intellectual work (I).

### **I – The Digital Book, an Intellectual Work**

In its preamble, the 2005 Convention acknowledges the importance of intellectual property rights for the creator and its creation. In order to preserve the diversity of cultural expressions, it is therefore essential to protect these rights. This entails an enquiry into the protection framework of the digital book.

This first part shall be centred, on the one hand, on studying the legal qualification of the digital book (A) and, on the other hand, on studying the regime applicable to it (B).

## A – Legal Qualification of the Digital Book

When looking at the digital book, the first question one should ask is the following: What are we talking about? The digitised book? The printed book distributed electronically? The equipment making it possible to be read? The book conceived exclusively in a digital format? The enriched book (or hyperbook)? Faced with such an avalanche of questions, the larger question of whether the digital book could actually be qualified as a book arose (1). Without really meaning to, this last question led to legal action that resulted in the statutory recognition of the digital book (2).

### *1. The Digital Book, a Book?*

The intellectual property code does not define the book as such; article L.112-2 only states, in the list of intellectual works, literary writings. In order to obtain a definition of the book, one must refer to a tax bulletin of December 30, 1971, modified in 2005 and 2009. It defines the book as "a printed, possibly illustrated composition, published under a title and aiming at the reproduction of an intellectual work by one or several authors with a view to teach, disseminate thoughts and culture. This composition may take the form of printed elements, assembled or united by any method, as long as these elements have the same object and their gathering is necessary to the unity of the work. They may only be sold separately if they are meant to constitute a whole or are an update of that whole (...)"". Upon reading this definition, one is forced to assess that the digital book cannot be qualified as a book. This assessment, somewhat unfortunate in the case of the digitised book, soon elicited some reactions.

Several proposals of a definition of the book that would integrate its digital edition were indeed created. One of these was the proposal made by the National Publishing Union (Syndicat national de l'édition, SNE) which, based on

the definition stated in the tax bulletin, removes any mention of the paper edition, focusing instead on the cultural content of the book, independently of its support (Borg 2010: 8). Another proposal was that made by the European parliament, during the debates on establishing a set price system for books, which grants the book statute to digital editions, as long as these replace printed books (Parlement européen 2002).

In the end, the definition of the book was never modified; however, and that is where the innovation happened, a legal definition of the digital book was established.

## *2. Legal Recognition of the Digital Book*

Although lawmakers were not unaware of the existence of the digital book, it was not until law No. 2011-590 of May 26, 2011 on the price of digital books that these earned their legal existence in the French legal environment.

As such, article 1 of aforementioned law states that: "The present law applies to the digital book when it is an intellectual work created by one or several authors and it is commercialised both in its digital format and published in printed form or it is, because of its content and composition, likely to be printed, with the exception of the additional elements specific to the digital edition". This definition prompts several comments.

First of all, it is perfectly established that the digital book is an intellectual work, eligible for the protection granted by copyright. More exactly, it takes its due space within the big family of intellectual works, covered in aforementioned article L.112-2. Although the article makes no express mention of the digital book, which is perfectly logical considering when it was written (in 1957), it remains that the latter now comes under the category of literary writings.

Then, upon reading the definition, one understands that it is the commercialised book that is concerned in its printed and digital formats, as long as the digital book is printed or at least printable. This means first that law-makers seem attached to a certain degree of materialism. Indeed, the digital book is admitted as long as it may be converted into a paper book in a click. Secondly, one notices that the law is concerned with the homothetic digital book, defined in Zelnik's report as "reproducing identically the information contained in a printed book, while admitting certain enrichments, such as an internal search engine" (Zelnik 2010: 7). However, is such a statement not reductive of what the digital book really is? Admittedly, the digital book may be many things and this is precisely why establishing its qualification is a complex matter. Nevertheless, does linking it so firmly to the printed format not lead to evading tomorrow's problems? In a society characterised by a culture of sharing, is the book exclusively conceived for the digital format not the future?

Finally, the definition mentions "additional elements specific to the digital edition". This means that the digital edition presents specific characteristics which therefore differentiate it from the paper edition. Why then decide to link the two?

In Europe, the digital book's legal classification is far from unanimous. Whereas some member States consider that a book is a book, whatever its support, the European Commission judges that the digital book is an electronically provided service. These two positions, which were expressed during a conflict between France and Luxembourg and the European Commission on the issue of VAT rate applicable to the digital book, resulted in the sentencing of these two States for infringing on European VAT regulations by applying a reduced VAT rate to the digital book (CJUE 2015a; CJUE 2015b).

Françoise Benhamou, the eminent culture economy specialist, drew an analysis that is a good assessment of the situation: legally, the digital book is “not quite the same, not quite different...” (Benhamou 2009: 73 et s.).

The issue of the digital book classification, which is clearly a complex one, is also essential in determining the legal regime applicable to it.

## B – An appropriate Legal Regime – the Publishing Contract Example

In order to determine the legal regime applicable to the digital book, the question was posed of whether the latter was the same as the printed book, in which case the same legal regime would be applied to it. Considering the legal classification established by lawmakers, it appeared that the legal regime applicable to the paper book could not, as such, be applied to the digital book. It was therefore decided to adapt that regime. One of the more significant illustrations of this is the publishing contract.

After presenting the reasons leading to the adoption of a new publishing contract (1), certain points of that contract shall be set out (2).

### *1. The Reform of the Publishing Contract – Explanations*

Defined in article L. 132-1 of the intellectual property code, a publishing contract is a contract through which an author transfers to a publisher the exploitation rights on his or her work, i.e. the right to reproduce and represent the work. In the context of such a contract, the publisher assumes both the financial and legal risks attached to exploiting the work. Originally conceived for the paper book, the publishing contract soon encountered difficulties when the book entered the digital age, thus requiring an adaptation of the legal rules applicable to the paper edition.

Although initially nothing was expressly planned for the digital edition in the publishing contract, it was not completely absent from it. Most of the time, the digital book edition was the object of an additional clause in the initial publishing contract, or so-called digital clauses, spread out in various paragraphs throughout the contract. Such a partial integration leading to legal insecurity on the part of the authors as well of the publishers, the latter decided to join forces in an effort to adapt the publishing contract to the digital age.

After four years of negotiations, authors and publishers reached an agreement: the March 21, 2013 agreement, adopted by the French Writers Council (Conseil Permanent des Écrivains, CPE) and the SNE, whose latest provisions have been effective since December 1st, 2014<sup>2</sup>.

## *2. The Publishing Contract in the Digital Age*

Globally, the new publishing contract intends to be more protective of the authors' interests. On one hand, certain practices related to the exercise of the publisher's profession are now the object of a provision. The obligation to exploit the work in a permanent and continuous manner, or to present the accounts, may be mentioned in this respect. Moreover, the contract introduces new clauses aiming to re-establish a fair balance between authors and publishers. The so called end-of-exploitation clause to the benefit of the authors notably comes to mind. Some elements of the contract still warrant some discussion; we shall now look at a few of these in succession.

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<sup>2</sup> Transcription of said agreement in the law with, on the one hand, the publication in the French Official Journal (Journal Officiel, JO) of the November 12, 2014 ruling, modifying the provisions of the intellectual property code concerning the publishing contract and, on the other hand, the signature of the "code of practice" and extension decree on December 10, 2014, followed by a publication in the JO.

*a) Unicity of the Publishing Contract*

With unicity in mind, the new publishing contract is common to the paper and digital edition. It includes two distinct parts, one concerning the cession of printed rights, the other that of digital rights.

Although the CPE and SNE had wished to gather the different book fabrication modes in one contract only, their efforts are vain in the case of termination by one of the parties, as such a termination would not entail the termination of the whole contract. For example, terminating the part of the contract relating to the digital rights shall not lead to the termination of the part concerning printed rights; the publisher may therefore still exploit the work in its paper format. This might be an issue if we consider, as it seems to be the case in France, publishing a digital book as an extension of its paper edition.

*b) The Digital Pass for Press*

The new publishing contract provides that the paper proofs' pass for press is also valid for the homothetic digital book; in contrast, a digital pass for distribution is required for the illustrated book, the enriched digital book and in case of considerable modifications or enrichments made by the publisher. This provision warrants a few comments.

On one hand, it is understandable that youth and school editions should need a digital pass for press, since they contain illustrations.

On the other hand, it would seem that such a provision makes a distinction between the homothetic digital book and the enriched digital book. Considering the legal definition of the digital book, this distinction is not in the least surprising; it does however invite a question about the enriched book status in the new publishing contract. Can it be the object of a publishing contract? If indeed it can, which part of the contract should it come under? Evidently, it does not seem to belong to the part relating to the cession

of printed rights anymore than to that relating to the cession of digital rights. Some specialists, based on the premise that the enriched digital book is closer to an audio-visual adaptation, suggest that adding a third part to the publishing contract should possibly be considered (Bruguière 2015: 61 – 63). The legal uncertainty surrounding the enriched digital book might explain why, in 2015, digital books enrichment remains marginal (KPMG 2015: 11).

c) *"Digital" Obligation to Exploit the Work in a Permanent and Continuous Manner*

One of the four criteria constituting the digital obligation to exploit the work in a permanent and continuous manner is the obligation, for the publisher, to make the work accessible for sale, in a non-proprietary digital format. Originally, this provision aimed to counter Amazon's proprietary format, *Kindle*. However, it does much more than that; it rekindles the discussion about using protective technical measures or *Digital Rights Management* (DRM) as they are known, a discussion which, to this day, struggles to come up with concrete answers. Is commercialising a digital book without DRM even conceivable, knowing that in 2015, 69% of publishers have adopted anti-piracy solutions, with DRM at the forefront with 39% ? (KPMG 2015: 26)

Though adapting the publishing contract to the digital age constitutes a fundamental breakthrough, it remains that its applicable legal regime still needs to be adapted, too. Some points have still not been answered, or at least not satisfactorily so; such is the case of the digital books resale or that of the digital loan rights in libraries.

If the digital book was conceived as an intellectual work, it is also distributed as a cultural product.

## II – The Digital Book, a Cultural Product

The digital book stands amongst the cultural products brought about by the digital wave. As noted in the preamble to the 2005 Convention, it possesses in this regard a double nature: economic and cultural. Therefore, in spite of being distributed as a cultural product, the digital book cannot be considered as a merchandise like any other. This is, incidentally, confirmed by the rules attached to its pricing. Just as the paper book, it benefits from a single price system, set by the publisher; said system, which breaks away from common law, was notably justified by the necessity to preserve publishing diversity, an aspect of cultural diversity (Autorité de la concurrence 2009: pt 60).

Anchored in the dynamic of the Internet and new technologies, the digital book brought about a whole new ecosystem centred around books and reading (A); it offers new reading opportunities to the citizens of the world, turning the digital book into a factor of sustainable development and social cohesion, values which are defended and consecrated by the 2005 Convention (B).

### A – The Digital Book, a New Ecosystem Centred around Books and Reading

The 90s, which were marked by the establishment of the first online bookstores and publishing companies, the advent of reading tablets and the opening of the first digital portals by libraries, bear witness to the entrance of the book in the digital age (Lebert 2011).

From an economic standpoint, the digital book led the actors of books and reading to redefine their role in the book chain, while it also brought about new economic models, carried by new cultural products distributors.

### *1. The Actors of Books and Reading to the Digital Test*

Considered in France as the electronic extension of the paper book, the digital book cannot be said to have really revolutionised the framework set by the paper book. Whether the book exists in paper or digital format, the actors involved in the book chain are the same; they are the publishers, the booksellers and the librarians. The actual revolution has more to do with the necessary adaptation of these actors' role in order to respond to the challenges brought to the market by the digital book. Let us take the example of publishing companies.

The arrival of the digital book on the market led publishers to develop a digital offer. In France, most of the publishers got started in 2011 and 2012; that period was also marked by the take-off of the tablet market. After these peaks, the digital book offer continued to grow, but less intensely so (KPMG 2015: 7). In 2015, 62% of publishers boast a digital book offer; however, it is notable that the big publishing houses are the only ones that have embarked on the digital adventure. Indeed, whereas all the big publishing houses, with a turnover over 20 million euros, boast such an offer, less than half of the smaller houses followed suit (KPMG 2015: 6). For half of the publishers concerned, this is justified by the fact that the digital offer would be unsuitable for their sector and it would be difficult for a small structure to develop (KPMG 2015: 9).

From a practical standpoint, the development of a digital offer requires setting up a digital format catalogue, as well as making the works available on online sale platforms and/or bookstore websites. As far as setting up a catalogue in digital format, in 2015, 1/3 of digital publishers offer more than half their available catalogue in digital format. The selection of digital books available through their catalogue is essentially made up of recent (published for 1 to 5 years) and new works (published less than one year ago). Nevertheless, some publishers have explained

that they are hindered in the digitization of their collection because they do not hold the rights (KPMG 2015: 10). Setting up a new publishing contract, legally organising the cession of digital rights, will undoubtedly bring a solution to this problem and indeed contribute to the enrichment of the publishing houses' digital catalogue. As far as points of sale are concerned, the three main buyers of digital books are Amazon, Apple and Kobo (KPMG 2015: 20). However, independent bookstores are not altogether absent from this market. Some have embarked full steam ahead in the digital. This is the case for several Parisian bookstores that joined forces in order to create an Internet site, <http://www.parislibrairies.fr>, enabling readers to search for the book of their choice, be it in printed or digital format, in the list of participating bookstores. Once the reader has found the desired book, they can pick it up in the nearest bookstore. Such a method gives readers a wide access to digital books, while benefitting from quality service which includes a selection process of the works. In 2015, for over 30% of publishers, digital books sales amount to over 5% of the turnover (KPMG 2015: 30).

The digital book market in France is evolving little by little, notably because of a rise in the number of readers. While they were 15% in 2014, in 2015 they represent 18% of the French population aged 15 and above (OpinionWay 2015).

## *2. New economic models*

In addition to the necessary adaptation of the book chain actors' role, the digital book brought about the advent of new economic models, carried by new cultural products distributors.

The digital book embraces the Internet's logic, in which algorithms and cutting-edge technologies get along well. The originality of these new formulas has to do with the fact that they are now based on a recommendation

logic. Thanks to cookies and algorithms, companies can now establish everyone's tastes and habits, so as to better target expectations as far as purchases are concerned. In this regard, Divina Frau-Meigs, UNESCO Chair "Savoir-devenir" ("Know-How to Evolve"), refers to the so-called "filter bubble". She explains that this bubble, made possible by algorithms, can have harmful consequences on creation. By confining individuals in a bubble made up exclusively of what they like, algorithms do not arouse curiosity and therefore do not encourage creativity; in this sense, they would constitute a threat to the diversity of cultural expressions (Frau-Meigs 2015).

This recommendation logic is increasingly present on the digital book market. Let us take the example of Kobo and its application, *Kobo Reading Life*. Beyond offering a connected reading, this application includes a service called *Kobo perso*, which analyses readers' tastes and comments on the books they have read, so as to suggest a personalised offer that users are likely to enjoy.

These new models also highlight complimentary services. Many companies offer their services in a complimentary manner, until they are able to make them profitable, notably by using advertising banners. This is for example the case of the *Booxup* application, dedicated to loaning books amongst private individuals. Recently launched by a French start-up, created by David Mennesson and Robin Sappe, the application is free and available on the Appstore.

The complimentary aspect has certain advantages; amongst other things, it enables the public at large to discover authors who do not necessarily stand a chance to be published by a publishing house. That is precisely what Michal Kicinski understood and why he recently launched his *OpenBooks* platform in Poland, allowing Internet users to download self-published digital books for free and pay the author after reading their work.

Finally, the digital book facilitated the establishment of wide public membership services. Although these had been around since the 2000s, they only had a very limited impact at the time (Engel & Phalippou 2015: 4). In France, Amazon's launch of its membership program, *Kindle Unlimited*, modernised these offers. Incidentally, this led the *Médiateur du livre*<sup>3</sup> to question whether these offers were compliant with the Law of May 26, 2011 relating to the price of the digital book (Engel & Phalippou 2015).

Even though the new economic models brought about by the digital book contribute to the creation of value, they are not without danger as far as intellectual property rights are concerned. In this respect, they are often precarious for creators, notably in terms of remuneration. Beyond the legal protection needed by authors in order to create and thereby contribute to the enrichment of cultural diversity, a fair and equitable<sup>4</sup> remuneration must be paid to them. Unfortunately, these models, as those mentioned before, do not focus much on this imperative. Nevertheless, they do offer new perspectives in terms of sustainable development and social cohesion.

## B – The Digital Book, a Factor of Sustainable Development and Social Cohesion

Anybody who has an Internet connection can now freely access thousands of works; this is how much the Internet has revolutionised access to culture.

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<sup>3</sup> The Book Mediator, an independent administrative authority responsible for arbitrating disputes related to the application of the legislation on book prices.

<sup>4</sup> Remuneration is fair and equitable when it takes into account all forms of exploitation of the work.

Born in the midst of this dematerialised environment, the digital book offers new reading perspectives. In this respect, it can be considered, on the one hand, as a factor of sustainable development (1) and, on the other hand, as a factor of peace and social cohesion (2).

### *1. A Factor of Sustainable Development*

As part of its preamble, the 2005 Convention states that the diversity of cultural expressions is “a mainspring for sustainable development for communities, peoples and nations”. Creation therefore appears as an essential condition of sustainable development. Beyond the purely economic dimension to which the digital book contributes, notably through the establishment of new economic models, it is clear that sustainable development depends on the cultural development of citizens.

When observed in its cultural dimension, the digital book contributes to the cultural development of individuals, notably because it gives access to the world's cultural heritage and grants access to reading to everybody.

#### *a) Access to the World's Cultural Heritage*

The existence of the homothetic digital book was made possible by the development of technologies and, more particularly, by the development of a coding technique called digitisation. The latter is used by libraries as a heritage saving tool. The French National Library has for instance created a digital library, *Gallica*, which contains digitised books, manuscripts, magazines, photos and an illumination collection. More recently, abroad, the New African Digital Edition (*Nouvelles Éditions Numériques Africaines*) announced they were launching a new offer, based both on digital libraries and audiobooks; its purpose being the dissemination of African cultural heritage throughout the world. By creating a homothetic digital book, digitisation gives a new

life to works which are wasting away with time. It thereby enables readers to discover older works, thus diversifying the available reading offer.

Nevertheless, although it presents certain advantages, digitisation sometimes leads to serious violations of intellectual property rights. Around this issue, one case particularly made an impression; it is the *Google Books* case, where Google integrally digitised several works, including works still under copyright, with the purpose of creating a universal digital library. In France, this case ended with Google being convicted for counterfeit (TGI Paris 2009); however, one positive outcome was the sparking of a new project. Indeed, after this case, lawmakers adopted Law No. 2012-287 of March 1st 2012 relating to the digital exploitation of unavailable 20th century books<sup>5</sup>. By allowing the digitisation of these unavailable books, the law entitles them to a new distribution, in digital format.

#### **b) Access to Reading for Everybody**

The digital book also appears as an innovative solution, in terms of publishing offer and reading ease, for the visually impaired and people suffering from dyslexia or a physical handicap preventing them from reading.

Although there are audiobooks, books in braille and printed in large characters, the publishing offer remains rather restricted, due to high costs and production time. With the development of digital technologies, an adapted reading format appeared, the DAISY format (*Digital Accessible Information System*), which offers better readability and facilitates browsing within the books, thanks to its structure. This format is increasingly used by publishers. Every

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<sup>5</sup> “Unavailable 20th century books” refers to books which are still cumulatively under copyright, were published in France between January 1st 1901 and December 31st 2000, and are no longer commercially distributed nor published, be it traditionally or digitally.

year, the SNE launches the new literary season in DAISY format, in order to make the most popular books available to as many people as possible.

E-readers and tablets also contribute to a better reading experience through the use of new functionalities, such as the ability to zoom on images or characters.

## 2. Factor of Social Cohesion

First of all, the digital book, specifically the enriched digital book, transforms the way we read; the book is no longer an object we flip through, but an object that enables us to travel to the heart of history. It unquestionably brings added value to a paper edition. Let us take the example of the Harry Potter saga; in its enriched digital version, it includes not only the full original text, but also author's comments, illustrations, animations and interactive scenes, taking readers to the heart of Hogwarts.

Secondly, the digital book, whether enriched or not, brings about a new way to read – collaborative reading. Digital books readers are able to interact simultaneously on the book, thus weaving social links; no need to look for a reading club near your home anymore! For some, collaborative (or social) reading is the future; this is the case for Bob Stein, Director of the Institute for the Future of the Book think tank, which is devoted to study the evolution of the written word. In his opinion, the digital evolution has more to do with the new reading perspectives it offers than with electronic media *per se* (Stein 2014). Incidentally, the Institute launched its own collaborative reading platform, *SocialBook*, offering advanced annotation and comment functionalities. In France, similar platforms can also be found, such as *Babelio*, launched in 2007 by three reading lovers<sup>6</sup>.

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<sup>6</sup> Vassil Stefanov, Pierre Fremaux and Guillaume Teisseire.

Finally, the integration of books and YouTube created the *booktubers*. This phenomenon, which appeared in the Anglo-Saxon world, now counts thousands of members all over the world. The concept is simple: booktubers read books, talk about it (usually in a humorous manner) and share them on the web via YouTube. In France, their numbers keep growing; amongst the most famous is Émilie Coissard, also known as "Bulledop". Drawing on this success, some French book start-ups such as *Librinova* and *Book Weather* devised a project aiming at bringing the booktubers closer to traditional publishing by launching *BookTube.fr* (Oury 2015), a platform which should improve the indexation of their videos.

The digital book brings culture at the heart of citizens' daily life, whether by setting up collaborative reading platforms or by making available books which are an integral part of the world's cultural heritage. In this respect, it fully fits the objectives established by the 2005 Convention, notably in terms of sustainable development, be it at the economic and cultural level or that of social cohesion.

## Conclusion

Just as other types of creations, be they music or movie related, the digital book contributes to enriching the diversity of cultural expressions. Its legal protection can therefore not be overlooked.

Although considered in France as the electronic extension of the printed book, the digital book is innovative. By bringing the literary world in the dynamic of the Internet and new technologies, it turned the book into a timeless object. Often poorly regarded by creators, due to the fact that the economic formulas it entails may go against intellectual property rights, it does offer new evolution

perspectives to the book and the reading experience. For the last few years, a whole social network built itself around it, thus creating interactions between individuals.

Although the present paper is but a brief overview of the digital book and the challenges that surround it, it does start a reflection on the issue. What is the future of the digital book in France? By tying it so firmly to the paper edition, is France missing the opportunities it offers?

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# Diversity of the Audio-visual Industry in the Digital Age: The Challenges Entailed in its Measurement<sup>1</sup>

(Original in French)

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## Introduction

What is diversity in the audio-visual field and how to measure it are two questions which have produced much debate in the realm of social sciences for years (Farchy & Ranaivoson 2011; McDonald & Dimmick 2003; McQuail 1998; Moreau & Peltier 2004; Napoli 1997, 1999; Ranaivoson 2007; UNESCO 2011; Van Cuilenburg 2000, 2007). Since the appearance of the first digital formats of cultural products in the nineties until the popularisation of the internet in the new century, the new networks have trans-

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formed cultural production, distribution and consumption, altering the value chain of cultural industries. From an idealistic perspective, digital technologies offer extraordinary possibilities of enrichment of the diversity of cultural expressions. Not only do they offer significant advances in terms of information transmission and reproduction quality, as well as in terms of storage thanks to compression and convergence possibilities, but digital technologies also "dematerialise" cultural expressions, enabling them to travel faster, in greater quantity, reaching wider and more dispersed audiences. The transition from the physical world to the digital ecosystem is thus characterised by an increase and diversification of the offer, the empowering of the public, but also of the majors, together with a widening of the digital divide (Guèvremont 2013).

In this new ecosystem, measuring the diversity of cultural expressions presents interesting challenges. Traditional dimensions and tools do not seem as effective in this context where power asymmetries cohabit with the emergence of new dominant players (Napoli et Karppinen 2013). Although these challenges are apparent in many areas, we shall focus concretely here on those affecting the measurement of audio-visual diversity. What are the new challenges faced by the measurement of audio-visual diversity in the new digital ecosystem? Which research results can we take into account? Are there any consensual tools available to measure audio-visual diversity in the new digital environment?

From a methodological perspective, this article is based on a research project titled "Cultural and Audio-visual Diversity: Best Practices and Indicators"<sup>3</sup>. One of its objectives consisted in drawing a path showing the methods used

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<sup>3</sup> Research project "Cultural and Audio-visual Diversity: Best Practices and Indicators", of the National Plan for Scientific Research, Development and Technological Innovation (I+D+i) of Spain's Ministry of Economy and Competitiveness (ref. CSO2011-26241).

to measure audio-visual diversity, systematising the main contributions and acceptations, thus providing a general framework that would help in the selection or construction of a tool (set of indicators) aimed at evaluating the different facets of diversity within the audio-visual industry and which would also enable a case comparison. Another, more specific project, was added to this first general study: "Diversity of the Audio-visual Industry in the Digital Age". Its objective was to offer a reflection on the existing measures applied to the digital audio-visual industry, especially on the internet, which might help define public policies and private actors' strategies.

Our conclusions will show that there are predominantly indicators aimed at measuring content diversity on the internet, but those focus on the linguistic dimension; that there is a lack of studies reporting on the diversity of sources (i.e. producers, distributors, etc.) and that, for this reason, more research on the structure of the internet and its actors are necessary; and that in spite of a few interesting experiences of online audience measurement — more if we consider the investments made in this field by big advertising agents in the network —, scientific research on audience access does not have sufficient quantity and quality data to evaluate the internet contributions to audio-visual diversity.

This chapter is therefore organised as follows: the first part briefly explains the transformations that have occurred in the audio-visual environment as a consequence of digitisation, convergence and development of the internet, as well as their impact on diversity. Section II focuses on a few attempts at measuring audio-visual diversity on the internet, looking to identify advances as well as weaknesses in this field. Finally, the last section highlights some of the main obstacles and challenges faced by the measurement of audio-visual diversity in the new context of digital production, distribution and consumption.

## I – Changes in the Audio-visual Environment: the new Digital Ecosystem

The term “convergence” has been used in the last few years to refer to the phenomenon that the distances between the telecommunications, audio-visual and IT sectors are narrowing, as a consequence of the incorporation, by the first two, of computer languages and technologies<sup>4</sup>. After a stage that might be called “telematic”, when large telecommunication companies started to incorporate digitisation to optimally manage their networks and exchange data among large corporations — at a time when IT was restricted to state or big company bureaucracies, the reduction in the production cost of processors, the simplification of computer interfaces, the advent of the personal computer market and the extension of computerisation to all industry sectors, the cultural industry in particular, blurred borders between the three sectors. Whereas they were independent until the nineties, the “binarisation” of their contents gave rise to a communication and culture mega sector, circulating on new networks (satellites, micro-waves, physical networks).

The basis for convergence lays in digitisation, that is to say the process through which different types of information — basically alphanumerical text, graphics, sounds and static and moving images — can be translated into binary code, which is most distinguished by its precision or, as Watkinson puts it (2001: 4), “that they are the most resistant to misinterpretation”. Digitisation makes it possible to manipulate all these data electronically, as far as the production as well as the transmission and consumption of cultural products are concerned. If the reduction in the cost

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<sup>4</sup> The concept of “convergence” was first used at the end of the seventies, but was developed as early as the late nineties to refer to the deep changes occurring in the press sector due to digital technologies (Salaverría, García Avilés & Masip 2010: 42).

of processors affected primarily the management of communication networks or the area of content production in cultural industries, from the second half of the nineties the drop in prices and miniaturisation of microchips led to the explosion of the mass consumption market of devices used as much for personal communication as for all types of cultural products. Since the end of the 20th century, the deregulation of internet access, the interconnection of physical and wireless networks using TCP/IP protocol and mass commercial access of the last ten years, via stationary as well as mobile devices, led to a formidable transformation of the content suppliers whose stature was already global, of the gatekeepers of the digital ecosystem (with global producers of hardware and software controlling access to cultural contents), and to consumer markets.

## II – Impact of the New Digital Ecosystem on Diversity

The consequences brought about by convergence, digitisation and the rise of the internet on the sector of cultural industries are still far from being totally understood. Among the factors that need examining are the extension of audio-visual services to all global markets, with the high rate of capillarity offered by physical and wireless telematic network and the possibilities of interactivity created by the application of the new technologies, as well as the research of new communication languages and new modes of relating to the consumer.

A fair proportion of the literature dealing with the impact of the processes mentioned above is centred around two main positions. Faced with the emergence and existence of a “digital public sphere” as opposed to an “old public sphere” (Schäfer 2015), opinions have split between what we might call the “cyberoptimists” versus the “cyber-pessimists” (Oates 2008), “utopians” versus “dystopians”

(Papacharissi 2002) or “net-enthusiasts” versus “critics” (Dahlberg 1998). By transferring these categories to the study of diversity, the current situation may be described in the following terms.

### A – Cyberoptimists

For cyberoptimists, the new reality created by digital technologies is positive due to the inclusion of more actors (diversity of sources) and a better visibility of their positions (plurality of contents). Online tools allow more people to be heard:

After all, content can be posted rather easily online, without the interference of gate-keeping journalists, and ‘connective action’ (Bennett & Segerberg, 2012) enables user-to-user communication which is less dependent on large-scale infrastructure and also more difficult for authorities to contain. All this might ‘empower’ those who have always wanted to engage in public debate but were previously marginalized by traditional media, e.g. individuals vis-à-vis institutions, smaller vis-à-vis larger, more powerful organizations, dissidents vis-à-vis authoritarian governments, or stakeholders from peripheral regions or developmental countries vis-à-vis ‘Western’, first-world stakeholders (Schäfer 2015: 324).

Thus, usually basing themselves on the paradigm of “mass self-communication” (Castells 2009), one of the main capabilities noted by the optimists in the new digital ecosystem is the possibility for each and every one to become a content producer and thereby an alternative source of content. The appearance of such concepts as “prosumers” or “produsers” or the characterisation of mutations — from mass communication to mass auto-communication (Castells 2009), from publics to participants and users (Silverstone 2006) — highlighted the ability of citizens to interact directly with others and thus offset dominant discourses.

Focusing now on the audio-visual field, convergence, digitisation and, fundamentally, the development of the internet produced significant transformations in the last few years regarding the interaction between IT and the cultural industries, when computers were included in processes of content management and production. These effects were felt as early as the eighties, with the introduction of non-linear production systems on digital platforms — already very common and cheap in the nineties — and led to a transformation of the productive fabric accessible by increasingly more actors. For instance, compared with the mid-20th, when its costs were very high, audio-visual production in the eighties and nineties — with the application of electronics and IT reducing the price of equipment — saw the emergence of a growing number of actors willing to offer their services<sup>5</sup>. During the last few years, the explosion of the internet as a commercial platform, after decades of it being an experimental network of academic research, witnessed the crystallisation of an incalculable number of initiatives centred around the new technological possibilities of digital media, with the attraction of its global reach (enabling the globalization of events and contents), as well as the ability to share (and commercialise) audio-visual contents without intermediaries.

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<sup>5</sup> Computerisation also played a significant part in the emergence of payng TV, which was made possible by encrypting technologies on terrestrial broadcasting networks. Moreover, after the first few years when television development was based in Europe on the technological and organisational advances of telecommunications (Miège 1990: 20), the development of new telecommunication technologies such as cable — as early as the forties but especially active since the sixties in the United States and the eighties in Europe — or geostationary satellites applied to the direct diffusion of signals, has transformed the audio-visual business, first with the inherent possibility to globalise events and contents, and then with the possibility of commercialising audio-visual contents directly from home.

Thus, for cyberoptimists, internet allows, thanks to its decentralised architecture, low production costs and its “end-to-end design”, an increase in the diversity of sources and, thereby, an actual ability to contribute to democratisation.

To this rise in the number of voices, other researchers (Benkley 2006) add that the internet can contribute to generating a new form of communication and construction of collaborative knowledge (through wikis for example). This new perspective implies a decentralised and networked production of contents, closer to the original idea of the World Wide Web as imagined by its creator, Tim Berners-Lee, a production which manages in many cases, due to its non-commercial objectives, to overcome the barriers imposed by the commercial logic of traditional communication means.

As far as contents are concerned, net-enthusiasts consider that the decentralised structure of the internet functions as a neutral, equitable and transparent platform, promoting a wider variety of contents. As a direct consequence of the increase in production sources and of the linear equation according to which an increase in the number of actors leads directly to an increase in the quantity and types of contents, the conclusion is that the digital revolution increased the level of diversity.

Meanwhile, audiences have become more powerful. Interactivity enables users to increase the control they have on the cultural product (Marsden & Verlhust 1999), for example, when they consume or modify it to personalise it based on individual preferences. Thus, as a consequence of the abundance of producers and contents and the extended abilities by citizens to format the cultural products they consume, the new digital environment appears to be an ideal of diversity.

## B – Cyberpessimists

At the opposite end of these technoptimistic discourses, critics consider that past logics were replicated while the number of sources increased, and that they were even accentuated in some cases. Robert W. McChesney (2013) argues that, more than an increase in the diversity of media contents, the advent of digital technologies increase concentration and the tendency to oligopolies. The concentration of the cultural industries was already one of the most notable characteristics of all traditional media systems in the context of progressive commercialisation and deregulation of the last few years (see, for example, Bagdikian 2004). In an economic perspective, company mergers reduce the number of actors and, consequently, eliminate the effective market competition. Moreover, the economic size of these actors is unseen, historically speaking. In 2012, Apple became the most listed company on the stock exchange since the beginning of the registry, at \$620 billions (Forbes 2012) and three years later, it became the first company in the world to exceed \$700 billions (Wakabayashi 2015). Nevertheless, in the field of cultural industries, the main problem is not only of an economic nature, but also, and especially, socio-political. The reduction in the number of actors implies a reduction in the number of voices and therefore, concentration has repercussions on the living conditions of public opinion. The problem affects the individual not as a consumer, but as a citizen participating to the cultural flows of the public sphere.

Within the current context of the internet, much more propitious to the transnational extension of corporations, the issue of emergence of new dominant actors (such as Google, Apple, Facebook, etc.), perpetuated by present power asymmetries on the network, refers directly to the question of diversity of sources. As Hamelink already fore-saw (2000: 12), "The technical convergence leads to institu-

tional convergence and to the consolidation of national and international provision of information (and culture) into the hands of a few mega providers".

Multinationals are consolidated vertically, horizontally or in multimedia<sup>6</sup>, with transnational interests and headquarters in various countries, their ownership being increasingly vague — due to the fragmentation of ownership made possible by stock exchange markets and the control help upon them by financial entities or investment funds. Their growing presence creates a new structure in this digital ecosystem, in which other content producers have a hard time competing. Napoli and Karppinen (2013) clearly summarized it when they quoted Eli Noam: "when it comes to media pluralism, the Internet is not the solution, but it is actually becoming the problem, due to the fundamental economic characteristics of the Internet (such as scale economies, capital intensity, etc.)".

Cyberpessimists do not criticise the lack of variety of content producers (in fact, they admit that the variety is wider), but the fact that said abundance did not modify existing power relations between groups and actors. Instead, it reproduces the same old logics, today with different participants, and leads to some voices being more audible than others. It is not the quantity of voices, but the power distribution of said voices that is denounced in the new digital environment.

As far as contents are concerned, critical positions emphasise the risks of increasing recycling and repetition practices, alongside quality loss (Doyle 2010; Fenton 2010;

<sup>6</sup> Consolidation is an essential characteristic of all industries, including communication and culture industries. Gershon (1996) had already examined many of its causes: mainly synergistic reasons (the possibility to commercialise a cultural product through different platforms), eco-political reasons (as a way of escaping restrictions on the growth of a company in its business sector – as a consequence of governments antitrust legislation or activity – or due to the company's own inability to grow further in its business sector), and technological reasons (convergence).

Freedman and Scholsberg 2011). Reuse has become a common practice. As Champion observes: “digital technology made content recycling easier and contributed to the rise of ‘churnalism’<sup>7</sup>, second-hand stories, reusing existing content, as well as recycling and remixing content for multiple platforms” (Champion 2015: 40).

The reproduction and repetition of existing ideas and the amplification of dominant discourses were exacerbated by the arrival of new intermediaries, search engines, contents aggregators, etc. which have further stifled access options to diverse contents. One notable reason for this is that, for structural reasons inherent to the internet, “the best search engines, in the best of cases, only cover a fifth of the total number of websites” (Picard 2000: 186). The “de-intermediarisation” of communicative processes is nothing more than a change of gatekeepers, where selection and hierarchisation are not made by traditional media actors but by the algorithms of the new companies. Thus, as Karpinen concluded (2009: 166),

it is increasingly clear that limitless number of options is not a value in itself. As the logic of exclusivity is shifting from the production to the filtering of information, it can be argued that the real issue for contemporary media policy is not lack of information but access to new and challenging content, exposure to different ideas, and particularly to new and innovative ideas and opinions of various alternative or minority groups, as opposed to satisfying pre-existing needs.

This is directly linked to the issue of audiences. Saturation on the one hand and segmentation and personalisation on the other are the two issues that harm diversity. Even though web 2.0 shows the advantages of universalising production and democratise access to contents, citizens

<sup>7</sup> ‘Churnalism’ is a play on the words ‘journalism’ and ‘churn’ which was extended to the production of news from press notes and other prefabricated material, so as to save time and money.

suffer from the supersaturation of the media flood (Gitlin 2002). There are so many voices that it becomes difficult to be heard; Picard's comparison is very revealing, when he suggests when describing the current situation "it is as if one is speaking in one's seat in a premier league football match and hoping other spectators can hear what you have to say" (2000: 186).

Digital technologies have increased fragmentation, through audience segmentation and content personalisation for individuals. "In order to survive in the highly competitive environment of fragmented audiences, media managers in broadcasting, cable, and publishing [...] tend to engage in audience segmentation" (Picard 2000: 184). In doing so, they have undermined consumption diversity (Baker 2002; Champion 2015; Helberger 2011, Napoli 2011b).

### **III – A Few Experiences in Measuring Audio-visual Diversity on the Internet**

In the new digital ecosystem, measuring diversity presents interesting challenges. Conventional tools and dimensions do not seem adequate for the task anymore (Napoli & Karpinen 2013). Although these challenges exist in many areas, we shall refer here to a few experiences that focused on measuring audio visual diversity.

The rare empirical studies looking at the measure of audio-visual diversity on the internet particularly analyse contents. For instance, Champion, Doyle and Schlesinger (2012) have researched how the growth of digital and multi-platform distribution have affected content and the economy of communication means. The question they posed was to what extent the evolution of media companies towards multiplatform production and distribution has amplified or reduced diversity and the plurality of contents. In order

to test these changes, they suggested carrying out content analyses. Compaine and Smith (2001) and Carpenter (2010) had already performed an analysis of the diversity of media contents, though restricted to a unique sector — the former studied the case of internet radio and the latter focused on citizen journalism and online news articles —. Compaine and Smith's study (2001) was based on the premise that internet radio added diversity to the traditional structure of radio diffusion and measured the level of diversity created in terms of formats, property, the localisation of the target market and language. Lin and Jeffries (2001) had previously compared television channels as well as radios and newspapers contents, but they had done so in the context of only one platform, based on the analysis of 422 websites.

Champion (2015) performed a detailed content analysis. He chose to focus on newspaper and magazine headlines and television signals<sup>8</sup> and analysed them over three time periods (spring 2013, 2014 and 2015). His working hypotheses were: 1) that multiplatform innovations increased the volume of available contents and 2) that they influenced its diversity. To operationalize concepts, the "volume" is calculated by taking into account the duration of the various programmes and the number and length of the articles, and "diversity" is measured in terms of repetition as well as concentration.

The study seems to suggest that the linguistic diversity of online contents has been the most debated and promoted dimension in the internet environment lately. While they do not focus directly on the audio-visual sector, the concern behind all these studies stems from the idea that:

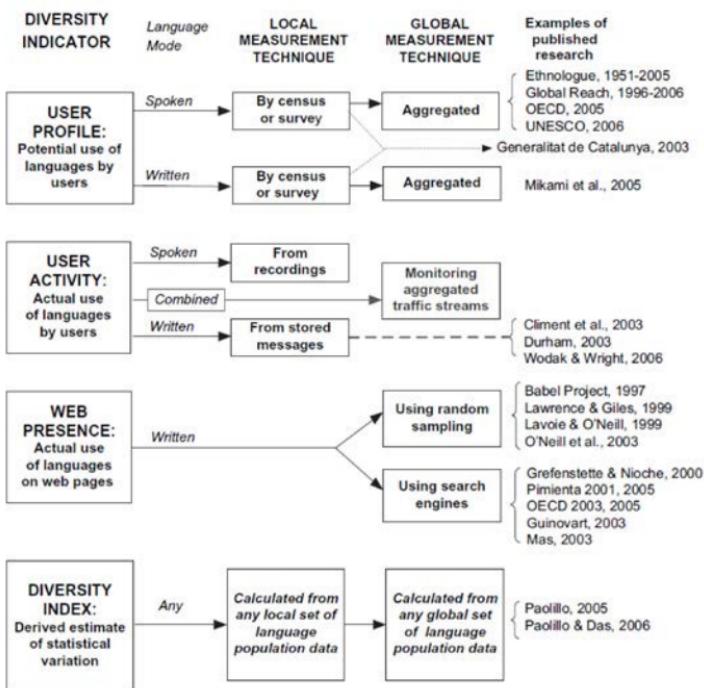
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<sup>8</sup> Eight organisations were selected as cases of study: two newspapers, The Financial Times (Pearson) and The Telegraph (Telegraph Media Group); three television channels, BBC One (BBC), MTV (Viacom International Media Networks Europe) and STV (Scottish Television Group); and three magazines: Elle UK (Hearst Magazines UK), T3 (Future Publishing) and NME (IPC Media).

For many Internet users, the potential benefits of the tremendous variety of content options available online from a vast array of sources essentially run aground against the fact that much of this information may not be available in their native language. As was noted in the IGF 2010 panel on linguistic diversity, there are more than 6,000 languages in the world, though only about 350 of them are represented online [...]. And, not surprisingly, there has been an overwhelming proportion of English-language content online, relative to English speakers' representation in the global population and the online population (Napoli & Karppinen 2013).

UNESCO (2005), in concert with the World Summit on the Information Society, promoted the measurement of linguistic diversity on the internet using three evaluation methodologies: 1) measuring the user profiles of the online population; 2) analysing the languages used in the online environment by users; and 3) analysing the languages used by websites (web presence). Gerrand (2007) classifies and systematises the measuring attempts that have applied these methodologies (figure 1) and offers a taxonomy.

**Figure 1. Taxonomy of methodologies used to estimate linguistic diversity on the internet**

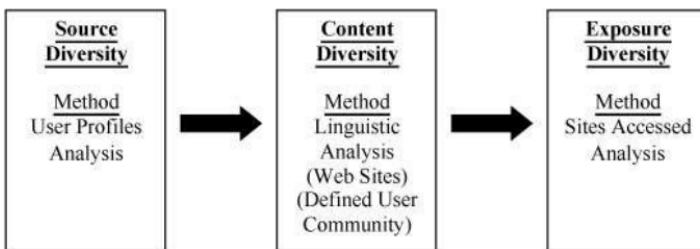


Source: Gerrand (2007: 1301)

Based on the review of these studies, Napoli and Karpinen (2013) adopt an analytical approach to measure the principle of diversity online (though they do not develop it). Reformulating the proposition of Napoli's classical studies (1997, 1999), the following diagram includes: 1) the diversity of sources (measured by analysing user profiles), 2) the diversity of contents (measured through a linguistic analysis

of websites and user communities), and 3) the diversity of exposition (measured by analysing the access to sites) (Figure 2).

**Figure 2. The principle of online diversity: analytical approaches**



**Source:** Napoli & Karppinen (2013).

Because of the small number of indicators that can be used to shed light on diversity in the digital context and, consequently, the low number of empirical researches, studies that have been conducted in the last few years are calling for a “reconnection” between the principle of diversity and public policies. Communication policies regarding what we now call “traditional media” were set up in a context which is now disappearing, or is at least in transition. The debates on the rarity of the radioelectric spectrum, the distribution of licences and the configuration of different barriers, to name just a few, which have historically characterised discussions on the regulation mass media of communication, are currently “non-issues” (Napoli and Karppinen 2013) in the internet environment. However, as Napoli points it out (2011a), the new context created new concerns.

On this point, Napoli and Karppinen (2013) criticise the degree of disconnection between the principle of diversity in traditional communication policies, and the context

of governance of the internet<sup>9</sup>. They denounce the fact, for instance, that during the sessions of the main forum of discussion on the governance of the internet, the Internet Governance Forum (IGF), the concept of diversity was limited to one discussion on multilingualism. Only on the margin of the main discussions was the concept connected at all to the themes of pluralism and freedom of expression. As these authors indicate correctly, the forum did not include any debates regarding the relationship between diversity of sources and diversity of contents, which characterise the principle of diversity in the discussions on the regulation of traditional media.

#### **IV – Conclusions, Challenges and Propositions Regarding the Measurement of Diversity**

The rare attempts made to measure diversity in the digital environment and more specifically on the internet were based on various problems, some of them current and others still unsolved, inherited from the past. The first is the lack of conceptual precision regarding what diversity actually is and, inasmuch, how and on what basis it should be measured. The inexistence of consensual categories applicable to cultural goods and services<sup>10</sup> is particularly obvious here. The difficulties of actor classification should also be noted, with the added problem that it is indeed almost impossible to place in one category alone the traditional

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<sup>9</sup> These authors analyse the preparatory meeting transcripts and the reports of the Internet Governance Forum (IGF) meetings, as well as other documents between 2006 and 2012, to find out whether the “diversity principle” is taking shape as a directing principle of the governance of the internet, and how its development and application are following a progression that is contrary to the history of said principle in traditional communication policies.

<sup>10</sup> The tendency has been to use the categories suggested by the industry in academic research.

actors of the value chain – producers, distributors, operators -, and new intermediaries, such as the contents aggregators or search engines, to name just a few, which are hard to catalogue.

The second obstacle inherited from the past is the insufficient data available on the operation of numerous cultural sectors, and the diversity of study methodologies when those data are available. While it was already difficult to obtain information, statistical information for the most part, allowing to measure diversity within the environment of the traditional cultural industries, their expansion to the internet worsened the situation even further. It is therefore necessary to encourage scientific and public research on the economy of digital culture, and to promote projects which strengthen the creation of common methodologies to study the sector.

The third problem lies in the lack of consensual indicators to measure diversity or pluralism, as noted by Napoli and Karppinen:

(...) it is now commonly acknowledged that the problems of market dominance and concentration of media power have not disappeared in the Internet environment. But as was noted in the 2010 workshop on how to measure communication and media in the digital converged era, the degree of concentration is increasingly difficult to measure in the online environment when there are no commonly accepted means to define relevant markets or assign market shares to different types of sources (Napoli & Karppinen 2013).

The same thing may be observed in reference to the indicators used to evaluate the development of contents in different languages:

(...) with the birth of the Web and the growth of the commercial part of the Internet, the academic sector has partly given up the creation of Internet demographic data to the private sector, and perhaps more controversially to the

marketing sector. This has created privately held, rather than publicly available, data. This has often led to the lack of transparency of research methodologies (Pimienta, Prado & Blanco 2009: 7-8).

As far as production, distribution and dissemination/exhibition are concerned, the new audio-visual environment has seen the emergence of new actors and, at the same time, generated transformations of great magnitude for those already existing. Global contents suppliers — some originating directly from the hardware and software industries — just as internet providers and the new intermediaries which can no longer be classified in the old categories based on the value chain of traditional cultural industries, make up a complex scenario, built on logics that are still vague and exist in tension, that must be taken into account in order to measure diversity. The main obstacle, in this sense, comes down to knowing how to measure the degree of diversity while it is still difficult to establish the limits of the markets in which the agents are acting, and consequently, generate segmentation criteria of the internet's infinite universe for its evaluation. In addition to this, another difficulty consists in measuring the size and geographical origin of said agents in an environment which is characterised not only by the opacity of information, but also by deterritorialization, with flows and interactions increasingly less conceivable in spatial terms.

As to the diversity of contents, the majority of studies so far have approached it in its linguistic dimension. Although it is an important one, it is necessary to go beyond those frontiers and to integrate other dimensions in the analysis of diversity. The question of whether the evolution towards a new ecosystem created not only more contents, but also more content diversity, can only be answered by studying other substantial categories — among others, the classical categories proposed by McQuail (1998) which are political, geographical and sociocultural —. At the same

time, it would be just as interesting to measure it in relationship to content recycling, by confronting their originality levels and reutilisation.

From the perspective of measuring consumed diversity, digitisation makes it necessary to develop new measurement instruments that would make it possible to shed light on direct and differed viewing, mobile content visualisation, consumption via computers, smartphones, tablets, etc., and the effects of the multi-screen. In other words, instruments that go beyond the measurement of the offline audience, which was used until now to measure consumption. Different organisations and companies conduct measurements of the digital media, varying in their degree of complexity and according to their instruments. The resulting inconsistency and lack of homogeneity constituted a major obstacle in advancing the measurement of the diversity of the contents produced, but even more fundamentally so of the contents consumed.

In order to measure the level of consumed diversity, it would be necessary to include mechanisms able to differentiate between the digital media that allow repeated viewing, reproductions or interactions (online video games, for example), from those which do not — an episode of an online TV series, for instance — (DMMF Report 2013). The new technical possibilities of downloading or streaming, involving linear or on demand offer, present new challenges for the measurement of consumed diversity. Additional obstacles exist, such as the analysis of consumption occurring through illegal or unauthorised platforms, or consuming or downloading though peer to peer technologies. In this sense, every attempt at monitoring must be based on substance and not on the platform; that is to say that it must, ultimately, be technologically neutral.

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# Exposure diversity as a new cultural policy objective in the digital age

MIRA BURRI<sup>1</sup>

## I – Introduction

Diversity has been conceptualized as a key objective of national and international cultural policies (Burri 2010). The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted under the auspices of the United Nations Educational Scientific and Cultural Organization (UNESCO) is a clear proof of this. The UNESCO Convention is a culmination of the efforts of the international community to secure regulatory space for domestic policy-makers in the field of culture, on the one hand. On the other hand, it goes beyond this and the inherent trade versus culture, international versus national contestations, and tries to promote diversity as a matter of global law and policy. Cultural diversity, much in contrast to the previous political slogan of “cultural exception”, has a positive connotation and the potential to inspire a broad agenda (Craufurd Smith 2007; Burri 2010a, 2014).

While the UNESCO Convention as a treaty basis can be deemed to be technologically neutral, the primary focus of its implementation has been placed upon analogue means of communication (Burri 2014). This flaw is

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natural rather than triggered by political economy contexts, and has to do with the conventional evolution of law and its tendency to lag behind technological advances (Gervais 2010). Indeed, this “error” flows from the similar “errors” made at the national level in formulating and implementing cultural policy toolkits for the protection and promotion of cultural diversity (Attentional et al. 2011; Burri 2007, 2013). This chapter argues that a peculiar characteristic of all these policies has been the almost exclusive concentration on the *diversity of supply* – that is, on the availability of diverse formats, outlets, media owners, etc. The chapter casts some doubt upon both the viability, as well as the efficiency of such policies in the digital age. It questions the underlying presumption for a causal link between source diversity, diversity of content, and the actual *consumed* diverse content.

Yet, it should be underscored that the present chapter is not intended to plainly criticize past and existing policies. It is rather meant to serve as a forward-looking analysis of the possibilities offered by digital technologies and how these can be best utilized to ensure exposure diversity – that is, a palette of diverse content, as actually consumed by users.

The chapter argues that although the balance between state intervention and non-intervention in the digital media certainly is precarious and individual rights are to be safeguarded (Valcke 2011), there may be subtle ways of intervening and promoting exposure diversity.

The chapter does not question that cultural diversity is an objective worth pursuing and assumes that this has not changed in the digital age. It works however towards disintegrating this objective (so as to include exposure diversity), which may permit for a more careful calibration of the applied cultural policy tools. The chapter’s particular weight is placed on the domain of audio-visual media. This focus is justified, because audio-visual media have been both the main target of diversity policies domestically (Footer and Graber 2000), as well as the main battlefield

in external trade policies – as early as the 1947 General Agreement on Tariffs and Trade (GATT) and in particular during the Uruguay Round of negotiations (Trumpbour 2007; Singh 2008).

The chapter starts with a brief introduction to some of the defining features of the new digital environment and the differences of this space when compared to analogue media. The chapter argues that against this backdrop of differently unfolding information and communicative processes, it makes sense for cultural policy-makers to define exposure diversity as a discrete target – above all, because of the broken causal link between source and content diversity and diversity in consumption, and because of the perils of intermediated communication that prevails online. Finally, the chapter outlines some proposals that may help address these challenges and design appropriate tools that cater for a vibrant and culturally diverse environment.

## **II – Diversity in the digital media space: presumptions and reality**

The transformations in the digital environment epitomized by the advent and wide spread of the Internet have been multi-faceted. Over the years, their effects have been captured, albeit not without contention, by a host of excellent studies (e.g. Benkler 2006; Sunstein 2007). It is not this chapter's purpose to describe or measure the quantitative and qualitative dimensions of these transformations (Cave et al. 2009; Bilbao-Osorio et al. 2013). It focuses rather on those specific developments that may be critical for pursuing cultural diversity objectives in this new space. In this sense, we are particularly interested in the changed ways content is produced, distributed, accessed, consumed and reused in the digital space.

To understand these changes, we start with the macro-picture, where key transformative trends are highlighted. Then we try to present a few, more granular, micro-snapshots that capture the complex developments which may sometimes go against commonly accepted suppositions.

## A – Macro trends

As broader lines of change, one can identify the following features of the new media space:

(a) *unlimited “shelf-space” and abundant content.* In the digital space, the notion of scarcity has been starkly modified. Blogs, social networking sites, virtual worlds and other forms of information and communication made available over the Internet have proliferated. They have turned into viable media outlets, co-existing next to traditional ones, offering a new way of accessing information and/or entirely new information. The sheer amount of information that is available at all times from any point connected to the Internet is simply staggering. There is indeed scarcity of attention.

What is also worth noting is the different way information is organized in the digital space. The fact that any type of data can be expressed in digital format has completely changed the rules for *organizing* information (Weinberger 2007). In contrast to conventional cataloguing methods, such as the Dewey decimal system for organizing libraries, the digital environment enables an encompassing, dynamic and interlinked information archive that can be searched through a single entry point according to unlimited criteria.

(b) *new ways of distributing, accessing and consuming content.* Enabled through multiple devices over the almost ubiquitous Internet, the patterns of handling information have changed. Instantaneous distribution to millions of people, pulling content instead of passively receiving it, simultaneous consumption from many sources are but few

of the (TV-unlike) features of contemporary online communication. These naturally have serious repercussions for users, businesses and for the entire market of information goods and services. They have also changed the transparency of cultural symbols and the ways they circulate in global and local contexts (Benkler 2006).

(c) *new modes of content production.* Reduced thresholds to participation, as well as the (ever greater) affordances of digital technologies, have allowed individuals and groups of individuals to create new content, to play around and remix existing content (Benkler 2006; Jenkins 2008). This type of creativity, interactivity and co-operation is unique to digital media and is a radical departure from the conventional image of massive and passive audiences.

## B – Micro developments

While the above transformations have been thematised in the literature and seem to reflect the broader trends, they *may* mask some of the more complex developments in media access and consumption. To offer a more cautious look, we examine three of the commonly shared narratives about the effects of digital technologies, namely: (1) the abundance and (2) diversity of content, as well as (3) the lack of intermediaries.

### 1. Abundance

We often talk of *abundance* of content as a matter of fact in the digital space. As earlier noted, if one looks at the numbers, such as the size of the web,<sup>2</sup> or the availability of data online, not only is abundance there but it is truly mind-boggling. In a converged world (European Commission 2013), we should also not single out online platforms,

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<sup>2</sup> On 12 February 2016, the number of indexed web pages was 4.84 billion, <http://www.worldwidewebsize.com/> (accessed 12 February 2016).

nor should we single out audio-visual media, since traditional print media (such as newspapers) or new players (such as digital games and virtual world providers) have become active in visual content too and users often treat these information sources as interchangeable (Horlings et al. 2005; Pew Research 2014). This ultimately makes the number of content items higher and the variety greater, as the conventional wisdom would have it.

Despite this astounding abundance of content, it can be that accessing it in practice is not that easy (e.g. Burri 2012). Indeed, limitations of legal and practical nature abound, especially as the digital networked environment matures. The barriers can be various and range from technical standards and other obstacles to interoperability to intellectual property rights enforced in opaque manner through digital rights management systems, or other forms of control through code and technology in general (Lessig 1999, 2006; Zittrain 2008; Brown & Marsden 2013). Filtering is the preeminent example of restricted access to information but far from being the only one. As Verhulst points out in this context, new technologies have introduced new types of scarcity as the control over information changes from old to new intermediaries that may control the flow of, and access to, information, from multiple and increasing points of entry (Verhulst 2007), as we show below.

## 2. Diversity

As corollary to abundance, the *diversity* of the content online is also commonly taken as given. Two widespread theories, both grounded in traits of the new digital environment, underpin such statements. The first, so-called “long tail” theory, preaches naturally generated diversity, as the reduced barriers to entry allow new market players to position themselves and make use of niche markets, which are economically viable in the digital ecosystem due to the dramatically falling storage and distribution costs (Anderson

2006). The Internet has also allowed for a dramatic reduction in the costs of searching. On the one hand, this means the time invested in search; on the other, its efficiency (Brynjolfsson et al. 2011). The Internet, as earlier noted, is a non-linear network that allows searching through a single point of entry. Search engines help us locate content within the huge volume of dynamic information, turning into “linchpins of the Internet” (Grimmelman 2007: 3; Weinberger 2007). The availability of new facilitators, such as tagging, samples, feedback and recommendations, enables users to find the desired products and even discover new ones (Brynjolfsson et al. 2006). Advanced tools, such as *Amazon* customer reviews, based upon collective intelligence (Surowiecki 2003), have emerged as new orientation institutions creating effective data filters.

In the digital space, it is also true that content remains accessible and usable long after its traditional “one-off” viewing at cinemas or on TV. “Pulling” content individually from a virtually unlimited selection may in effect change the *value* attached to cultural content. The popularity of documentaries or original series on *Netflix* may be a proof in this regard.

In a sense, the “long tail” theory promised corrections to many of the market failures of traditional media markets defined by scarcity, high entry barriers and economies of scale and scope. It suggested a new type of distribution of content, as supply and demand meet not only for “mainstream” products available in the “head” of the snake, but also for many other products, now available in the ever lengthening “tail” (Anderson 2006: 26). Critically for our debate, all of these put in doubt the adequacy of current models of state intervention in media markets (Burri 2012).

Another important challenge to existing regulatory templates comes from the phenomenon of user created content (UCC). UCC has been conceived as a powerful tool of democratization of content production and distribution, enabled by the increased broadband penetration,

the falling prices and the almost ubiquitous availability of connected devices (Benkler 2006). UCC can be said to bear the key components of diversity, localism and non-commercialism (Goodman 2004), and in this sense could readily fulfil public interest objectives without additional intervention. Further, it has been argued that the Internet-facilitated communication without intermediaries or other substantial access barriers has already created the aspired to vibrant “marketplace of ideas” (Lessig 2006: 245).

Miel and Farris (2008: 4) offer a snapshot of this highly optimistic vision: “Vigorous debate – now open to all – allows unprecedented levels of participation. Errors and lies by politicians, corporations, and irresponsible media are corrected quickly by the scrutiny of the crowd. Authentic stories about the lives of real people are part of a richer, more human information space. Easy and cheap multimedia production and remixing tools bring fresh new voices to light. The Internet connects us to people and ideas from around the world that we would never have encountered in the past”.

Undoubtedly, the appeal of these transformative theories is great, and only rightly so mobilized in the debates for reforming cultural policies for the media. Yet, the evidence of current practices seems much more nuanced.

As for the “long tail”, it appears unclear, at least so far, whether an environment of unprecedented choice and sophisticated tools for accessing content helps or hurts the prospects for content that has not traditionally resided in the “head” (Napoli 2012). One of the inherent characteristics of the new “attention economy” is the granular level of competition for audience, so that as online platforms offer the possibility to track the popularity of individual pieces of information and entertainment, editorial decisions may be distorted in favour of topics and genres that have mass appeal (Miel & Farris 2008: 33). Also, as global legacy media and Internet corporations merge in the pursuit of better utilization of all available channels and platforms, diversity

may in fact be lost. The question of real consumption, that is particularly interesting to us, is also vexed, as we show below.

The positivism for user creativity is still strong. However, we have seen so far few changes in law and in practice that seek to reflect the new creative processes and effectively accommodate UCC forms. The current copyright regime is author-centric and often insufficiently flexible (e.g. Burri 2011). Moreover, and more relevantly to our discussion, it is still disputed how real this grassroots content production is and how it impacts on cultural discourses. Sceptic voices stress the dangers of discourse fragmentation (Sunstein 2001, 2007; Pariser 2011). For instance, while early analyses of the blogosphere have applauded the low threshold of participation and incredible possibilities of free speech, recent accounts are less exalting and indeed disquieting. Cammaerts (2008: 363) suggests for instance that the blogosphere has been colonized by the market, with an “ever more increasing commodification of content and by concentration trends leading to the creation of oligopolies”. Censorship by states, organizations and industries proliferates and many spaces become appropriated by political and cultural elites, which are naturally better positioned in terms of capabilities and finance for speedy and forceful mobilization (Cammaerts 2008: 366–368; Hoofd 2011). At the individual level, such negative processes unfold due to social control by citizens, intimidation by other bloggers and communities, as well as due to concentrated antidemocratic voices that question fundamental societal values (Cammaerts 2008: 369–371). These perils are well reflected in the context of intermediaries too, as we show next.

### 3. *Intermediaries*

Another myth of cyberspace, which demands a closer look and is of particular importance to our debate, is that *intermediaries do not exist* and one can freely choose any content

at any time. As contemporary digital media practice shows, this myth does not reflect reality. In fact, intermediaries with different types of control on the choices we *make* and on the possibility for choices we *see* abound. We focus here in particular on those gatekeepers existing at the application and the content levels – what Helberger calls “choice intermediaries” (Helberger 2011; 2011a), or Miel and Farris, the “new editors” (Miel & Farris 2008: 27).

Conventionally in the offline/analogue world, editorial roles were concentrated under the roof of a single institution. Editorial choices were based on a certain, limited, pool of materials, which were in a way “property” of the media institution. Editorial products were finite, bounded by the limitations inherent of each medium, such as the pages of a printed newspaper or the length of a broadcast. The targeted audience was also typically addressed in a certain rhythm, which had an influence on the breadth and depth of the content – e.g. daily newspapers, a weekly edition or a one-off reportage. The format reached the entire audience of any given publication or programme in the same way.

The picture is decidedly different now, as these analogue limitations have been removed and have triggered major changes in the composition and consumption of media products (Miel & Farris 2008). The new editors are multiple and distributed, and they seem to be both enhancing and limiting diverse consumption. Miel and Farris (2008; also Latzer et al. 2016) offer a helpful taxonomy of the new editorial institutions. Some of them are truly web-native; others come as an addition to conventional media practices.

(i) *Aggregation*, which is the process of assembling different types of content in a tailored fashion and constantly updating it, belongs to the former group. This sort of personalized editor is offered on different platforms, for different types of content – be it news, entertainment, or gossip. It automatically generates information tailored to a particular user profile and/or previous experience in a

seemingly seamless manner. The information used is commonly produced elsewhere. So, the big three news aggregators (Yahoo!, AOL and Google) all rely on legacy media, such as the Associated Press (AP), for the bulk of their content (Miel & Farris 2008: 28). This may disperse some of the conventional criticism that aggregators amplify the impact of unreliable non-traditional sources (Keen 2007); on the other hand, it becomes evident that content is not made more abundant but has merely become more distributed. The ultimate consumption appears limited to a handful of mainstream online sources that are, as a rule, professionally produced by white, educated men (Hindman 2009).

(ii) *Search* is nowadays absolutely essential (Grimmelmann 2014). It is presently the starting point for most online experiences and is the most significant driver of online traffic (Ofcom 2008). Without being indexed and searchable on the net, content is plainly rendered non-existent (Introna & Nissenbaum 2000). The search business is also highly concentrated with very few providers, and with Google distancing itself clearly from its competitors (Travis 2009). Generally speaking, it is in the long-term interest of search providers to meet the needs of their users – both as consumers and as citizens. This said, it should be stressed that search results are generated algorithmically and automatically assign relevance to certain information units. Automated selection is prone to manipulation using a range of search engine optimization techniques (Ofcom 2008).

(iii) *Social bookmarking* is increasingly important as a mechanism of giving prominence to content. Here the crowd acts like an editor through different ranking and bookmarking systems, such as Reddit, Technorati or Del.icio.us. As part of the social media phenomenon, these mechanisms not only tailor media consumption but also succeed in commanding the attention of large groups (Miel & Farris 2008: 30). Naturally, the marketing industry has swiftly learnt to incorporate these tools and utilize them for mobilizing consumer attention.

Overall, through all these different mechanisms the network functions as a multi-channel editor. On the positive side, it may be justified to view “the networked media environment as a virtual social mind that produces something richer, more representative, and more open to ideas than the top-down mass media model of the past” (Miel & Farris 2008: 30). On the other hand, this positivism may be deeply flawed. Often are also the workings of the system somewhat haphazard – the trajectory from online obscurity to prominence remains poorly understood, as there are simply too many variables (Bilton 2014).

Thinking about the societal, especially cultural, functions of the media in the context of our discussion, it could be that this complex environment presents certain dangers of reduced exposure diversity and discourse fragmentation (Sunstein 2001, 2007).

First, we need to acknowledge the possible interferences with users' individual autonomy and freedom of choice. As Latzer et al. (2016) argue, while filtering reduces search and information costs and facilitates social orientation, it can be “compromised by the production of social risks, among other things, threats to basic rights and liberties as well as impacts on the mediation of realities and people's future development”. In this sense, user autonomy in the new informational space becomes heavily dependent on media literacy (High Level Group on Media Freedom and Pluralism 2013).

The second worry in this context has to do with the impact of tailored media production and consumption. In the former sense, there is a recent trend towards automated content production, where algorithms drive decision-making in media organizations by predicting audiences' consumption patterns and preferences (Napoli 2014; Saurwein et al. 2015). While in some areas this may be viewed as beneficial in giving the audiences what they want, in other areas, such as for news, this may be highly problematic, as news and current affairs become tailored to the

demographic, social and political variables of specific communities. Napoli (2014) thematises also the so-called “content farms”, which based on data, such as popular search terms; ad word sales and the actual available content, produce content rapidly and cheaply in order to meet that demand. “The output then represents a prediction of the type of content for which there is the highest unmet audience and advertiser demand” (Napoli 2014: 35). The creation of content is completely commodified and possibly harmful to any public interest function of the media we can think of.

In the second sense, the personalization of the media diet, as based on a distinct profile or previous experience, “promotes content that is geographically close as well as socially and conceptually familiar” (Hoffman et al. 2015: 1365). Hoffman et al. (2015) argue that social media only exacerbate this effect by combining two dimensions of “homophily”: similarity of peers and of content. This may not be particularly conducive for taking informed and balanced decisions – either individually or as a group (Sunstein 2006). While these situations have been differently labelled – “cyber-ghettos” (Dahlgren 2005), “filter bubbles” (Pariser 2011), “echo-chambers” (Sunstein 2001) – they all point to a fragmentation of the public discourse and possible polarization of views.

### C – Intermediate conclusions

The above section sought to underline the breadth and depth of the transformations that digital technologies have brought about in the last two decades, as well as the complexity and the related uncertainty as to their societal impact. In particular with regard to the fundamental cultural policy objective of diversity and the overall conditions of free speech in the digital media space, there are a number of ambiguities. On the one hand, the possibilities to create, distribute, access and consume content seem unprece-

dented – we can hardly compare with the offline/analogue world of the television, the newspaper and the magazine. On the other hand, as we showed with regard to the underlying assumptions of abundance, diversity and communication without intermediaries, things are not straightforward. Indeed, we ventured that in many senses diversity, and in particular exposure diversity, may be reduced. Although we cannot as yet be definitive in this supposition, since we seem to still know far too little about how people combine offline and online sources, how the changes in the delivery and consumption of the media are actually affecting their public awareness, opinion building and civic engagement, and how these changes relate to different generations (Miel & Farris 2008; Webster & Ksiazek 2012), we can nonetheless acknowledge two important things.

The first puts in serious doubt the causal link between source and content diversity and the actual consumed diversity. What appeared at least somewhat plausible under the conditions of analogue media where the sources were few, it is now, under the conditions of digital media, extremely hard to believe. Closely related to this doubt is the question about the adequacy of the presently applied cultural policy tools, which, almost exclusively target source and content diversity. In the following section, we explore some alternative instruments.

### **III – Towards diversity in consumption**

How to react to the above sketched new media environment and design apt state intervention that ensures diversity, in particular diversity in consumption?

Thinking of those specific situations where access to content may be hindered or made difficult, one could suggest a number of basic framework conditions that can improve the chances of diversity of exposure, such as lower

and equal threshold for access to content; increased interoperability between networks, devices, and applications; non-discrimination between different types of content and applications; enhanced transparency as to default settings and terms of service with regard to privacy; more legal certainty with regard to the grey zones of copyright law and practice. The list of such conditions is lengthy and demands the attention of policy-makers, because even in seemingly technical situations, essential rights and values, such as freedom of expression, equality of opportunity and justice are affected (e.g. Zittrain 2008), as the network neutrality debate has clearly proven.<sup>3</sup>

In the following, we focus on some tools that target more deliberately exposure diversity in the media.

## A – Updating existing tools

Despite the fact that exposure diversity has never been explicitly formulated as a cultural policy objective (Helberger 2012), there have been a number of ways, also formulated as a matter of law, that sought to ensure that (national) audiences have exposure to certain content. An important function in this regard has been assigned to the Public Service Broadcasters (PSBs), which in the European tradition,<sup>4</sup> are large media organizations, such as the original model of the British Broadcasting Corporation (BBC), often funded by taxes or through dual funding schemes including income from advertising.

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<sup>3</sup> The neutrality principle has been intrinsic to the Internet architecture. It holds in essence that the network should be neutral to the content being passed (e.g. Wu 2003).

<sup>4</sup> The US model has evolved differently and PSBs play a less prominent role in media exposure and have a more distributed public interest function, often catering for the underserved, minorities and the poor. The European model tends to align media with cultural policy, whereas US model has been aligned with telecommunications policy and focused on ownership and access issues (Van Cuilenburg & McQuail 2003).

It is fair to note that at least at the outset of public service broadcasting (PSB), when the incumbents enjoyed a state of monopoly, its paternalistic function was clearly evident – PSBs had to provide the audience with a well-mixed diet of news, entertainment and educational programmes and cater for their “enlightenment” (Coase 1950: 65). Next to this large project of PSB, which was supposed to provide the audience with steady flows of “good” content that is innovative, challenging, original and of high-quality, there have been subtler ways to ensure that the users get more easily access to such content.

For instance, PSBs in Europe have had the privilege to occupy the first slots in electronic programme guides (EPGs) and have been given so “due prominence”. Foster and Broughton (2012: 12) show that EPGs have been an important tool for consumers finding and selecting programmes and there is evidence that channels with slots near the top of each section of an EPG have had an advantage in viewers’ selection over those further down. Yet, although television is still the primary content medium, this is likely to change, and is already now doubtful for younger people. The value of EPGs as a tool for enhancing the prominence of specific content is bound to be reduced, and there is a need for adjustment (Foster & Broughton 2012: 19).

One can first think of an “updated” variation of the EPG. Foster and Broughton see this as a two-step process of “nudging”, whereby viewers are attracted to the PSB channel or brand and then a range of techniques are used to “lead audiences to a wider range of content than they might otherwise have chosen for themselves” (Foster & Broughton 2012: 11). The authors have justified the need of a new legislation (in the UK but also subsequently at the EU level) that will ensure prominence of PSB brands or individual service brands on online platforms.

Such an arrangement may have its benefits and address future developments in the digital media space, where access to globally-produced (mostly US) productions is the

core proposition of many new content packagers, and new on-demand brands focused on specific demographics or genres (such as Netflix) may crowd-out the mixed genre, general interest PSB brands (Foster and Broughton 2012: 21–22). This “due prominence” approach may also receive more weight in the EU, as it is now in the process of reviewing the Audio-visual Media Service Directive (AVMS) as part of the new and far-reaching Single Digital Market Strategy (European Commission 2015). From the latest consultation of EU regulatory authorities, there appears to be support for “prominence” tools as form of implementation of the duty for the Member States to “promote, where practicable and by appropriate means, production of and access to European works”.<sup>5</sup> This approach, which may involve advertising inserts, separate tabs, or adequate identification of European works (European Commission 2012; European Audio-visual Observatory 2014), seems to be favoured as the most efficient – also because it relates to actual higher consumption of European works and is the least burdensome for operators (European Commission 2014).

## B – New and newly targeted action

Thinking beyond existing models of intervention, policy-makers can explore other types of action. One cluster of such actions is more defensive and relates to the activities of PSBs. The other is more proactive and involves other media players too. In the first category, policy-makers can strive to highlight specific cultural content by providing “information about information”, which can effectively assist users in comparing and finding content that is relevant and valuable to them, while delineating it from other “noise”. As Helberger (2011: 343) explains: “[i]nforming consumers about their choices (in the hope that they will make the right ones) has

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<sup>5</sup> Article 13(1) AVMS.

been repeatedly advanced as a preferable route to the traditional, paternalistic approach in media regulation – which regulates the offering and pre-defines choices”.

Labelling is the most obvious and conventional transparency-enhancing tool known from consumer protection policies that can be employed to meet these ends. Helberger (2011) has proposed the so-called “diversity” label to this effect – which marks content as being diverse. Another opportunity will be to simply extend the PSB brand, or the brand of a particular cultural institution or of a certain type of valuable cultural content, to more online spaces. Such a general-purpose label can spare us the demanding task of deciding which content is diverse and in comparison to what.

A similar idea had been explored during the PSB review in the UK in the context of the so-called “Public Service Publisher” (PSP) (Ofcom 2007). Relevantly for our discussion of labelling, the PSP was supposed to function as “a ‘facilitation brand’, subordinate to other brands in consumers’ eyes, but having an important impact in the decision process – providing a potential mark of quality, much like the ‘Intel Inside’ brand for PCs” (Ofcom 2007: 8). Such labels can not only be visible on the diverse platforms where the content is offered but can also be designed as a discrete tag or a suite of tags that can facilitate search processes.

This labelling can be well linked to the question of trust in the media. As the digital media landscape is profoundly fluid and uncertain, the value attached to media may be changing. Trust may become absolutely critical. On the one hand, this refers to the trustworthiness of *content*, its high quality, independence, accuracy and authenticity (Foster & Broughton 2012: 23). But trust can become critical for making choices not only about content but also about the *platform* that provides the content – in the sense of its commitment to privacy, to high ethical standards (Mayer-Schönberger 2011; Hendy 2013), to transparency of terms of use and to overall user friendliness (Lemley 2011).

Beyond informing through labelling, there is a separate question of whether there should be discrete policy initiatives that effectively aim at ensuring diversity in consumption. This involves a deeper type of intervention and is somewhat controversial from the viewpoint of interference with other rights, as earlier noted. Helberger has argued still that there could be important positive effects of such an intervention, which she aptly refers to as “principled consumption” target. Tools aiming to achieve this target entail some sort of guidance for users to the “relevant” and the “quality” content, making sure that they then consume the “right mix” (Helberger 2011: 346). In this form, cultural policy tools take up distinct “asymmetric paternalism” functions (Sunstein 2000; Sunstein & Thaler 2003).

Two critical questions arise in this context – of *awareness* and *serendipity* – i.e. “do people know about the full range of content opportunities available to them online, and how often do they stumble across content which they like but which they did not know existed?” (Ofcom 2008a: para. 3.95).

While the avenues of raising awareness can well be covered by the above described tools of informing and attracting audiences, the question of serendipity – i.e. of introducing viewers to content they would not otherwise look for or challenging users’ views and expanding their knowledge “by chance” (Ofcom 2008a), has not been addressed so far. In this context, some scholars have stressed that, “[s]erendipitous encounters might alleviate some concerns about restrictive coping strategies and a tendency in users to hide in their ‘information cocoons’, and “promote understanding and open-mindedness, and thereby also advance democratic goals” (Helberger 2011a: 454). The digital space and different ways of analysing data and aggregating content allow for the random delivery of different types of content, which can be displayed next to the chosen by the viewer content or in dedicated “less searched”, “less viewed” and other type of less popular, not

mainstream lists. Also, since it appears that there is a great difference in the availability and discoverability of discrete genres of cultural content, it can be apt to make cross-genre linkages, so as to increase the chances of overall more diverse consumption.

However, there should be caution in these random offerings, as they can simply be ignored or can even disrupt the viewer's experience. Research has shown that there must be more to serendipitous encounters than just chance. Schönbach explains that in order to work and incentivize users, surprises must be "embedded in the familiar" (Schönbach 2007; Helberger 2011a). Hoffman et al. (2015: 1363) argue along the same line that we can speak of "diversity experience" only if users "perceive and digest this content according to their motivations, awareness, and capabilities".

Overall, one can argue that in the complex media space of digital media, there is a need for "good aggregators" of content that can counteract some of the negative features of digital communications and ensure more actually found and consumed public service content (Goodman & Chen 2011; Burri 2015). In the age of "Big Data" (Mayer-Schönberger & Cukier 2013), it can be assumed that designing such smart editors is doable. The question of balancing between the virtue of the intervention and its possible side-effects, which are intrinsic to such paternalistic actions, remains (Helberger 2015).

#### **IV – Conclusion: New cultural policy tools for the media**

Despite the far-reaching transformations brought about by digital technologies, there have been few changes in the cultural policy toolboxes of the pre-Internet age. One plausible explanation stems from the existing path dependences (Liebowitz & Margolis 2000; Page 2006) in national

policies, which have prevented real innovation so far. Well-organized stakeholders and self-interested politicians, profiting in the short- and mid-term from defending national values, anti-commercialization and anti-globalization, have hindered policy overhauls, as public choice theory would predict (Shughart 2007). Another explanation comes from the complexity of issues involved and the inherent difficulty to pinpoint policy instruments that work, and efficiently and effectively contribute to the fundamental cultural policy goals, such as the sustaining of a vibrant and diverse public sphere.

The incredible possibilities of creating, distributing and accessing content across a range of platforms and devices in the digital environment do, on the one hand, signal for less state intervention. Whilst this may be true, we showed, on the other hand, that the conditions of free speech may often be rendered challenging, user sovereignty may be impaired and diversity may be seriously reduced – with potentially grave consequences for individual freedom, political and cultural discourses. We also showed that the goal of exposure diversity has been insufficiently thematised in policy discussions and many of the presently applied cultural policy instruments may be off the target.

As a relatively young theoretical concept, “exposure diversity” allowed us to explore novel ways of proactive cultural governance and to think of the different degrees of intervention that may satisfy that precarious balance between user autonomy and the public interest objective of diversity. We put forward in particular some proposals for raising the awareness about the availability of public service content, as well as for increasing the level of exposure diversity through serendipity nudges.

It is fair to note that some of the suggested measures have a paternalistic character in that they attempt to bridge the “difference between the public interest and what interests the public” (Sunstein 2000: 501); but such policies have

been typical for state intervention in the media and clearly fade in their intensity when compared to measures such as content quotas, that pre-define choices.

Actual exposure to diverse cultural content is neither straightforward nor self-evident. Learning to better understand if and how content reaches the user, what obstacles users encounter, as well as the overall impact of these, is not only an important academic exercise; it is also the route to formulating better, more effective cultural diversity policies. The UNESCO Convention certainly provides enough room for such policy experimentation.

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# The Internet platforms' impact on the Diversity of Cultural Expressions: to the Long Tail, and beyond!

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## Introduction

While there is a common agreement on the necessity to promote and protect the diversity of cultural expressions, this requires knowing more about *how* to achieve such a result, in particular in the digital era. First results have been provided regarding the impact of policies (CEIM 2015; Thiec 2014). However, the impact of non-state actors remains understudied, in particular of online platforms.

This is all the more important that digitization is deeply modifying the way cultural sectors are functioning, with an ambiguous impact on the diversity of cultural expressions. These sectors are among the first that have

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been heavily hit by the digital shift, i.e. the digitisation of information, the generalisation of the Internet protocol, and the rapid take-up of these technologies (Simon & Bogdanowicz 2012), all this in a context of creative destruction and disruptive innovation.

Besides, the digital shift has brought about a reconfiguration of the cultural industries' value networks (Ballon et al. 2012), in turn leading to uncertainty, conflicts and strategic shifts. In particular, digital technologies are likely to threaten traditional players (creators, intermediaries) to the benefit of Internet giants and specialized platforms (Zhu & Seamans 2010). It is claimed that these players' strategies are likely to lead to more homogeneity in content supply and consumption (Guèvremont et al. 2013).

This paper proposes to analyse how Internet platforms contribute to, or hinder, the online diversity of cultural expressions: do they propose a more diverse offer? Do they induce a more diverse consumption of cultural content? What are the mechanisms at work? It does so via a literature review focused on the main theory elaborated to assess the impact of digitization on the diversity of cultural expressions, namely the Theory of the Long Tail. The paper opposes it to the Theories of Superstars, since they provide opposite predictions on the impact of digitization on the diversity of cultural expressions. Finally, it proposes ways to go beyond the results and approaches of these theories.

In the remainder, section 2 describes the methodology used, in particular the Stirling Model. Section 3 analyses the Theories of Superstars and the Theory of the Long Tail, and provides an overview of recent studies on the Long Tail. Section 4 discusses the main differences between these theories and ways to go beyond their limitations.

## I – Methodology

Based on desk research, the paper consists in an overview of papers analysing the impact of platforms on the diversity of cultural expressions. The papers were found using Google Scholar, and in the references of each paper. The paper notably updates and expands Brynjolfsson et al (2010).

In particular, it proposes to reframe the Long Tail's theoretical framework and point at its limitations by using the Stirling Model. The Stirling Model considers diversity as a mix of variety, balance and disparity (Stirling 2007). In this approach, the diversity of a system (e.g. Netflix's feature films catalogue) can only be assessed when its elements (e.g. the feature films) have been grouped into categories (e.g. these films' nationality). Once this categorization has been done, variety corresponds to the number of categories; balance to the way the elements are spread among categories (e.g. the share of films released per nationality); disparity to the level of difference between the categories (e.g. between every pair of them or between the two most distinct). This Model is increasingly used in the cultural field (see e.g. Peltier & Moreau 2012; Ranaivoson 2007).

As it is somehow too generic to analyse the diversity of cultural expressions, the paper also distinguishes between supplied diversity and consumed diversity (Van Cuilenburg & Van der Wurff 2001). Supplied diversity corresponds to the diversity of what is made available. Consumed diversity refers to diversity as it is actually consumed, thus depending on both consumer tastes and supplied diversity.

## II – Theoretical background

To assess the impact of platforms on the online diversity of cultural expressions, the paper proposes two theories that have contrary analyses of the implications of digital technology for content diversity: the Theories of Superstars and the Long Tail Theory.

### A – The Theories of Superstars

The Theories of Superstars aim at explaining why consumption is focused on a restricted number of products or creators, the so-called Superstars. There are two theories with different, though compatible, approaches: Rosen (1981) and Adler (1985).

According to Rosen (1981), some creators (or products) are Superstars because they are more talented and benefit from technology that allow them to reach a great number of consumers at a low cost. First, there is a limited substitutability for consumers between two creators with different talents (Rosen 1981). Therefore, a slight superiority in talent leads to a much larger revenue. In other words, revenue is a convex function of talent. However, the assumption of a common agreement among all consumers regarding the distribution of talents is problematic (Benhamou 2012 & Moureau 2006) notably as it lacks realism. More interestingly, Rosen (1981) argues that it is crucial that distribution and consumption technologies rely on low marginal costs. Actually this allows better products or more talented creators to benefit from economies of scale. Therefore, technology plays a crucial role in Stars' success (Moureau 2006), by allowing to reduce congestion costs in consumption (Schulze 2003).

The Theory of Superstars in Adler's (1985) approach puts information at the core of the choice by consumers and hence of the resulting (lack of) consumed diversity. For Adler (1985), what is important is "*the need on the part*

*of consumers to consume the same art that others do*" (Adler 2006: 3). This results from the assumption that consumers get increasingly satisfied the more they know about what they are consuming (Adler 1985; Stigler & Becker 1977). Therefore, information is at the core of Adler's (1985) theory. For this reason, in his theory, talent is not a crucial assumption.

Since consumers try to know as much as possible about what they consume, the most famous creators or products are advantaged, and this is a self-reinforcing feature (Adler 1985). Adler's (1985) model also allows to understand why distributors concentrate their marketing means on a few creators, instead of spreading them equally among all creators. Actually the aim is that the creator reaches the threshold that will trigger increasing returns. That is why those artists who may seem to need it the least (due to their notoriety) will benefit from the maximal coverage.

A related consequence of Adler's (1985) model is that Superstars allow to erect barriers to prevent market entry. More precisely the most important players will try to acquire Superstars as they attract most of the attention – and most revenues. Such strategy does not prevent to resort to proliferation of novelties though. Having both Superstars and a proliferation of novelties allows to saturate attention while possibly benefitting from the surprise success of one of those novelties (Benghozi 2006).

While neither Rosen (1981) nor Adler (1985) could have envisaged the impact of the Internet on Superstars, it is possible to extrapolate their arguments to show that the Internet can reinforce Superstars (Brynjolfsson et al. 2010). With digitization, marginal costs for distribution and consumption are even more decreasing. As for information over Superstars, it becomes even more ubiquitous due to the Internet. Whereas the Theories of Superstars have been developed before the Internet era, the theory of the Long Tail derives directly from this technological revolution.

## B – The Long Tail and its consequences

Anderson coined the Long Tail to predict that digital technology will allow consumption to become much more diverse (Anderson 2006). The Long Tail consists in two trends: (i) the decreasing importance of Superstars in relative or even absolute terms (e.g. respectively the decrease of their market shares or of their sales volumes, see also 4.5); (ii) the increase of the Tail, i.e. the increase of niche products. The latter idea is also argued for by Brynjolfsson et al. (2003) when they discuss the importance of obscure works in online sales.

There are various reasons for such trends to take place. The Long Tail can emerge first thanks to a democratization of production means, for different types of content (Anderson 2006). Personal Computer and more recently mobile devices have been instrumental in such a trend. Second, there is also a reduction in costs to access content, notably thanks to the Internet (Anderson 2006). Actually, in the offline world, space (or time e.g. for broadcasting) must be reserved to best-sellers rather than left to works that take as much space but sell less (Anderson 2006; Brynjolfsson et al. 2003). In other words, supplied content diversity is broader online than offline as physical space restrictions and logistics are reduced (Le Lec et al. 2015). Third, digitization allows to group enough consumers to create market niches of a sufficient size (Anderson 2006). Finally, relevant filters exist that help consumers find what is likely to please them in spite of the abundant supply.

According to Anderson (2006), the development of the Long Tail benefits consumers and platforms. Consumers benefit from the Long Tail through this much larger choice. Brynjolfsson et al. (2003) thus assess that in the US book market, consumers have benefited more from the increase in supplied variety than in price reduction. The Long Tail also leads to the constant emergence of new services relying

on innovative business models (Masnick & Ho 2012). Such services or new activities are at all steps in the value chain from creation to distribution.

The greatest beneficiaries, however, are those companies that give consumers access to a great variety of goods or services (Anderson 2006; Brynjolfsson et al. 2003). Such companies are generally platforms that act as intermediaries between different types of users, e.g. for Amazon between consumers and third-party retailers who sell on its platform. Furthermore, they benefit from economies of scope, i.e. the marginal costs of adding content to their catalogue is very low. This also incites them to increase the diversity of their offer. Another advantage of such a strategy is that a diversified catalogue allows companies to reduce risks, alike with financial assets (Markowitz 1952). Finally, it is also a way to reduce competition since saturation of the market allows erecting barriers to entry (Lancaster 1979 & Schmalensee 1978). Therefore, the impact on traditional intermediaries (bookstores, record producers, etc.) is ambiguous, as is discussed in III.F. Finally, while Anderson (2006) predicts a positive impact on creators, it should be on average of limited scale. Marcone (2010) does not predict major changes for independent creators since the Tail is not developing fast enough.

### C – Is there a Long Tail?

The following table provides an overview of studies that have tested the existence of a Long Tail in the cultural sector, mostly in content industries, although there are a few exceptions (e.g. Brynjolfsson et al. 2011). Also, only empirical papers were kept, therefore papers relying on experiments were excluded (e.g. Le Lec et al. 2015). Most papers are based on US data, several others on French data. All papers focus on Variety (V) and Balance (B), and only Bourreau et al. (2011) take disparity (D) into account. Finally, there is no unique trend towards either reinforcement of

Superstars or of the Long Tail. One reason might be the type of index used to assess diversity. We come back to both issues in III.E.

**Table: Overview of empirical studies on the Long Tail**

Article	Sectors	Country	Offered / Consu- med	Stir- ring Defini- tion	Long Tail	Results Effe- cts?
Anderson (2006)	music, video, book	US	S&C	V,B	+	LT has an increasing share of sales (40% on Rhapsody, 21% on Netflix, 25% on Amazon)
Bear Sterns (2007)	TV	US	C	B	+	Decrease of Big 3 in Total Day TV Viewing
Benghozi (2008)	DVD, CD	France	C	V,B	+	DVD sales are concentrated online. LT effect stronger for CDs
Benghozi & Benhamou (2008)	CD, DVD	France	S&C	V,B	+	LT effect although less strong during periods when sales are the highest
Bourreau et al. (2011)	Recorded music	France	S&C	V, B, D	+	Increased consumed variety. Weight of top 100 and 100 is lower online, as well as Hirschman Herfindahl Index
Brynjolfsson et al. (2011)	feminine clothes	US	C	B	+	More balanced sales for Internet purchases compared to catalog purchases

Elberse (2008)	music	US	S&C	V,B	+/-	Longer Tail but online transactions are even more concentrated, e.g. 1% of titles available on Rhapsody = 32% of titles listened to
Elberse & Oberholzer- Gee (2006)	video	US	S&C	V,B	+/-	Longer Tail. More videos that do not sell at all. Growing importance of best sellers
Given & McCutcheon (2014)	DVD, books	Aus- tralia	S&C	V,B	+/-	LT if absolute values. But more concentration if relative values
Goel et al. (2010)	movies, music, Web search & browsing	n/a	C	B	+	Nearly everyone is at least a bit eccentric (the paper deals more with consumer satisfaction)
Hinz et al. (2011)	VOD (transac- tional)	Ger- many	S&C	V,B	+/-	A growing assortment leads to greater demand per customer, although on a diminishing scale. A growing assortment size does not necessarily lead to the end of the "blockbuster era". Strong influence of search technologies on the demand distribution. Niche demand is mainly generated by heavy users
Kumareta. (2011)	motion pic- ture	US	C	B	+	Shift towards niche titles

Leskovec et al. (2007)	book, DVD	US	C	B	+	Top 100 = 11,4%. Top 1000 = 27%. 67% of all products have a single purchase. They account for 30% of recommendations. The tail is a bit longer (the paper deals with recommendations, not with sales)
Marcone (2010)	music (Billboard data)	US	C	B	-	Online sales have become more concentrated, and the hits matter more each year. Overall album sales have fallen over 30% since 2004, and popular album sales have fared even worse than overall album sales
Moreau & Peltier (2011)	books	France	S&C	V, B	+	Sales have decreased for top 500 and all more restrictive tops. They have increased for all other categories. Increase in the number of titles
Mulligan (2014)	Music (on-and offline)	US	S&C	V, B	-	In 2013 the top 1% of repertoire accounted for 77% of all artist recorded music income. Bias of digital platforms towards the top 1% (streaming, download, but also radio). Weakest concentration for physical music. This does not correspond to a dominance of majors over independents

Page & Garland (2009)	Music	UK	C	B	-	Volume (legal sales or 'pirate' swaps) is concentrated amongst a small proportion of the available tracks. The gap between hits and niches is widening
Peltier & Moreau (2012)	book	France	C	B	+	Bestsellers got smaller market shares online than offline, contrary to medium- and low-sellers. Both online and offline sales shift from the head of the distribution to the tail with increasing magnitude. The LT appears to be more than just a short-lived phenomenon caused by the specific preferences of early adopters of e-commerce
Smymaios et al. (2010)	online news	FR (French-speaking)	S	V, B	-	French-speaking news websites have quite similar characteristics to those of traditional media. News appears to be both varied and very unevenly distributed
Tan et al. (2015)	movie rental	US	S&C	V, B	-	Product variety is likely to increase demand concentration. Increasing product variety diversifies the demand away from each movie title, but less significantly for hits than for niche products

Walls (2010)	DVD	North Ameri- ca	C	B	+	The DVD market is less heavy-tailed and exhibits less of a winner-take-all property than the theatrical market for motion-pictures
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### III – Long Tail vs Superstars: beyond the dichotomy

The Theory of the Long Tail and the Theories of Superstars provide quite opposite predictions regarding the impact of digital technology on the diversity of cultural expressions. Before analysing the results of recent empirical research, this section reviews the common points in these theories. This allows us to emphasize the point made by Brynjolfsson et al. (2010) that these theories can and should be analysed as part of an integrated research agenda on the impact of digital technology on online product diversity.

#### A – An increase of supplied diversity

The Theory of the Long Tail and Theories of Superstars all take as a starting point the supplied diversity of products. This is an important aspect of the Theories of Superstars that they explain the discrepancy between supplied diversity on one side and consumption concentration on the other side.

This increase of supplied diversity results from the observations already made by the Theory of the Long Tail (see 3.2). Following Stirling's (2007) definition, it is easy to see that Variety has greatly increased. Digital technologies and in particular the Internet have vastly expanded the variety of products that can be profitably made available (Brynjolfsson et al. 2010), leading to a dramatic increase

in assortment sizes (Hinz et al. 2011). This may include content that was not supposed to be made available in a permanent way, as used to be the case for most TV content.

Supplied disparity is also arguably increasing with consumers being given access to content from all over the world, traditional or resolutely modern. Smyrnaios et al. (2010) give the argument in the case of newspapers that the high distribution costs in offline markets are particularly detrimental to marginal newspapers and magazines that have low sales are disadvantaged in such a system. Therefore, the lower costs of distribution in online markets allow for such newspapers and magazines to be present, with their more differentiated content. However, it is difficult to assess whether online supply is more balanced.

While there is an agreement on the increase of supplied diversity, there are opposite predictions regarding the impact on consumed diversity.

## B – The question of whether consumers as a whole like diversity

The two theories are first opposed in terms of whether consumers as a whole value diversity. This itself corresponds to the fact that they have diverse preferences or that every consumer values diversity (Ranaivoson 2012). In theories of Superstars, consumers do not value diversity. On the contrary, according to Anderson (2006), the Internet allows consumers to realize that as a whole they like diversity more than they expect.

Theories of Superstars do not consider that consumers as a whole value diversity. In the case of Rosen's (1981) theory, this is already noticed by Schulze who regrets the absence of "*heterogeneous tastes or a love of variety [that are] an important limitation to star power*" (Schulze 2003: 432). In fact, Rosen (1981) evokes the assumption of a taste for diversity but thinks it would not change much to the model's results. On the other hand, Adler (1985) evokes the existence of

niches, and therefore recognizes that consumers may have different tastes – although not necessarily that each consumer may like diversity. This vision of a lack of taste for diversity is crudely expressed by Mulligan (2014) when he compares consumers to sheep who need herding and to be led by the hand, be it offline or online.

Anderson (2006) agrees there are reasons for the Internet to further promote Superstars, in particular through word-of-mouth that induces positive retroactions. However, he thinks such retroactions will take place at the level of market niches, e.g. music genres. Tan et al. (2015) propose that a larger product variety may satisfy heterogeneous consumers' increasingly varying tastes. From an economic point of view, the Long Tail assumes an under-exploited spectrum of customer tastes that has not been addressed sufficiently or cost-effectively by pre-Internet retailers (Hinz et al. 2011).

Actually, Anderson (2006) believes individuals want more than only Superstars. Le Lec et al. (2015) indeed confirm that, as individuals are offered a larger choice set containing a variety of products, their aggregated consumption mechanically evolves towards a less concentrated distribution. Goel et al. (2010) show the diversity of individual tastes, calling into question the conventional view that niche products appeal only to a minority of consumers. For example, consumers may be interested in consuming products that are not recent (Poirier 2010) and more generally not available in physical stores (Bourreau et al. 2011). Furthermore, this may be the case even more for heavy users, as Hinz et al. (2011) find in particular a shift in their demand from blockbusters to niches. This relates to assumptions developed in sociology around the idea that "omnivorous" consumers tend to be "voracious" too (Sullivan & Katz-Gerro 2006; for an overview, see Ranaivoson 2012).

## C – The impact of technology as it drives costs down

There is an agreement between Anderson (2006) and Rosen (1981) regarding the importance of technology in driving marginal costs of distribution and consumption down. The Internet enables retailers and manufacturers to increase their assortment sizes (Hinz et al. 2011). Actually, it reduces distribution costs, in particular because there is no longer a risk for retailers to end up with cumbersome unsold articles (Bourreau & Labarthe-Piol 2003). In the same way, storage costs have decreased, also on consumer side (Tepper et al. 2007). In the case of news provision, in online markets, distribution costs of informational goods are very low compared to offline markets (Smyrnaios et al. 2010).

However, the consequences of such technological changes in terms of consumed diversity are quite opposite. For Rosen (1981), reduction in marginal costs of distribution makes it easier for Superstars to get an access to a larger audience. By creating nationally and globally interconnected markets, technology may create incentives for retailers and distributors to disproportionately promote Superstars (Brynjolfsson et al. 2010). It is also possible in some instances that diversity remains low because the costs of producing original content remains high, as Smyrnaios et al. (2010) explain for online news. On the contrary, for Anderson (2006), such reduction benefits above all the works in the Tail whose storage and distribution are made easier. Without digitization, storing and distributing these works would not be profitable (Brynjolfsson et al. 2010). Customer demand increases for the products that belong in these new, larger assortments (Hinz et al. 2011).

## D – Accessing to, and computing, information

Anderson (2006) as well as Adler (1985) puts the acquisition of information at the core of their theory, again with opposite consequences. Indeed, digital technology provides

access to a virtually unlimited amount of information. An increase in the diversity of available options makes it harder to cope with the related increase in the load of information as research in psychology shows (Ranaivoson 2012). A strategy for users can therefore be to limit the riskiness of their choice and opt for what they already know: Superstars. All the more so that there is even more information available online on these Superstars. A study on peer-to-peer networks of early 2000's thus shows that consumption there focuses on Superstars because getting information has become more costly (Bourreau & Labarthe-Piol 2003). More recently, Mulligan (2014) has argued that size of the online music services' catalogue are an inconvenience for their users. This is, he argues, notably due to the small amounts of visual display space digital services have compared to stores' feet of window space and of front-of-store display space. Therefore, it is possible that the Internet reinforces the position of Superstars as reassuring landmarks for the users, thus transposing the advantages they already have in the offline world.

Anderson (2006) rather argues that the lower costs in acquiring information concern the products and creators for which it is more difficult to get information offline, i.e. those that belong to the Tail. Furthermore, they benefit from decentralised prescription and promotion, contrarily to more centralized traditional media.

The question is also about *how* digital technology allows us to be given access to information. In other words, this is the question of the filters set up and used, and how they can lead consumers to either the Superstars or the Tail. While the edition process may remain important to guide users (Poirier 2010), such new filters are required to enable online retailers to serve diverse tastes profitably in a context of increasingly big offers (Hinz et al. 2011). Their aim is to reduce customer search costs. According to Hinz et al. (2011), there is a lack of research on the effects of search technologies on individual demand or whether they

might influence shares of purchased products. The existing literature suggests that lower search costs enable shoppers to find more products that better fit their preferences (Hinz et al. 2011) and may therefore lead to higher demand for niche products (Tan et al. 2015).

More generally Hinz et al. (2011) find that small changes in search technologies may have significant effects on the distribution of demand. According to them, search functionalities, such as additional filters, can lead to a shift in demand from blockbusters to niches; while systems based on recommendations may shift demand from niches to blockbusters (Hinz et al. 2011). The same way Tan et al. (2015) explain that selection-biased recommendation systems can reduce sales diversity because these systems tend to recommend products with sufficient historical data (and only hits have enough historical data).

## E – The measurement of the Long Tail and its limitations

An explanation for the opposite results of the studies on the Long Tail may lie in the fact that different measures of the Long Tail can lead to seemingly contradictory outcomes (Tan et al. 2015).

Brynjolfsson et al. (2010) distinguish three ways to define and measure the Long Tail. First, the *Absolute Long Tail* measures changes in the absolute number of products sold, e.g. the measure of sales above an absolute cut-off of 100,000 titles (Brynjolfsson et al. 2003). This is also the approach most commonly followed by Anderson (2006). Second, the *Relative Long Tail* focuses on the relative share of sales above or below a certain rank, e.g. using the

Gini coefficient.<sup>2</sup> According to Hinz et al. (2011), existing Long Tail research often relies on the Gini coefficient to assess whether such Long Tail exists. Elberse's (2008) work belongs to this second category. Third, it is possible to compare the relative importance of the head versus the tail by looking at the value of the slope of the relationship between ordinal rank and cardinal sales<sup>3</sup> (Brynjolfsson et al. 2010). These approaches are not interchangeable, in particular leading to different results. Brynjolfsson et al. (2010) thus notice that the first approach usually leads to conclude that the Long Tail is important, whereas both other approaches lead to conclude that the Long Tail is not so important.

None of these approaches however takes *disparity* into account. Interestingly, this absence is pointed out by various scholars, although without any reference to the Stirling model. Smyrnaios et al. (2010) oppose the quantitative growth of online information circulation (i.e. variety) to the spectrum of social, political and economic issues covered (i.e. disparity). Brynjolfsson et al. (2010) suggest to apply distance metrics in product space to assess “true product variety” (i.e. disparity). In fact this simply reminds of the spatial model (Hotelling 1929).<sup>4</sup>

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<sup>2</sup> The Gini coefficient measures the inequality among values of a frequency distribution, e.g. the inequality in income distribution. It varies between 0 (perfect equality) and 1 (maximal inequality). In this context, it may be used to assess sales concentration.

<sup>3</sup> To illustrate this, if one wants to compare inequalities in sales for two retailers, one will get two curves representing how sales are spread for each retailer. The third way consists in comparing the slopes of both curves. This assumes that the relationship follows a Power Law distribution.

<sup>4</sup> Hotelling's model assumes that a line can be used to represent one characteristic of a product. For example, he applies it to cider: the left side would correspond to sweetness and the right side to sourness. Going to the left would mean providing a sweeter cider, to the right a sourer cider. It is then also possible to position consumers based on their tastes (here for more or less sweet cider).

## F – Considering the role of platforms

Finally, there is a need to go beyond the Long Tail by considering not only the impact of new online platforms on the diversity of cultural expressions but their industrial role, and how they reconfigure cultural sectors. Cultural sectors are getting increasingly organised as two-sided markets (Rochet & Tirole 2002), where new online companies play the role of platforms mediating between different categories of users (e.g. advertisers and readers). As such, they behave in a different way from traditional cultural industries since they have to take into account the interactions between their various categories of users (e.g. consumers, advertisers, app developers, etc.).

According to the proponents of the Theory of the Long Tail, platforms are incited to provide a huge diversity of products as it gives them a competitive advantage towards their competitors (Brynjolfsson et al. 2010). Indeed online platforms typically offer a large selection of niche products and provide the relevant filters to discover niche products, while their traditional competitors only aim at the Head (Brynjolfsson et al. 2010).

However, while platforms may provide a huge diversity of cultural content, they tend to become more than actors in value chains, with an impact difficult to assess on consumption choices (Kulesz 2015). Goel et al. (2010) believe that there is a risk that the online platforms' increasing control over access to cultural works may threaten the visibility and promotion of marginal cultural works even compared to the current situation.

It should also be investigated how offline and online markets interact, in particular for traditional cultural players who have now entered into online markets by providing their own platforms. To our knowledge, only the research conducted by Doyle and Champion (2014) has provided a

serious, evidence-based attempt to compare media companies' strategies and their impact on content diversity across platforms.

## Conclusion

The paper has aimed at showing that there is already an interesting stream of literature that can be used to address the impact of online platforms on the diversity of cultural expressions. This literature has built around the Theory of the Long Tail and more or less implicitly around its opposite Theories of Superstars. The existence of the Long Tail in cultural sectors, or of a trend towards it, is somehow dependent on the indexes used to assess it. Nevertheless, this literature has important findings and raises interesting questions.

First, there is a common agreement on the increase of the supplied diversity of cultural expressions. Digital technologies make it cheaper to produce and distribute content, thus also democratizing tools for more and more citizens all over the world.

The impact on the consumed diversity of cultural expressions is at the core of the debate between proponents of, and opponents to, the Theory of the Long Tail. It depends on whether consumers as a whole value diversity. Technology also plays a role. First because it reduces costs. But more ambiguously because the online production and distribution of cultural content requires the set-up of filters, some of which did not exist in the pre-Internet era (recommendation systems, search engines, social networks, etc.). And each filter may have a different way of orientating consumers towards blockbusters or more obscure works.

The Theory of the Long Tail and the Theories of Superstars, however, do not take the issue in its entirety. First, they do not take disparity into account, for example

this component of diversity is not assessed in most studies on the Long Tail. Second, they miss the industrial view of cultural sectors. Actually, the surge of online platforms not only change the way citizens have access to cultural works, but they dramatically modify the relationships between players in the cultural sectors.

A renewed approach is therefore needed that could use the Theory of the Long Tail as a starting point but needs to consider the width of choices available to citizens and how it impacts their consumption decisions (*disparity*); and the relationships between the diversity of cultural expressions and industrial reconfigurations now taking place. This notably to see whether the development of the Long Tail could be a sustainable process. It needs then to be seen how this could feed into the political process, in particular in relation to the implementation of the UNESCO 2005 Convention.

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# Is Cultural Diversity Adapted to the Digital Era?

*(Original in French)*

PASCAL ROGARD<sup>1</sup>

This may be a provocative question but it must be asked, for the upheavals brought about by digital technology, not to call it a “revolution”, have touched many areas of our lives and economy. Of course they have not spared culture, either, which until then had enjoyed a particular statute and dispensation policies.

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<sup>1</sup> Pascal Rogard was born in 1949 and graduated in public law, an alumnus of Paris Institute of Political Studies (Institut d'Etudes Politiques). He started by creating a theatre group and directing several plays. Between 1981 and 2003, he held different functions within numerous professional organisations and was in particular: General Secretary of the French Movie Producers and Exporters Trade Union of C.I.C.C.E. (Comité des Industries Cinématographiques et Audiovisuelles des Communautés Européennes et de l'Europe Extracommunautaire, European Communities and Extra-Community Europe Cinematographic and Audio-visual Industries Committee) General Delegate of A.R.P. (Société des Auteurs, Réaliseurs et Producteurs, Society of Authors, Directors and Producers). On January 1st, 2004, Pascal Rogard assumed the position of General Director of the Society of Dramatic Authors and Composers (Société des Auteurs et Compositeurs Dramatiques) as well as president of the French Coalition for Cultural Diversity (Coalition française pour la diversité culturelle). He is also vice-president of the European Coalitions for Cultural Diversity (Coalitions européennes pour la Diversité Culturelle). Pascal Rogard has received the distinctions of Officer of the Legion of Honour, Commander of the National Order of Merit and Commander of Arts and Literature.

## I – Cultural Diversity: a Concept Recognized on the International Scene

The political existence of the concept emerged during the negotiations that took place between Europe and the United States in the eighties and nineties and really took shape during the commercial negotiations of the General Agreement on Trade on Services (GATS) during GATT's (General Agreement on Tariffs and Trade) Uruguay Round, which led to the creation of the World Trade Organization (WTO).

Led by movie directors who realized the dangers presented by this tendency towards the liberalisation of commercial exchanges, a movement saw the light, centred around four strong principles: cultural goods and services are not products like any others; cultural policies must be preserved from commercial discussions; the elimination of cultural policies and, specifically, of investment and broadcasting quotas promoting local and national creation must be avoided; risks of hegemony must be resisted and diversity of creation kept alive.

Thus was cultural exception born, to successfully extract culture from market logic only and recognize the right of States to adopt cultural policies and policies to promote local creation.

A little over 10 years later, on October 20, 2005, cultural exception became cultural diversity and earned full international legal recognition when the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter referred to as CDCE or Convention) was adopted in Paris. Rarely in the history of international law was a convention adopted, signed and ratified so quickly. Today, more than 140 States have signed it.

## II – What about Digital Technologies?

Many take advantage of the fact that the term “digital” itself is absent from the CDCE text to jump to the conclusion that the effectiveness of the Convention and its principles would stop at the border of this new digital world. Yet its absence is no more an oversight than an intent to freeze the Convention in a world without a vocation towards evolution. It was their wisdom, rather, that led the writers of the Convention to leave room for the possibility to take technological evolutions into account when implementing this unique international tool.

The challenge faced by cultural diversity is not any lesser today. Fears of the hegemonic domination of one culture over others and of circumventing policies that promote creation are actually revived by digitization.

Should one therefore deduce that digitization is nothing but a threat to cultural diversity? One must avoid any univocal or unbalanced position and instead, take the measure of the opportunities as well as the risks brought about by this new digital world. It could indeed be an opportunity for creation and, in particular with the advent of a wider range of tools to create and exhibit art works, discover new artistic forms, develop new ways of financing artwork, widen the access to art for the audiences. With it the dissemination of cultural works undeniably gains a new promotion mode as well as tools that energize and enhance their impact. In it, creation finds new means to express itself.

Yet it is also true that the digital economic model is centred on seeking the highest profitability for creative works through powerful intermediaries, the internet giants also known as “GAFA” (Google, Apple, Facebook, Amazon), who hold a dominant position and whose natural vocation is not to defend and support creative diversity. In the end, digitization could be, to culture, what globalization was to industry. The weakening of national regulations supporting

creation, the risk of culture uniformisation, outsourcing movements, the impoverishment of creators are, as a matter of fact, a few of the direct and sometimes violent effects that are striking culture today.

### **III - Act and Regulate**

Faced with these mutations, it is urgent to act and regulate. To act and seize the potentialities offered by digitization in enhancing and energizing the creative movement and facilitate its dissemination to audiences. Also to regulate, for the principles of cultural diversity remain as indispensable and indisputable as ever. Cultural policies and their modalities must evidently evolve to account for the consequences of digitisation, but the right of States to defend authors' rights, to develop tools that support local and national creation, to adopt measures to finance cultural public service and cultural actions are not relicts from the past.

### **IV - The European Challenge**

This challenge may first be answered at the European level, for the risks of an extensive deregulation must not be underestimated. Nearly 20 years after the 1993 GATT negotiations, the surprise discovery that commercial discussions had been initiated between Europe and the United States with the aim to reach a free trade agreement confirmed those fears. The liberalisation of audio-visual and cultural services which the European Commission, under Mr Barroso's presidency, wished to negotiate with the Americans, would have had the immediate consequence of challenging the policies that support cultural diversity in Europe, particularly with regard to new online services.

Fortunately, the mobilisation shown by France and the European Parliament strengthened the exclusion of audio-visual services from trade discussions and even extended it to digital services such as video on demand. But Europe's temptation to turn cultural goods and services into commodities like any others, without any particular entitlement to set up specific regulations to finance creation and protect creators, is increasingly apparent: authors' rights being called into question, the fight against the territoriality of rights despite its being the basis for audio-visual and cinema financing, and the benevolence demonstrated towards the internet giants who always set up shop in the States where taxation is the lightest and obligations favouring creation are the least, speak volumes about the risks that come with a slashed, diminished cultural diversity.

Without a strong intervention from public authorities to impose rules that favour creation, in all its diversity, and support creators, the cultural dumping that would then prevail would amount to the consecration of the reign of the mightiest and most standardised. The exact opposite of cultural diversity.

It is up to Europe to give itself the necessary means and tools to establish the balanced and protecting framework of this "cultural diversity 2.0".

If Europe does not meet the challenge, it would then have a heavy responsibility in the emergence of a politically incoherent, culturally disastrous and industrially dangerous model. Politically incoherent because it would indicate Europe's incapacity to honour its commitment in favour of cultural specificity and diversity, notably expressed in its ratification of CDCE. Culturally disastrous because it would weaken all policies, notably broadcasting quotas and investment obligations, which have helped sustain the drive of French and European creations. Industrially dangerous because it would strengthen even more the American

internet and digital giants to the detriment of French and European operators who honour their obligations and their commitments with regards to cultural diversity.

## V – A UNESCO Convention 2.0

Ten years after its establishment, the Convention must be revisited in the light of the digital challenge. Neither obsolete nor anachronistic, it does not need to be completed with new articles, for its universality is accompanied by the vocation that it can be applied to all supports enabling the dissemination and distribution of cultural works. Nevertheless, Parties would benefit from adopting operational guidelines to assist the States as cultural actors in the implementation of the Convention so as to better integrate the digital component. Work is already underway in this very direction since last year and will translate into follow-up discussions, which will be held at the UNESCO at the end of 2016.

It would be erroneous to believe that our digital world put a definite end to the threats of uniformisation, standardisation and to the fears of a new form of imperialism, which indeed remains dangerous for the future of cultural creation and the necessary dialogue between civilisations.

Faced with this reality, we make ours Lacombe Lacordaire's famous quote: "Between the strong and the weak, between the rich and the poor, between the lord and the slave, it is freedom which oppresses and the law which sets free." How better to call for the establishment of regulations preserving cultural diversity in the digital era!

# Transversal Operational Guidelines as a Road towards a Diversified Networked Culture<sup>1</sup>

MICHÈLE RIOUX & KIM FONTAINE-SKRONSKI<sup>2</sup>

The digital age fundamentally transforms the domain of creation and all its dimensions, artistic, social and economic. These transformations bring opportunities and risks for the diversity of cultural expressions, whether we consider the issue of fully benefiting from opportunities inherent to

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<sup>1</sup> This chapter is based on a study conducted on behalf of the Ministère des Affaires étrangères et du Développement international (MAEDI) and the Ministère de la Culture et de la Communication (MCC) of France in 2015 (Rioux et al. 2015). A short version of this study, in English, is available online. The opinions expressed in these pages belong solely to the authors and do not constitute the official position of the French government. We wish to thank the professionals of the cultural sector, the digital technology actors and all the experts in France, Canada and abroad who accepted to contribute to this study by providing information and who responded to our survey. The authors are also grateful to Hughes Brisson, Guy-Philippe Wells, Felipe Verdugo, François St-Amant, David Regimbal, and Destiny Tchéhouali.

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the digital age or the capacity of actors to face the challenges it brings at the national and international levels in the cultural domain. The implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE)<sup>3</sup> in the digital age allows States to find answers and modes of action (measures, policies or others) that can produce the required institutional environment for the digital revolution to become a genuine vector of innovation in the promotion and protection of the diversity of cultural expressions.

While the CDCE is not the only tool available, it remains a very important instrument of global cultural governance in the digital era, but one that needs to adapt and adjust to the digital age, in order for Parties to develop strategies aiming towards a “networked culture”. The technological neutrality of the CDCE makes no doubt, but it has seemed necessary to go one step further by elaborating operational guidelines (OGs) on the digital issue that could impact on the normative body of the Convention and its modes of implementation. More importantly, the United Nations Educational, Scientific and Cultural Organization (UNESCO) must, as an international organization, develop a proactive strategy for a networked culture that recognizes and reaffirms its leadership within the larger cultural governance in the digital age.

In this chapter, we argue that opportunities linked to the digital revolution and the deployment of broadband Internet networks are numerous, but threats are real and significant, especially with regards to the financing and monetization of online cultural content in a context of technological convergence, trade liberalization, and economic concentration. This is why public policies and inter-

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<sup>3</sup> Adopted in Paris in October 2005 and entered into force in 2007, the CDCE has been ratified by over 140 States. As an international legal instrument, the Convention asserts the specificity of cultural goods and services and the legitimacy of public intervention for protecting and promoting the diversity of cultural expressions.

national cooperation must play a major role to enable these opportunities to translate into real gains for the diversity of cultural expressions, as well as to counter threats and maximize benefits inherent to the transformations induced by digital technologies. Our research is based on a scientific review of available literature and of official documents published by UNESCO and other international organizations, as well as on the conduct of interviews and data collected through an online survey that was sent to various professionals and experts of the cultural sector.<sup>4</sup>

This chapter has three sections. The first one discusses the transformations linked to digital technologies and introduces five processes (deterritorialization, desintermediation, delinearization, dematerialization, decompartmentalization) that structure a set of opportunities and threats translating into challenges for collective action. The second part concerns good practices in the form of policies or strategies. Finally, the third section addresses the question of the implementation of the CDCE in the digital era.

## I – The Digital Era and its Impacts

From our survey, we found that: 73,6% of participants think that the digital era affects cultural goods and services in all dimensions (creation, production, dissemination, distribution, accessibility, and education); 54% considered that the digital revolution has a positive impact on the diversity of cultural expressions; and 86,7% of participants coming from developed countries identified distribution/diffusion as the dimension affected the most by digital technologies,

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<sup>4</sup> The survey, entitled "What do you propose for the protection and the promotion of the diversity of cultural expressions in the digital era?", was launched in September 2014. We received 147 responses of which 56% came from developed countries, while 44% were from developing countries and emerging economies.

while 75% of those from developing countries identified creation/production as the most affected dimension. These results testify to the tremendous impact of the digital era on cultural industries and to the opportunities and threats for the diversity of cultural expressions.

Three other results from our survey pinpoint that we should be worried about the risks of digital cultural divides and attentive to possibilities of a technological leap allowing for a rapid development of cultural and creative industries. These three results are: 73% of participants considered the increase of supply of foreign cultural products as more important than the growth of supply of local content; 85% of those who did not notice a growth in the supply of foreign cultural content were from Europe or North America; and 63% of participants from developed countries noticed an increase in international outreach for cultural goods and services of their countries.

The transformations induced by digital technologies and networks are indeed significant. We distinguish five processes/challenges that we call the 5Ds: deterritorialization, delinearization, desintermediation, dematerialization and decompartmentalization. The positive and negative impacts of the 5Ds are summarized in Table 1.1.

**Table 1.1. The 5Ds of the digital era: Positive and negative impacts for the diversity of cultural expressions**

5Ds	Opportunities for the Diversity of Cultural Expressions	Risks for the Diversity of Cultural Expressions

<p>Dematerialization: we no longer pay for the ownership of a cultural good but for accessing content through Internet services</p>	<p>Greater diversity, accessibility and affordability of cultural products.</p> <p>Reduction of access inequalities (possibility to reach dispersed and far away publics).</p> <p>Facilitation of exchanges and sharing as well as more rapid modes of delivery.</p> <p>Interoperability and interconnection of networks facilitating access.</p>	<p>Decreasing financial means dedicated to creation and renewal of talent because of piracy and free sharing (see, for example, HADOPI 2014; IFPI 2014).</p> <p>Increasing rent for Internet access providers, possibility of dominant position and abuses from Internet access providers dominating the value chain (see, for example, Ichbiah 2013).</p> <p>Marginalization of certain populations who do not have access to services and networks.</p>
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Desintermediation: weakening of traditional intermediaries	<p>Direct relationship between creator/producer and consumer.</p> <p>Creation of new forms of participative financing, enabling the emergence of original or challenging projects (See, for example, Iordanova &amp; Cunningham 2012).</p>	<p>Imbalances between proprietary and sharing economies.</p> <p>Possibilities of reintermediation by actors benefiting from dominant positions based on networks and innovation effects allowing them to control the distribution of certain products.</p> <p>Emergence of new intermediaries (platforms, search engines, etc.) playing essential roles in access to content (organizing and managing content access, etc.) (Benghozi 2011; Garside 2014; Forum d'Avignon 2014; and Conseil d'Etat Français 2014).</p>
Decompartmentalization: technological convergence and disappearance of frontiers between traditional sectors	<p>Emergence of a wide set of tools for creation and exhibition as well as new artistic forms.</p> <p>Increasing accessibility of content on the web.</p> <p>New business models.</p>	<p>Regulatory asymmetries between different sectors.</p> <p>Legal and economic uncertainties.</p>
Delinearization: end of top-down programing by the media	<p>Potential end of mass culture and beginning of a culture of niches: multiplication of contents.</p> <p>The Long Tail: longer life cycle of rare and fragile cultural products.</p>	<p>Amplification of processes of concentration, standardization and marketization (Internet economic superpowers controlling data and networks).</p>

Deterritorialization	<p>Facilitation of international cultural and artistic exchanges.</p> <p>Greater choice of cultural content.</p>	<p>Problems of effectiveness of national policies regarding regulations, fiscal systems, property rights regimes, etc.</p> <p>Problems in the general economic organization of the financing of creation.</p>
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Opportunities are numerous and increasingly recognized.<sup>5</sup> However, certain actions can have a multiplier effect allowing for greater benefits in terms of the diversity of cultural expressions. Threats are also real, especially when it comes to questions related to financing and monetization of cultural products and the production and distribution of diversified contents. There are also legal and economic uncertainties inherent to the industrial re-combinations linked to the process of sector convergence and to the proliferation of trade agreements affecting cultural industries. Many participants to our survey noted a process of industrial concentration and new cultural digital divides. In developed, as in developing and emerging economies, the conclusions on this are the same, since the digital era is inherently global and transnational.

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<sup>5</sup> The creative economy (which brings together, *inter alia*, audio-visual, design, new media, performance arts, visual arts and edition) is growing importantly. In developing countries, it had an average growth of 12.1% every year from 2002 to 2011 (UNDP 2013: 10). Assuming this growth continues, it offers developing countries an opportunity to increase their participation in the global trade of cultural goods and services. It is estimated that Africa is the region where subscriptions to cell phone plans are growing the fastest, and the number of such subscriptions in developing countries is greater than that of developed countries since 2013 (ITU 2013: 6). Information and Communication Technologies (ICTs) have also been considered as representing a great way to spread contents in French (Attali 2014: 56).

Different priorities must be taken into consideration though. In developing countries, Internet and the digital world can be powerful vectors of changes leading up to a technological leap. However, risks of new digital divides are also present since those countries are usually the ones facing the greatest imbalances between local and international contents. Considering the rapid deployment of digital technology and services, both developing and developed countries must begin to integrate the digital component in their cultural policies and international cooperation efforts in this area. The concrete consequences of not establishing strategies or the failure to politically adapt to the digital age would include a loss in economic growth, increased social and cultural inequalities at the national and international levels, the depletion of the world's cultural heritage, and the marginalization of some countries in cyberspace.

In this context, where the technological environment becomes a potentially powerful vector of creative diversity, there is hope for developing countries to win the visibility battle by promoting online access for their cultural goods and services and, therefore, increasing their participation in the global market. Yet, it is also crucial to creatively adapt technology to local contexts (Kiyindou 2013). Moreover, to foster a technological catch-up, policies and regulatory frameworks must support and be adapted to the digital environment and the challenges of the 5Ds. Many communities and populations in the world are still deprived of Internet connection, as emphasized by the Global Internet Report of the Internet Society (ISOC 2014). Constraints that block the cultural value chain in developing countries are also often linked to a lack of public support, adequate regulatory frameworks and long-term strategic visions, the inadequate training of actors and cultural professionals, and the lack of investment and funding available for cultural industries.

These various difficulties, obstacles and constraints require a motivating dynamic that will ensure that the digital era is supportive of the diversity of cultural expressions and the development of a creative world economy, respectful of creators of all countries, and especially in developing countries. Institutions are beginning to adopt digital strategies. These are critical for the performance of both developing and developed countries. That is why it is important to share good practices that can instruct the process of developing “2.0 cultural policies”.

## II – Cultural Policies and Practices

According to our survey, the development of policies aimed at ensuring international outreach of local cultural content is at the forefront of the measures identified by respondents for the “promotion” of the diversity of cultural expressions in the digital era. Some States are already implementing cultural policies that integrate digital technologies or have adopted digital strategies that include a cultural component. However, there is still a lot to be done in most countries to take full advantage of the digital revolution and adapt cultural policies.<sup>6</sup> Beyond infrastructure development, States are expected to adopt policies that support the production and dissemination of digital cultural content.

The importance of the digital content industry and of mobile applications should also be reflected in developing countries’ economic development strategies. Indeed, according to our survey, publication and online consultation of cultural and artistic content is at the forefront of digital practices that might influence the diversity of cultural expressions the most. For some, the digital era marks

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<sup>6</sup> In response to our survey, 55% of respondents believed that cultural policies in their countries could be better suited to face digital challenges.

the end of protectionism and the victory of globalization as it breaks most remaining barriers, including those created by policies to protect cultural industries.<sup>7</sup> For others, it is an opportunity to rethink policies and adapt regulations in the face of dramatic changes (Guèvremont et al. 2013; Beaudoin 2014). These divergent analyses point to the fact that there is little consensus on the way we understand these transformations and on the way to respond to the challenges of the digital era in the cultural field. One fact is clear though: States are increasingly confronted to new issues and challenges related to the integration of digital technologies in many policy areas (Lescure 2014). The digital ecosystem does not spontaneously generate diversified cultural expressions, and it can even be, in certain conditions, an obstacle to it. It may signify the loss, for States, of policy-making prerogatives in the cultural domain. States, supported by international organizations, must, in such conditions, intervene to implement appropriate measures and policies.

Public policies and international cooperation in the field of culture need, therefore, to be revisited in order to adapt to new digital challenges. Culture is also a fertile ground for the emergence of new practices that demonstrate the capacity of actors to adapt to the digital environment. Recognizing that the implementation of the CDCE

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<sup>7</sup> Musitelli writes: « *Le déploiement foudroyant de l'écosystème numérique ne remet pas seulement en cause les modes de production, les modèles économiques et les pratiques sociales relatifs à la culture. Il pose à la puissance publique dans sa fonction régulatrice une question existentielle.* » ("The far reaching deployment of the digital ecosystem not only affects modes of production, economic models and social practices related to culture. It puts the public authority and its regulatory function in front of an existential dilemma." – Musitelli 2014: 312, translated by the authors). On the same subject, John Ibbitson argues that "[i]t's over. Globalization has won, in culture as in every other contest. Canadian cultural industries will have to compete in the marketplace along with everyone else. It's simply a question of when the last protections are dismantled. It won't be long." (Ibbitson 2014).

must rely on the spread of best practices<sup>8</sup> in the digital age, our previous study highlighted what is happening on the ground in terms of projects, initiatives and digital practices in the field of culture. The next table summarizes some of the best practices we identified.

**Table 1.2. Summary of Good Cultural Practices in the Digital Era**

Category	Example of best practices by Countries/States and Civil Society/Firms
Articulation of cultural and digital strategies	Countries/States: France numérique 2012-2020 (France); Digital Agenda for Norway (Norway); Estrategia Digital Nacional (Mexico); Stratégie culturelle numérique Québec (Québec, Canada); Book Revitalization (Tunisia); Política Cultura 2011-2016 (Chile); Plan national TIC (Bénin).
Sharing platforms of content and cultural information	Countries/States: La Fabrique culturelle, Télé-Québec (Canada), Cinema Digital BV (Netherlands), Networks of residences (Portugal), ONF.CA (Canada) Civil Society/Firms: HALLYU (South Korea); Kheweul.com (Senegal); Last.fm (UK); Musiqueno-made.com (Canada).

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<sup>8</sup> Sekhar and Steinkamp define “good practice” as “a creative and sustainable practice that provides an effective response based on the idea of direct knowledge utilisation. It enjoys potential for replication as an ‘inspirational guideline’ and can contribute to policy development. A good practice develops new and creative solutions to common problems. Its impact is visible in the improved quality of life of people and communities, while also being socially, culturally, economically and environmentally sustainable.” (Sekhar & Steinkamp 2010: 10).

Virtual library and museum collections	<p>Countries/States: Europeana; Digital library Colombia; Cancionero discográfico de cuecas chilenas.</p> <p>Civil Society/Firms: Conte-moi la Francophonie; Google Art Project (UNESCO); Nouvelles Editions Numériques Africaines (NENA) (Senegal).</p>
Education, public awareness and capacity building of cultural actors	<p>Countries/States: Points NAC (Argentina); MatrizPCI (Portugal); MEC (Uruguay); Collaboration Slovenia/University Hérat (Afghanistan); Banque mondiale d'images (Danemark/Mali).</p> <p>Civil Society/Firms: Thydêwa (Brazil); Arts Network (Mongolia); ONG IRIPAZ (Guatemala).</p>
Networking actors	<p>Countries/States: Sudplanète; Fondation européenne de la Culture (FEC); Culturessud.com (France); Qantara.de (Germany)</p> <p>Civil Society/Firms: Labforculture.org; Ci*Diguente; ONG Kér Thiossane.</p>
Corporate social responsibility	Vivendi; Disney; CBS, Time Warner, BBC.

Several States have already begun the process of adapting their cultural policies in the era of digital technologies, in the North and in the South. Projects initiated by civil society and identified in our study provide further benchmarks for other organizations wishing to develop their digital cultural strategies. Despite these initiatives, it is clear that there is still much to be done. How may these best practices inspire the adaptation of existing cultural policies and the development of new measures? What might a "2.0 cultural policy" look like?

The challenge here is not to question all mechanisms, measures and instruments in existing public cultural policies, but to distinguish between those which can be adapted to the digital age from those which become obsolete. Another challenge is to design and create new policies and innovative modes of support for creators and cultural industries so that they can deal with the digital upheaval, while, on the other hand, taking advantage of the opportunities offered by new technologies. Political authorities are called to rethink their ways.

The adoption of 2.0 cultural policies requires strong political will to support creators, producers and delivery networks of digital cultural content. It also means artistic education on digital creation, capacity-building of digital skills of cultural actors, as well as public awareness. Authorities in charge of culture must also ensure that the major digital distribution platforms make plenty of room for local and national works in the countries where they operate. Furthermore, cooperation and international solidarity must strive to enable countries, especially developing countries, to create and strengthen their cultural and creative industries through the use of digital technologies at the local, national and international levels. Information-sharing and equitable access to a wide range of diverse cultural expressions, as well as the means to express and disseminate them using digital technologies, are key objectives for a 2.0 cultural policy.

Moreover, cultural industries that used to work in silos are increasingly being intertwined in the digital age, resulting in an increasingly networked culture. The divisions traditionally held between areas of government intervention are also gradually fading. Some elements observed in recent cultural policy according to the five traditional cultural areas of intervention – access/consumption; creation/production; distribution/dissemination; training/capacity building; and education/public awareness – and the costs and benefits associated with each, are exposed below (Table

1.3). To counter the negative effects of new technologies in the cultural sector and create a synergy favorable to the diversity of cultural expressions, it is important to encourage dialogue and coherence, at both national and international levels, between cultural policies and those relating to digital development, trade, tax measures, as well as the regulation of telecommunications and the Internet. The networking of the various ministries involved would be a way to promote coherence and create a synergy of public policies affecting the development of cultural industries.

**Table 1.3. Benefits and Costs of Different Types of Measures Susceptible to be Integrated into a 2.0 Cultural Policy**

Axes of Intervention	Measures	Possible Benefits and Costs
Access/ Consumption	<p>Virtual and digital infrastructure programs (broadband, XP Points, Internet access).</p> <p>Digital cultural information-sharing platforms (e.g. Art-SNow, <i>Espagna es cultura</i>, SinCA, Cultures online project).</p> <p>Virtual libraries and museums.</p>	<p><b>Benefits:</b> Digital technologies become a vector of economic and cultural development; Exponential dissemination of cultural contents, cultural and artistic reach across borders.</p> <p><b>Costs:</b> Resources and funding deviated toward technological infrastructure projects; Increased risk of pirating databases; risk of losing access to non-digital forms of art</p>

Creation/ Production	<p>Support for creators of digital arts and producers of online content.</p> <p>Grants programs to encourage interdisciplinarity and innovation.</p> <p>Support for online publishers and new business models.</p>	<p><b>Benefits:</b> Avoid the gradual withdrawal of funds for the creation of cultural content; Encourage the emergence of new talent and new forms of creation; Development of new programs and new expertise.</p> <p><b>Costs:</b> Risk of redirecting funds away from traditional cultural goods and services.</p>
Distribution/ Dissemination	<p>Digital platforms for audio-visual cultural content (e.g. La Fabrique culturelle project, Cinema Digitaal BV, Festival Ars Electronica).</p> <p>New regulatory measures that include private broadcasters.</p> <p>Revised tax measures.</p>	<p><b>Benefits:</b> Increased access to cultural content; Develop new sources of funding; Engage a wider range of players.</p> <p><b>Costs:</b> Complexified negotiations on copyrights issues; Increased transnationality of issues; Conflicting national laws; Cost associated with the development of technological expertise.</p>
Training/ Capacity-Building	<p>Residency programs for visiting artists.</p> <p>Co-production agreements for digital works.</p> <p>Cultural cooperation agreements strengthening digital capabilities.</p>	<p><b>Benefits:</b> Reduce the digital divide; Facilitate information-sharing on best innovative practices.</p> <p><b>Costs:</b> Resources and funding diverted to specific programs on technical assistance; Transition costs of expertise transfers and skills upgrading.</p>

Education/ Public Awareness	<p>Digitalization of library and museum collections (e.g. Google Art Project in partnership with UNESCO).</p> <p>Development of technological skills.</p> <p>Development of multi-stakeholder networks.</p>	<p><b>Benefits:</b> Increased communication between actors; Public to take ownership of new technologies and develop new practices.</p> <p><b>Costs:</b> Related to the development and management of virtual collections; and the negotiation of cooperation agreements and partnerships.</p>
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### III – Bringing the CDCE in the Digital Age

The five challenges posed by digital technologies oblige us to find new tools to analyse and measure the new realities taking shape in order to reach a diagnosis of the situation that can thereafter allow for building the necessary consensus for collective action. Another priority consists in creating new international diplomatic processes to help articulate three distinct worlds (trade, culture and Internet) that have, so far, evolved separately. On the basis of these two priorities, a third one concerns the adoption of a proactive approach, or the definition of a genuine digital strategy, based on emerging best practices that could inspire the development of 2.0 cultural policies and enhance inter-

national cooperation centred around the Convention<sup>9</sup> and UNESCO within the global governance of cultural goods and services in the digital age.

The CDCE remains an indispensable tool for the digital era, but UNESCO's challenge is to seize the opportunity offered by new technologies to position itself on the international stage as a proactive player in the development, implementation and sharing of best practices developed and implemented by different actors seeking to adapt to a new cultural world. Already, Parties to the Convention have adopted several operational guidelines (OGs) that integrate the digital context. Table 1.4 provides a summary of the articles of the Convention for which there are already operational guidelines, as well as our observations on how well they incorporate digital issues.

**Table 1.4. Existing Operational Guidelines – account for digital issues**

Guideline	Comments/Observations
Articles 7, 8, 17 Measures to promote and protect cultural expressions	While these guidelines incorporate digital issues, there remains a lack of information on best practices in this new context, which is especially important for developing countries.

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<sup>9</sup> The Convention contains nine different articles and four operational guidelines related to international cooperation. Two are particularly important: article 21 on International Consultation and Coordination, which commits Parties to promote the objectives and principles of the CDCE in other international fora, and article 23 on the Intergovernmental Committee's functions, including "establishing procedures and other consultation mechanisms to promote the objectives and principles of this Convention in other international fora" (article 23.6 (e) CDCE). Also worth mentioning is article 20 on "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination" which was one of the most debated items during the drafting of the Convention.

<b>Article 9</b> Information Sharing and Transparency	These OGs provide an easy access to the CDCE Parties' reports through digital platforms and websites; co-develop indicators to measure the impact of digital technologies; and integrate, in the Parties' reports, measures showing the importance of digital technologies in cultural policies.
<b>Article 10</b> Education and Public Awareness	These guidelines incorporate digital issues. We should emphasize here the role of social media and Web 2.0 tools in the efforts of public awareness.
<b>Article 11</b> Participation of civil society	These guidelines do not mention how digital technologies could be used to increase the participation of civil society.
<b>Article 13</b> Integration of culture in sustainable development	These guidelines only partially integrate digital issues.
<b>Article 14</b> Cooperation for development	These guidelines incorporate digital issues.
<b>Article 15</b> Collaborative arrangements	While these guidelines incorporate digital issues, information-sharing on partnerships could allow for the establishment of a database that may contain sections dedicated to digital partnerships.
<b>Article 16</b> Preferential treatment for developing countries	These guidelines incorporate digital issues.
<b>Article 18</b> International Fund for Cultural Diversity	These guidelines do not include digital technologies in the Fund's operating principles and objectives. Specific calls for projects on the development of innovative digital cultural services could be launched.

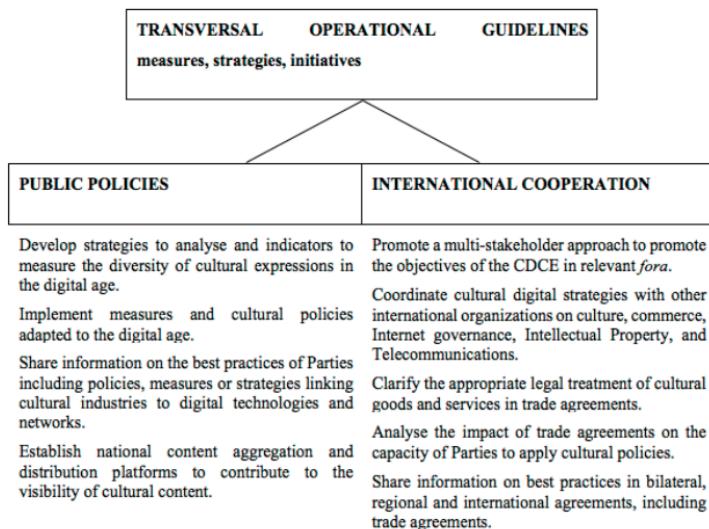
<b>Article 19</b> Exchange, Analysis and Dissemination of information	These guidelines partly integrate digital issues. Should also be mentioned: issues on Open Data, transparency in data collection processes, and cooperation with companies that detain Big Data.
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Our research points to the important role that transversal guidelines on the implementation of the CDCE in the digital era should have in helping develop a new approach and enable actors to create a positive, coherent and efficient digital ecosystem, including for the implementation of those provisions that are not currently addressed by operation guidelines. Cross-cutting operational guidelines on digitalization should allow Parties to recognize the technological neutrality of the Convention<sup>10</sup> and express their commitment in elaborating measures, strategies and initiatives that fully integrate digital technologies in support of the creation, production, distribution, dissemination and access to cultural activities, goods and services (Gensollen 2012). Parties should be encouraged to update their public policies as well as their commitments to international cooperation in the digital era. Figure 1.1 summarizes our proposals for transversal operational guidelines in the digital context.

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<sup>10</sup> As stated in the *Organisation internationale de la Francophonie* (OIF) Resolution, adopted at the Dakar Summit in 2014 (OIF 2014). On this subject, see also: Beaudoin 2014; Comby 2014.

**Figure 1.1. Proposals for transversal Operational Guidelines in the digital context.**



To this end, it is necessary to first examine the means States have, at the national level, to adapt their cultural policies or adopt new ones, in order to achieve the objectives of the Convention in the digital age. The dematerialization of cultural goods and services challenges the principle of “territoriality” upon which rest current cultural policies. Article 6 of the CDCE on the rights of Parties at the national level is of particular concern here. The best way forward is to develop a best practices guide on the application of the principles and objectives of the Convention in the digital age and invite Parties to transmit information on their digital cultural policies and measures, showing how States apply the principles and objectives of the CDCE to account for the changes brought about by new technologies.

Moreover, such guidelines could help develop platforms of aggregated content for national distribution, and contribute to enhancing the visibility and sustainability of audio-visual cultural works. They could also lead to policies that take into account the increased importance for the Parties to develop policies that focus on the empowerment of civil society and cultural enterprises (article 11). In addition, they should incorporate measures that strengthen international cooperation based on a multi-stakeholder approach and the new models of governance that are taking shape, such as those involved in Internet regulation, allowing for the CDCE to be increasingly part of an institutional architecture that is becoming more and more diverse. Finally, they should act as an incentive for Parties to cope with the challenges posed by digital technologies and entice them to promote the objectives of the Convention in other relevant *fora* (articles 21 and 23).

On the question of international cooperation, there is still a lot of room for improvement. Our survey established that 64% of respondents are dissatisfied altogether with this aspect of the implementation of the Convention. This was also evidenced when we asked respondents to evaluate the efforts toward international cooperation: 43% believe them to be weak, 19% found them to be average and only 12% think they are strong. Other results from our survey underline the role and importance played by international organizations for successfully implementing the Convention. Indeed, respondents point toward WIPO (World Intellectual Property Organization), UNDP (United Nations Development Programme) and UNCTAD (United Nations Conference on Trade and Development) as the most important organizations for collaboration with UNESCO. Moreover, it is generally considered that UNESCO should especially work with the ITU (International Telecommunication Union) on the issues of access to cultural contents and technical assistance for development.

The June 2015 Conference of Parties (CoP), marking the 10th anniversary of the CDCE, brought the Parties together to discuss how the Convention can unleash the positive potential of the digital era while countering its inherent threats. Despite the fact that new operational guidelines were not a prerequisite for actors to find ways to adapt to digital technologies, the CoP endorsed such an idea to promote the implementation of the CDCE in the digital environment and those guidelines are to be defined in the following months. It will be important to set the stage for this process to occur in very pragmatic and strategic terms.

The digital challenge transcends national frontiers and should gather energies around the promotion and protection of the diversity of cultural expressions in a transversal way. UNESCO is the legitimate forum to engage such action and to mobilize the international community, and the CDCE must be the central tool used to this end. Technological mutations do not undermine the founding principles or the concrete implementation of the Convention. They offer, conversely, the opportunity to confirm its usefulness and to enrich its content through the use of new digital tools, and ultimately to reaffirm the pioneering role of UNESCO on the matter (Musitelli 2014: 307) and to enhance its credibility amongst other multilateral organizations.

## Conclusion

Our research has led to four conclusions. Firstly, the Convention is a legitimate instrument to address the impact of digital technologies on the diversity of cultural expressions. Secondly, the Convention is neutral on the digitalization issue as it seeks the promotion and protection of the diversity of cultural expressions irrespective of the technologies used. Thirdly, the digital era is a new environment that

requires new measures and new policies. Fourthly, these measures and policies should enable States and cultural actors to enjoy the opportunities offered by new technologies for the diversity of cultural expressions while providing them with tools to overcome the challenges that have been identified above.

Threats resulting from the 5Ds are obvious: among them, the loss, for national States, of benchmarks and instruments of public cultural policy. Businesses operate in a different world than the one regulated by existing national policies and regulations, and this calls for the “rethinking” of the national regulatory space. A re-articulation of the links between the two is necessary if States want to adopt effective instruments of public policy in the digital era. But how can policy instruments be adjusted on national territories in order to create room for manoeuvre without favouring fragmentation of the Internet? The threat becomes twofold: to cut ourselves from the world by erecting barriers that may turn against us, or be open to cross-border flows without taking adequate measures to ensure the presence and visibility of diversified cultural works.

Digital culture has transformed the world of culture into a “networked” environment, linking numerous systems, several forms of content on many different supporting devices and networks, and diverse communities. Ongoing changes go beyond the technological dimension; they are geographical, economic, social, political and human. It is our relationship to the world that is changing, individually and collectively. In an increasingly transnational context, the current institutional structure, comprehending distinct private and public facets, gives way to “global governance”, i.e. a mode of governance based on networks of private and public actors within which States and UNESCO must find their place.

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## 12

# Will Digitisation Help Remobilise Civil Society?

*(Original in French)*

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The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter referred to as CDCE or Convention) may be one of the few multilateral treaties that acknowledges the contribution of the civil society, because of its historic role within the international movement that led to its adoption, but also because diversity of cultural expressions is largely based on freedom of artistic creation. Article 11 of the Convention states that:

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention. (CDCE, Article 11)

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The embryo of the first coalition for cultural diversity saw the light in France about fifteen years ago, then in Canada, and later expanded to about forty countries on the five continents, with a particularly presence in Western Europe, French-speaking Africa and Latin America. Initially joined in an informal network called "International Liaison Committee," the coalitions deemed it necessary, after the Convention was adopted, to formalise their relations with UNESCO by acquiring a legal structure and governance system. The International Federation of Coalitions for Cultural Diversity was born in Seville in 2007 and held its subsequent sessions in Salvador da Bahia (2009), Bratislava (2012) and Mons (2015).

A coalition for cultural diversity represents various associations of professional artists from all cultural industries – actors, musicians, producers, directors, authors, publishers, dancers, singers, etc. – with one common goal: to affirm the sovereign right of governments to adopt measures in favour of national cultural expressions, as agreed amongst the Parties to the 2005 Convention. This fundamental right thus aims to prove the legitimacy of subventions and other government assistance in the present context of globalisation and proliferation of trade agreements which tend to neutralise the effect of those public policies considered non-tariff barriers.

Coalitions for cultural diversity are unique in that they are the only civil society organisations that represent the whole cultural environment. Coalitions provide a handy way for governments to have access to all fields of expertise through a single contact point. A coalition must first reach a consensus amongst its members before presenting it to the government.

One of the essential tasks of coalitions remains to promote the Convention. In Senegal, the Convention was translated in 9 languages. The Malian Coalition translated it in *bamanan kan*, one of the most spoken national languages and provided an audio version of it to community radios,

so as to reach the vast percentage of the population who is illiterate. Another example of public communication is that of the French Coalition, which every year discerns a prize highlighting the significant contribution of a specific individual or organisation.

Efforts to promote the Convention are generally motivated by an intent to widen the consensus and open up to the diversity of cultural expressions. The office of the International Federation of Coalitions for Cultural Diversity, based in Montreal, does everything possible to demonstrate the same openness. The Canadian Coalition and International Federation websites, which record a total of 160 000 unique visits per year, offer contents in French, English and Spanish.

Coalitions are also very active at the national level by engaging their authorities in a dialogue aimed at implementing the Convention. That is the first vocation of their commitment. The dynamics of such relations are specific to each country, since within a same continent the countries development level and the priority given to culture vary greatly. The Convention makes it possible, maybe for the first time, to recognize the value of the artist's and the civil society's contribution. The implementation of the Convention requires a reinforcement of capabilities, made possible by the assistance programmes set up by the International Organisation of la Francophonie and UNESCO. Ministry executive and parliamentarian trainings are also open to civil society representatives, which is a first.

The obligation for Parties to the Convention to produce an implementation report every four years after ratifying it is an opportunity to take stock of the civil society's participation. The operational guidelines regarding the preparation of the quadrennial periodic report require for the Parties to consult with the civil society. The periodic report must also mention the participation of creators' associations in the elaboration of national cultural policy. Based on the first 45 periodic reports submitted to

UNESCO, experts were able to draw an analytical synthesis. The general takeaway was that civil society, with some exceptions, is deemed insufficiently organised, insufficiently informed or insufficiently mobilised. This did not prevent some coalitions to position themselves as privileged contact points with their governments on Convention-related issues, such as how trade agreements deal with culture (Canada, France, Chile, Australia), international cooperation in the cultural field (Switzerland, Great Britain, Germany, Austria), the artist condition and freedom of artistic creation (Slovakia, Morocco, Peru) or the role of culture in national strategies of sustainable development (Burkina Faso).

## I – A Pluralist Civil Society

The International Federation of Coalitions for Cultural Diversity is not the only civil society movement that has been mobilised. So has the International Theatre Institute, the International Music Council, the European Broadcasting Union, the International Network for Cultural Diversity, the International Network of Lawyers for the Diversity of Cultural Expressions (*Réseau international de juristes pour la diversité des expressions culturelles*, RIJDEC), the International Federation of Arts Councils and Culture Agencies, etc. The list goes on, which shows that the UNESCO Convention stroke a chord with a wide range of cultural associations and individuals who see, in the Convention, an agent for change.

The debate which is taking place at ONU for the adoption of Agenda 2030 for Sustainable Development is a good example of the power of mobilisation of civil

society. Eight large international networks<sup>2</sup> from the arts and culture scene joined forces to launch, in May 2014, a world campaign which gathered over 2500 signatures, 1000 of which from organisations, in 120 countries. The text of the Declaration, available online on the website [www.culture2015goal.net](http://www.culture2015goal.net), was translated by volunteers in 7 languages – French, English, Spanish, Portuguese, Arabic, Russian and Chinese – so as to demonstrate the universal significance of the message.

Their common action resonated all the way to the United Nations headquarters in New York, where members States suddenly realized the scale of the cultural world's mobilisation. This brought legitimacy to UNESCO and its allies, members of the "Group of Friends of Culture for Development" presided by Peru's permanent delegate to the UN. Agenda 2030 for Sustainable Development, adopted by the General Assembly in September 2015, is an important step forward in that, for the first time, it recognizes the role of culture by using specific targets. Precise performance indicators will be linked to these targets, which will make it possible, in due time, to give a tangible demonstration of the progress recorded.

The other important role played by these international non-government organisations has been to voice their members' concerns during UNESCO discussions on operational guidelines establishing the enforcement modalities of each one of the Convention articles, so as to ensure that the Convention would truly come to fruition and not remain a mere political statement. Incidentally, the Intergovernmental Committee of Parties to the Convention requested that a discussion item on the role of civil society be, from now on,

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<sup>2</sup> Arterial Network, Culture Action Europe, Agenda 21 for Culture of United Cities and Local Governments (CGLU), International Federation of Arts Councils and Culture Agencies (IFACCA), International Council on Monuments and Sites (ICOMOS), International Federation of Coalitions for Cultural Diversity, International Music Council, International Library Federation and *Red Latinoamericana de Arte y Transformación Social*.

included in the agenda of all its meetings. It also accepted that all documents submitted by the civil society for information would be made available to all participants before the meeting so they may be taken into account during the discussion. This constitutes considerable progress, which the civil society must seize in order to give it full effect.

## II – Challenges

Generally speaking, the cultural field has to work with limited financial means. This is true for the coalitions movement, which has benefitted from the support of the Quebec and Canada governments to finance a great part of its activities, as well as a financial contribution from the Canadian Coalition member associations, which offer a secretarial service to the International Federation of Coalitions. It is also true for the Convention secretarial office at UNESCO, whose everyday activities rely increasingly on voluntary contributions from member States. Sweden recently donated 2.5 million USD, but requested that they be used to set up a programme to build capacity in 12 priority countries of its choice, focusing on human rights and creative freedom, areas little emphasized until now. Such penury of resources is also true for the International Fund for Cultural Diversity (IFCD), set up under the Convention, whose voluntary financing can now only support about ten projects per year, to the amount of 100,000 USD each.

This resource issue is all the more acute as the number of countries which have ratified the Convention has increased to 143, the vast majority of which are developing countries. UNESCO is counting on the results of the Swedish-financed programme to attract other sponsors. It entails a cooperation axis with member States which is ideal

in every way and which eventually could further weaken IFCD financing and therefore civil society, whose projects received 60 % of the aid granted.

The other great challenge faced by the coalitions is that of governance. The movement saw the day about fifteen years ago. The very first campaigners, who were strongly committed against globalization, the domination of Hollywood on the screens of the world, and WTO multilateral negotiations, have for the most part moved on to something else. In various developing countries, the same individuals are spread thin working on every cause. They mobilise strongly wherever the urgency demands it. At the latest Coalition Federation Congress held in Mons in October 2015, it was decided that several coalitions, who had not been heard from since the previous congress in Bratislava in September 2012, would have two years to comply to the membership policy. Meanwhile, a recruiting campaign aimed at attracting youth, recruiting new members, expanding to new countries, new regions... has started to bear fruit. Relief is on the way.

Nevertheless, this opening comes with a new challenge for the coalitions movement: to open to new realities of diversity of cultural expressions, and to issues which are not limited to northern countries, mostly focused on the relationship between culture and trade agreements. The final resolution adopted during the Mons congress includes aspects related to the protection and promotion of the diversity of cultural expressions, incorporates concerns from the southern countries regarding the need for innovative financing, while also opening a brand new perspective on organisations and creators in conflict zones, where the diversity of expressions is at risk when it is not completely flouted.

In short, the coalitions movement has somehow become a victim of its own success. The general mobilisation around the concept of the Convention itself is now replaced by very diverse challenges, extremely different

from one country to the next depending on the development level, and even in cases where a consensus exists, as is the case regarding the impact of the digital era for instance, the target of militant actions is much more diffuse and multiform. The governance of the Internet, tax evasion by the big Internet players, international conventions on authors' rights, commercial negotiations which now include a chapter on digital trade... are all onerous themes which largely escape UNESCO. The Parties to Convention have their work cut out for them to set up a realistic work plan in a field where everything still has to be done.

As far as UNESCO is concerned, this could be an opportunity to position itself at the heart of the great challenges of the communication age, and for the Convention the opportunity to prove its relevance. It shall also be an opportunity to invite and engage the civil society groups – there are many of them – who have committed to making the Internet a space dedicated to democracy and diversity of cultural expressions. It shall be particularly important, in months and years to come, to involve them actively in the work of Convention bodies, so that the Convention does not run the risk of appealing exclusively to UNESCO delegations and the sectoral ministries officers concerned.

## Conclusion

There is no greater risk for an international treaty than to sink into oblivion. The continuing commitment of civil society groups is one of the Convention's most precious assets. The International Federation of Coalitions enjoys a great reputation and a capital of sympathy. By providing adequate support and recognition to creators and artists, they will be sure to keep on campaigning for the implementation of the Convention, beyond government and civil servants changes, and to be the guardians of the Convention

and its funding principles. That is what the international movement of coalitions is working on, through its cooperation programmes and solidarity networks. That is what UNESCO and the International Organisation of la Francophonie are working on, through their technical assistance programmes. That is what the Swedish cooperation is working on by setting the artist condition and creative freedom at the heart of its project. Let us hope that more will follow this example.



## **Inter-organizational networking in the digital age: Lessons from international organizations' purposes and practices in the cultural sector**

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The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter CDCE) – adopted by UNESCO in 2005 and in effect since 2007 – is now a main international instrument within the global and multi-level governance of cultural industries. Recently, France, Belgium, and Canada have been attempting to promote the CDCE implementation in the digital era through operational guidelines on digital issues. The objective is to more explicitly align the CDCE with the development of new technologies and to ensure the existence of public cultural policies and the recognition of the dual nature of cultural goods and services within the digital environment (Vlassis 2011: 503).

In this context, in June 2015 the Conference of Parties to the CDCE “request[ed] the Secretariat to continue exchanging with the Communication sector as well as international organizations and civil society organizations whose work on digital issues may impact the implementa-

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tion of the Convention" (UNESCO 2015a: 25). According to the report 'For A Diversified Networked Culture' and the results of a questionnaire (Rioux et al. 2015: 101-107), 43% of respondents estimate that existing cooperation among intergovernmental organizations (IOs) within the CDCE implementation is not developed enough. In order to facilitate production and distribution of digital cultural goods and services, the respondents estimate that UNESCO should promote collaboration with (in order of priority): the World Intellectual Property Organization (WIPO), UN agencies such as the United Nations Development Program (UNDP) and the UN Conference on Trade and Development (UNCTAD), as well as the Organization for Economic Co-operation and Development (OECD), the *Internet Corporation for Assigned Names and Numbers* (ICANN), the International Telecommunication Union (ITU), and the *Organisation internationale de la Francophonie* (OIF). In respect of access and consumption of cultural goods and services, the respondents suggest that UNESCO should establish and enhance cooperation with (in order of priority) the following organizations: ITU, OECD, ICANN, UNCTAD and UNDP, WIPO, World Trade Organization (WTO), and the World Bank. In the same vein, the preliminary draft of Operational Guidelines on measures aimed at implementing the CDCE in the digital environment suggest, in light of Articles 9 and 19 of the CDCE, "the development of mapping and compilation of statistics on the uses, practices and markets of digital cultural expressions, in cooperation with international institutions already working in data collection, such as the UNESCO Institute for Statistics and the ITU"; as well as "dialogue and cooperation with other international actors concerned with digital issues, particularly those responsible for the trade, competition, intellectual property and telecommunications sectors" (UNESCO 2015b: 10-11). More specifically, the case of the CDCE is also interesting, insofar as a regional international organization, the European Union (EU), ratified the CDCE in

2007 and directly participated, as a single entity, in the CDCE negotiations, under an expanded observer status at UNESCO for the first time.

"There is potentially no issue of global or transnational dimension in which IOs are not involved" (Brosig 2011: 147). International and regional organizations play an increasing role in the distribution of ideas and resources within the global governance of cultural industries (Vlassis 2015a). The present contribution encourages an original view on the global governance of cultural industries and more concretely on the CDCE implementation – thematic, which remains widely law-oriented and thereby state-centric (Schorlemer & Stoll 2012; Kono & Van UytSEL 2012) – and it focuses on the networking among IOs. Few scientific research works focus either on an individual organization's behaviour within the global governance of cultural industries (Loisen & De Ville 2011; Vlassis 2013, 2016) or on the dyadic links between IOs (Canedo & Cruafon 2014; Sarikakis & Granter 2014). Scholars have not yet taken up the inter-organizational networking as a serious topic of research and the present contribution aims at filling this gap. It intends to analyse IOs' interactions, how international and regional organizations interact with each other within the context of the global governance of cultural industries, as well as the different purposes of the IOs' networking. What are the objectives of such inter-organizational networking? What are the factors contributing to this novel form of cooperation? And what would be the role of networking among IOs in view of the CDCE implementation in a context of digital transition?

The next section briefly examines which IOs participate in the CDCE intergovernmental meetings. Subsequently, the article draws attention to four purposes of the inter-organizational networking within the global governance of cultural industries and sheds light on the role

of digital technologies in recent cooperation among IOs. Finally, concluding remarks deal with the factors leading to IOs' cooperative behaviour.

## I – Intergovernmental organizations and the CDCE

Several IOs took part in the sessions of the CDCE Conference of Parties and Intergovernmental Committee as observers. At the 16 sessions taking place from 2007 to 2015, 12 IOs were present once or more. Perceived so far as the institutional partner of the CDCE, the OIF has taken part in 14 sessions. The OIF was indeed the first IO to adopt in 1999 in Moncton (Canada) a resolution on the necessity of an international instrument on cultural diversity, and also the first IO to adopt, in 2014, a resolution regarding the need to promote the CDCE in the digital era. Similarly, the Parliamentary Assembly of Francophonie, an interparliamentary organization of Francophonie countries also participated in 14 sessions.

In addition, several IOs have participated between 5 and 7 times: the Council of Europe, the Arab League Educational, Cultural and Scientific Organization, the Latin Union and the WIPO<sup>2</sup>. Particularly interesting is the case of WIPO, notably present during the early meetings of the Committee and the Conference of Parties throughout 2007-2010 and absent since then, in sessions on the CDCE implementation. The UNCTAD and the World Bank participated only at the beginning of the implementation process. By contrast, the ITU has become more and more active in recent sessions.

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<sup>2</sup> The Council of Europe, the Latin Union, the Islamic Education, Scientific and Cultural Organization and the Arab League Educational, Cultural and Scientific Organization have a Permanent Observer mission to UNESCO.

As a partial conclusion, it should firstly be noted that the CDCE has not generated a strong and permanent interest from IOs beyond the Francophone organizations. More concretely, whereas the linkage between culture and development remains at the core of the CDCE normative framework, IOs dealing with development issues such as the UNCTAD, the World Bank, the OECD or the United Nations Industrial Development Organization (UNIDO) are not involved in the CDCE debates. Secondly, several IOs maintaining a permanent office to the UNESCO Headquarters in Paris do not participate at all in the CDCE sessions, e.g. the African Union, the Interamerican Development Bank, and the Organization of Ibero-American States for Education, Science and Culture. Furthermore, IOs whose mandates revolve around culture, such as the Community of Portuguese Language Countries, the Commonwealth of Nations, the Organization of American States and the Organization of Ibero-American States have not shown a real interest for the CDCE implementation.

Intergovernmental organizations	Number of participations (2007-2015)
<i>Organisation internationale de la Francophonie</i> (OIF)	14
<i>Assemblée parlementaire de la Francophonie</i>	14
Arab League Educational, Cultural and Scientific Organization	9
World Intellectual Property Organization (WIPO)	7
Council of Europe	5
Latin Union	5
International Telecommunication Union (ITU)	4

Commonwealth Foundation	3
Islamic Educational, Scientific and Cultural Organization	3
Organization of Islamic Cooperation	3
United Nations Conference on Trade and Development (UNCTAD)	2
World Bank	1

**Source:** Author's research, based on UNESCO, CDCE Conference of Parties and Intergovernmental Committee.

## II – Inter-organizational cooperation since the CDCE: purposes unravelled

Despite the facts highlighted earlier, throughout the 2000s networking among IOs has been strengthened and the exchange of human and financial resources, the sharing of tasks, as well as the flow of information have been intensified. Even though all these partnerships are not strictly linked to the CDCE implementation, the 2005 Convention and cultural diversity have transformed into one of their references. In this section, we will show that inter-organizational cooperation can serve four analytically distinct purposes in order “to address collective action problems in a globalized world” (Zaum 2013: 13): technical assistance and policy-oriented analysis, financial assistance, conceptual frameworks building, as well as data collection (Barnett & Finnemore 2004: 16-44). Hereinafter, each purpose will be distinguished and a closer look will be taken at specific programs and activities. In other words, “what matters most in the end is what comes out of” the

cooperation among IOs, that is, the policies that inter-organizational cooperation produces (Rittberger, Zangl & Kruck 2012: 119).

## A – Technical assistance and policy-oriented analysis

Inter-organizational cooperation provides technical assistance and policy-oriented analysis to governments in order to help them build institutions and improve their capabilities and knowledge regarding, in the topic analysed here, the cultural sector. Through their direct assistance and capacity-building programs, IOs ultimately seek to shape the cultural policies of their host countries (Biermann & Siebenhüner 2013: 152). Four cases illustrate that technical assistance and policy-oriented analysis are a central function of inter-organizational cooperation in that sector.

### *1. Expert facility project*

In 2010, UNESCO and the European Commission adopted the first international project to make the CDCE operational at the country level, highlighting the emergence of a supranational partnership for the implementation of international norms. As such, they created an expert facility project, funded by the EU in order to implement the CDCE through the strengthening of the system of governance for cultural industries in developing countries. In this respect, the UNESCO/EU project allocated 1.2 million euros for creating a pool of 30 experts in public policies for cultural industries. 13 technical assistance missions were put in place in order to transfer knowledge and know-how towards countries in Africa (Burkina Faso, Democratic Republic of the Congo, Kenya, Malawi, Mauritius, Seychelles, Niger), Latin America (Argentina, Honduras), Asia (Vietnam, Cambodia) and the Caribbean (Barbados, Haiti).

## *2. "Culture and development" and the Millennium Development Goals*

In relation to the Millennium Development Goals (MDGs), the Spanish Agency of International Cooperation for Development (AECID) has supported 18 joint programs<sup>3</sup> linked to the theme of 'Culture and Development' (Vlassis 2015b: 1656) with a financial allocation of 95.6 million USD<sup>4</sup>, even though cultural aspects are not explicitly referred to within the MDGs (AECID 2013: 4-7). It is noteworthy that "this development assistance is grant aid, not loans; hence it does not create future burdens for recipient countries" (Karns & Mingst 2010: 407).

The 18 programs addressed a wide range of cultural policy fields such as cultural industries, cultural heritage and cultural tourism, and were implemented in five countries in Africa (Ethiopia, Mauritania, Mozambique, Namibia, Senegal), two countries in Asia (Cambodia, China), three Arab States (Egypt, Morocco, Occupied Palestinian Authority), three countries in Europe (Albania, Bosnia and Herzegovina, Turkey), as well as five in Latin America (Costa Rica, Ecuador, Honduras, Nicaragua, Uruguay). In addition, all the joint programs dealt with the MDG 1 (Eradicate Extreme Poverty and Hunger) and MDG 3 (Promote Gender Equality and Empower Women).

Crucial support came through several IOs, which served as implementing agencies. Two UN agencies played a central role and received more than 60% of the total financial allocation: the UNDP – lead organization in the provision of technical assistance, whose agenda, compared to the World Bank institutions, is more "influenced by the interests of the developing countries" (Rittberger, Zangl

<sup>3</sup> In the UN context, a "Joint Program" is a program involving two or more agencies.

<sup>4</sup> The MDG Fund is the result of a major partnership signed in December 2006 by the Government of Spain and the UNDP. It was provided with 831 million USD in order to contribute to progress on the MDGs.

& Kruck 2012: 62) – and the UNESCO. The latter was charged with implementing all the programs and the former 17 programs – excepting the joint program ‘Sustainable Cultural Tourism in Namibia’. On the other hand, a substantial number of UN agencies also had a key role in the implementation of these joint programs, according to their mandate and their special expertise: the Food and agriculture organization (FAO), the United Nations Population Fund (UNFPA), the UNICEF, the UNIDO, the UN Women, the United Nations World Tourism Organization (UNWTO), the International Labour Organization (ILO), the United Nations Environment Program (UNEP), the UN Habitat, as well as the World Health Organization (WHO). Whereas the programs in Albania and in Ethiopia were jointly implemented by two IOs, namely UNESCO and the UNDP, and the programs in Mauritania and in Bosnia by three IOs, in all the other programs four and more IOs have been involved.

### *3. Strengthening the creative industries*

An interesting case of inter-organizational cooperation is the implementation of a pilot multiagency project aimed at ‘Strengthening the creative industries in five ACP countries through employment and trade expansion’<sup>5</sup>. Five IOs have been involved in the realization of the project. The latter was jointly implemented by three IOs, namely the UNCTAD, the ILO and UNESCO, with financing aid from the EU and the institutional support from the Secretariat

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<sup>5</sup> The concept ‘Creative industries’ has emerged in Australia in the early 1990s with the project by Paul Keating’s Labour Government ‘Creative nation’. It was given wider exposure with the election of ‘New Labour’ in the United Kingdom in 1997 when the Blair government set up the Creative Industries Task Force. Noteworthy is that, as Galloway and Dunlop (2007: 18) argue, culture is abandoned as elitist and exclusive, whereas ‘creativity’ is embraced as democratic and inclusive. In 2001, the term ‘the creative economy’ was the title of J. Howkins’s book, published in London.

of the ACP Groups. The beneficiary countries were Fiji, Mozambique, Senegal, Trinidad and Tobago and Zambia. The project intended to offer examples of effective ways of stimulating the creative economies of developing countries, through a variety of activities spread over 4 years (2008-2011). Regarding task-sharing among the IOs, UNCTAD offered policy advice and capacity-building activities seeking to enhance supply capacities, trade, and investment. ILO's work focused on employment and cultural entrepreneurship. Finally, UNESCO work aimed to safeguard cultural diversity and enhance the linkages between culture and development. UNCTAD released, moreover, two policy-oriented reports for the cases of Mozambique and Zambia as an outcome of the multi-agency project.

#### *4. Development of Clusters*

In 2014, the EU funded the project 'Development of Clusters in Cultural and Creative Industries in the Southern Mediterranean', hosted by the Union for the Mediterranean. It was implemented by UNIDO, a specialized UN agency devoted to manpower in small industries of developing countries, which was ranked in 2004 by the British Department for International Development as the most effective agency in the UN system (Rittberger, Zangl & Kruck 2012: 63). The aim of the project was to strengthen selected clusters in cultural and creative industries in Southern Mediterranean that were identified as having the potential to develop into promising pilot cluster initiatives. Firstly, a team of UNIDO interviewed over 500 persons throughout the seven participating countries — Algeria, Egypt, Jordan, Lebanon, Morocco, Palestine and Tunisia — and identified over 140 clusters and 70 other economic realities in cultural and creative industries. Then, 14 high-potential clusters were selected for receiving technical assistance over a period of three years. Most of the selected

clusters are in the design-based industries. The project budget comes from the EU (5 million euros) and the Italian cooperation agency (600.000 euros).

## B – Financial assistance: interregional funds and EU as a core actor

The EU has an extensive web of relationships in cultural affairs with other regional groups such as the ACP partnership and Mercosur, and provides significant non-reimbursable grants on a project-by-project basis.

### 1. ACP Cultures+

Undoubtedly, cooperation between the EU and the 78 African, Caribbean, and Pacific countries, many of which are former European colonies, is the cornerstone of EU development assistance programs (Karns & Mingst 2010: 175). The ACP Cultures+ Program is funded under the 10th European Development Fund for an amount of 30 million euros and is implemented by the Secretariat of the ACP Group of States<sup>6</sup>, with account taken for the CDCE principles and objectives. In the Brussels resolution following the 3rd Meeting of ACP Ministers of Culture ‘No Future without Culture’, held in October 2012, the ministers of the ACP Group of States underscored explicitly “the commitments

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<sup>6</sup> Article 27 of the Cotonou Agreement, entitled ‘Culture and development’, provides that: “Cooperation in the area of culture shall aim at: a. Integrating the cultural dimension at all levels of development cooperation; b. Recognizing, preserving and promoting cultural values and identities to enable inter-cultural dialogue; c. Recognizing, preserving and promoting the value of cultural heritage; supporting the development of capacity in this sector; and d. Developing cultural industries and enhancing market access opportunities for cultural goods and services” (ACP-European Union 2000: 40). The Cotonou Agreement, signed in 2000, entered into force in 2003 and revised in 2010, represents a new stage in cooperation between ACP and EU, which began with the signing of the Yaoundé Convention in 1963 and the Lomé Convention in 1975.

made by Member States by ratifying the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" (ACP Ministers of Culture 2012: 2).

The ACP Cultures+ has three main objectives: a. boosting the creation/production of cultural goods and services in the ACP countries; b. promoting their access to markets at different levels – local, regional, intra-ACP, European and international; c. enhancing the technical and entrepreneurial capacities of the different players in the cultural sector in the ACP countries. The ACP Cultures+ Program is currently financing 55 projects: 33 regarding the audio-visual and cinema industries and 22 towards all the other cultural industries (music, theatre, dance, photography, etc.).

## 2. Mercosur Audio-visual

The RECAM (*Reunión Especializada de Autoridades Cinematográficas y Audiovisuales del Mercosur*) was created in 2003 in order to establish an institutional instrument for strengthening the integration process of cinema and audio-visual industries in the Mercosur region. In this sense, in the context of the 1995 Interregional Framework Cooperation Agreement between Mercosur and the EU, the latter provided the Mercosur Audio-visual Program with 1.5 million euros (within a total program budget of 1.86 million euros). The program, established in 2007, has four specific objectives: a. harmonization of the legislation in the audio-visual sector in Mercosur Member States; b. circulation of audio-visual content; c. support for the preservation and dissemination of the audio-visual heritage of Mercosur; d. professional and technical training in the audio-visual sector (European Commission 2008).

## C – Building conceptual frameworks

In addition to technical and financial assistance, one of the best-known features of IOs is that “they classify knowledge and help to define pursuits” (Finnemore & Barnett 2004: 31). In 2004, immediately after the UNCTAD XI Conference in Brazil and its São Paulo Consensus for the introduction of creative industries into the international economic and development agenda<sup>7</sup>, the Secretary General of UNCTAD – an IO traditionally “reflecting the aspirations and needs of least developed countries” (Davies & Woodward 2014: 348) – set up the UN multi-agency informal group on Creative Industries in an effort to build synergies with other relevant UN agencies<sup>8</sup>. The group brought together: UNCTAD, UNESCO, WIPO, ILO, International Trade Centre – a service operated jointly by UNCTAD and WTO; and the UNDP also joined in 2005. Obviously, the issue of creative industries was major and ambitious, requiring division of labor as well as shared responsibility and resources among IOs. The aim of the five UN bodies was to improve policy coherence and to provide knowledge-based activities in the sector of creative industries. In 2007,

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<sup>7</sup> “The international community should support national efforts of developing countries to increase their participation in and benefit from dynamic sectors and to foster, protect and promote their creative industries” (São Paulo Consensus, paragraph 91) (UNCTAD 2004a: 19). “Creative industries can help foster positive externalities while preserving and promoting cultural heritages and diversity (...)” (paragraph 65) (UNCTAD 2004a: 14).

<sup>8</sup> “At UNCTAD X, the Bangkok Plan of Action identified audio-visual services, informatics and software development for particular attention in UNCTAD’s analytical work (...) UNCTAD convened an Expert Meeting on Audio-visual Services in November 2002. On the basis of the final report of the Expert Meeting, the Commission on Trade in Goods, Services and Commodities recommended that UNCTAD examine issues involved in trade in audio-visual services and continue its analytical work on related issues. In undertaking this work, UNCTAD has sought to build closer collaboration with other international organizations, notably the ILO, WIPO, the International Trade Centre and UNESCO” (UNCTAD, 2004b: 2).

UNCTAD has convened two meetings of the multiagency informal group, the first in April and the second in July (UNCTAD 2006-2012).

Two concrete outcomes of the UN informal group should be noted: the first is the project “Strengthening the creative industries in five ACP countries” (see A3 earlier). The second is the launching during the UNCTAD XII Conference in Ghana of the Creative Economy Report, the first report to make an intellectual contribution of IOs to discussions about the creative economy. The aim of this policy-oriented analysis was to establish a conceptual framework, with a view to assist governments in formulating policies and to reshape the development agenda with creative industries in mind. UNCTAD took the lead in preparing the 2008 and 2010 reports, whereas the 2013 report was notably executed by UNESCO and the UNDP. The reports brought together contributions from UNCTAD, UNDP, UNESCO, WIPO and ITC.

As of July 2010, the 2008 Creative Economy Report was consulted more than 52.000 times on the Internet and was linked to from 1.080 websites all over the world (UNCTAD 2010: XIX). In addition, UNCTAD played an essential role in disseminating the results of the 2008 and 2010 Reports to stakeholders. In this regard, in October 2008, UNCTAD was invited by the German Commission for UNESCO to present the report at the fifth German annual conference on creative economy held in Berlin and it was also invited to open the session of the China International Cultural Industries Forum and to launch the Chinese version of the Report. In November 2008, UNCTAD presented the Report at the Creative Clusters Glasgow Conference and at the fourth Inter-American Meeting of Ministers of Culture of the Organization of American States Committee for Culture.

## D – Collecting and analysing information

The final purpose of inter-organizational networking addressed in the present study is data collection. Cooperation among IOs also pursues its objectives through knowledge management, as well as through gathering, synthetizing and analysing data received from national governments and research institutes. The UN Interagency Technical Working Group on Cultural Industries Statistics was a working group convened by UNESCO comprising members from IOs including UNDP, UNESCO Institute of Statistics, UNIDO, and the WIPO. It was formed in February 2005 in the context of the Senior Experts Symposium “Asia-Pacific Creative Communities: A strategy for the 21th Century” convened in Jodhpur (India) by UNESCO. The purpose of the working group was to collaborate on the development and implementation of a strategy for the collection and analysis of cultural industries statistics and their impact on economic and social well-being at the global, regional, national and community levels. In 2007, the technical working group published the document “Statistics on Cultural Industries: Framework for the Elaboration of National Data Capacity Building Projects”.

Similarly, in 2014, the Organization of American States, the Inter-American Development Bank and the British Council, were jointly charged with elaborating a report entitled ‘The economic impact of the creative industries in the Americas’ to show the important contribution to growth, jobs and trade in the Americas by creative and cultural activities, such as the arts, design, music and advertising, amongst others. The report surveys 44 countries – including 34 countries in the Americas and 10 benchmark countries from other regions around the world.

As a partial conclusion, the strengthening of the themes of “creative economy” and “diversity of cultural expressions” became a catalyst for inter-organizational cooperation. Clearly, in a globalizing world, the multifaceted and

transnational nature of these issues calls for closer coordination among IOs, even though “guarding institutional autonomy has an almost intuitive appeal for international organizations” (Biermann 2008: 158). In this regard, since the CDCE adoption, the flow of resources and the sharing of information among IOs have been intensified and projects with shared responsibility have been established.

### **III – Digital technologies in inter-organizational cooperation**

Several projects addressed by inter-organizational cooperation relate to the development of digital technologies. Three cases are worth mentioning: the ACP Cultures+, the expert facility project, and the Mercosur audio-visual program.

Six projects financed by ACP Cultures+ deal with new technologies with a total budget of 2.5 million euros (ACP Secretariat 2015):

- The “3D Distribution Project” will acquire rights to a catalogue of 400 Caribbean-themed films and monetize them to audiences in the region and internationally by creating and implementing three integrated platforms enhancing digital, domestic and diaspora distribution. One of the objectives is the implementation of a Video on Demand (VOD) platform, as well as the establishment of deals with regional broadcasting networks. The EU grant amounts to 274.096 euros and the main coordinator is the *Caribbean Tales Worldwide Distribution* (Barbados).
- The “*Capital numérique*” seeks to boost audio-visual productions in ACP countries by enhancing the value of works and digital image banks in 20 African countries. Its objective is, through digitization, to allow for ACP author works that are available on analogue supports to be broadcasted on television, in cinema or on

the internet (via VOD). The project is coordinated by the OIF, together with the West African Economic and Monetary Union and other partners. The total budget of the project amounts to 685.000 euros and the EU grant represents 73 % of the budget.

- The “Digital United ACP”, through leading African VOD platforms Buni.tv and Africafilms.tv, will develop a fair and common contract, which will simplify the digital distribution process for filmmakers. The project aims to federate 300 to 400 rights owners into building a collectively stronger and more diversified catalogue of ACP content through fairer deals with distribution channel operators, and to empower the digital presence of the ACP film sector through several actions, such as fight against online piracy, better digital pipeline management, etc. The EU grant is of 500.000 euros and the project is managed by *Buni Media Ltd* (Kenya).
- The “Caribbean Film Mart and Virtual Marketplace”, promoted by the Trinidad and Tobago Film Festival, provides a virtual platform for Caribbean filmmakers and organizations in order to promote networking among filmmakers and film industry professionals from the region, establishing also an itinerant Caribbean Film Mart held annually at different festivals throughout the region. The aid from the EU is of 339,301 euros.
- The project “Culture Works Connections”, promoted by Visiting Arts (United Kingdom), aims to create an online interactive platform for the cultural and creative sector in the partner countries (Pacific islands, Southern Africa, Trinidad and Tobago) offering the ability to promote the work of artists and cultural operators on major international markets. The project includes the mapping and surveying of creative businesses and provides the sector with access and training to be in

position to self-promote through the World Cultures Connect (WCC) online platform. The EU aid amounts to 444.120 euros.

- The “*Afrique en Doc TV*” seeks to make African documentaries available through a DVD collection and a web platform. Its goals are to constitute an annual collection of 60 original documentary films directed in their majority by Africans, to implement a subscription internet consulting and downloading platform intended for African broadcasters, and to strengthen partnerships between distributors and broadcasters. The coordinator is Doc Net (France) and the EU grant for this project is of 380.000 euros.

The expert facility project between the EU and UNESCO also included four projects dealing with digital aspects (UNESCO 2013):

- In Honduras, the technical mission aimed to accompany the government to develop an operational strategy in order to encourage private and public actors to work together to support different cultural sectors, and increase access to different cultural expressions. One of the activities was the creation of a digital communication platform that would promote and market cultural products, and also connect individuals, groups and institutions involved in its implementation.
- In Kenya, the role of the technical assistance mission was to support the government in developing modern marketing skills for artists. The national team and the experts developed a training program for marketing visual arts and music using Information and Communication Technology (ICT) tools.
- In Mauritius, the government sought technical assistance to elaborate a strategy for the development of cultural entrepreneurship and cultural industries and an action plan to implement it. One of the objectives of

the draft Strategy and Action Plan was to reflect on the impact and challenges brought by digital technologies on production, distribution and consumption across all cultural industries.

- In Seychelles, technical assistance aimed to advise the national government in building a cultural policy for its creative industries based on the Culture Department Strategic Plan 2011-2015. In order to foster creative industries, public intervention is also envisaged in the ICT use.

Finally, the Mercosur audio-visual program also includes the creation of a network of 30 digital cinema theatres in order to exhibit regional audio-visual content. This axis towards the circulation of audio-visual content benefits from the contribution by the EU mentioned above (635.000 euros).

As discussed above, the projects dealing with digital technologies address two purposes: technical and financial assistance. Undoubtedly, digital revolution has strong connections with the protection and promotion of the diversity of cultural expressions, illustrating unique challenges. Digital issues have become an intrinsic part of the public agenda in the past two decades, as shown by the EU "Digital Agenda for Europe", elaborated in 2010 by the European Commission. However, one has to recognize that existing inter-organizational cooperation regarding the link "digital technologies and cultural industries" seems to be still poorly developed in terms of resources, new norms, information activities, and programs of action.

#### **IV – In closing: factors for inter-organizational networking in the digital age**

Overall, inter-organizational networking in the digital age is supposed to perform four functions as pointed out earlier: technical assistance activities and policy-oriented analysis; the provision of financial assistance; the building of conceptual frameworks; and data collection. Admittedly, IOs frequently avoid cooperation and shared operations, because it entails a certain loss of autonomy and control on their own policy agenda (Biermann 2008: 158). Each organization establishes its own priorities and working with others may mean restricting its authority. However, the cases of inter-organizational cooperation regarding cultural industries are numerous, as examined above.

Six main factors seem to contribute to IOs' cooperative behaviour (Biermann 2008; Brosig 2011) and cooperation among IOs in the digital age could also be motivated by these factors, which include both cost-benefit and intangible considerations:

Domain similarity and common interests of IOs on a specific issue. For instance, the creative industries became a shared issue with significant exchanged competences among UNCTAD, UNESCO, WIPO, and UNDP. "Without domain similarity, the *sine qua non* for cooperation is lacking" (Biermann 2008: 156). More specifically, since creative industries moved to the top of UNCTAD's agenda, all organizations strove to demonstrate their specific expertise on the matter and better position themselves in this new issue. However, this factor cannot automatically generate inter-organizational cooperation.

The scarcity of human, epistemic or economic resources of an IO or the mutual dependence of resources among IOs to address a major issue. In this sense, the IOs prefer to pursue their preferences through policy coordina-

tion and not unilaterally. In this case, are worth mentioning both the Creative Economy Report and the majority of projects funded by the EU.

The multidimensional, multifaceted and transnational nature of an issue, which requires the exchange of resources among IOs. The issue of creative economy is an illustration thereof, revealing the necessity of inter-organizational networking, insofar as the nature of the issue overcomes the mandate and the resources of one IO. In other words, no organization was capable to address this issue on its own and the handling of such issue was not achievable without access to other IOs' resources. For instance, UNCTAD had very little experience regarding cultural or intellectual property matters. Initiating cooperation with relevant institutions helped, therefore, to reduce uncertainty about a complex and multifaceted issue.

The external pressure from national governments or civil society for IOs to enhance their inter-organizational cooperation. Here again, the Creative Economy Report, the UN Interagency Technical Working Group on Cultural Industries Statistics or the program on "Culture and development" from the Spanish Agency of International Cooperation for Development are some relevant examples.

Political leadership from an IO to create policy synergies for enhancing its own position and stimulating its credibility within an international debate and thereby its attractiveness. Several initiatives of UNESCO and UNCTAD could be included in this case. For instance, UNESCO intended to cooperate with EU – which was perceived to have a stronger reputation – to improve its own image within the development topic. The central position of the EU in the international development aid area made the EU a highly attractive partner.

A trigger event, such as the adoption of the Convention on the diversity of cultural expressions, proved capable of inducing a profound change of preferences and introducing a new political and economic theme, such as the one

regarding cultural goods and services, into the international agenda, while stimulating the rise of inter-organizational networking. Undoubtedly, inter-organizational networking on that matter before the CDCE adoption was practically nonexistent.

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# The Contribution from the Music Collection of Instituto Moreira Sales Site to Diversity. A Case Study: Brazilian Christmas Carols

*(Original in Portuguese)*

NÍSIO TEIXEIRA<sup>1</sup>

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) of October 2005, ratified by Brazil in 2007, establishes in its Section III, Definitions, Article 4, the meaning of “Cultural Diversity”:

[it] refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

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Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

According to items 4 to 6, still in Section III of the CDCE cited above, cultural activities, goods and services refer to those that incorporate or transmit cultural expressions, independently of the commercial value they may have, with cultural industries producing and distributing such goods and services, which themselves need culture-related policies and measures on the local, regional, domestic or international level. Such policies must focus on culture as such, or intend to have a direct effect on the cultural expressions of individuals, groups, or societies, impacting the creation, production, diffusion and distribution of activities, goods and cultural services, as well as access to them.

It is with this perspective in mind that the present article understands the songs: as forms of a society's expression of diversity, both from the point of view of the lyrics as from the point of view of the music. The songs help to understand different social conjunctures, and their incorporation as research material has been more and more common due to their recognition as "historical documents" as well (Valente 2003: Moraes 2010). Valente indeed suggests that the song can be understood as a "testimonial narrative", not only when the cultural text found in the music carries a register that can have been prevented from taking place in literary, historiographical or even journalistic narratives, but, above all, as the representation of a society's individual or collective aspect. In these evolving times of ICT (Information and Communication Technology), especially the Internet, we are aware that universal access to these collections has become easier, though it faces

a dual challenge: to actually find the song in order to listen to it, and most importantly, in our case, a song that was produced decades before the advent of the vinyl LP (*long play*), and which only circulated on 76 or 78 RPM (rotations per minute) records.

Memory appears here as a research challenge and a key concept to comprehend the testimonial value of the song, since the remembrance and/or the recollection triggered off by the lyrics-music combination, beyond the song as a document, are found therein. The song brings what Valente calls a “memory capsule” – not only individual but collective as well (as we know, there are several examples of striking songs for each specific historical period or social group). On the other hand, a challenge exists in accessing and understanding the cultural industries and policies linked to the different media resources that provide these songs. Resources which, again, and even in the Internet age, become scarcer the further back in time these songs were recorded and phonographically produced.

Thus, before going further, we should highlight the contribution of the *Instituto Moreira Salles* (IMS) as an extremely important actor in facilitating access to this musical collection. The IMS digital collection not only enables the exercise of cultural diversity expression within an ethnocentric rupture line, by offering an ample collection of various expression forms in Brazil, but also an ethnochronic rupture, since it precisely allows an ample and free access to listening to these “memory capsules” produced in the Brazil of yesterday.

In the first place, it should be noted that its music collection is only one of IMS’ four heritage pillars. Besides music, its collection includes literature, iconography, and (the biggest of them all) photography. Its actions “are supported by an endowment initially set up by Unibanco and expanded later by the Moreira Salles family” (IMS 2015). The IMS is present in three cities: Poços de Caldas (municipality in the state of Minas Gerais, where the institute was

founded in 1992), Rio de Janeiro and São Paulo. Besides exhibition catalogues, photograph albums, literature and music, the IMS “publishes two magazines on a regular basis: the biannual ZUM, about contemporary photography in Brazil and worldwide, and the quarterly *Serrote*, about essays and ideas” (IMS 2015). All collections go through conservation, organization and diffusion processes which can be detailed as follows:

The **Photography** collection comprises 800 thousand images, from the most important testimonials of the XIX century – Marc Ferrez’s splendid images particularly stand out here – to the relevant collections that nearly encompass the whole XX century. In these latter, it is important to mention the names of Marcel Gautherot, José Medeiros, Maureen Bisilliat, Thomaz Farkas, Hans Gunter Flieg and Otto Stupakoff, among others. And it is the IMS’ priority to incorporate images of the XXI century in its collection. This formidable set – 40 collections, 19 of them being the photographers’ complete works – accredits the IMS as the most important photography institution in the country. **Music** accounts for the early days of Brazilian songs recordings. The collection is replete with 78 rpm records, a repository of 80 thousand phonograms, underpinned by the invaluable collection of José Ramos Tinhorão and Humberto Franceschi. But there are also collections of three seminal composers that enrich Brazilian musical fortune – Chiquinha Gonzaga, Ernesto Nazareth, and Pixinguinha. Letters, papers, several documents, and books compose the **Literature** collection. Personal files of Otto Lara Rezende, Érico Veríssimo, Clarice Lispector, Carlos Drummond de Andrade, Rachel de Queirós, Lygia Fagundes Telles and Paulo Mendes Campos, among others, are deserving of researchers’ attention and enhance knowledge about the country’s literary activity with valuable information. The Prehistory of Photography, the IMS’ **Iconography**, entirely expressed on paper (watercolours, prints, drawings) is a precious record mostly executed by travelling artists who came to Brazil on board of diplomatic or specifically cultural expeditions in the XIX century. In this collection we can point out the beautiful

watercolours left by Charles Landseer, who arrived here in 1825, and the drawings of German artist Von Martius (Carl Friedrich Philipp), who explored Brazilian nature between 1817 and 1820 (IMS 2015, emphasis added).

Apart from regular exhibitions of its collection through programs that also include exhibiting and discussing visual art and cinema, one of the IMS' central objectives is the wide dissemination of its whole heritage. This is the reason why it constantly invests in the universal and free propagation of its collections, as well as programming on the Internet through the site [www.ims.com.br](http://www.ims.com.br). In the case examined hereafter, the musical collection also receives the support of a radio station, *Rádio Batuta*, which explores the potentials of this collection "and produces documentaries about great composers and interpreters."

Thus, we set our focus on what is available on the IMS website in terms of phonograms of its ample musical collection. The IMS' Musical Technical Reserve was inaugurated in early 2000, and maintains 14 collections that are centred on two aspects: musical practice itself within its multiple functions (composer, arranger, conductor, etc.), and research and collecting activities. The great diversity of musical representation supports that exist can be roughly organized along two guidelines: one that exists through the *music scores*, and one that exists through the *recordings*.

We shall focus on the recordings. Available on the IMS web portal are digitized phonograms of records once launched in 76 and 78 rpm; these collections take on a special importance. "The main ones are Humberto Franceschi's and José Ramos Tinhorão's, with about six thousand pieces each. But there are smaller samples also in Pixinguinha's and Antonio D'Aura's collections, besides the donations received from several cities in Brazil, and the contributions of small collectors that lend us their records to be digitized here" (Leme 2015). All recordings come with a detailed technical datasheet of the phonogram.

Added to this material are recordings coming from other supports, such as roll and cassette magnetic tapes that contain non-commercial material (essays, presentations, interviews and radio programs), besides “purely musical supports”, such as, again, Tinhorão’s collection, “in which, apart from an over six-thousand-volume library, complete collections of magazines and various rare works, there are about 2,600 photographs, a collection of over 15 thousand newspaper and magazine clippings, and hundreds of important documents, the whole thing being focused on the researcher’s great passion for urban popular culture” (Leme 2015).

In this study, and from this ample collection of IMS’ recordings, we will highlight the testimonials of Brazilian Christmas carols so that we can understand, with and through them, how the song, as an important historical document and testimonial narrative, reveals some aspects of how part of the Brazilian society interpreted the period. Listening to this production that saw the day in Brazil between 1913 and 1956 was made possible precisely through accessing the IMS collection research site (<http://acervo.ims.com.br>), for which we only selected the “música” (music) item, and did a search using the expression *Natal* (Christmas) and similar ones (*Papai Noel* (Santa Claus), *dezembro* (December), *festas* (parties), etc). It should be noted that producing Christmas theme songs, which was once a common occurrence in the Brazilian phonographic industry (just like what it is done to this day in other countries, notably in the USA), has become increasingly scarce. Recent exceptions (not included in the IMS’ collection) can be pointed out, such as the singer Simone, who launched a record in 1995 (but with standards and adaptations of worldwide Christmas carols), and more than ten years later, in 2006, the album of new songs *Um Natal de Samba* (A Samba Christmas), with compositions of samba musicians Almir Guineto, Cláudio Jorge, Luiz Grande and others, part of which is included in the samples used for this work.

Thus, the article hereafter presents an analysis of 45 songs on the Christmas theme produced by the Brazilian phonographic industry. As we said before, the largest array of samples were selected between 1913 and 1956 – thanks to the collection accessed through the IMS website – but it also includes a 1976 song and the aforementioned album from 2006<sup>2</sup>. Without pretending to establish categories that are in fact interchangeable, we have divided our impressions of the Christmas carols testimonials analysed under *nostalgia*, *description*, *relationship*, and *dispirit*. It is our intention, with this small exercise, to demonstrate how the songs, and through them the role of a digital collection such as the IMS', contribute to the dissemination and promotion of cultural diversity.

## I – Nostalgia

In this first case, nostalgia can be perceived in the waltzes *Sinos de Natal* (Christmas Bells), by Erotildes de Campos, 1925, recorded by Pedro Celestino (Vicente's brother):

Saudades de outrora Que eu já esquecia Que alegres crianças Sonhando esperanças Quanta alegria No trono de Deus Há tantas doçuras Imensas ternuras Que vêm lá do céu	Nostalgia of the old times That I was already forgetting. What joyful children! Dreaming of hopes. There's plenty of joy On God's throne. So much sweetness, Immense tenderness that come from the sky above.
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And in *Meu Natal* (My Christmas), performed by Francisco Alves (composed by himself with Ary Barroso, 1934):

<sup>2</sup> The 1976 and 2006 songs can be found on Internet platforms such as YouTube.

<p>Nessa noite em criança      Sempre tinha a esperança      De um presente de valor      Colocava na janela      Meu sapato de fivela      Pensando em nosso Senhor</p>	<p>On this night when I was a child      I always hoped for      A present of value      I would put in the window      My buckled shoe      Thinking of Our Lord.</p>
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Or another one performed by Alves and Trio de Ouro: *Natal* (Christmas) (Herivelto Martins and Rogério Nascimento composers 1945):

<p>Dorme, dorme filhinho,      Meu anjinho inocente,      Natal chegou, meu santinho,      A mamãezinha está contente.</p>	<p>Sleep, sleep my little son,      my innocent little angel,      Christmas has come, my little      saint,      Mommy is happy.</p>
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Or also in the waltzes recorded in 1954 by Roberto Paiva, such as *Boas festas* (*Happy Holidays*, by Rui de Almeida and Guido Medina composers), and *Dezembro* (December) (Amil and Gaó composers, 1954). This latter one, for example, contains the following verses:

<p>Dezembro, mês de sonhos e poesias</p> <p>Tudo era belo e encantador na vida</p> <p>Natal, presépios, noites de alegria</p> <p>Da minha infância linda e tão querida</p> <p>Ó tempo vem por hoje dizimar</p> <p>Eu punha atrás da porta os sapatinhos</p> <p>E Papai Noel me dava brinquedinhos</p> <p>Nas noites estreladas de Natal</p> <p>Dentre os presentes todos que ganhei</p> <p>Ganhei também um lindo palhacinho</p> <p>De roupas bonitinhas</p> <p>Que comigo sempre conservei</p> <p>Nunca está triste</p> <p>Invejo-lhe a maneira</p> <p>Traz nos seus lábios um mordaz sorriso.</p>	<p>December, month of dreams and poetry,</p> <p>All was beautiful and lovely in life;</p> <p>Christmas, nativity scenes, joyful nights</p> <p>Of my beloved, wonderful childhood.</p> <p>Oh Time who comes today to wipe it out;</p> <p>I would put my little shoes behind the door;</p> <p>And Santa would give me little toys;</p> <p>On the starry nights of Christmas;</p> <p>among all the presents I got</p> <p>There was also a beautiful little clown</p> <p>dressed in pretty little clothes</p> <p>which I have always kept</p> <p>He is never sad</p> <p>I envy him the way</p> <p>He puts on his lips a mordacious smile.</p>
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Among other examples, we also find *Jerusalém*, performed by Zilá Fonseca (Castro Perret and Jane composers 1953):

<p>Noite feliz de Natal que nos põe alegria</p> <p>Dentro da alma cansada na vida vazia</p> <p>Noite de amor que nos traz novamente a lembrança</p> <p>Uma janela, um sapato, um cismar de criança.</p>	<p>Happy Christmas night that brings us joy</p> <p>To our tired souls and empty life</p> <p>Night of love that brings us back the memory</p> <p>A window, a shoe, a child's daydream.</p>
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And *Papai Noel* (Santa Claus), performed by Carlos Galhardo (Ivo Santos e Raul Pompéia composers 1956):

<p><b>Papai Noel</b></p> <p>Que saudade que me vem      Já escuto lá longe o badalar      Dos sininhos de Belém      Papai Noel      O meu tempo já passou      Mas na noite tão alegre de      Natal      Bem feliz eu sou      Eu também fui pequenino,      pequenino      Mas depois eu fui crescendo,      fui crescendo      E as minhas ilusões quando      menino      Foram desaparecendo      E a vida foi seguindo para      frente      Com saudades sou feliz hoje      também      Porque já sou papai Noel</p>	<p>Santa Claus,      that nostalgia that comes      I can hear tolling in the dis-      tance      the little bells of Bethlehem.      Santa Claus,      my time has gone already      But on such a happy Christmas      night      I am very happy      I, too, was little, little;      But then I started to grow      and my illusions as a child      went fading away      and life went on and on      with nostalgia I am also happy      today      because now I am Santa      Claus.</p>
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And *Papai Noel esqueceu* (Santa has forgotten), performed by João Dias and Ângela Maria (David Nasser and Herivelto Martins composers, undefined year):

<p><b>Meu sapato no sereno</b></p> <p>Ficava a noite inteirinha      Na janela do meu quarto      Quando eu era criancinha      E dormindo meio acordado      Eu esperava ela vir      Trazendo um brinquedo novo      Papai Noel era você, mamãezinha.</p>	<p>My shoe in the cool air      would lie all night long      at my bedroom window;      when I was a child      and sleeping half awake      I waited for her to come      bringing me a new toy:      Santa Claus was you, Mommy.</p>
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It is curious to note that this strong memory from childhood, associated to the mother figure on Christmas nights, came at a period when this kind of recording was starting to become rarer in Brazil, in the 1970s, in the rock-soul *Hoje é Natal* (Today is Christmas) by Cassiano (Cassiano and Paulo Zdanowski composers 1976). Apart from all the European references such as fireplace and swans, in the end it is all about a longing cry for the mother:

<p>Hoje é Natal de estrelas no céu      Hoje é Natal, Papai Noel      Deixou pra você os sinos do amor      E em meio às flores na sala,      no bar      Lareira e as crianças a brincar      E no jardim o nosso cão a rosnar      Nossos cisnes enfeitam o pomar... Mamãe...</p>	<p>Today is Christmas with stars in the sky!      Today is Christmas, Santa Claus!      He left the bells of love for you      Amidst the flowers in the room,      in the bar      Fireplace, and the children at play.      In the garden our dog is growling      Our swans embellish the orchard... Mommy...</p>
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## II – Description

Still in the form of waltzes and lullabies, but also with a greater occurrence of *marchinhas* (a popular style of dance music, characteristically joyful, with military march rhythm and binary or quaternary beat – NDT), some songs describe either a traditional Christian version of the history of Christ's birth, or how this celebration occurs in diverse places, in the city or in the countryside, like in *Natal no Sertão* (Christmas in Sertão) by Capitão Furtado and Tia Chiquinha (Villa Lobos and O.F. Pessoa composers 1939):

<p>Meia noite o gallo canta      Todo mundo se elevanta      Alegremente dobra o sino      Toda gente vai para a igreja      E a terra toda festeja      O nascer do bom menino      Toda gente tá contente      No terreiro o violeiro cantarola      uma suave viola.</p>	<p>At midnight the rooster crows      gaily the bell tolls.      Everybody goes to church      and the whole land celebrates      the birth of the good Boy,      Everybody is happy      In the farmyard the viola player      fingers a gentle viola.</p>
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There is also *Natal dos Caboclos* (Christmas of the Caboclos – said of an individual born from a Caucasian and an indigenous, physically characterized by their brown or coppery skin and straight black hair – NDT), performed by Quarteto Tupã and Paraguassú (Paraguassú and Ariovaldo Pires composers 1938):

<p>Noite de alegria, noite de amor      Nasce nesse dia Cristo Reden-      tor      Como é divinal lá no meu      sertão      Ao chegar Natal quanta      tradição      Toca alegre o sino na igreja      da Serra      É o senhor menino que desceu      à Terra.      Noite de alegria, noite de amor      Nasce nesse dia Cristo Reden-      tor      Como é divinal lá no meu      sertão      Ao chegar Natal quanta      tradição      Toca alegre o sino na igreja      da Serra      É o senhor menino que desceu      à Terra.</p>	<p>Night of joy, night of love,      On this day Christ the      Redeemer is born;      How divine it is in my sertão,      when Christmas comes there's      plenty of tradition.      Gaily tolls the bell in the hill      church,      It is the Lord Child that came      to Earth.      Night of joy, night of love,      On this day Christ the      Redeemer is born;      How divine it is in my sertão,      when Christmas comes there's      plenty of tradition.      Gaily tolls the bell in the hill      church,      It is the Lord Child that came      to Earth.</p>
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*Cartão de Natal* (Christmas Card) performed by Isis de Oliveira and Luiz Gonzaga (Gonzaga and Zé Dantas composers 1954):

Boas-festas Feliz Ano Novo Ouvindo os sinos de Deus Repicando na matriz Para você e os seus Peço um Natal bem feliz.	Happy Holidays! Happy New Year! Hearing God's bells Chiming in the Mother Church To you and yours I wish a very Happy Christmas.
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*Salve Papai Noel* (Hail Santa Claus), a *dobrado* (said of music played in a military march rhythm style – NDT) performed by Bandinha do Altamiro Carrilho (*Altamiro Carrilho's band*) and Carequinha (Carequinha and Mirabeau composers, undefined year):

Salve, salve Papai Noel! Com alegria vamos todos festejar.  Salve, salve Papai Noel! Meu sapatinho na janela vou botar	Hail, hail Santa Claus! Let's all celebrate with joy. Hail, hail Santa Claus! My little shoe in the window I will lay.
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Nature itself (the rooster, the stars, the light), as well as the small urban centres, especially dotted with bell chimes, mark the Christian influence and transform themselves so as to announce the coming of Jesus, an aspect also reinforced in other songs of the past, with no less than three songs named *Sinos de Natal* (Christmas Bells). The first one, performed by Carlos Galhardo (Sanches de Andrade composer 1941):

Construí uma casinha Lá no meio do caminho Que foi feita de papel (que foi feita de papel) Vou receber este ano Com prazer uma visita do Papai Noel	I've built a little home There down the way Which was made of paper (which was made of paper) This year I'm gladly going to receive A visit from Santa
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And another, performed by Francisco Alves (Victor Simon and Wilson Roberto composers 1950):

Numa simples manjedoura Num presépio de luz Veio ao mundo um menino O menino Jesus Vinte e cinco de dezembro É o dia de Natal Luz no céu, paz na Terra, Glória universal!	In a simple manger, In the nativity crib, A Boy came to the world, Jesus Child. Twenty-fifth of December Is Christmas Day, Light in Heavens, peace on Earth, Universal Glory!
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The third one, performed by Aurora Miranda (André Filho and Orestes Barbosa composers 1934):

Ô, ô, ô, ô, ô, O galô já cantou E o Natal anunciou.	Oh, oh, oh, oh, oh, The rooster has crowed, And Christmas has been announced.
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Besides these, there is also *Natal Divino* (Divine Christmas) (Milton Amaral composer 1935):

Natal, Natal! A lua cor de ouro emite a luz Vê que a humanidade está risonha Festejando o divino aniver- sário de Jesus.	Christmas, Christmas! The gold-colored moon sheds light, and sees that mankind is smil- ing, celebrating the divine birth of Jesus.
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There are several other examples, such as *Chegou Papai Noel* (Santa has come), performed by João Petró de Barros (Kid Pepe and Roberto Martins composers 1934):

Chegou Papai Noel Faz anos que Jesus nasceu O galo cantou no terreiro Uma estrela lá no céu apare- ceu.	Santa has come It's been years since Jesus was born The rooster crowed in the farmyard A star appeared in the sky.
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*Cantiga de Natal* (Christmas Carol), performed by Elizeth Cardoso (Lina Pesce composer, circa 1950):

Uma noite no oriente Uma estrela apareceu Anunciando à toda gente A mensagem lá do céu Meu Jesus Jesus menino Para o nosso bem nasceu Trouxe paz, trouxe alegria Quanto amor ofereceu.	One night in the East, a star came up to bring us all a message from heaven up there: My Jesus, Jesus Child, for our own good was born bringing Peace, bringing joy. How much love He has offered!
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*Natal das crianças* (Children's Christmas), performed by Blecaute (Blecaute composer 1955):

Natal, Natal das crianças Natal da noite de luz Natal da estrela guia Natal do menino Jesus	Christmas, Children's Christmas! Christmas of a night of light, Christmas of the guiding light, Christmas of Jesus Child.
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*Noite de Natal* (Christmas Night), performed by Alvarenga and Ranchinho (Murilo Alvarenga and Newton Mendonça composers 1941):

É noite de Natal A lua no céu anuncia Reina paz na terra Nessa noite de alegria É noite de Natal.	It is Christmas night. The moon in the sky announces There is Peace on Earth In this night of joy It is Christmas night.
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*Prece de Natal* (Christmas Prayer), performed by Leny Eversong, with Aloísio, Seu Conjunto e Coro (*Aloísio, His Band and Chorus*), (José Saccomani, Lino Tedesco, Walter Melo composers 1956):

Lindas estrelas nascem no céu Anunciando que o Natal chegou Cubra-se o mal com um véu Façamos preces ao nosso senhor.	Beautiful stars are born in the sky announcing that Christmas has come. May evil be covered with a veil Let's say our prayer to our Lord
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*A Valsa de Natal* (Christmas Waltz), performed by Orlando Silva (Hilton Gomes and Sivan composers 1953):

<p>Preces falando de amor neste dia de paz          Sinos vibrando e rezando na mesma oração          Benção de nosso Senhor espalhando clarões          E todos cantam a mesma canção          Natal ao meu Senhor</p>	<p>Prayers speaking of love on this day of peace          Bells tolling and praying the same prayer          Our Lord's blessings gleaming over          and all sing the same song,          Christmas of my Lord.</p>
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And *Presente de Natal* (Christmas Present), performed by Zelinha do Amaral (Alvarenga and Ranchinho composers 1936):

<p>Reina paz na Terra          A lua no céu anuncia          Que vai chegar o Papai Noel          Trazendo pra nós alegria          Que belo bailinho no céu          As estrelinhas luzentas          Parece que estão dizendo          Eu também quero um presente.</p>	<p>There is peace on Earth          the moon up there announces          That Santa is coming          bringing us joy.          What a nice dance in the sky!          The little stars twinkle,          They seem to be saying:          "I want a present too".</p>
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A present that Brazil itself gets, too: in *Sonhos de Natal* (Christmas Dreams), performed by painter-singer Gastão Formenti (Henrique Vogeler, J. Menra and Lamartine Babo composers 1929), a play upon words between the Christian festivity and the capital of the state of Rio Grande do Norte:

<p>Nesta noite o bom velhinho          Ao Brasil dera afinal          Lá do fundo do saquinho          A cidade de Natal.</p>	<p>Tonight good old Santa          To Brazil has given at last          From the bottom of his bag          The city of <i>Natal</i> (<i>Natal</i> also means Christmas in Portuguese – NDT).</p>
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Still in this descriptive category, with the 1950s come the classical Portuguese versions of foreign Christmas *standards* such as *Jingle Bells*, performed by João Dias (James Pierpoint composer, in the famous version by Evaldo Rui 1951):

Hoje a noite é bela Juntos eu e ela Vamos à capela Felizes a cantar Ao soar o sino Sino pequenino Vai o Deus menino Nos abençoar.	Today the night is beautiful, Together she and I Go to the chapel Happily singing. When the bell tolls, Little tiny bell, The Lord Child shall Bless us all.
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And a version also recorded as *Sinos de Belém* (Bells of Bethlehem) performed by Sônia Delfino and Club do Guri. Or the versions of *O Silent Night* (Franz Gruber) translated as *Noite de Natal* (*Noite Feliz*), performed by Dalva de Oliveira (version by Mário Rossi, undefined, c.1950):

Noite feliz, noite lustral É Natal, é Natal Em Belém uma estrela irradia A mensagem que a todos con- duz Filho da Virgem Maria Nasce o Menino Jesus	Happy night, blessed night! It's Christmas, it's Christmas! In Bethlehem a star radiates the message that leads us all! Son of Virgin Mary, Jesus Child is born.
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Or another version, *Noite de Luz*, performed by Zilá Fonseca (Osvaldo Moles composer, undefined, c. 1950):

Noite de luz Noite de paz Nasce Jesus Pra nos salvar E as estrelas sentiram o amor.	Night of light, Night of peace, Jesus is born to save us all, And the stars felt love.
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And also *Noite Feliz*, performed by Duo Moreno (by Arlindo Pinto and Mário Zan, undefined, c.1950):

Noite feliz O céu também diz Dobra o sino Num som divino...	Happy night! The heavens also say The bell tolls In a divine sound.
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Still around that period, the traumas of World War II and the imminent Cold War can also be found in Christmas lyrics, such as in *Paz no sapato do mundo* (Peace in the Shoe of the World), performed and composed by Castro Barbosa (1949):

Meu bom Papai Noel Que coração tão profundo Pede a Deus a paz do céu Para o sapato do mundo	My good Santa Claus What a deep heart! Ask God for heavenly peace To fill the shoe of the world
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Or also in *Canção de Natal do Brasil* (Brazil's Christmas Song) performed by Francisco Alves (by himself, David Nasser and Felisberto Martins 1951):

Varrei o ódio da guerra Protegei o bem contra o mal Abençoai nossa terra, Senhor Nesta noite de Natal.	Wipe the hatred of war away, Protect the good from the evil, Bless our land, Lord, On this Christmas night.
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A recent counterpoint, in the 2006 album mentioned earlier, in *Momentos de Paz* (Moments of Peace), Luiz Grande (by himself, Barbeirinho and Marcos Diniz) describes a different type of Christmas party:

<p>Boas-festas comadre      vou me mandar      Hoje é noite de Natal      Eu só vou tomar uma      De maneira alguma      Não posso ficar      Minha nega já está      Com a caxanga arrumada      Não falta mais nada      Vou chegar pra lá      Encontrar os parentes      Amigos da gente      Pra comemorar.</p>	<p>Happy Holidays, <i>comadre</i>!      I'm getting out of here      Today is Christmas night      I'll just take a nightcap      No way      I can't stay      My woman      has packed already.      there's nothing missing,      I'll get going      To meet my folks,      Friends of ours,      To celebrate.</p>
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Yes, the amorous interlude will also take a ride in the Christmas lyrics, such as it does in the following examples.

### III – Relationship

The beloved person as received, desired, or lost Christmas present also punctuates part of the Christmas songbook, such as the funny *marchinha Dia de Natal* (Christmas Day), performed by Carmen Miranda (Hervê Cordovil composer 1935), in which the best present, besides the beloved person, was to get Carnival to arrive soon to party:

<p>Hoje é dia de Papai Noel      Hoje é dia de Natal      Vou pedir ao meu Papai Noel      pra fazer      Chegar depressa o Carnaval      Eu este ano vou pedir a ele      E quero ver se ele consente      Vou pedir pra nunca mais eu      perder      Você que foi o meu melhor      presente.</p>	<p>Today is Santa's day!      Today is Christmas day!      I'm going to ask my Santa to      make      Carnival come soon.      This year I'm going to ask him,      I wonder if he will consent,      I'm going to ask him not to      let me lose      My best present that's You.</p>
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In a similar way, the same Carmen Miranda sings *Recadinho de Papai Noel* (Santa's Little Message), (Assis Valente composer 1934), in which love sounds like a toy, and the perfect Christmas present would be a honeymoon:

Papai Noel se quiser vai me fazer um favor Eu quero a lua p'rá mim, para mim e meu amor Aquela lua-de-mel, em noite nupcial Prá ver se assim sou feliz, na linda noite de Natal.	Santa, if you please you'll do me a favor, I want the moon for me, for me and my love, That honeymoon, on a wedding night To see if that way I am happy, on the beautiful Christmas night.
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The same can be observed in *Noite de Natal* (Christmas Night), performed by Orlando Silva (Maugeri Neto and Maugeri Sobrinho composers 1952):

Noite Feliz Noite de Natal Noite tão feliz Fico a recordar meu lindo sonho de amor Juntos na capela rezando pertinho dela Eu pedi a graça do Senhor Num prolongado beijo As nossas vidas se encontraram.	Happy night! Christmas night! Such a happy night! I keep remembering my beautiful Together in the chapel praying by her side, I asked for the Lord's grace In a prolonged kiss Our lives met.
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Or even in the recent *Presente de Natal* (Christmas Gift), performed by Fundo de Quintal (Roque Ferreira composer 2006):

<p>Eu gosto de namorar      No pé da ladeira      Debaixo do pé de araçá      Ao pé da fogueira      Amor ardente é o desejo      Quando vem pra pegar      Toca na boca da gente      Um gosto bom de amar      É bom provar do seu mel      Seu beijo fatal      Abre a roda que sou eu      Sou eu o seu presente de      Natal.</p>	<p>I like dating      At the foot of the hill      Under the <i>araçá</i> tree,      By the bonfire,      Passionate love is the desire,      When it comes to us,      It leaves in our mouths      A good taste of love.      How good it feels to taste your      honey,      Your deadly kiss,      Open the circle for I am,      I am your Christmas gift.</p>
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But, we can also try to ask Santa to bring us the beloved one, as in *Se Papai Noel quisesse* (Only if Santa wanted), performed by Sílvio Caldas (Cristóvão Alencar and Hervé Cordovil composers 1936):

<p>Se Papai Noel quisesse      Eu seria tão feliz      Pois eu lhe pedia que me      desse      A mulher que não me quis.</p>	<p>If Santa wanted,      I would be so happy      For I asked him to give me      The woman that didn't want      me.</p>
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Or in *Eu sou pobre, pobre* (I'm poor, poor), performed by Aurora Miranda (André Filho and Orestes Barbosa composers 1934):

<p>Papai Noel, tenha pena de mim      Meu sapatinho furou      Não posso mais viver assim      Não tenho amor      Não tenho nada      Sou pobrezinho      Papai Noel, seja meu cama-      rada      Eu sou pobre, pobre pobre de      marédeci      Vou te dar meu endereço      pra com mais facilidade você      me encontrar      Moro na rua da Saudade,      longe da felicidade      Será fácil me achar.</p>	<p>Santa, have mercy on me!      My shoe has a hole in it,      I can no longer live like this,      I have no love,      I have nothing,      I am a poor thing.      Santa, be my pal!      I'm poor, poor, as poor as the      tide!      I'm going to give you my      address      so you can easily find me:      I live on Nostalgia Street,      far away from Happiness.      You can't miss it.</p>
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In this respect, a malicious counterpoint can be heard in *Listinha de Natal* (*Christmas List*), (Indía and Jorge Henrique composers 1956), in which the star Virgínia Lane brings on lyrics full of bad intentions towards the good old man:

<p>Papai Noel, eu quero um casaquinho de arminho      Sempre fui pra você, meu velhinho      O que de mais honesto se vê.      Papai Noel      Eu quero um Cadillac azulzinho      Diamantes também      E prometo que em troca lhe darei um beijinho      Quanto tempo eu perdi      Quantos brotos eu deixei de namorar      Ano que vem serei igual      Se atender minha listinha de Natal      Papai Noel      Eu quero apartamento e joias também      Talõezinhos de cheque      Prometo ser sua só e de mais ninguém.</p>	<p>Santa, I want an ermine coat;      I've always been to you, my dear old man,      The most honest person ever.      Santa,      I want a blue Cadillac,      Diamonds, too.      I promise I'll give you a kiss in exchange.      The time I've wasted,      The young men I didn't date,      Next year I'll do the same      If you fulfill my Christmas list,      Santa,      I want an apartment and jewels, too;      Check books,      I promise to be only yours and nobody else's.</p>
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## IV – Dispirit

But not all is joy at Christmas, as Almir Guineto describes in *Meu Natal* (My Christmas) (Guinet, Gilson Souza, Mi Barros composers 2006):

Pra uns o Natal é feliz Pra outros é sabor de fel Vivi o Natal que não quis Tão cruel... Não ouse dizer pras crianças Que Papai Noel não existe Pra ter esperança Não ser triste É Natal É Jesus Divinal que conduz.	For some Christmas is happy, For others it tastes bitter, I had a Christmas I didn't want So cruel... Don't you dare tell the children That Santa does not exist To have hope and not to be sad. It's Christmas! It's Divine Jesus That leads us.
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In other words, not everyone can have everything they want, as also expressed in *Quando chega o Natal* (When Christmas comes), performed by Neide Fraga (Sereno composer 1950):

Meu sapatinho é tão velho Que eu tenho vergonha de pôr no fogão Quando o Natal vem chegando Eu fico pensando no Papai Noel Quantos brinquedos bonitos Soldados de chumbo, trenzin- hos de apito Mas nada disso eu queria Se Papai Noel me pudesse atender Era trazer alegria e levar a tristeza Do meu padecer.	My shoe is so old That I'm ashamed to put it by the fireplace. When Christmas is coming I keep thinking of Santa. So many beautiful toys! Lead soldiers, whistling trains, But I didn't want any of them. If Santa could only hear my prayers Bring me joy and take away the sadness Of my suffering.
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Or even more critically out of Ângela Maria's lips, in *Outros Natais* (Some other Christmases), (Cláudio Luiz composer 1956):

<p>Vocês que moram em palácios      E dormem em colchão de mola      Que perdem na mesa de jogo      Bem mais do que dão de esmola      No dia em que os sinos cantarem          Trazendo um Natal a mais          Procurem lembrar-se que existem outros natais              Natal das crianças doentes              Das nossas favelas              Anjinhos da fome que a idade se conta                  nos dedos                  Que pedem a Papai Noel                  Que passe também perto delas                  Trazendo ao menos remédios                  Em vez de brinquedos                  Natal das crianças que dormem                      na dura calçada                      Debaixo do teto opulento de nossas marquises                      Natal sem castanha, sem bolo, sem cobre                      Sem nada                      Natal das crianças que morrem                          pra serem felizes.</p>	<p>You, people, who live in palaces,      And sleep on spring mattresses,      Who lose money gambling      Far more than the alms you give,      On the day when the bells toll,      Bringing another Christmas,      Try to remember that there are other Christmases.      The Christmas of sick children,      Of our slums,      Hungry little angels whose age you can count      on your fingers,      Who ask Santa      To pass by their homes too      Bringing at least medicines instead of toys;      The Christmas of children that sleep      on hard streets,      Under the opulent ceiling of our marquees.      Christmas with no chestnuts,      no cake, no coins,      Not a thing!      The Christmas of children that die      to be happy.</p>
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Happiness disguised by consumerism – combined to a frustrated marriage – is also expressed in the critical *Sapato na janela* (The Shoe in the Window), performed by Emílio Santiago (Claúdio Jorge composer 2006):

<p>Acho que esse amor não tem mais jeito          O vazio em nosso peito          Tá difícil de aturar          Cenas desse nosso casamento          Desencontro, sofrimento          Veja só, os nossos filhos vão chorar          É melhor partir pra decisão          Libertar essa paixão          E tentar em outro porto ser feliz          Já está chegando o fim do ano          Novos ares, novos planos          De plantar nova raiz          Procurar a paz pela cidade          Enfrentar a realidade          É o que o coração nos diz          Mas na rua vejo a propaganda          É papai Noel chegando          Com presentes p'reu comprar          Na TV nos jogam nessa trilha          Um Natal sempre em família          Fora disso não é fácil suportar.</p>	<p>I think this love is hopeless,          The emptiness in our chests          Is hard to bear;          Scenes from our marriage,          Disagreement, suffering...          Look, our children are about          to cry!          We'd better take a decision,          Set this passion free,          And try to be happy some-          where else,          Since the end of the year is          coming          Fresh air, new plans          Of planting new roots,          Searching for peace around          the city,          Facing reality.          This is what the heart tells us,          But in the streets I see          announcements,          Santa is coming          With presents for me to buy          On TV we are thrown on this          trail          Christmas in family as always          Otherwise, it is not easy to          bear.</p>
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A synthetic song in this respect might be one of the biggest hits of the Brazilian Christmas songbook: *Boas festas* (Happy Holidays), (Assis Valente composer 1933), made famous by Carlos Galhardo. Suicidal and solitary, composer Assis Valente summarizes in scathing lyrics the death of Santa and of happiness itself, typical of the period, camouflaged by a *marchinha* that, in counterpoint, gives it a happy and rhythmic melody:

<p>Anoiteceu, o sino gemeu      e a gente ficou feliz a rezar      Papai Noel, vê se você tem      A felicidade pra você me dar      Eu pensei que todo mundo      Fosse filho de Papai Noel      E assim felicidade      Eu pensei que fosse uma      Brincadeira de papel      Já faz tempo que eu pedi      Mas o meu Papai Noel não      vem      Com certeza já morreu      Ou então felicidade      É brinquedo que não tem.</p>	<p>The night has come, the bell has      wailed      and we were happy praying.      Santa, see if you have got      Some happiness to give me.      I thought everybody      was Santa's children,      And so happiness      I thought it was      a paper toy      It's been a long time since I      asked,      But my Santa won't come.      Certainly, he is already dead,      Or else happiness      Is a toy he hasn't got.</p>
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## Conclusions

This analysis does not include the phonographic recording which might have been the first of the period: *Natal das crianças pobres* (Poor children's Christmas): a *dobrado* recorded in 1913 by the 10th Infantry Regiment Band, composed by Eduardo F. Martins, also available in the IMS collection. Though it is not a song, this piece which is probably the first one dedicated to the period, contains the childhood theme associated with Christmas, which seems to strengthen the nostalgia aspect mentioned, the time of no return, a past forever gone. Such aspects, as we saw, were reinforced by the discourse of the lyrics, and reiterated by the musical tone of various songs – normally, and not by chance, associated with rhythms such as *acalanto* (lullaby), *samba-rancho* (a samba variation – NDT), or waltz. In another set of songs, we discovered a more descriptive character, depicting aspects of the celebration, and finally, other songs that use Christmas to speak of discouragements or other type of affections, such as love. To a lesser extent, some

even joke about the season and instead of waltzes, *acalantos* or *samba-ranchos*, what we have is a slightly greater occurrence of *marchinhas*.

If the rarefaction of the Christmas songbook can be interpreted as a sign of crisis faced by the Brazilian (and worldwide) phonographic industry due to the new technology and information reconfigurations, on the other hand, they can also be interpreted as a curious gap in the social testimony of the last few decades. A similar phenomenon, by the way, can be speculated upon regarding the period dedicated to the *festas juninas*. (June parties celebrating St. Anthony, St. John, and St. Peter – NDT), which perhaps deserves a similar approach, for in both cases there was a production process for the repertoire specific to these times – and also nostalgia: “the oldies”, songs which, back in the day, already dealt with reminiscing. Listening to them today, as we intended to present here with the Christmas songbook, is precisely an example of the song as “memory capsules” (Valente 2003), as well as social narrative testimonies of their time.

In its preamble, the CDEC recognizes “the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment”. The analysis presented here is only one of many that can happen today thanks to the combination of researchers’ historical efforts, the use of new technologies and, in the present case, the institutional mission of the *Instituto Moreira Sales* (IMS) to provide wide and free access to listening to this vast Brazilian cultural production, thereby contributing to the exercise of cultural diversity of ethnocentric as well as ethnochronic rupture provided by research, access and listening to these songs of the past – and, now, of forever.

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# The Audio-visual Technology Hub Programme and TV Diversity in Argentina

LUIS A. ALBORNOZ & AZAHARA CAÑEDO<sup>1</sup>

## I – Introduction

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) argues that cultural diversity is one of the main engines of sustainable development. Based on the assumption that all cultural expressions deserve the same dignity and respect, this international agreement urges countries to create a favourable environment for individuals and social groups in their respective territories to be able to create, produce,

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disseminate and distribute cultural expressions of their own, as well as have access to a range of cultural expressions originating from their own territories and the rest of the countries in the world.

One decade after the approval of the Convention there are numerous initiatives in place to support its goals in the field of culture and communication (UNESCO 2012 and 2013; Albornoz & García Leiva 2017; Gallego 2017). A case in point is the Audio-visual Technology Hub Programme (*Programa Polos Audiovisuales Tecnológicos*, PPAT) implemented in Argentina<sup>2</sup> between 2011 and 2015, with the aim to revert the historically high geographic concentration of TV content production in the city of Buenos Aires. One of the consequences of such concentration is that the diversity of cultural practices originating in different regions of the country are seldom seen on the screen. Thus, sixty percent of the hours of free-to-air TV programming in the provinces during 2011 were live or deferred retransmissions of contents generated by metropolitan stations (AFSCA 2012).

In response to this situation, and in a context of changing audio-visual public policies and terrestrial digital television deployment (Albornoz & García Leiva 2012; Krakowiak et al. 2012; Mastrini et al. 2012; Becerra et al. 2012), the former administration of Cristina Fernández de Kirchner, who served two terms (2007-2011 and 2011-2015), supported the PPAT in order to activate TV production in the various provinces and regions of Argentina. To accomplish that goal, the national territory was divided into nine audio-visual technology hubs, where national public universities acted as centres that gathered a range of regional stakeholders.

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<sup>2</sup> Argentina, with an area of 2,780,400 km<sup>2</sup>, is the world's eighth largest country. Its territory is organised in 23 provinces, with a total of 40,117,096 inhabitants.

The purpose of the present case-study is to analyse this effort to decentralize TV production, embodied in the PPAT. The research techniques that support this study include documentary review, search and analysis of indicators, and in-depth interviews with key players: PPAT managers, audio-visual producers and researchers. This chapter provides an overview of the context of PPAT implementation and the program's goals, organizational structure, focus areas and funding. It then goes on to describe the phases of the Content Production focus area between 2011 and 2015, and discusses the diversity of sources and TV genres / subgenres, considering the 18 TV seasons that were aired between 2013 and 2014. The following sections address the dissemination of the Programme and the limited commercialization of the 18 projects produced. The case-study closes with a brief set of conclusions about this initiative.

## **II – The Audio-visual Technology Hub Programme**

The Audio-visual Technology Hub Programme, hereinafter referred for its Spanish acronym as PPAT, has as its direct precedent the enactment of the Audio-visual Communication Services Act No. 26,552 (*Ley de Servicios de Comunicación Audiovisual*, LSCA) in 2009. This law distributes the radio-electric spectrum allocated to broadcasting services in equal portions among State operators, private for-profit operators and private not-for-profit operators; introduces major limits to concentration of ownership of broadcasting media; and creates a regulatory entity that is less dependent on the Government. Additionally, it establishes content quotas for national and local production, in order to develop and bring to light diverse audio-visual contents.

In 2011, the PPAT was introduced as one of the proposals developed by the Government to meet the objectives of the new law, with the goal to "encourage federalization of audio-visual content production by implementing a network of Audio-visual Technology Hubs, in which national universities could, through articulation and administration activities, collaborate with other governmental and civil-society sectors in the field of audio-visual production" (Consejo Asesor SATVD-T 2010: 4). Additionally, this initiative was also intended to create contents reflecting the cultural diversity in the country, develop a federal and sustainable audio-visual sector, and encourage research and development for digital TV. In this manner, the PPAT was conceived as a tool to reach the national and local production quotas for free-to-air TV signals established by the Audio-visual Communication Services Act: a minimum of sixty percent of national production contents, and between thirty and ten percent of local independent production depending on the demographics of the regions where the TV stations are located.

Eva Piwowarski, PPAT coordinator, described the horizon for the project: "Federal public policies are required (...) to open opportunities for genuine expressions from all over the country and to empower civil society for the legitimate appropriation of their own discourse, to promote local skills and drive the development of a new domestic TV market leading to the effective deconcentration of the business, thus guaranteeing the formulation of a new communication model for Argentina" (Piwowarski 2011).

The structure of the PPAT comprised the creation of nine regional Hubs in different parts of the country – called Digital Audio-visual Technology Research and Improvement Hubs or Audio-visual Technology Hubs – and four focus areas: Research and Development, Training, Equipment, and Content Production. The Advisory Council for the Argentine System of Terrestrial Digital Television

(SATVD-T),<sup>3</sup> an instrumentality of the Federal Ministry for Planning, Public Investment and Services (MINPLAN),<sup>4</sup> was assigned the coordination and management of the various Hubs through two areas: Implementation and Follow-up, and Project Assessment and Viability. Furthermore, the SATVD-T Advisory Council hosts the Administrative HQ of the PPAT, in charge of coordinating activities and projects in each region. Its roles included articulation of efforts with national universities, project selection and follow-up.

The regional production systems were made up of one or two Main Sites, depending on the area covered, and led by public universities. The universities, in turn, through the National Inter-University Council (*Consejo Interuniversitario Nacional*, CIN), were commissioned to manage and run the project in each region. Additionally, each Main Site included several Audio-visual Technology Nodes involving different local stakeholders – institutions, private companies, social collectives, individuals, non-profit civil society organizations and labour unions – in order to produce TV contents. Each Main Site promoted networking among the Nodes under its responsibility, short-listed the projects that they submitted, and provided technical, research and training support to the Nodes.

The geographic configuration of the Nodes was conceived in such a way that any large urban conglomerate in the country had a Node in its geographic proximity. The role of Nodes was to provide free technical support for the local audio-visual sector, conduct research and training activities, and articulate and coordinate PPAT policies.

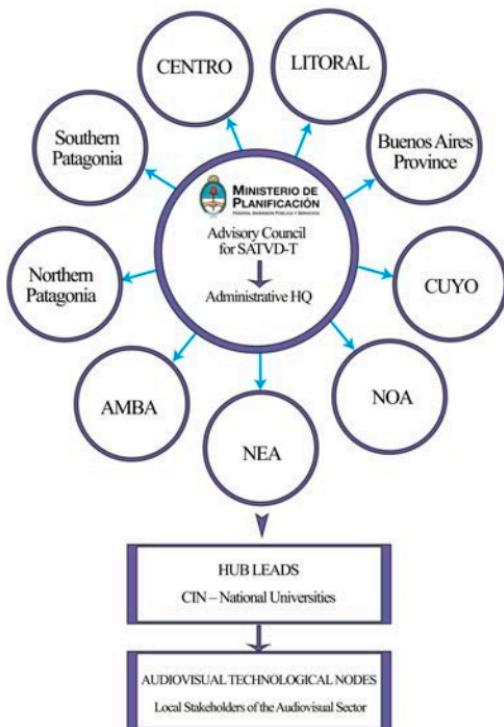
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<sup>3</sup> The Advisory Council, with representatives from different Ministries, works on the implementation of SATVD-T. Its objectives include the promotion of social inclusion, cultural diversity and the national language through access to technology.

<sup>4</sup> One of the fifteen ministries existing in Argentina when PPAT was introduced. In December 2015, the new Mauricio Macri Administration adopted Decree 13/2015 changing the ministry structure and proposing the merger of MINPLAN into the newly created Ministry for Energy and Mining.

The Nodes were also in charge of preparing a map of local actors, encourage innovation in new format and content production, and promote the organization of audio-visual projects capable of becoming independent economic units.

Figure 1. PPAT organizational structure



Source: Own research.

On 2 March 2011, the first Node was established at National University of Mar del Plata, belonging to the Buenos Aires Province Hub. Less than five years later (December 2015) there were 45 nodes in operation throughout the Argentine territory. Table 1 shows the geographical division of the country in Hubs with their main sites, territories, populations and nodes.

**Table 1. Audio-visual Technology Hubs: territorial structure and organization**

Hub	Territory	Population	Main Site(s)	Nodes
Centro (Centre)	Provinces: Córdoba, San Luis and La Pampa	4.060.037	National University of Villa María	-Córdoba -San Luis -Villa María -Río Cuarto -La Pampa
Litoral	Provinces: Entre Ríos and Santa Fe	4.430.531	National University of Entre Ríos	-Litoral - Rosario -Costa del Uruguay -Paraná -Concepción del Uruguay

Cuyo	Provinces: San Juan, Mendoza and La Rioja	2.753.626	National Uni-versity of Cuyo	-San Juan - Mendoza Sur - Mendoza Centro -Oeste Riojano
AMBA – Área Metro-politana de Buenos Aires (Met- ropolitana area of Buenos Aires)	City of Buenos Aires and Greater Buenos Aires*	12.806.866	National Uni-versity of Tres de Febrero / National Uni-versity of Arts	-Rodolfo Walsh -La Matanza - Conurbano Sudeste - Moreno -Lanús -La Pla- ta - General Sarmiento - Avellaneda -North San Martín
NEA – Noreste Argentino (Northeast Argentina)	Provinces: Misiones, Formosa, Chaco and Corrientes	3.679.609	National Uni-versity of Misiones	-Misiones -Chaco - Formosa - Corrientes
NOA Noroeste Argentino (Northwest Argentina)	Provinces: Jujuy, Salta, Tucumán, Santiago del Esterro and Catamarca	4.577.770	National Uni-versity of Jujuy / National Uni-versity of Tucumán	-Tucumán -Jujuy - Catamarca - Santiago del Esterro

Patagonia Norte (Northern Patagonia)	Provinces: Neuquén and Río Negro	1.187.911	Université nationale de Comahue / Université nationale de Río Negro	-Atlántico -Ríos & Bardas -Andino -Norpatagónico
Patagonia Sur (Southern Patagonia)	Provinces: Chubut, Santa Cruz and Land of Fire, Antarctica and South Atlantic Islands	910.277	National University of Patagonie Austral / National University of Patagonie San Juan Bosco	-Tewsen -Valle -Cordillera -Aonikenk -Tierra del Fuego
Buenos Aires Province	Cities in the province of Buenos Aires not included in the Greater Buenos Aires *	2.818.218	National University of centre Buenos Aires	-Luján -Bahía Blanca -Trenque Lauquen -Tandil -Mar del Plata

**Notes:** \* Greater Buenos Aires comprises 24 municipalities in the outskirts of Buenos Aires city.

**Source:** Own research based on PPAT internal documents and website, and National Statistics and Census Institute of Argentina 2010.

As with any initiative, the budget allocation was a vital aspect for PPAT. In 2011, the Government granted an initial allocation of \$ 4.9 million: one half was allocated to the purchase of equipment and the other half was invested in Research and Development, Training and Content Production. The next year, the same budget allocation was maintained. However, in 2013, a few months after its introduction, the PPAT underwent a total cut of budgetary resources for reasons that remained unclear, without any official

explanation.<sup>5</sup> This unexpected shortage of resources seriously affected the initiative, which was in its early stages, hindering the implementation of TV productions. Subsequently, in 2014 and 2015, the initiative recovered part of its budget allotment, receiving a little over \$1 million each year. This considerable reduction in resources already cast doubts on the viability of an initiative, which, with the advent of the neoliberal administration of Mauricio Macri on 10 December 2015, has a low likelihood of continuity.<sup>6</sup>

As mentioned, the PPAT included four focus areas. The first one, Research and Development, was intended to prepare a theoretical and fact-based framework to strengthen the development of digital TV in Argentina, encouraging dialog among public universities and leading to a tailored approach in each of them based on their respective territorial realities. Each Main Site disclosed the human and technical resources available and proposed research lines

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<sup>5</sup> According to Piwowarski, this budget cut was due to “political and not-so-political priorities (...) The Ministry [MINPLAN] did not contribute funding directly but through an agreement with universities that went through the CIN. And the CIN started to manage too many things. (...) As the financial level rose, the system deteriorated. The CIN had to negotiate many things, not only the Hubs [Programme]. I'll give you money for the Cultural Equality [National Plan] but not for the Hubs [Programme] because now there is a shortage. What did the CIN do? It had never managed so much money. There was a deterioration not of the people but of the weak institutionality that created very poor political practices. The University should have defended a programme that was vital.” (Piwowarski 2015). As a result of the budget cut, the Headquarters did not always deliver on the execution deadlines set, or the economic amounts committed, which hindered the development of some audio-visual products, causing a slowdown in their production schedules.

<sup>6</sup> In its first months in office, the Macri Administration has given clear signals of wanting to repeal the core tenets of the Audio-visual Communication Services Act. This has triggered a reaction from various social and academic groups. In this regard, please see the statement “*Ante la Política de Comunicación delineada por los DNUS 13/15 y 267/15 de M. Macri*” (“About the Communication Policy outlined by Decrees 13/15 and 267/15 by M. Macri”) (Becerra et al. 2016).

to follow. Subsequently, the Headquarters and the Advisory Council selected some research projects and proposed others to be implemented across several public universities.<sup>7</sup>

The second focus area had to do with the training of Node members. Based on a database of professionals prepared by the Headquarters – extendable with the addition of local trainers, at the suggestion of the Nodes – and relying on the cooperation of labour unions and renowned professionals, training workshops were delivered, with topics selected based on the needs of each Node. Between October and December 2011, 87 classroom courses were held at the nine Hubs. Based on the results, the 2012 Training Plan developed 150 self-managed courses; 75 clinics focusing on new projects from ongoing lines of production for Node members, and 55 tutorships for direction, production, screenplay and acting during the production of projects, through the assignment of a specific tutor to each. During the 2013-2014 period, only 91 training activities were held. Such a considerable decrease in activity was triggered by two factors: on the one hand, the reduction of the PPAT budget, and on the other, the progressive professionalization facilitated by the training activities conducted in the previous years. It is worth noting that training was one of the key points of the PPAT proposition, because lack of training was detected as one of the main barriers to TV programme production in several regions.

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<sup>7</sup> The following studies were conducted: “Relevamiento de recursos de la producción audiovisual argentina 2012. Encuesta nacional y diagnóstico por regiones” (Arias 2013), “Regulación del derecho de propiedad intelectual para producciones audiovisuales en Argentina” (Loreti et al. 2013), “Sustentabilidad y nuevos mercados” (Borello 2013), “Consumos y audiencias televisivas. Informe comparativo de estudios locales. Nodos Córdoba, Ríos y Bardas, y Jujuy” (Córdoba & Morales 2013) and “Desarrollo de la TV digital argentina” (Bulla & Hernández 2013). An additional study was “Conocer para contar” (Programa de Estudios sobre Comunicación y Ciudadanía 2013), a methodological guide to conduct quantitative studies on TV audiences, from the Communication and Citizenship Study Programme of the National University of Córdoba.

In the area of Equipment, it is worth noting that when the PPAT was introduced, Public Centres for Audio-visual Production were created at each Main Site. Through concession agreements, these centres were awarded to the universities in order to democratize access to the equipment required to produce contents. As such, each Node was authorised to request from the respective Main Site the necessary equipment. These requests were evaluated by the Advisory Council and the Headquarters, and answered based on budget availability. The equipment was delivered to the Nodes on loan, on the condition that the members of local communities were allowed free access to it, ensuring it was used for non-profit purposes.

Finally, the Content Production focus area may be viewed as the most important one in the Programme, as it meant the effective implementation of article 153 of the Audio-visual Communication Services Act, which commissioned the government to implement, among other measures, policies to promote and defend the national audio-visual industry. These measures would be based on “the promotion of activities with a federal orientation, considering and stimulating local production in the provinces and regions of the country.”

### **III – Digital television production: diversity of sources and contents**

Content Production focus area was organized during the last five years through successive phases, with a total investment of \$4.5 million of public funds for making audio-visual products.

The execution of the Pilot Plan for Testing and Demonstrating Installed Capacity, started in March 2011, was the first phase of the Content Production focus area. After four months and an investment of \$ 1.3 million, 90 hours of

digital TV content were developed (10 hours per Hub). Additionally, the Testing Pilot Plan – involving more than one hundred professionals, 47 universities and the creation of 31 new programme cycles – served to conduct a diagnosis of the production capacity of each Hub before the PPAT intervention.

The second phase, called TV Factory (*Fábrica de TV*), can be claimed as the essence of the Content Production focus area and was broken down, in turn, in three cycles. The first one, in 2012, created 55 pilot programmes in Journalistic, Fiction and Entertainment formats. These programmes entailed a cost of \$ 718,062: \$ 11,013 for each Journalistic and/or Entertainment pilot, and \$ 17,621 for each Fiction pilot. Subsequently, between 2013 and 2014, based on those 55 pilots, 18 seasons were made, with 12, 10 and 8 episodes that were 26 minutes long. For their making, each Fiction production received \$ 97,489 per season, while each Journalistic and Entertainment production received \$ 62,038. This meant a total investment of \$ 1.2 million. Finally, in 2015, the third cycle of the Content Production focus area selected other 25 projects that are currently in the making stage. Each project was allocated \$ 43,317 for the making of seasons comprised of four 26-minute long episodes.

In parallel with the TV Factory, other productions were made: the “Tell me a Story” cycle for Acua Mayor,<sup>8</sup> including 30 micro spaces of five-minute duration each; 18 promotional spots for Access to Knowledge Nodes, which are part of the *Argentina Conectada* National Telecommunications Plan; and 76 micro-reports to be inserted in 26-minute units in the PPAT audio-visual magazine *Aquí Va*.<sup>9</sup>

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<sup>8</sup> Launched in 2013, Acua Mayor is a state-run TV station for senior citizens that is part of the Digital Free-to-Air TV Platform supported by MINPLAN.

<sup>9</sup> Magazine produced by PPAT members. “Approximately 300 producers, reporters, editors, cameramen and technical assistants took part in the project, from 39 audio-visual nodes from all over the country. They produced 78 (sic) reports with topics they described themselves. This is how a one-of-

**Table 2. PPAT: Investments in production, 2011-2015**

Production Phase		Completed Products	Investiment
Pilot Plan for Testing and Demonstrating Installed Capacity (2011)		31 cycles of News programs (90 hours of TV)	\$ 1,313,869
TV Factory	Pilot Phase (2012)	55 pilot programs for TV Formats: fiction, entertainment and journalistic (26 minutes each)	\$ 718,062
	New Formats (2013-2014)	18 productions for TV Formats: fiction, entertainment and journalistic (15 productions of 12 episodes of 26 minutes each, 1 production of 10 episodes of 26 minutes each, and 2 productions of 8 episodes of 26 minutes each)	\$ 1,223,043

a-kind production routine was set up, changing 60 years of Argentine history, being made from all corners of the country" (<https://www.youtube.com/watch?v=PRBTfQAdwdA>).

	New Formats (2015)	25 productions for TV Formats: fiction, entertainment and journalistic (4 episodes of 26 minutes each)	\$ 1,082,921
Cycle "Tell me a Story" for Acua Mayor		30 micro fiction productions for TV (5 minutes each)	\$ 66,079
Promotional spots for Access to Knowledge Nodes – <i>Argentina Connected</i> National Telecommunications Plan		18 TV spots (9 informational spots of 45 seconds and 9 testimonial spots of 1 minute)	\$ 36,264
<i>Ahí va</i> (PPAT audio-visual magazine)		76 micro-reports (150 seconds each) assemblies in unit emissions (26 minute)	\$ 23,515
Total			\$ 4,463,753

**Source:** Own research based on instructions and internal production reports, PPAT.

Considering the 18 TV seasons designed in the framework of the first phase of the New Formats of TV Factory cycle during the 2013-2014 period, it is possible to analyse the diversity of sources, in terms of variety and balance, in the context of the Argentine TV market. To that end, the components of variety and balance mentioned by Andrew Stirling (1988 and 2007) in his examination of the concept

of diversity have been considered, comprising the combination of three components: variety, balance and disparity. Variety relates to the number of different categories defined in a given set, balance considers the different extents to which these categories are represented, and disparity has to do with the degree of similarity among the different categories. The larger the number of categories, and the more balanced and more dissimilar they are from each other, the more diverse the system. The findings presented below are the result of a quantitative analysis based on the computation of participating Hubs and Nodes, and the calculation of the content percentage developed by each of them. As shown in table 3, all Hubs had a presence in this stage, reflecting a variety of geographic sources.

**Table 3. TV Factory-New Formats: Productions, 2013-2014**

Hub	Node	Locality	Title of the Production	Gender *	Subgender **
Centre	Villa María	Villa María	Vale la pena conocer-nos	Journalistic	Interviews
	San Luis	San Luis	Jóvenes vocaciones	Entertainment	Educational
Litoral	Litoral	Santa Fe	Habitación 13	Fiction	Multi-genre
Cuyo	Mendoza Centro	Mendoza	Inversiones	Entertainment	Cultural
			Los buscadores	Entertainment	Cultural

AMBA	La Matanza	La Matanza	Ver de otra manera	Entertainment	Environmental
	La Plata	La Plata	El mejor plan del mundo	Entertainment	Cultural
NEA	Corrientes	Corrientes	En tus zapatos	Entertainment	Social
			En el patio	Entertainment	Cultural
	Misiones	Oberá	Casi el mismo techo	Fiction	Comedy
		Misiones	Revolución estéreo	Entertainment	Musical
NOA	Jujuy	Jujuy	Waikuna Wasi	Entertainment	Gastronomy
	Santiago del Estero	Santiago del Estero	Ideas en trama	Entertainment	Environmental
Northern Patagonia	Andino	Bariloche	La inutilidad del conocimiento	Entertainment	Cultural
Southern Patagonia	Tewsen	Caleta Olivia	Mini periodistas	Entertainment	Children
	Aonikenk	Comodoro Rivadavia	Sonido Sur	Entertainment	Musical
Buenos Aires Province	Mar del Plata	Mar del Plata	Dos estrellas	Fiction	Comedy
	Tandil	Tandil	Telepípedos	Entertainment	Children

Notes: \*Classification determined by PPAT in its call for pilot programmes.

\*\*Authors' classification based on the documentation submitted by each production maker.

Source: Own research based on instructions and internal reports, PPAT.

As shown in Chart 1, the Hub with the largest share in the 18 productions made during the first phase of the TV Factory New Format cycle was the NEA Hub: with four titles, it has 22.2 percent of productions. At the opposite end are the Litoral Hub and the Northern Patagonia Hub, which, with one production per Hub, have a share of 5.6 percent respectively. The rest of the regions have two productions each.

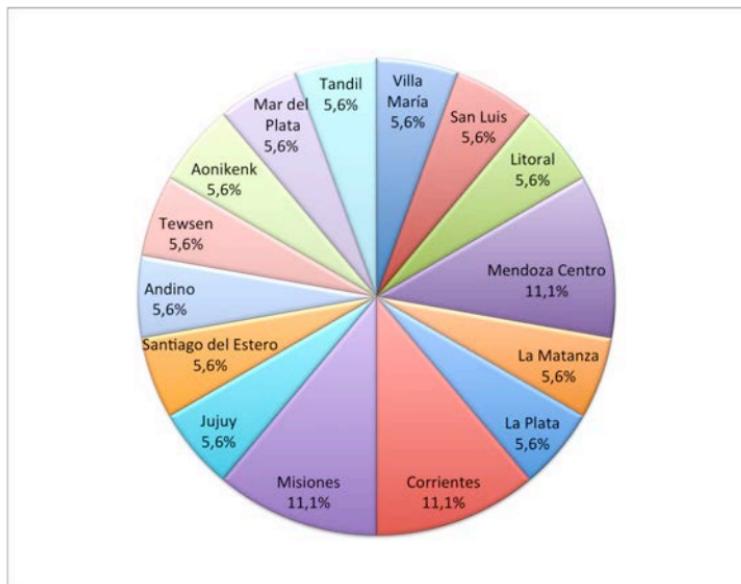
Chart 1. TV Factory - New Formats: Geographic origin of productions per Hub, 2013-2014



Source: Own research based on instructions and internal reports, PPAT.

Furthermore, an analysis of production per Node illustrated in Chart 2 shows the involvement of 15 Nodes with 18 productions in total; this reveals a major diversity in terms of variety of sources. On the other hand, it also shows a marked balance regarding the number of productions made. The exceptions were the Nodes of Mendoza Central, Misiones and Corrientes, with two productions each.

**Chart 2. TV Factory - New Formats: Geographical origin of productions per Node, 2013-2014**

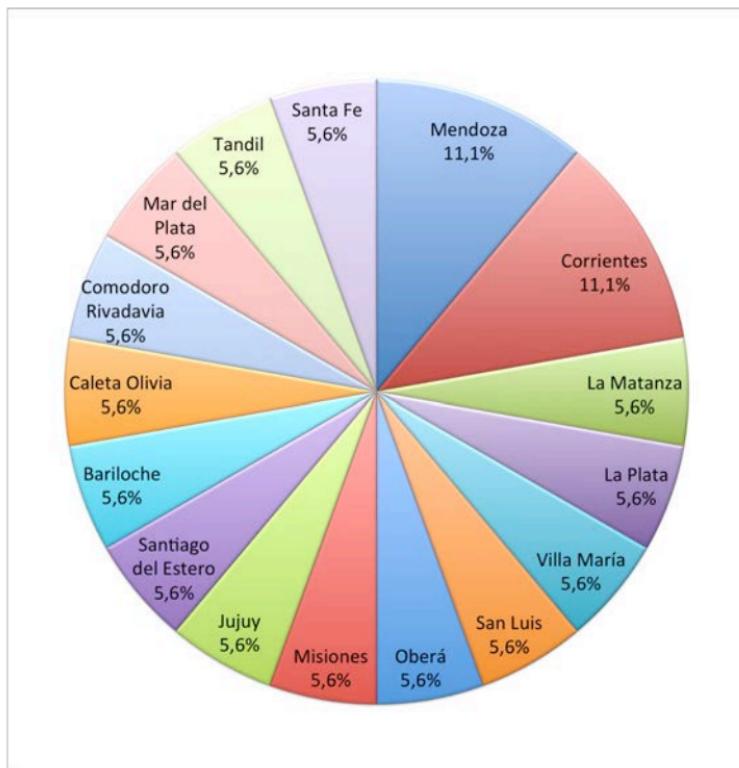


**Source:** Own research based on instructions and internal reports, PPAT.

An analysis of data based on the locations where the TV seasons were made shows that variety increases compared to the previous chart. Chart 3 reveals the presence of 16 locations in the 18 productions made, which entails a high

diversity in terms of variety as well as balance. With the exception of Mendoza and Corrientes cities, with two productions each, the rest have one production per location.

**Chart 3. TV Factory – New Formats: Geographical origin of productions per location, 2013-2014**



**Source:** Own research based on instructions and internal reports, PPAT.

Regarding the topics addressed by the first 18 seasons made in the framework of the TV Factory-New Formats cycle, it should be noted that they are all infused, in essence,

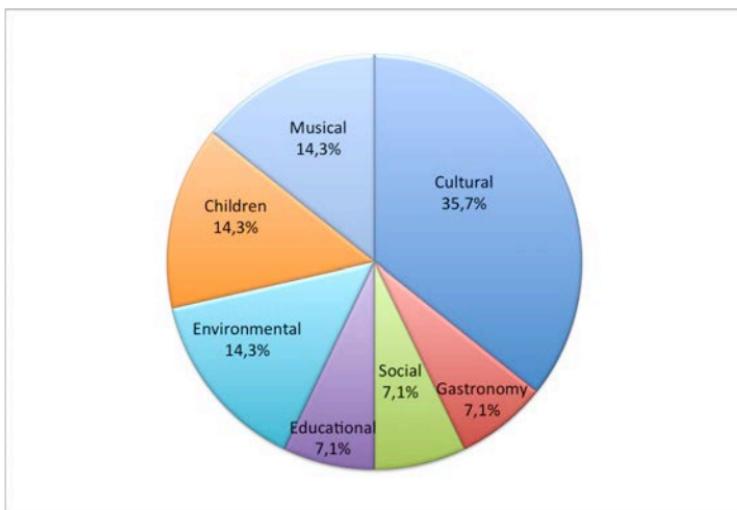
with the cultural identity of the regions where they were made, in view of the importance given to local content relevance. Now, considering the distribution of productions according to the large three TV genres used by PPAT, it is clear that there is a prevalence of Entertainment programmes: they represent 78 percent of titles produced, versus 17 percent Fiction and 5 percent Journalistic, evidencing a lack of production diversity in terms of balance.

With regard to the classification in TV subgenres, the only Journalistic programme made falls under the Interviews subgenre, and as to the three Fictions, two of them are comedies and the third one – *Habitación 13*<sup>10</sup> – can be coded as multi-genre, as each episode has a different genre. In the field of Entertainment, the subgenre breakdown shows a diverse spectrum. As seen in Chart 5, in terms of variety there is a range of seven subgenres: cultural, musical, children, educational, environmental, social and gastronomy. In terms of balance, there is prevalence of the cultural subgenre, with 35.7 percent of the total productions. The musical, children and environmental subgenres each have a share of 14.3 percent, and the educational, social and gastronomy subgenres have a share of 7.1 percent.

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<sup>10</sup> In this regard, see El Litoral (2015).

**Chart 4. TV Factory - New Formats: Productions per entertainment subgenre, 2013-2014**



**Source:** Own research based on instructions and internal reports, PPAT.

#### **IV – Production dissemination and marketing**

From its first steps, the PPAT tried to reach citizens based on a presence, though sporadically fed, on different platforms and social networks: Facebook since 2010, and Twitter and YouTube since 2011. Additionally, managers sought to disseminate this initiative through the audio-visual magazine *Aquí va*, and the creation of micro TV programmes for the Acua Mayor station.

The PPAT – designed more to focus on training and content production than on their dissemination and promotion – was a governmental initiative which, through the involvement of several universities represented by the CIN, sought to become rooted at local level. This initiative,

oriented to TV production in digital format, necessarily had to be supplemented by the emergence of new TV stations as a result of the application of the Audio-visual Communication Services Act. The stations managed by non-profit organizations would be the natural channels of dissemination of the TV production from the Nodes scattered throughout the country. However, the partial implementation of the Audio-visual Communication Services Act by the Fernández de Kirchner Administration (Becerra 2015), followed by its suspension by the Macri Administration, has been a major obstacle for productions reaching Argentine viewers.

In practice, the PPAT established a difference between the resulting TV productions and their formats. On the one hand, the intellectual and industrial property rights of productions belong to the State, and should be included in the catalogue of the Digital Audio-visual Content Database (BACUA – *Banco de Contenidos Audiovisuales Digitales*)<sup>11</sup> in order to attract potential channels/stations. On the other hand, the rights over the production formats are the property of their creators, who are entitled to market them in and outside the country. Furthermore, the Main Sites were entitled to market their productions abroad during the 24 months following their delivery to BACUA. The problem is that public universities do not have the power to sign purchase-and-sale agreements abroad —in practical terms, this prevented the commercialization of TV productions.

Regarding the productions resulting from the first phase of the cycle TV Factory-New Formats, while the Nodes were empowered to take steps for the broadcasting of their programmes, they had to comply with a require-

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<sup>11</sup> Established in 2010, BACUA is a free-access audio-visual repository fed by producers and cultural organizations at the disposal of Argentine digital free-to-air TV stations.

ment: the projects presented had to be supported by an agreement with a free-to-air screen for the broadcasting of the prospective programme.

If we consider the 18 seasons resulting from the 2013-2014 New Format cycle, it is noted that so far they have had very limited circulation. As shown in Table 4, one year after the end of this phase, only 11 productions (61 percent of the total) were actually premiered on TV, and only two did so on two different screens (though it is expected that another four productions will follow on that path). As regards the screens that will receive the premieres already released or to be released soon, about 62.5 percent of them are managed by the private sector; which means that little more than one-third of the PPAT investment will be allocated to cover the grids of public operators.

**Table 4. TV Factory - New Formats: Production screening windows, 2013-2014**

Title	Number of episodes	TV Screen				Face-book Profile
		Channel	Property	Range: Territory / Population (approx.)	Premiere	
Vale la pena conocer-nos	12	Canal 20 Compar-tir	Private	Villa María 99,820	Non-scheduled	Yes
Jóvenes voca-ciones	12	Merlo TV	Private	San Luis 250,947	10/10/ 2015	No
Habitación 13	12	Canal 13 Santa Fe	Private	Santa Fe Province 1,800,000	25/09/ 2015	Yes

Inven-ciones	12	Canal 9 Televida	Private	Gran Mendoza 937,154	23/11/ 2014	Yes
		Señal U	Public	Gran Mendoza 937,154	28/05/ 2015	
Los bus-cadores	12	Canal 9 Televida	Private	Gran Mendoza 937,154	15/08/ 2015	Yes
Ver de otra man- era	12	TV Uni-versidad La Plata	Public	La Plata 643,133	Non-scheduled	No
El mejor plan del mundo	12	TV Uni-versidad La Plata	Public	La Plata 643,133	12/06/ 2015	No
En tus zapatos	12	Telemóvil 5 de Corrientes	Private	More than 400 cities (provinces: Corri- entes, Chaco, Misiones, Entre Ríos, Santa Fe, Cata- marca, Salta, Jujuy, Chubut, Río Negro and San- ta Cruz)	02/08/ 2015	Yes

En el patio	12	Telemóvil 5 de Corrientes	Private	More than 400 cities (provinces: Corrientes, Chaco, Misiones, Entre Ríos, Santa Fe, Catamarca, Salta, Jujuy, Chubut, Río Negro and Santa Cruz)	16/10/2014 (03/09/2015: 2nd Season)	Yes
Casi el mismo techo	12	Canal 12 Posadas	Private	Province of Misiones 1,097,829	17/04/2015	No
Revolución estéreo	10	Wanda Cablevision SRL	Private	Wanda, province of Misiones 15,529	ND	Yes
Waikuna Wasi	12	Canal 4 Jujuy	Private	Province of Jujuy 672,260	Non-scheduled	No

Ideas en trama	12	Canal 7	Private	Province of Santiago del Estero, Valle de Catamarca and southern province of Tucumán 800,000	19/10/2014	Yes
La inutilidad del conocimiento	8	360 TV	Private	National	28/11/2015	Yes
		Canal 3 AVC	Private	Bariloche 112,887	17/12/2015	
Mini periodistas	12	Canal 7 Rawson	Public	Province of Chubut 509,108	Non-scheduled	No
		Canal 9 Santa Cruz	Public	Province of Santa Cruz 273,964	April 2016	
Sonido sur	12	Canal 7 Rawson	Public	Province of Chubut 509,108	Non-scheduled	No
		Canal 9 Santa Cruz	Public	Province of Santa Cruz 273,964	April 2016	
Dos estrellas	12	Canal 33 Mar del Plata	Private	Mar del Plata 618,989	ND	No
		Canal Caprica	Private	Mar del Plata 618,989	ND	

Telepípedos	8	Canal 13 Ai tv coop.	Private	Necochea 84,784	ND	No
		LU 91 TV Canal 12 Trenque Lauquen	Public	Judicial district of Trenque Lauquen 43,021	ND	

**Sources:** Own research, based on personal interviews, PPAT production reports; PPAT official Facebook page; National Statistics and Census Institute of Argentina; TV station websites; official Facebook pages of programmes.

It should be noted that half of programmes, 9 out of 18, have their own profiles on the Facebook social network. In terms of dissemination through digital platforms, only the fiction programme *Habitación 13* is available on the online video-on-demand platform in the Free-to-Air Digital Content section (*Contenidos Digitales Abiertos*, CDA). As regards the presence of productions in BACUA, even though there is proof that the producers delivered their productions to the audio-visual database, and in spite of the PPAT commitment to this platform as a showcase for such contents, the fact is that productions are not currently available.

## Conclusions

In closing this first approach to the PPAT, we share some conclusions in the hope that they will be useful to stimulate a reflection on this case and encourage the study of measures designed to protect and promote the necessary diversity of audio-visual expressions:

1. The five years of PPAT implementation in Argentina are framed in a context of political, legislative and technological changes involving the audio-visual sector, and an

administration whose discourse championed the diversity and pluralism of the communication media system. In this regard, the governmental initiative, whose aim was to drive the TV production of different geographical regions in the country, is in line with the objectives of the CDCE.

2. PPAT is an attempt to respond to a serious problem faced by the Argentine audio-visual industry: the strong concentration of audio-visual production, including TV, in Buenos Aires City. This historical concentration of production, added to the power of TV stations in the large metropolis, results in a serious distortion of the offerings on the screen, with underrepresentation of regional and local idiosyncrasies in a large and diverse country. The larger country that lies beyond the city of Buenos Aires usually appears on the small screens "in the form of news of catastrophic or violent events or as a tourist or exotic landscape, to the amazed eyes of the capital city audience" (Piwowarski 2011).

3. The PPAT as an initiative also has a strong dependence on the Government that set it in motion and faces the challenges of internal conflicts that trouble it (the budget cut of 2013 is an example). On the other hand, the close relationship between the administration in power and communication policies has remained invariable throughout Argentine history (Mastrini 2009). With the change of administrations, the chances of continuity for this initiative are very low.

4. The PPAT organizational structure shows a large degree of centralization of decision-making in the entities around MINPLAN. Contrary to what may be expected from a federal initiative intended to empower a diversity of citizens throughout the country with a TV production endowed with recognizably local traits, the first five years of operation do not reveal strong connections among the various Hubs. On the other hand, the fact that public

universities have taken the lead in an initiative designed to create and strengthen regional productive systems is a positive milestone of the project.

5. Training of workers in the TV sector and provision of the equipment to produce programmes in different locations of the country are remarkable achievements of PPAT. It is yet to be determined how the different stakeholders involved in this initiative will articulate a response that can provide continuity for PPAT objectives in the adverse political context that they face today. As an example, we may wonder about the use that will be given to audio-visual production centres hosted in the universities that acted as main sites for the Hubs.

6. The audio-visual productions resulting from PPAT show a commitment to reflect the cultural identity of the regions and locations where they were made. For their part, the 18 TV programme seasons analysed in this document speak of an actual geographical diversity of sources in terms of variety and balance. Of note, there is a clear prevalence of the Entertainment genre, though with a variety of subgenres.

7. In spite of its explicit objectives and the high investments made, unfortunately the PPAT has not succeeded in achieving the level of institutionalization that would have enabled it to put an end to the lack of visibility of regional and local TV production. This is demonstrated by the so far scarce number of productions that have been released in free-to-air screens and their unavailability at the BACUA database.

8. Managing any programme aiming to boost local TV production must start by looking at two key issues: the commercial exploitation of contents through various audio-visual windows – traditional as well as new – and their promotion at different levels – regional, national and international. This implies carefully defining those responsible for commercialising the programs produced and their

*modus operandi*, and establishing a strategy involving content dissemination through online platforms. Two aspects that were not well defined when the PPAT was developed.

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## Educational policies and the diversity of cultural expressions in the digital era

GEMMA CARBÓ RIBUGENT & GUILLERMO MACEIRAS GÓMEZ<sup>1</sup>

*Internet is the site of the total communication meeting point, a place where cultures can communicate endlessly. Internet has been a dream for mankind since quite a long time. (Barbero 2008: 12, free translation)*

### Introduction

The citation above allows us to introduce the present case study, which is focused on two innovative approaches to education in cultural diversity in the digital context. Cultural diversity, education and the digital world do not always seem to be good partners. In this case study, we examine the difficulties of this relationship and, through the analysis of two cases, we demonstrate that it is possible and necessary to establish alliances among them in order to improve cultural citizenship.

The first premise is that culture no longer exists as a singular element. The diversity of cultural and artistic expressions requires new ways to promote conviviality that agree with the universal values of democracy and respect

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for human rights and that is one of the main goals of educational systems all over the world. Some educational approaches give greater recognition to cultural diversity – multicultural education, critical education and intercultural education – and try to modify the tradition of educational policies that tend towards standardization and homogeneity.

The acceptance of cultural diversity as a core value of individual and collective development is opening up interesting fields of thought in the field of teaching and the organization of school curricula. From the conventional organization of the curriculum, based on subjects and disciplines, the tendency is now moving towards skills and abilities that may be interiorized in children and young people, and in the public in general, in order to let them creatively construct their own learning process. In European Union (EU) countries, the skills defined as transversal are those directly related to cultural diversity, in addition to communicative and digital competences (European Parliament 2006). They include, among others, artistic and cultural competence, as well as communicative competence.

Secondly, the educational and social structure needs to adapt to the new demands arising from the technological revolution of the Internet and the Network Society. Digital revolution and the Internet – described as a planet-wide, artificial neurocerebral system by Morin (2009) – have exponentially multiplied and accelerated the cultural and communicative possibilities of the present day, reviving the historical debate regarding media and communication and their relationship to culture and education, which may be seen as incestuous or, on the contrary, essential. In the field of education, the culture-communication-education triad still enflames debate between radical supporters and equally radical opponents; between those who champion the endless integrative possibilities of the culture-

communication alliance (Ferrés 2008) and those who decry it as leading to an apocalypse of homogenized culture that ought to be kept well away from education (Fumaroli 2007).

The replications and derivations of this debate – already dissected by the Frankfurt School and to which little else has been added – could go on forever but there begins to be a generalized demand that certain responsibilities and decision making be adopted in relation to this new reality (UNESCO 2011). This paper presents and analyses some good practices linking education to cultural diversity through digital resources in order to achieve such goal. As we intend to demonstrate through the analysis of two different educational proposals presented in this study, education in cultural diversity is a cultural human right linked to basic educational goals such as cultural education, media literacy and digital competence.

## I – Cultural rights and cultural diversity

The epistemological and pedagogical perspective adopted for our analysis is a Human Rights approach to education and cultural diversity. As the UNESCO Universal Declaration on Cultural Diversity states in its article 4 (entitled “Human rights as guarantees of cultural diversity”): “[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms (...)” (UNESCO 2001).

It should be recalled that Human Rights are indivisible, whether they are civil and political rights or economic, social and cultural rights. And not only indivisible, but interrelated and interdependent. Until the 1990's, as Janusz Symonides explains, “[c]ultural rights were often qualified as an ‘underdeveloped category’ of human rights. They were mentioned together with economic and social

rights, but in fact attention was limited to economic and social rights, whereas cultural rights were not debated" (Symonides 1998).

Cultural rights were difficult to defend *inter alia* because they were not defined enough in the international covenants. They required more conceptual development and that was the important task assumed by the United Nations General Assembly in adopting the 1966 International Covenant on Economic, Social and Cultural Rights (United Nations 1966), UNESCO and, notably, the Fribourg Group in 1991. But there was also another difficulty: the fears and suspicions of States that the recognition of the right to different cultural identities, the right of identification with vulnerable groups, in particular minorities and indigenous peoples, may encourage the tendency towards secession and may endanger national unity.

The third important issue was that, through the acceptance of the right of everyone to have different cultural identities, the recognition of cultural specificities and differences was viewed sometimes as a justification of cultural relativism. On this subject, the World Commission on Culture and Development in its report "Our Creative Diversity" pointed out that "the logical and ethical difficulty about relativism is that it must also endorse absolutism and dogmatism. (...) Cognitive relativism is nonsense, moral relativism is tragic." (World Commission on Culture and Development 1996).

The existence of cultural differences should not lead to the rejection of any part of universal human rights. In 1993, the Vienna Declaration, adopted by consensus by the World Conference on Human Rights, confirmed the universality of human rights and rejected the notion of cultural relativism. The Declaration, in its paragraph 1, "reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and pro-

tection of, all human rights and fundamental freedoms for all (...). It stresses that “[t]he universal nature of these rights and freedoms is beyond question.” (United Nations 1993).

After much debate, the scope of cultural rights today is based on the very understanding of the term “culture”. As the UNESCO Mexico City Declaration on Cultural Policies clarified in 1982:

(...) in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs. (UNESCO 1982: Preamble).

We are therefore talking about creative, artistic or scientific activities, but also about the sum of human activities, the totality of values, knowledge and practices. The Human Rights Council, through its resolution 10/23 of 26 March 2009, established, for a period of three years, an “independent expert in the field of cultural rights”, with the mandate, *inter alia*:

- To identify best practices in, and possible obstacles to, the promotion and protection of cultural rights at the local, national, regional and international levels;
- To foster the adoption of measures for their protection, including to submit proposals and/or recommendations to the Council on possible actions in that regard;
- To study the relation between cultural rights and cultural diversity.

The adoption of the broader definition of “culture”, the acceptance of cultural diversity as an essential part of cultural rights and the advances in the definition of the right to participate in cultural life enshrined in article 15.1 (a) of the 1966 International Covenant on Economic, Social and Cultural Rights (United Nations 1966), means finally

that cultural rights also embrace other related questions, as the right to education. As definitively stated by the United Nations Committee on Economic, Social and Cultural Rights (CESCR):

(b) *Access* covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. (CESCR 2009: 4)

## II – Education in cultural diversity as a cultural right

The right to education, as understood by International Human Rights Covenants, includes a culturally appropriate education.<sup>2</sup> In this sense, education responds “to the needs of students within their diverse social and cultural settings.”<sup>3</sup> Cultural diversity concerns were generally limited to the students’ need to receive an education respectful of and according to their own culture. The need of “understanding (...) the importance of the protection and promotion of the diversity of cultural expressions (...) through educational (...) programmes” – as stated under article 10 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) – was not initially at the core of the right to education. It was through changes in the concept of another human right – the right to take part in cultural life – that cultural diversity concerns started to be seen as an essential part of education policies (Barreiro & Carbo 2015).

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<sup>2</sup> See, for instance, point 6 (c) of the General Comment No. 13 on the right to education (article 13 of the Covenant) by the UN Committee on Economic Social and Cultural Rights (UN CESCR 1999) and Tomasevski, K. (2006).

<sup>3</sup> Point 6 (d) of the aforementioned General Comment (UN CESCR 1999).

Today, as mentioned in the above section, it is part of the mandate of the UN independent expert on cultural rights to study the relation between cultural rights and cultural diversity, and it is one of the most important questions we should address when working with children and young people. As the CDCE also states, the plurality of cultures has to be seen as a positive factor, leading to intercultural dialogue. In the contemporary world, cultures are not isolated. They interact peacefully (or not) and influence each other. The intercultural dynamics is set in motion by the contemporary processes of globalization which lead, not without tension, to the emergence, consolidation or reformulation of specific cultural and ethical values at the local level.

The CESCR in its Forty-third session, held from 2nd to 20 November 2009, issued its General Comment n° 21, which states also that, if we talk about best practices for intercultural dialogue, education is a fundamental strategy:

26. (...) States parties should take all the steps necessary to stimulate and develop children's full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians. In particular, when taking into consideration their obligations under the Covenant and other human rights instruments on the right to education, including with regard to the aims of education,<sup>4</sup> States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth.<sup>5</sup> Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies. (UN CESCR 2009).

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<sup>4</sup> In particular articles 28 and 29 of the Convention on the Rights of the Child.

<sup>5</sup> See UNESCO (1990).

Cultural diversity must be promoted and protected through education as a cultural right. “The Future we want includes culture” is a campaign led by the main agencies and civil cultural entities of the world. The Sustainable Development Goals (SDGs) approved on 27 September 2015 include a main goal regarding “quality education” (SDG 4). Under Goal 4, Target 4.7 stresses the need for education to promote a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development. We need therefore to focus on cultural rights, cultural diversity and education together and as a whole. A fourth fundamental component to be taken into account in the digital era refers to cultural industries and arts education.

### **III – Cultural diversity, cultural industries and arts education**

Education in cultural diversity from a cultural rights perspective has another important component. The diversity of cultural expressions is the foundation of creativity and innovation. It stimulates the lateral and interdisciplinary thinking that is indispensable in the new economic and social context (Alonso 2014: 28).

Target 8.3<sup>6</sup> of the SDGs suggests that creativity and innovation should be encouraged by development-oriented policies, together with productive activities, decent job creation and entrepreneurship. This precisely brings up policies regarding cultural and creative industries, linked to cultural diversity and with a clear component of digital technologies. Cultural industries – which generally include printing, publishing and multimedia, audio-visual

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<sup>6</sup> Goal 8 of the SDGs addresses “sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”.

and phonographic productions, as well as crafts and design – are fundamental for the economic and professional growth in Europe and all over the world.

Arts and cultural expressions lie at the core of all societies and communities, and they mean an opportunity for young people to get involved in the labour market. In terms of development and future labour opportunities, artistic and aesthetics education is key for young people. That is one of the reasons why educational systems all over the world are looking for new ways to teach and learn new approaches to knowledge through languages such as music, dance, cinema, theatre, etc.

The work done by UNESCO in Lisbon and Seoul with the “Seoul Arts Education Agenda” (UNESCO 2010a), the “Roadmap for arts education” (UNESCO 2006), as well as the report “The right to freedom for artistic expression and creativity” from the Special Rapporteur in the field of cultural rights (Shaheed 2013) are, in that sense, extremely important, because they give to educational policies some clear trends. Among other recommendations, the Special Rapporteur has recommended that States:

- (j) Develop and enhance arts education in schools and communities, instilling respect for, appreciation and understanding of artistic creativity, including evolving concepts of acceptability, awakening the ability to be artistically creative. Arts education should give students a historical perspective of the constant evolution of mentalities on what is acceptable and what is controversial. (Shaheed 2013: §90)

Moreover, “The Seoul Agenda: Goals for the Development of Arts Education” (UNESCO 2010a) reflects the conviction that

(...) arts education has an important role to play in the constructive transformation of educational systems that are struggling to meet the needs of learners in a rapidly changing world characterized by remarkable advances in technology

on the one hand and intractable social and cultural injustices on the other. Issues that concerned the [International Advisory Committee] included but were not limited to peace, cultural diversity and intercultural understanding as well as the need for a creative and adaptive workforce in the context of post-industrial economies. (UNESCO 2010a: Preamble)

#### **IV – Digital technologies as a strategic factor to achieve contemporary educational goals**

Cultural diversity and creative arts education from a human rights perspective have, in the digital era, the possibility to converge and improve new ways of teaching and learning. Through the analysis of two different experiences, we can state today that arts education as a resource for cultural diversity education has in the digital world its great opportunity. An illustration may be found with "*Diversidades, the creativity game*" and the project "*Window to diversity*", both funded by UNESCO's cultural sector.

##### **A – The diversity game**

*"Diversidades, el juego de la creatividad"* is a collection of teaching materials and a pedagogical proposal that focuses on play and education, designed to work with young people on the values of protecting and promoting cultural diversity that were agreed upon by the UNESCO Member States in the 2001 Universal Declaration on Cultural Diversity and upheld in the year 2005 within the CDCE.

The program seeks to help young people between the ages of 12 and 16 years old to improve, from a perspective of plurality, tolerance, and democracy, their understanding of cultural diversity as part of their everyday lives. It also seeks to improve their understanding of the relationship between creativity and cultural diversity and of the importance and usefulness of protecting and promoting

the diversity of cultural expressions. Finally, the program teaches the meaning of the CDCE in international law and its implications for local politics and economies.

It involves a proposal based on education and play in which teachers work alongside the young participants on such thematic axes as: cultural diversity, creativity in artistic expressions, cultural policies and measures, solidarity and cultural cooperation.

In "*Diversidades, el Juego de la Creatividad*," the central role played by the website [www.diversidades.net](http://www.diversidades.net) indicates that its methodology is replicable and that the knowledge generated can be transferred without major adaptations. This is certainly a great advantage. Moreover, it is not only transposable to different educational groups, but it also provides training for new trainers.

The content is worded very accessibly, in order to encourage participation by people beginning the game. Respect for and acceptance of diversity runs through all the materials, although an additional step is taken: building a perspective according to which creativity requires and is enriched by diversity. This highly complex and multidimensional concept is dealt with intelligently in a playful and effective way. Its approach is based on a logical chain that goes from the identification of diversity to the promotion of cooperation and solidarity: I – We – Another – All.

The game focuses on the right of free personal and cultural expression and promotes the diversity of opinions and the development of skills in that area. In addition, it encourages the active and equitable participation of the participants, their personal development, and the construction of the individual as an autonomous, solidary, and neutral social being.

A kit and the website provide trainers and participants with support. The kit also contains a specific proposal for training that can be used along with the implementation and development of the general educational project.

This educational proposal entails a 10-hour workshop, for teachers, educators, and/or trainers of trainers that are led by the producers of the educational material.

The game "*Diversidades*" is available online and can be downloaded free of charge from anywhere. It has been used at schools and other educational establishments in Guatemala, the Dominican Republic, Mexico, Ecuador, Uruguay, and Brazil. In Europe, it has been used in Spain, France, and Austria.

The second phase of the project, also funded by UNESCO, involves:

- Preparing a manual to train trainers in the use of "*Diversidades*" and continuing to create educational communities throughout the countries;
- Converting the game into an online resource that can be played over the Internet. This will help those countries where computers are used as educational tools in the classroom to use "*Diversidades*" as a form of learning that is integrated into their study plans.

## B – Window to diversity (We2Di)

We2Di ([www.abrituventana.org](http://www.abrituventana.org)) manifests a creative possibility for youth. The program engages young creators and entrepreneurs from diverse cultural origins into the making of a collaborative ICT-based creative network. Participants around the world learn first-hand how to develop and co-create not just a collection of trans-media art pieces, but a deeper sense of intercultural values that state the relevance of creativity and collaboration for solving nowadays challenges at global scale.

A window symbolizes the limit between public and private spheres; it represents the spot where we look outwards to our neighbourhood and, likewise, our portion of private space is exposed to the public. In contexts where different cultural communities share the same space, a window also

represents how the others sees a community, as well as the viewpoint from which their members look outwards to see the world around.

This parabola, though, does not necessarily rely only on the world of ideas: in multi-cultural societies with conflictive backgrounds, safe houses represented a place where members from a given culture expressed and enjoyed their cultural traditions and practices. The sign of our times has somewhat expanded our neighbourhood to a planetary scale: what we show from our window is virtually reachable by – almost – every other culture from the planet. Still, our perception of *the other* is just a portion of *their* everyday real life and cultural imaginaries.

In this context of the so-called Network Society, trans-cultural dynamism has grown significantly. People, and remarkably the youth, interact as an interconnected virtual living system that is constantly re-created and re-coded by group-oriented *users* with tendency to self-promotion and certain individualistic idolatry. Even though their core cultural values still exist underneath those social profiles, prejudice and biased information about each other is commonly found as you start to peel the onion across the web. With the ICT accessibility boundaries being constantly expanded, the time has come for promoting intercultural creativity among the youngsters from both the cultures with full Internet access and those that are just logging in.

In this sense, We2Di represents a tool that fosters the capacity of all cultures to collaborate, while engaging with – and learning from – others in equity, following a quite appealing medium for the youth: art and new media. We2Di pave the way for youngsters to interiorise art as a thinking process and behave creatively while designing their own careers and interacting with others. Since 2014, We2Di network has developed more than 20 methodologies and implemented them collaboratively with hundreds of youngsters from dozens of cultures along 12 States and 3 continents, from Indonesia to Argentina.

On a first stage, Window to Diversity designed and co-organized, in partnership with local organizations, a set of activities aimed to generate a process with focal groups of youngsters from diversified cultural origins, often from a marginalized background. The process did not end with the programmed activities, but rather became a blueprint for participants' upcoming cultural interventions by fostering their own replicable and scalable methodologies. As a result, on a second stage, We2Di network members (*grupo de ventaner@s*) are developing their methodologies and sharing them with other members, expanding the topics initially proposed and diversifying the artistic disciplines and interactive ways to engage with each other.

We2DI is helping build capacities of the global youth to overcome barriers posed by cultural or socioeconomic backgrounds and develop their imagination by collaborating in art projects that hold potential for replicating effects and improving societies. Following an intercultural innovation approach, We2Di network is still designing an ever-growing number of co-creative methodologies, inspired by ideas ranging from post-structuralism to cooperative learning labs. Learning-by-doing driven, all *co-creative experiences* shift participants' technical grounds, practical experience and ethical values by connecting cultural imaginaries through collaborative-art creations.

## Conclusions

Human cultural rights are clearly related with the protection and promotion of cultural diversity as the different United Nations and UNESCO declarations and covenants establish. The next step in that chain embraces the advances in cultural rights definition and perspectives, making education in cultural diversity as a specific cultural right. At that stage, arts and creativity education appears as a

strategic pedagogical approach to the development of new citizens' competences related to the values of intercultural dialogue and, at the same time, to the creative economy professional needs.

Internet and the digital world appear finally as an opportunity to bring together the three components: cultural diversity, creativity and education. Two examples have been presented in order to understand the possibilities of that synergy. Internet is the place where cultures can communicate and play in order to increase creativity and values of intercultural understanding. The premise for that is, ultimately, a human cultural rights perspective.

Art-based pedagogical approaches are not just about teaching art techniques, but about awakening creative citizens who can use their creativity in all spheres of life. Thus, art is the perfect medium to awaken creative thinking through which diverse people can work together, fostering mutual understanding and collaboration beyond the artistic process itself. This approach embodies a relevant strategy to engage people into a learning process that highlights the importance of cultural diversity as a source of mutual understanding. From this perspective, digital-based, culturally-diverse pedagogical initiatives hold potential in the safeguarding and promotion of cultural rights.

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# **Annexes**



## **Interview réalisée le 11 décembre 2015 avec Luis Ferrão de la Commission européenne**

Luis Ferrão, juriste à l'Unité Créativité de la Commission européenne (Direction générale des réseaux de communication, du contenu et des technologies), en charge de la politique de numérisation et accessibilité en ligne du patrimoine culturel et préservation numérique.

### **Quel est l'impact du numérique sur la protection et la promotion de la diversité culturelle ?**

Le numérique apporte des possibilités inédites de faire connaître et de valoriser le patrimoine culturel, indépendamment des contraintes géographiques, physiques, temporelles ou autres; la numérisation et l'accessibilité en ligne permettent d'amener à la portée de chaque citoyen, des chercheurs, des enseignants, des créateurs et des entreprises les ressources culturelles dispersées aux quatre coins du monde (dont parfois seule une petite fraction est accessible ou exposée au public à chaque instant dans le monde analogique) – et ceci 24h/7, 7jours/7.

Le numérique ouvre de nouvelles possibilités de visualisation, de présentation et d'interaction avec les ressources culturelles (réalité virtuelle, réalité augmentée, haute résolu-

lution, modélisation 3D, réseaux sociaux), qui s'ajoutent aux formes traditionnelles d'engagement avec ces ressources dans l'environnement analogique.

En même temps, le matériel numérisé peut être utilisé pour élaborer du contenu pédagogique et éducatif, des documentaires, des applications dans le secteur du tourisme, des jeux, des animations et des outils de conception, contribuant ainsi à l'essor des activités de création et au développement du potentiel culturel et créatif dans son ensemble.

### **De nouvelles normes ou autres mécanismes additionnels permettraient-ils une meilleure mise en œuvre de la CDEC dans l'environnement numérique ?**

À mon avis, la dimension numérique du patrimoine culturel, les défis comme le potentiel et les débouchés économiques liés à l'élargissement des possibilités d'accès offert par la numérisation des ressources culturelles pourraient être davantage reflétées dans les textes relatifs à la mise en œuvre de la Convention.

En effet, ces aspects sont à peine mentionnés, malgré l'importance que le numérique a pris dans les usages et les comportements actuels, en particulier des nouvelles générations (réseaux sociaux, plateformes collaboratives de partage, de collecte de ressources en ligne, wikis, blogs, etc.).

**Parmi les mesures ou politiques adoptées par la Commission européenne pour promouvoir les industries créatives à travers les nouvelles technologies, lesquelles pourraient être à votre avis le plus facilement répliquées par d'autres Parties à la CDEC et notamment les pays en développement ?**

Des mesures de coordination, visant à la mise en commun des ressources et à éviter des duplications inutiles, pourraient contribuer à réduire les coûts élevés de la numérisation du patrimoine culturel, rarement à la portée des seules institutions culturelles (bibliothèques, musées, archives...), voire certaines régions, prises individuellement.

Le choix de normes et de formats ouverts faciliterait l'interopérabilité et l'accessibilité des contenus numérisés, ainsi que leur réutilisation, que ce soit à des fins récréatifs, professionnels ou de recherche.

De même, le recours à des centres de compétence en matière de numérisation, des agrégateurs sectoriels ou régionaux de contenus culturels et à des plateformes dédiées comme Europeana ([www.europeana.eu](http://www.europeana.eu)), peut contribuer à promouvoir la visibilité des ressources culturelles et l'exploitation de leur potentiel à l'échelle planétaire, propre à l'environnement numérique.

La plateforme numérique culturelle européenne offre en effet, dès aujourd'hui, un accès ouvert et multi-langue à des dizaines de millions d'objets provenant de plus de 3.000 bibliothèques, musées et archives dans 38 pays.



## Interview with Lilian Richieri Hanania<sup>1</sup>

**At UNESCO the issue of “promoting the diversity of cultural expressions online” is increasingly the focus of debates. What is meant by: “diversity of cultural expressions in the digital realm”?**

The expression “diversity of cultural expressions” as employed in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) refers to one specific aspect of cultural diversity: the diversity of supply of cultural content in all steps of the artistic value chain (creation, production, dissemination, distribution and access). It implies allowing for rich and balanced exchanges of cultural goods and services from diverse origins – no matter which technologies used to provide them – at the local, national, regional and international levels. Attaining the diversity of cultural expressions in the digital realm means therefore that digital cultural content created, produced, made available and effectively accessed by consumers is culturally diverse.

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<sup>1</sup> Published in « Kulturelle Vielfalt Online. Im Spannungsfeld zwischen UNESCO, TTIP und Netzgiganten – Interview mit Lilian Richieri Hanania » (Cultural Diversity Online. Between UNESCO, TTIP and net giants – an interview with Lilian Richieri Hanania), in Österreichische UNESCO-Kommission, Jahrbuch 2015/Annual Report 2015, Agnes & Ketterl GmbH, Mauerbach/Vienna, ISBN: 978-3-902379-03-0

**UNESCO, as the specialized UN-organization for culture, strives not only to promote cooperation, but also to define standards and norms. Taking up the issue of “culture diversity online” implies a need for action. Is there a need for action?**

Yes, there is definitely a need for action. Guaranteeing the diversity of cultural expressions, whether in a digital environment or not, requires an active engagement of States and of civil society. Letting the market of cultural goods and services function alone has proven insufficient to guarantee a diversified cultural offer. This explains the adoption of cultural policies by varied States that consider important to ensure national cultural production is available in the market, not only because of their economic importance, but also and most importantly due to their cultural nature and their significance as vehicles of identities, values and meanings. The flagrant imbalance of the market of cultural goods and services in the last decades has led to the negotiation and adoption of the CDCE. The latter legitimates national cultural policies and measures and encourages international cooperation in the cultural field, with an emphasis on development issues. It also recognizes the fundamental role of civil society in those areas.

**The Convention legitimizes and calls for an active engagement of the State (and the civil society) to counterbalance imbalances, if needed. What does this mean in the digital context?**

Digital technologies require different types of action to promote balanced exchanges and interaction among cultures, but the basic logics stated above remain the same in this new context. While digital technologies have been progressively facilitating cultural creation and production,

and Internet provides for theoretically unlimited availability of cultural content, it is still very hard to guarantee distribution and visibility of a diversified cultural offer in the digital market.

**Could you name some examples of developments that lead or could lead to imbalances in the digital context?**

The “net giants” (e.g. Google, Apple, Facebook, Amazon (GAFA), Netflix) have become powerful new intermediaries that end up establishing the criteria and, consequently, deciding which digital contents are going to be distributed, publicized and have a greater chance of being visualized by consumers. Moreover, the optimum use of digital technologies by consumers still depend, in many countries, on significant investment in infrastructure, as well as in education policies and capacity building programs to allow for the most diverse participation in cultural life, both at the creation/production and at the enjoyment/access levels.

**Speaking of net giants and the internet. State regulation of the internet is not only highly disputed but also soon reaches its limit – in practical as well as legal terms. Which room for maneuver to conduct policies do States have in the digital context?**

From a legal point of view and in a few words, the space available for States to adopt and maintain policies in favor of the diversity of cultural expressions based on the CDCE depends particularly on the commitments they have already undertaken in international trade agreements. Those agreements may be multilateral (e.g. World Trade Organization agreements), as well as regional or bilateral (e.g. recent agreements concluded by the European Union

with the CARIFORUM countries or Canada). In fact, trade liberalization commitments in cultural sectors may prevent a country from adopting discriminatory policies in favor of its national production (e.g. quotas or subsidies for national audiovisual production) or to establish a preferential relationship with specific countries (e.g. audiovisual co-productions).

**So trade agreements also define which policies and measures to promote culture are possible, including in a digital context?**

Yes. For this reason, when negotiating international trade agreements, the European Union has ensured that audiovisual services, whatever the technological means used to provide those services, were excluded from liberalization. Through such “cultural exception” in its trade agreements, the EU has reaffirmed the specificity of audiovisual services vis-à-vis other tradable services and has maintained policy space for its Member States in that sector.

**So excluding audiovisual services from trade agreements – that is: not negotiating about any liberalization in the areas of film, TV and radio – is sufficient?**

The digital context complicates the matter, firstly because States are still struggling to understand this new and extremely dynamic environment in order to be able to adopt appropriate cultural policies. Secondly, this new changing reality raises doubts on the way it should be dealt with in trade agreements. Which sectors should be excluded from a trade agreement in order to maintain a country's policy space when it comes to new digital products

and increasingly converged and interdependent economic sectors (e.g. mobile phone manufacturers and operators, or Internet providers that propose cultural content as part of the good or service offered to consumers)?

**A currently much debated example of trade agreement is the TTIP. Are audiovisual services part of these negotiations?**

In June 2013, the EU Member States agreed on the exclusion of audiovisual services from the European Commission mandate for negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the United States. Unless a unanimous decision by the Member States is made during the negotiations to modify that position, liberalization commitments should not be undertaken in that sector – the EU should remain free to adopt cultural policies and measures in that field.

**So there is no cause for concern? Film, TV and radio, be it “analogue” or online will not be affected by TTIP?**

Caution remains necessary in order to make sure that other sectors that may have an impact on cultural goods and services, especially those provided online, are also not liberalized. This concerns, for instance, the sector of information and technology communication services. The EU and the US signed “Trade Principles for Information and Communication Technology Services” in April 2011 in the framework of the Transatlantic Economic Council (TEC). It aimed to establish trade-related principles to support the development of international technology networks and services. Those principles not only blur the traditional

distinction employed by the EU between “content services” and “services related to the transportation of content”, but may also have a large impact on market access.

Another matter that will require attention is electronic commerce. In recent trade agreements, the United States have managed to introduce a category of “digital products” which are subject to liberalization, while not contesting reservations from its trade partners regarding traditional audiovisual services. The difficulties mentioned earlier in fully comprehending and responding to the digital reality, as well as in determining the most appropriate policies for the diversity of cultural expressions in such context, require significant vigilance from the EU Member States in order to maintain their cultural policy space.

**How does the UNESCO-Convention relate to this?  
The Convention recognizes the right of States to  
cultural policy – also in the digital realm. If a State  
liberalizes this sector in trade agreements, it  
renounces or limits this right. Can the Convention  
have an effect in this regard?**

The CDCE does not oblige a Party to exclude cultural sectors from its trade agreements and cannot change previously undertaken trade commitments. But it provides political support in future negotiations if that Party decides to maintain a policy space in cultural matters as large as possible. This is all the more important in the digital context, because of the flexibility and rapidity needed when adopting policies and measures addressing such a constantly changing environment. Technological development requires thus greater vigilance from the CDCE Parties when negotiating trade commitments.

**As mentioned in the beginning, UNESCO is currently debating the promotion of the diversity of cultural expression online. What can UNESCO do in this regard? What role can UNESCO play?**

UNESCO can play a fundamental role in promoting the diversity of cultural expressions in the digital context. It has demonstrated its efforts towards that objective in recent years, among others through the works and discussions that led to the decision, by the CDCE Conference of Parties in June 2015, to prepare specific operational guidelines to foster the CDCE implementation in the digital environment.

Nevertheless, the adoption of operational guidelines by itself will not solve challenges in implementing the CDCE in the digital environment. Its implementation will still require strong political will of its Parties and active engagement of civil society. UNESCO may contribute to it, among others, through the following actions:

- raising awareness around the CDCE and its technological neutrality;
- clarifying the object and objectives of the CDCE vis-à-vis other UNESCO conventions;
- promoting discussions, studies and understanding on the new reality brought by new technologies;
- identifying successful cultural policies and measures, as well as best practices adopted both by governments and the civil society, aimed at the diversity of cultural expressions in the digital market;
- encouraging the CDCE Parties to formulate national strategies and roadmaps as detailed as possible, in order to stimulate implementation of the CDCE in the digital context;
- fostering debates among the CDCE Parties on the specificity of cultural goods and services (including those provided electronically) and international trade agreements;

- advocating coordination by the CDCE Parties, at the domestic level, among different governmental bodies and ministries whose work addresses sectors of the creative economy and, more largely, sustainable development issues;
- working closely with other international organizations whose actions may have an impact on the supply of digital cultural content and, more generally, promoting coordination and coherence with the work of other international organizations that deal with different facets of sustainable development, in order to ensure greater usefulness and efficiency of actions.

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# **Convention on the Protection and Promotion of the Diversity of Cultural Expressions**

**ANTONIOS VLASSIS & LILIAN RICHIERI HANANIA<sup>1</sup>**

## **Background**

Since the 1980s, increasing financial globalization, economic integration as well as liberalization of trade exchanges and investment have raised major concerns for several national governments and cultural organizations regarding the effects of such new context on cultural diversity. Given the twofold (economic and cultural) nature of cultural goods and services, which encompass both symbolic and material production, their treatment within international trade agreements became the subject of growing political interest.

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The importance of establishing international norms on cultural goods and services has risen since the early 1990s, based on the advent of the so-called “cultural exception” (*exception culturelle*) in international and regional economic integration, as well as UN debates on an alternative conception of development, going beyond its economic aspects and having, among others, a cultural dimension. Indeed, a coalition of actors, driven by France and Canada, advocated the adoption of a “cultural exception” allowing to exclude cultural goods and services from the agenda of trade negotiations, such as those which led to the General Agreement on Trade in Services (GATS) within the World Trade Organization (WTO), the Multilateral Agreement on Investment (MAI) within the Organization for Economic Cooperation and Development (OECD) in 1993, the free trade agreement (FTA) between the United States (USA) and Canada in 1989 and the North American Free Trade Agreement (NAFTA) between the USA, Canada and Mexico in 1994. By the late 1990s, however, the term “cultural exception” was gradually replaced with the more inclusive and less defensive term “cultural diversity”, and discussions led to the decision to pursue a counterbalance to trade agreements outside international trade frameworks and, eventually, within UNESCO.

In parallel, UNESCO had been exploring how to foster the links between culture and development, seeking to become the main international arena for the expression of the concept of cultural development. The organization had been promoting a change from a strictly economic conception of development to an enlarged approach, which integrated other dimensions, such as culture. Several UNESCO meetings and normative tools had indeed demonstrated efforts to disseminate the concept of cultural development at the international level and to raise awareness by the international community of the relevance of cultural policies. The 1982 World Conference on cultural policies (MONDIACULT), the World Decade for Cultural

Development (1988–1997), the report “Our Creative Diversity” by the World Commission on Culture and Development (1996), and the International Conference on Cultural Policies for Development in Stockholm (1998) offer relevant examples of such efforts.

By the end of the 1990s, an alliance of actors including multilateral international and regional organizations (Council of Europe, International Organization of *Francophonie*, Organization of American States), several national governments (France, Canada, China, South Africa, Brazil) and non-governmental organizations (National Coalitions for Cultural Diversity, International Network for Cultural Diversity) was mobilized in favour of cultural diversity and the establishment of a new international binding legal instrument within UNESCO (Vlassis 2015: 107–230). The first step was taken with the adoption of the 2001 UNESCO Universal Declaration on Cultural Diversity. Exceptionally fast was then the decision to negotiate a new UNESCO convention, complementary to other UNESCO treaties dealing with cultural diversity. Initially entitled “Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions”, the UNESCO “Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (CDEC) was negotiated between 2003 and 2005. As Jean Musitelli explains (Musitelli 2005: 515), the “diversity of cultural expressions” was built on the impetus around both the concepts of “cultural exception” from trade negotiations and “creative diversity”, conceptualized by UNESCO.

Following hard negotiations on several issues, such as the interface between trade and culture and the relationship between the convention and other international treaties, the precise scope of such new legal instrument, as well as the dispute settlement mechanism to be foreseen, the CDCE was adopted on October 20, 2005. It entered into force extraordinarily fast, in March 2007.

## Coverage

The CDCE is the main multilateral law instrument addressing global and multilevel cultural governance (Aylett 2010). As of August 2016, the CDCE had received the support of 144 Parties, including France, Germany, the United Kingdom, Canada, Brazil, Mexico, Argentina, India, China, Australia and South Korea and the European Union (EU), while the United States of America, Russia, Japan and Pakistan, as well as several Middle Eastern countries (Iran, Israel, Saudi Arabia) have not ratified the CDCE.

The object of the CDCE is particular *vis-à-vis* other UNESCO legal texts and does not refer to cultural diversity in the broadest sense of the term. The terminology “diversity of cultural expressions” may, nevertheless, be confusing, considering the use of “cultural expressions” in various other contexts and treaties, within and outside UNESCO. In fact, during negotiations, such term was selected as a shorter replacement for “cultural contents and artistic expressions” and refers, according to article 4.3 of the CDCE, to “expressions that result from the creativity of individuals, groups and societies, and that have cultural content”. A systemic interpretation of the CDCE and of UNESCO documents preceding its negotiation provide better clarity on its object and purpose: it addresses a specific aspect of cultural diversity, *i.e.* the diversity in the offer and the exchanges of cultural goods, services and activities created, produced and distributed by cultural industries, such as literature, music, photos, films, dance, theatre, etc., “whatever the means and technologies used” (article 4.1 CDCE). The CDCE is indeed technologically neutral and may be adequately employed in the current context of rapid technological progress.

The CDCE addresses two main facets of action in favour of a diversified offer of cultural goods and services. The first one is the recognition of the specificity of those goods and services and, consequently, of the legitimacy of cultural policies and the need for a specific legal treatment

for such goods and services, including in international trade agreements. The CDCE is very flexible regarding the types of measures and policies to be adopted, as well as the sectors in which Parties may decide to intervene in order to protect and promote the diversity of cultural expressions when implementing the convention. It contains, however, no legal obligation for the Parties to adopt "cultural exceptions" in their trade agreements – the CDCE provides rather political support in that sense (Graber 2006; Richieri Hanania 2009 and 2014). Moreover, it cannot modify trade agreements already concluded by its Parties. On this matter, article 20 of the CDCE on the relationship with other international agreements (including trade-related treaties) contains two paragraphs, which at a first glance seem to be irreconcilable. They reflect both the willingness to exclude subordination of the CDCE to other treaties and the desire to not undermine other international commitments previously adopted, including in the trade sector. Through this provision, the CDCE has therefore expressly established a relationship based on equality vis-à-vis other treaties (Richieri Hanania 2009: 327–329).

The second aspect addressed by the CDCE, which is also fundamental towards balanced exchanges of cultural goods and services, is cultural cooperation and, in particular, cultural cooperation in favour of development. The CDCE deals directly with the link between culture and development and reiterates the role of culture in sustainable development (article 13 CDCE), ultimately requiring greater coherence and coordination between policies and actions adopted in different fields, such as economic, social, environmental, cultural and development policies (Richieri Hanania 2014: 297-301 and Richieri Hanania 2015). In order to strengthen international cultural cooperation, the CDCE proposes several tools, such as information exchange among the Parties (articles 9 and 19 CDCE), collaborative arrangements (article 15 CDCE), preferential treatment for developing countries (article 16 CDCE),

as well as an International Fund for Cultural Diversity, a multi-donor voluntary Fund established under its article 18. Between 2010 and 2015, the Fund has supported 78 projects in 48 developing countries, with contributions accounting for an amount of US\$7.6 million. Following the strong involvement of civil society during the CDCE negotiations, its article 11 acknowledges the essential role of civil society in its implementation.

## Challenges

Despite its symbolic, political and legal contribution to the “trade and culture” debate and its progressive and significant practical implementation (Richieri Hanania 2014), the CDCE contains few binding obligations on its Parties and remains a hard law instrument with a soft normative content (Vlassis 2011: 495). It provides an important leeway on issues such as cultural cooperation, appropriate cultural policies for the diversity of cultural expressions and the “trade and culture” interface (Neuwirth 2012), but its implementation still remains strongly dependent on each of its Parties’ political will (Richieri Hanania 2014: 297; Vlassis 2015: 257-275). The CDCE implementation is also challenged today by the difficulties encountered by most Parties in completely understanding and appropriately addressing challenges brought by new technologies in the creative economy. In order to guide the implementation and promotion of the CDCE provisions by different stakeholders within the digital environment, new operational guidelines are presently under discussion at UNESCO.

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## Tableau – Résumé des principales règles de l'OMC et leur influence sur le secteur culturel

LILIAN RICHIERI HANANIA

### Règles en matière de traitement national et d'accès aux marchés

Les principales dispositions du GATT (Accord général sur les tarifs douaniers et le commerce)

Disposition	Effets sur le secteur culturel
<b>Traitement national</b> (article III) <p>Interdiction de traitement discriminatoire entre produits nationaux et produits étrangers en matière d'imposition et de réglementation intérieure.</p> <p><b>Objectif :</b> garantir l'égalité des conditions de concurrence entre produits importés et nationaux « similaires » ou « directement concurrents ou substituables ».</p>	Toute <b>exigence de contenu local</b> , du fait qu'elle avantage les produits nationaux similaires ou concurrents, peut être considérée comme violant en principe cet article. Problèmes : difficulté d'établir la « similarité » entre produits culturels ; dans certains cas, c'est en avantageant les produits ou services culturels nationaux qu'il est possible de protéger l'industrie culturelle d'un Etat.

<p><b>Interdiction des restrictions quantitatives au commerce</b> (article XI). Les restrictions tarifaires (droits de douane, taxes ou autres impositions) sont préférées à toute restriction quantitative (contingents, licences d'importation ou exportation).</p>	<p>Cela implique l'<b>interdiction en principe des quotas à l'importation</b> (y compris de contingents pour les produits culturels).</p>
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### Exceptions

L'**article XX du GATT** prévoit des **exceptions générales** pour l'adoption de mesures nécessaires, entre autres, à la protection de la moralité publique, pour assurer le respect des lois et règlements qui ne sont pas incompatibles avec les dispositions du GATT, imposées pour la protection de trésors nationaux ayant une valeur artistique, historique ou archéologique, etc.

Le **chapeau de l'article XX** exige toutefois que ces mesures ne soient « *pas appliquées de façon à constituer soit un moyen de discrimination arbitraire ou injustifiable entre les pays où les mêmes conditions existent, soit une restriction déguisée au commerce international* ».

Il existe une **exception spécifique pour les films cinématographiques** (article IV du GATT)

### – Exceptions générales (article XX du GATT)

Dans la pratique, en raison du cumul de conditions pour qu'elles soient admises par le juge de l'OMC (conditions des alinéas et du chapeau de l'article XX), leur application pour couvrir des préoccupations non commerciales s'est montrée relativement limitée.

### – Exception spécifique pour les films cinématographiques (article IV du GATT) : les quotas à l'écran pour les films nationaux sont admis sous certaines conditions :

- uniquement des réglementations quantitatives « intérieures » : pas de restriction quantitative à l'importation de films.

- exclusivement pour les films d'origine nationale (une fraction maximale de films étrangers ne serait pas couverte par cet article).

- les quotas à l'écran ne peuvent discriminer qu'entre films étrangers et films nationaux (une réglementation nationale qui limiterait uniquement la part de marché des films provenant d'un seul Etat serait interdite).

- l'article IV ne concerne pas les services liés aux films cinématographiques ou encore d'autres produits audiovisuels : il ne couvre pas les quotas dans le domaine de la télévision, la radio et d'autres sous-secteurs de l'audiovisuel.

**Les subventions** (article XVI du GATT et Accord sur les subventions et les mesures compensatoires – SMC).

**Obligations de consultation et de limitation des effets négatifs** de ces mesures sur le commerce.

L'Accord sur les subventions et les mesures compensatoires concerne les **subventions « spécifiques »** (bénéficiant uniquement à une entreprise, une branche de production, ou un groupe d'entreprises ou de branches de production).

**Subventions « prohibées » :** celles qui, pour être accordées, exigent un certain volume d'exportations ou l'utilisation de produits nationaux pour la production.

**Subventions « pouvant donner lieu à une action » :** elles sont permises tant qu'aucun Membre ne démontre qu'elles affectent négativement ses intérêts.

Les mesures de financement des produits audiovisuels peuvent être contestées, en raison de la **définition large du terme « subvention »** (article 1:1 de l'Accord SMC). Une « subvention » existe dans l'attribution d'un avantage et peut être soit une contribution financière des pouvoirs publics (y compris les transferts directs de fonds, les transferts directs potentiels de fonds ou de passif, les abandons ou non perception de recettes tels que les incitations fiscales et la fourniture ou l'achat de tout autre bien ou service qui ne soit pas considéré comme faisant partie d'une infrastructure générale), soit « *une forme quelconque de soutien des revenus ou des prix au sens de l'article XVI du GATT de 1994* ». Toute attribution d'avantage financier à une industrie nationale (par exemple, audiovisuelle) pourrait ainsi en principe être attaquée si elle affecte les intérêts d'un autre Membre.

L'article III du GATT (traitement national) établit une **exception pour les subventions attribuées directement aux producteurs nationaux** (§ 8, alinéa b). Les subventions accordées directement aux producteurs nationaux de certains produits culturels semblent donc être couvertes par cette exception.

Par contre, les aides financières attribuées indirectement et souvent employées en faveur des industries culturelles (e.g. renonciation à des recettes) devront respecter le traitement national et être appliquées iden-

	tiquement aux produits nationaux et étrangers. En effet, dans l'affaire <i>Canada – Périodiques</i> (DS31), les remises de taxe ont été considérées comme <b>incompatibles avec l'article III:8</b> . Il s'ensuit que la marge de manœuvre des Membres pour adopter des mesures de soutien financier comme cela leur semble le plus adapté à leurs marchés culturels et à leurs réalités administratives devient réduite.
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### **Les principales dispositions de l'Accord sur les mesures concernant les investissements et liées au commerce (Accord MIC ou « TRIMs Agreement »)**

L'Accord MIC exige le respect des articles III et XI du GATT en ce qui concerne les mesures relatives aux investissements pour le **commerce des marchandises**. De telles mesures devront être **notifiées et progressivement éliminées**.

Sont prohibées, selon cet accord :

- les **prescriptions concernant la teneur en éléments d'origine locale** (ex. : le conditionnement de l'achat de films étrangers à celui de films d'origine nationale) ;
- les **prescriptions d'équilibrage des échanges** (prescriptions proches des exigences de contenu local ; ex. : subvention en matière culturelle dépendant de la distribution ou de l'achat de produits culturels nationaux par les investisseurs étrangers ; exigence de la part d'un Membre selon laquelle les distributeurs étrangers agissant dans le pays doivent distribuer un minimum d'œuvres nationales sur le marché national ou international).

### **Les principales dispositions de l'AGCS (Accord général sur le commerce des services)**

Disposition	Effets sur le secteur culturel
<p><b>Les services publics</b>  L'article I:3(b) exclut tout « service fourni dans l'exercice du pouvoir gouvernemental », défini comme « <i>tout service qui n'est fourni ni sur une base commerciale, ni en concurrence avec un ou plusieurs fournisseurs de services</i> ».</p> <p>L'article VIII établit des règles précises pour les monopoles et les fournisseurs exclusifs de services : ceux-ci devront agir selon les obligations de l'AGCS du Membre où ils opèrent.</p>	<p><b>Les services publics de radiodiffusion ne peuvent être exclus de l'application de l'AGCS</b> lorsqu'ils sont en concurrence avec d'autres fournisseurs. Ils sont <b>soumis aux règles de l'AGCS</b> et aux engagements assumés au sein de cet Accord.</p>

**Le traitement national et l'accès aux marchés dans l'AGCS** ne s'appliquent qu'aux secteurs où les Etats ont pris des engagements (**listes positives par secteurs**).

Les Membres peuvent assumer des engagements et y imposer parallèlement des **limitations et conditions relevant de leurs sensibilités nationales**. Cependant, il est difficile de garantir cet équilibre dans la pratique des négociations en raison des **rapports de force inégalitaires entre les Membres**.

Par ailleurs, les difficultés de distinction entre produits et services (difficultés renforcées par les nouvelles technologies) et l'application concomitante du GATT et de l'AGCS peuvent restreindre la marge de manœuvre d'un Membre de l'OMC sans qu'aucun engagement dans le secteur des services ait été contracté (ex. affaire *Canada – Périodiques*).

Le **danger de la prise d'engagements** dans le secteur culturel apparaît dans l'affaire *Chine – Publications et produits audiovisuels* (DS363), à propos de mesures affectant la commercialisation et la distribution de certaines publications et certains produits de divertissement audiovisuels de la Chine. Selon les Etats-Unis, les mesures chinoises sont discriminatoires et incompatibles avec les engagements de la Chine au titre de l'AGCS (articles XVI et XVII), de l'article III du GATT et de son Protocole d'accès à l'OMC.

**Accès aux marchés** (article XVI) : six catégories de **limitations** sont acceptables, à condition d'être introduites expressément dans la liste des Membres, pour les secteurs où ils ont assumé des engagements d'accès aux marchés.

Ce sont en majorité des limitations quantitatives (nombre de fournisseurs, valeur des transactions, nombre d'opérations ou quantité de services, nombre de personnes physiques employées, types d'entité juridique exigé pour la fourniture d'un service et limitations à la participation du capital étranger).

Dans le cas où un Membre assume des engagements dans le secteur de l'audiovisuel, **ces limitations doivent être consignées de manière expresse afin d'être maintenues**. Ex. : restrictions au mouvement de personnes physiques, restrictions à la participation d'actionnaires étrangers, restriction du temps d'antenne autorisé aux productions étrangères, contingents à l'écran d'œuvres télévisuelles, obstacles à l'accès aux réseaux de télécommunication du Membre importateur, politiques d'achat accordant une préférence aux productions nationales ou règlements imposant aux productions nationales de recourir à des studios et laboratoires nationaux. **Dans la pratique, peu d'Etats ont pris des engagements dans le secteur de l'audiovisuel** à travers ce mécanisme, mais cela n'est pas irréversible.

Les **Etats ayant contracté des engagements** dans le secteur de l'audiovisuel sont **en général** ceux qui détiennent une **industrie audiovisuelle relativement puissante**, ne serait-ce que sur le plan régional (Inde, Japon, Etats-Unis), ou ceux qui, ayant accédé plus tard aux Accords de l'OMC, ont subi de fortes pressions les conduisant à ouvrir leur marché de l'audiovisuel.

**Le traitement national** (article XVII) : interdiction de favoriser les services et les fournisseurs de services locaux au détriment des services et fournisseurs étrangers. Ces mesures discriminatoires sont interdites lorsqu'un Membre contracte des engagements de traitement national dans sa liste.

Pour l'audiovisuel :

– les effets sur le commerce transfrontières de supports physiques sont assez proches de ceux résultant des règles touchant aux marchandises en général.

– quant à la diffusion par satellite, les conséquences du traitement national peuvent être similaires à celles relatives aux obligations d'accès aux marchés (ex. : il faudra accorder aux entreprises étrangères les mêmes possibilités d'accès aux réseaux de télécommunication que celles attribuées aux entreprises nationales).

L'application du principe de traitement national peut contribuer à améliorer les conditions d'accès aux marchés par des entreprises étrangères en raison de son impact sur les éventuelles mesures discriminatoires existantes.

**La réglementation intérieure (articles VI et XVIII)**

Plusieurs mesures culturelles peuvent être traitées par la réglementation intérieure d'un Etat : procédures en matière de qualification, normes techniques, prescriptions en matière de licences, dans les secteurs où les Etats ont adopté des engagements.

**Objectif :** garantir un **standard minimum** dans les réglementations intérieures servant à appliquer des politiques publiques, de manière à éviter qu'elles ne deviennent des barrières au commerce. L'Accord exige ainsi que ces réglementations soient **administrées d'une manière raisonnable**.

Exigence d'**« administration d'une manière raisonnable »** de ces réglementations : risque qu'elle soit développée dans la jurisprudence de façon à imposer des obligations substantielles de proportionnalité.

Dans la pratique, ces engagements peuvent aussi promouvoir l'accès aux marchés. En effet, les **mesures sont en même temps soumises aux articles VI, XVI (accès aux marchés) et XVII (traitement national)** de l'AGCS. L'obligation de traitement national peut servir à contester des réglementations intérieures considérées illégales (parce qu'elles établissent un traitement différencié et moins favorable à des services similaires ou à des fournisseurs de services similaires). De même, l'article VI contribue à l'ouverture des marchés et à l'accès effectif à ceux-ci.

Il peut être en outre **délicat de distinguer entre ce qui relève des engagements en matière d'accès aux marchés et de traitement national** (devant être fixés de manière précise dans les listes des Membres) et **ce qui appartient à la réglementation intérieure des Etats** (où il doit y avoir une certaine flexibilité d'action, à condition que ces mesures soient appliquées de manière raisonnable, objective et impartiale). Cette distinction est particulièrement subtile depuis l'affaire *Etats-Unis – Jeux* (DS285).

<p><b>Exceptions générales</b> (article XIV)</p> <p>L'article XIV prévoit, entre autres, des exceptions pour des mesures nécessaires à la protection de la moralité publique ou au maintien de l'ordre public, et nécessaires pour assurer le respect des lois ou réglementations qui ne sont pas incompatibles avec les dispositions de l'AGCS.</p> <p><b>Le chapeau de l'article XIV</b> exige toutefois que ces mesures ne soient « <i>pas appliquées de façon à constituer soit un moyen de discrimination arbitraire ou injustifiable entre les pays où des conditions similaires existent, soit une restriction déguisée au commerce des services</i> ».</p>	<p>Dans la pratique, le cumul de conditions pour que ces exceptions soient admises par la jurisprudence rend leur application relativement difficile.</p>
<p><b>Secteur des télécommunications</b></p> <p>Des <b>différences</b> existent entre la <b>classification</b> contenue dans le document MTN.GNS/W/120 (<i>Services Sectoral Classification List</i>) et celle de la CPC (<i>Provisional Central Product Classification</i> des Nations Unies).</p>	<p>En prenant des engagements en matière de télécommunications, un impact peut en découler pour les industries culturelles nationales, notamment aujourd'hui, avec les nouvelles technologies.</p>
<p><b>Subventions</b></p> <p>Les <b>dispositions sur les subventions</b> dans le cadre de l'<b>AGCS</b> sont <b>encore sujettes à des négociations</b> (article XV) : pas encore, pour le commerce des services, de dispositif précis sur les subventions et les critères permettant leur acceptation. Elles sont donc <b>régies</b> pour l'instant <b>par les engagements spécifiques pris par les Membres en matière de traitement national</b>.</p>	<p>La possibilité pour les Membres de subventionner l'industrie audiovisuelle nationale dépend de la mesure de leurs <b>engagements contractés en matière de traitement national dans le secteur</b>.</p>

## Règles en matière de traitement de la nation la plus favorisée

Disposition	Effets sur le secteur culturel
<b>GATT : Article I:1</b> Interdiction de la discrimination entre différents produits étrangers.	À l'exception des situations prévues au paragraphe 2 de ce même article, aucune préférence ne peut être accordée à un produit provenant d'un Membre sans que ce traitement préférentiel ne soit étendu aux produits de tout autre Membre.

**AGCS : Article II**

Interdiction de la discrimination entre différents services ou fournisseurs de services étrangers.

Les Membres de l'OMC ont été autorisés, au moment de l'entrée en vigueur des Accords de Marrakech, à inclure dans une liste annexe à l'AGCS toute exemption à l'obligation de traitement de la nation la plus favorisée.

**Les exemptions relatives à l'audiovisuel** concernent généralement les accords de coproduction et de partenariats, les accords régionaux ou multilatéraux qui prévoient des préférences entre pays, le traitement préférentiel au temps d'écran, des moyens de représailles contre des mesures unilatérales de la part d'autres pays dans le secteur audiovisuel, ainsi que l'allocation de temps d'écran à des œuvres et des prestataires de services audiovisuels répondant à des critères spécifiques d'origine culturelle. **Elles se justifient dans leur plupart par la promotion de l'identité, de valeurs culturelles et d'objectifs de protection linguistique.** Toutefois, les Membres qui n'ont pas inscrit d'exemption faute d'accords de coproduction ou de fonds régionaux d'aide au cinéma au moment de la signature des accords OMC ne pourront plus le faire.

Pour ceux qui l'ont fait, ces exemptions sont soumises aux limites prévues par l'AGCS : **limitation de durée et réexamen périodique** par le Conseil du commerce des services, même si la majorité des Membres refuse d'indiquer une durée précise pour ces exemptions. Par ailleurs, des pressions pour l'élimination ou du moins la réduction de la portée de ces exemptions dans le secteur audiovisuel à travers des **demandes de « clarifications et précisions »** mettent en péril cette possibilité.

## Règles en matière de transparence (AGCS)

Disposition	Effets sur le secteur culturel
<b>Article III de l'AGCS :</b> Les Membres se tiennent mutuellement informés à propos des mesures qu'ils adoptent dans les différents secteurs des services.	<p>Un <b>répertoire plus complet de législations</b> en matière de politique culturelle pourrait promouvoir une <b>meilleure connaissance et compréhension des mesures</b> adoptées par les différents Membres selon leurs circonstances particulières, ce qui contribuerait à leur légitimation et servirait éventuellement d'inspiration pour d'autres pays.</p> <p>Cependant, il faut faire attention à l'<b>écart des moyens</b> entre les pays développés et les pays en développement ou moins avancés. Il existe un <b>risque d'excès dans la proposition</b>, faite par certains Membres, d'exigence de « notification préalable » (<i>prior notice</i>), qui impliquerait une plus grande participation à la procédure (interne) d'adoption d'une mesure, ce qui n'était pas prévu initialement par l'AGCS. Dans le secteur culturel, ce type d'intervention dans l'élaboration de la réglementation intérieure des Etats peut s'avérer très dangereux.</p>

## Règles en matière de droits d'auteur et de droits voisins

Disposition	Effets sur le secteur culturel
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<p><b>Deux groupes principaux de règles dans l'Accord sur les ADPIC (Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce):</b></p> <ul style="list-style-type: none"> <li>– celles qui définissent des <b>standards de protection minimum</b> (application des dispositions de la Convention de Berne sur les œuvres littéraires et artistiques et de la Convention de Rome sur les droits voisins à tous les Membres de l'OMC).</li> <li>– celles qui décrivent les <b>procédures et les remèdes</b> devant être prévus par les Membres de l'OMC dans leurs législations nationales (<b>protection effective</b> des droits de propriété intellectuelle).</li> </ul> <p><b>L'un des objectifs primordiaux :</b> promouvoir la <b>créativité</b>, en garantissant aux créateurs la rémunération de leur travail (en les incitant, par conséquent, à investir dans la création) et au public, l'accès à l'information et à la culture.</p>	<p>Les industries culturelles les plus puissantes œuvrent davantage aujourd'hui dans le sens du <b>renforcement et de la généralisation de la protection de la propriété intellectuelle</b> (extension au plus grand nombre d'Etats et augmentation de la durée de la protection).</p> <p>Une <b>perspective à fort caractère économique du sujet</b> risque de :</p> <ul style="list-style-type: none"> <li>– <u>diminuer l'accès</u> du public aux œuvres ;</li> <li>– <u>diminuer</u> les bénéfices pour l'<u>auteur</u> ; et</li> <li>– <u>renforcer</u> les bénéfices pour les <u>autres titulaires</u> de droits d'auteur.</li> </ul>
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**Exceptions** à la protection des droits d'auteur : extension par l'**article 13**, à tous les droits patrimoniaux d'auteur, du « **test de trois étapes** » (prévu initialement par la Convention de Berne uniquement pour le droit de reproduction de l'auteur).

Ce test exige que les exceptions ne soient prévues que pour des **cas spéciaux** ; qu'elles **ne portent pas atteinte à l'exploitation normale de l'œuvre** (exploitation à laquelle l'auteur pourrait raisonnablement s'attendre) ; et qu'elle **ne cause pas de préjudice injustifié aux intérêts légitimes des titulaires du droit d'auteur**.

**Malgré une « flexibilité apparente » de ce test**, appliqué au cas par cas par le juge de l'OMC, il a été interprété restrictivement (ex. *aff. Etats-Unis – Article 110(5) de la loi sur le droit d'auteur*).

Par ailleurs, l'article 71 de l'Accord sur les ADPIC témoigne de la **tendance au renforcement de la protection** (ex. *WIPO Copyright Treaty*).

Cela peut contribuer au **déséquilibre entre la protection des détenteurs des droits et l'encouragement de la créativité** à travers l'accès du public aux œuvres de l'esprit.

# **The Information Technology Agreement (ITA)**

**ROSTAM J. NEUWIRTH<sup>1</sup>**

## **Background**

The Information Technology Agreement (ITA) was concluded in December 1996 as a part of the declaration issued by the Singapore Ministerial Conference held one year after the creation of the World Trade Organization (WTO). Adopted as a plurilateral agreement between 29 WTO members, it entered into effect in 1997 with the objective of recognizing the “key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy” (ITA Declaration 1996). In substance, it entails the obligation of signatory members to enhance market access opportunities for information technology (IT) products by notably binding and eliminating customs duties and other duties and charges of any kind on this category of products. Since the inception in 1997, the ITA has grown from 29 to 82 of the

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total of the current 162 WTO members but in effect covers approximately 96 per cent of world trade in information technology products (WTO Committee 2015).

With trade in IT products growing rapidly, soon after the adoption of the ITA, efforts were undertaken to expand the list of covered products by an additional 201 categories of IT products (Portugal-Perez, Reyes and Wilson 2010). The efforts were successful, when in December 2015 the Nairobi Ministerial Conference effectively expanded the list of covered IT products. Newly added IT products included two main categories listed in the Annex (WTO Nairobi Ministerial Declaration 2015). The first category are Attachment A Products, which bear specific Harmonized System (HS) 2007 subheadings, such as microphones, loudspeakers, “smart cards”, television cameras, digital cameras and video camera recorders as well as video games and video game consoles. The second category are Attachment B products, which comprise 10 groups of products regardless of their HS classification but include products like Multi-component integrated circuits (MCOs), touch screens, ink cartridges, and portable interactive electronic education devices primarily designed for children.

### **The ITA Agreement, Culture and the Creative Economy**

Information technologies form one of the cornerstones of the growing global “knowledge-based” or “information economy”. In parallel, a cultural economy developed, which gradually began to converge with the information economy to what is now commonly called a “creative economy” (Venturelli 2001; UNCTAD 2008 and 2010). Similar to the concept of culture, the creative economy was termed an “evolving concept”, which “entails a shift from the conventional models towards a multidisciplinary model dealing

with the interface between economics, culture and technology and centred on the predominance of services and creative content" (UNCTAD 2008: iii and 3-4). Thus far the creative economy has also been defined as comprising cultural and creative industries (CCI) (Garnham 2005), which have been constantly evolving as "concentric circles" (Throsby 2008). Virtually in all sectors of the economy a trend of convergence can be observed, which has led to the term "convergenomics" (Lee and Olson 2010). A converging economy is characterised by the production of so-called convergence products, such as "smart phones", which merge several separated devices, technologies, and industries and also alter the way products are produced, distributed and consumed. In a converging and creative economic environment, which strongly relies on information technology and digital technology, it means that any industry is potentially a creative industry given that almost all industrial sectors are relying on innovation (Galloway and Dunlop 2007: 19). These trends are highly problematic for the traditional legal distinction between cultural and "purely" economic products. The reason is that the creative industries' dual, i.e. cultural and economic nature, are increasingly blurring formerly well-established lines of legal distinctions (Neuwirth 2015).

### **The ITA Agreement: A Brief Assessment**

Despite the recent progress made in terms of the expansion of covered categories of IT products, the ITA Agreement will continue to face serious challenges in terms of customs classification against the backdrop of rapid technological evolution of the IT sector and a general trend towards greater convergence in the global economy. The convergence of economic products in general, including both goods and services, also has important implications for

the “culture and trade debate”, as exemplified by the legal relations between the WTO covered agreements and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) and the question of establishing a coherent regulatory framework for international trade in the era of an emerging creative economy (Richieri Hanania 2015). The challenges include notably the classification and distinction of various information technology products as either specific cultural or ordinary economic products and the question of their separate or joint regulation (Guèvremont et al. 2015; Neuwirth 2015; Weber and Burri 2013). A further challenge comes from regionalism, *i.e.* the increasing negotiation and conclusion of regional trade agreements, which contain important chapters on digital or information technology products (Mann and Liu 2008; Weber 2015).

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## Audiovisual na Internet: homogeneização ou diversidade cultural?

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*Audiovisual na Internet:  
homogeneização ou diversidade cultural?*

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AUDIOVISUAL**

<http://diversidadaudiovisual.org>



**La diversidad audiovisual en internet:  
economía y políticas**

< 3 y 4 de noviembre de 2016 – Universidad Carlos III de Madrid >

Diversidad cultural y audiovisual: buenas prácticas e indicadores (2012-2014)

Diversidad en la industria audiovisual en la era digital (2015-2016)



## Audiovisual: homogeneização ou diversidade?

Ideia 1: A problemática da homogeneização no domínio da cultura e da comunicação não é nova

Ela está diretamente relacionada com os processos de internacionalização das indústrias culturais ao longo do todo do século XX

A internacionalização da indústria cinematográfica no começo do século passado - e o consequente perigo de homogeneização - pode nos oferecer um claro exemplo:

Grã-Bretanha: invasão de filmes 'made in USA'



Screen Quota System (Cinematograph Films Act 1927 – 1985)

Luis A. Albornoz – IIGG, UBA / CONICET

## Audiovisual: homogeneização ou diversidade?

### *Reações políticas nacionais*

Cuán satisfechos nos sentiríamos si las **diversas comunidades locales** que forman nuestro país siguieran nuevamente sus propios caminos y, fieles a sí mismas, se aplicaran a **hacer cosas diferentes a las de sus vecinos**.

Nada hay más lamentable que el prestigio, según muchos desmesurado, de que disfrutan las modas y normas artísticas que llegan de las grandes capitales.

De ahora en adelante, **cada uno de los componentes de la feliz Inglaterra debe ser feliz a su manera**. ¡Muerte a Hollywood!

**John Maynard Keynes**

Presidente do Conselho das Artes da Grã-Bretanha (1946)

Luis A. Albornoz – IIGG, UBA / CONICET

## Audiovisual: homogeneização ou diversidade?

### *Reação da comunidade internacional - UNESCO*

- Proposta de uma Nova Ordem Mundial da Informação e da Comunicação (Nomic) nos anos '70 → Relatório MacBride (1980)
- Conferências intergovernamentais sobre políticas culturais: Europa (1972), Ásia (1973), África (1975) e ALC (1978) → Conferência Mundial sobre Políticas Culturais – Mondiacult 1982

Documentos da época atestam a necessidade de:  
**-proteger a diversidade e a identidade das nações contra a crescente mercantilização da cultura**  
**-controlar o fluxo de informação e cultura exercida pelos países centrais**

Consequência: as ações da UNESCO foram punidas com a **retirada dos EUA (R. Reagan)** em 1984, e **da Grã-Bretanha (M. Thatcher)** em 1985

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## Audiovisual: homogeneização ou diversidade?

### Reações do âmbito acadêmico

- **Sociologia crítica:** Escola de Frankfurt: W. Benjamin, Theodor Adorno, Max Horkheimer...
- **Economia crítica da cultura-comunicação:** H. Schiller, D. Smythe, T. Guback, R. McChesney, V. Mosco, N. Garnham, P. Golding, G. Murdock, B. Miège, P. Fliechy...
- **Pensamento crítico iberoamericano sobre comunicação:** H. Muraro, A. Pasquali, A. Mattelart, S. Capparelli, O. Jambeiro, E. Bustamante, R. Zallo, E. Sánchez Ruiz...

### Denúncia: concentração empresarial / desigualdades / funcionamento transnacional / imperialismo e colonização cultural / perda de valores endógenos

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## Audiovisual: homogeneização ou diversidade?

### Ideia 2: A Convenção sobre a proteção e promoção de diversidade das expressões culturais é uma valiosa nova ferramenta para as políticas culturais

- É uma resposta aos perigos de acabar com as políticas públicas em matéria de cultura e comunicação (debate sobre GATT-GATS / disputas na OMC)
- Reconhece a natureza específica dos bens e serviços culturais como portadores de identidade, valores e sentidos
- Reafirma o direito soberano dos Estados para elaborar políticas culturais
- É um instrumento do presente e do futuro
- Tratado internacional juridicamente vinculante – ratificado por 143 países + UE

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## Audiovisual: homogeneização ou diversidade?

### *Impacto da Convenção*

- Iniciativas nacionais e locais
- Fundo Internacional para a Diversidade Cultural – FIDC
- Relatórios quadriennais
- Incorporação de capítulos especiais (Cultura) em acordos internacionais de cooperação
- Catálogos de melhores / boas práticas (iniciativas destinadas a favorecer a diversidade cultural)

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## Audiovisual: homogeneização ou diversidade?

### Ideia 3: O novo ecossistema digital é um dos maiores desafios que deve enfrentar a *Convenção*

Como conseguir hoje o acesso equitativo a uma gama rica e diversificada de expressões culturais procedentes de todas as partes do mundo?

Redes e suportes digitais: vêm complicar o quadro e reavivar um discurso tecno-determinista      + tecnologias digitais = + DC

Discurso desconhece:

- A re-territorialização da internet através do *copyright*
- A etiquetagem de conteúdos (*tag*) por parte dos poderosos motores de busca
- O peso dos novos intermediários digitais (de Hollywood a Hollyweb)
- O caráter socialmente construído dos mercados da informação, da comunicação e da cultura

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## Audiovisual: homogeneização ou diversidade?

### EUA não assinou a Convenção

Posição dos EUA (2005): “(...) a presente Convenção (...) poderia ser utilizada pelos Estados para justificar políticas que poderiam ser usadas ou violadas para controlar a vida cultural de seus cidadãos”

➤ Principal produtor e exportador de bens e serviços audiovisuais

➤ Principal propulsor do comércio eletrônico (através dos tratados de livre comércio com diferentes países e regiões do mundo)

➤ Papel altamente beligerante na OMC (vs. China, vs. Turquia)

➤ Sede das principais multinacionais do audiovisual na paisagem digital (Google, Facebook, Amazon...)

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## Audiovisual: homogeneização ou diversidade?

### Poder econômico (e político) das multinacionais

Top 100 - International Media Corporations	
1.	Concentric (Philadelphia / USA)
2.	Google Inc. (Mountain View / USA)
3.	The Walt Disney Company (Burbank / USA)
4.	News Corp., Inc. / 21st Century Fox (New York / USA)
5.	Discovery, LLC (Brentwood / USA)
6.	Viacom Media Networks / CBS Corp. (New York / USA)
7.	Time Warner Inc. (New York / USA)
8.	Sony Entertainment (Tokyo / JP.)
9.	Berlitzmann SE & Co. KGaA (Gütersloh/GER)
10.	Apple Inc. (Cupertino / USA)
11.	Cox Enterprises Inc. (Atlanta / USA)
12.	Liberty Media Corporation/Discovery Interactive (Englewood, CO / USA)
13.	Media General Communications (Flemington, NJ / USA)
14.	Vivendi S.A. (Paris/ FRA)
15.	Tencent Holdings Ltd. (Shenzhen / China)
16.	Thomson Reuters Corporation (New York / USA)
17.	Facebook, Inc. (Palo Alto / USA)
18.	Regal Cinemas (Torrance / CA)
19.	The Hearst Corporation (New York / USA)
20.	McClatchy Media (San Francisco / USA)
21.	Leopoldina Media (Paris/ FRA)
22.	RELX Group (London/ GBR)
23.	Charter Commc. Inc. (St. Louis/ USA)
24.	Bloomberg L.P. (New York / USA)
25.	AAR (Berlin, München/GER)
26.	Pearson plc (London / UK)
27.	ABC News (New York / USA)
28.	BBC (London / UK)
29.	Baidu Inc. (Beijing / China)
30.	Globo Comunicação e Participações S.A. (Rio de Janeiro/ BRA)

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## Audiovisual: homogeneização ou diversidade?

### *Poder econômico (e político) das multinacionais*

- **Estratégias de evasão impositiva – “otimização fiscal”** (sedes contábeis em paraísos fiscais: Ilhas Virgens, Ilhas Cayman, Bermudas...)
- EUA: Internal Revenue Service, Congresso e Senado estabeleceram que **Apple** evadiu 74 bilhões de USD de impostos durante 2009-2012
- **Funcionamento dos motores de busca de conteúdos:** algoritmos secretos e promoção de conteúdos patrocinados
  - Google é utilizado em 95% das buscas *online* feitas na Europa
- **Tratamento de dados pessoais para fins comerciais (*big data* vs. privacidade):** informações relevantes sobre os padrões de consumo, permitindo personalizar a gama de produtos e serviços
- Último capítulo: **CE vs. Google - "abuso de posição dominante"** por seu sistema operacional Android para smartphones e tablets

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## Audiovisual: homogeneização ou diversidade?

### *Processos de re-intermediação*

- Nas novas redes e suportes digitais se verifica um processo de **re-intermediação** promovido por **novos agentes** – como Google, Youtube, Facebook, Spotify... – e alianças deles com **tradicionais conglomerados midiático-culturais**, que promovem um questionamento acerca da DC nas redes digitais
- A atuação desses **intermediários ou gatekeepers da paisagem digital** forma uma espécie de “**gargalo**” que dá **visibilidade** e promove determinados conteúdos culturais (“os mais vendáveis”) em detrimento de outros
- A postulada “cauda longa” - metáfora que faz referência à ampla disponibilidade de conteúdos através das redes digitais - funciona como uma “**cauda longa invisível**”

Fonte: **DECLARAÇÃO SOBRE A PROTEÇÃO E PROMOÇÃO DA DIVERSIDADE CULTURAL NA ERA DIGITAL** (workshop internacional Proteção e promoção da diversidade no meio audiovisual na era digital, 3-4.X.2013, UC3M)

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## Audiovisual: homogeneização ou diversidade?

### *Oligopólios na distribuição de conteúdos*

Em contraste com os canais de distribuição físicos que muitas vezes operam em nível nacional ou local, a distribuição *online* permite a internacionalização do negócio de distribuição de conteúdos

➢ **Indústria da música:** iTunes (Apple) quota de mercado de 58,4% nos EUA em 2014 // Spotify, Deezer e Pandora capturaram + de 80% dos assinantes de serviços de streaming de música no mundo



➢ **Televisão:** iTunes domina o mercado de TVOD e Amazon Prime Instant Video e Netflix o mercado de SVOD (Subscription Video on Demand)

➢ **Livros:** Amazon domina o mercado de venda de livros digitais – quota de mercado de 60% dos ebooks nos EUA e de 78% no Reino Unido

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## Audiovisual: homogeneização ou diversidade?

### *Reflexões finais*

➢ Apesar das possibilidades que o **novo cenário digital** traz para a realização do princípio da diversidade no campo das indústrias culturais, existem **sérios riscos**

➢ A luta pela diversidade vai contra as maiores tendências de comunicação e cultura na economia global construída nas últimas duas décadas: os processos de concentração e financiarização (nacionais/global) têm piorado com **efeitos nocivos contra a diversidade oferecida e consumida**

➢ A verdadeira diversidade depende de:

- **Produção:** coexistência de grandes corporações, pequenas e médias empresas, de serviço público, terceiro sector
- **Distribuição:** oligopólios, distribuidores locais
- **Comercialização e visibilidade**
- **Demandas e consumo efetivo**

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## Audiovisual: homogeneização ou diversidade?

### *Reflexões finais*

A diversidade de um sistema audiovisual depende de uma multiplicidade de factores. A fim de avaliar a diversidade que se deve considerar, pelo menos, o seguinte:

➤ A capacidade de produção, distribuição e exibição/difusão de conteúdos audiovisuais não deve estar concentrada em um pequeno número de agentes. Esses agentes devem apresentar diferentes tipos de propriedade, tamanho e origem geográfica.

➤ O sistema deve oferecer diferentes conteúdos (variedade, equilíbrio e disparidade) em termos de valores, identidade e estética. Estes devem refletir os vários grupos que coexistem ao interior de uma sociedade e refletir as culturas estrangeiras.

➤ Os cidadãos devem poder acessar e fazer suas escolhas a partir de um grande número de conteúdos audiovisuais. E devem até mesmo ter a oportunidade de criar e disseminar conteúdos próprios.

Fonte: <http://diversidadaudiovisual.org/glosario-2/d> Fonte: <http://diversidadaudiovisual.org/glosario-2/d/>

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## **Extrait du Rapport “Le renouvellement de l’exception culturelle à l’ère du numérique”**

### *Sections II.1 et II.3*

**LILIAN RICHIERI HANANIA**

Rapport présenté au Gouvernement de la Fédération Wallonie-Bruxelles à l’occasion du Colloque organisé le 25 octobre 2015 à Mons pour célébrer le dixième anniversaire de la Convention sur la protection et la promotion de la diversité des expressions culturelles

Auteurs du rapport : Véronique Guèvremont (dir.), Ivan Bernier, Géraud de Lassus Saint-Geniès, Rostam J. Neuwirth, Lilian Richieri Hanania, Ivana Otasevic et Hélène Ruiz Fabri

Membres du Réseau International des Juristes pour la Diversité des Expressions Culturelles



Octobre 2015

## **Sections II.1 et II.3 du Rapport du RIJDEC,**

Lilian Richieri Hanania<sup>1</sup>

Avocate, Chercheure associée à l'Université Paris 1 – Panthéon-Sorbonne et à l'Université de Rouen, Chercheure auprès du Centre d'études Société et Technologie (CEST) de l'Université de São Paulo – USP.

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<sup>1</sup>

L'intégralité du Rapport est disponible sur  
<https://www.fd.ulaval.ca/accueil-rijdec>  
(...)

## II. La prise en compte de la spécificité des produits et services culturels à l'ère du numérique

L'incorporation de références explicites à la CDEC dans les accords de commerce devrait s'accompagner de clauses reflétant la nature spécifique des biens et des services culturels. Il est vrai que des modèles dignes d'intérêt se sont développés non seulement avant, mais aussi depuis l'adoption de la CDEC. Néanmoins, la libéralisation du commerce électronique (II.1) et les défis véhiculés par la convergence d'une pluralité de secteurs maintenant associés à la production, la distribution et la dissémination de contenus culturels (II.2), incitent à envisager une redéfinition et une extension de l'exception culturelle afin de la rendre mieux adaptée à la réalité du numérique (II.3). À titre complémentaire, il peut par ailleurs être utile de réfléchir à d'autres techniques permettant de promouvoir les objectifs et principes de la CDEC, de manière à assurer une prise en compte effective de la spécificité des biens et des services culturels dans les accords de commerce (II.4).

### *II.1 Le traitement du commerce électronique dans les accords commerciaux et ses défis pour la diversité des expressions culturelles*

La libéralisation du commerce électronique présente un lien flagrant avec la libéralisation des produits et services culturels. À titre d'illustration, sur le site de l'OMC, lorsque des exemples sont donnés de produits distribués électron-

iquement, sont immédiatement indiqués « les livres, les œuvres musicales et les vidéos transmis par le biais des lignes téléphoniques ou par Internet »<sup>2</sup>.

Un Programme de travail sur le commerce électronique a été établi dès 1998 par le Conseil général de l'OMC<sup>3</sup>. Aux fins de ce programme, « commerce électronique » renvoie à la production, la distribution, la commercialisation, la vente ou la livraison de produits et services par des moyens électroniques (§ 1.3 du Programme de travail). Depuis, les discussions entre les Membres de l'OMC à ce sujet se déroulent au sein des conseils de l'Organisation traitant du commerce des marchandises, du commerce des services, de la propriété intellectuelle, et du commerce et du développement. Parmi les sujets débattus, figurent *inter alia* la classification du contenu des transmissions électroniques, l'impact fiscal du commerce électronique, la participation des pays en développement au commerce électronique et ses effets, ainsi que l'imposition de droits de douane sur les transmissions électroniques. Sur ce dernier sujet, les Membres ont convenu de conserver leur pratique de ne pas imposer de tarifs douaniers sur ces transmissions (§ 34 de la Déclaration de Doha), en reconnaissant qu'il « importe de créer et de maintenir un environnement favorable au développement futur du commerce électronique »<sup>4</sup>.

Tandis que la question de l'application ou de la non-application de droits de douane est plus aisément perceptible et significative dans un contexte de commerce des marchandises, le commerce des services par voie électronique est de fait traité au sein des listes des Membres

<sup>2</sup> Voir : OMC, « Commerce électronique », [www.wto.org/french/thewto\\_f/whatis\\_f/tif\\_f/bey4\\_f.htm](http://www.wto.org/french/thewto_f/whatis_f/tif_f/bey4_f.htm) (consulté le 18 octobre 2015).

<sup>3</sup> Pour plus d'informations, voir : OMC, « Programme de travail sur le commerce électronique », 25 septembre 1998, [www.wto.org/french/tratop\\_f/ecom\\_f/wkprog\\_f.htm](http://www.wto.org/french/tratop_f/ecom_f/wkprog_f.htm) (consulté le 18 octobre 2015).

<sup>4</sup> *Déclaration ministérielle de Doha*, adoptée le 14 novembre 2001, WT/MIN(01)/DEC/1, 20 novembre 2001, [www.wto.org/french/thewto\\_f/minist\\_f/min01\\_f/mindecl\\_f.htm#electronic](http://www.wto.org/french/thewto_f/minist_f/min01_f/mindecl_f.htm#electronic) (consulté le 18 octobre 2015).

de l'OMC en tant que modalité de fourniture d'un service, chaque Membre pouvant s'il le souhaite s'abstenir de prendre des engagements relatifs à cette modalité de fourniture pour un secteur donné de sa liste d'engagements. L'extension naturelle du mode de fourniture transfrontière à la fourniture d'un service par voie électronique est considérée conforme au postulat de « neutralité technologique », soutenu de manière générale par les Membres de l'OMC. En effet, il est utile de rappeler que « [l]a notion de "neutralité technologique" dans l'AGCS [*Accord général sur le commerce des services*] a été défendue dans l'affaire Chine – Publications et services audiovisuels par [l'Union européenne] lors de sa soumission en tant que tierce partie, et également par les États-Unis, pour qui, comme le rappelle le Groupe spécial, "le principe de neutralité technologique est compatible (...) avec l'idée que l'AGCS est suffisamment dynamique pour que les Membres n'aient pas besoin de renégocier l'Accord ni leurs engagements compte tenu de l'évolution constante de la technologie" (Rapport du Groupe spécial, § 7.1160). Tout en se référant au Rapport du Groupe spécial dans l'affaire États-Unis – Jeux (où le principe de neutralité technologique avait été considéré comme paraissant être "largement partagé parmi les Membres de l'OMC"), le Groupe spécial constitué pour traiter cette affaire a considéré ne pas avoir besoin d'invoquer un tel principe pour interpréter l'engagement de la Chine concernant les services de distribution d'enregistrements sonores (§ 7.1258) »<sup>5</sup>. L'incertitude quant à la classification des contenus numériques comme des produits ou des services demeure, néanmoins, une pierre d'achoppement dans toute tentative de simplification à des fins de détermination de la règle de

<sup>5</sup> L. Richieri Hanania, *Diversité culturelle et droit international du commerce*, CERIC, Paris, La Documentation française, 2009, p. 195, à la note 402 ; *Accord général sur le commerce des services*, annexe 1B de l'Accord instituant l'OMC, 15 avril 1994, (1995) 1869 R.T.N.U. 219, (1994) 33 I.L.M. 1167 (entré en vigueur le 1er janvier 1995 ; ci-après « AGCS »).

droit applicable. Les difficultés de classification des nouveaux produits et services permis par les nouvelles technologies ajoutent à la complexité du sujet<sup>6</sup>.

Dans le cadre des accords bilatéraux ou régionaux de commerce, tant les États-Unis que l'Union européenne ont tenté de promouvoir le commerce électronique avec leurs partenaires commerciaux en établissant des principes d'ouverture des marchés. Leurs accords diffèrent toutefois et reflètent en définitive leurs positionnements respectifs concernant la spécificité des produits et services culturels.

Les accords négociés par les États-Unis<sup>7</sup> démontrent l'intention manifeste de cet État de consolider sa position déjà prédominante sur le marché des produits numériques. La « fourniture de services par voie électronique » y est distinguée du « commerce des produits numériques ». Le chapitre sur les services fournis par voie électronique renvoie aux dispositions de libéralisation énoncées dans d'autres chapitres de l'accord. Dans l'accord avec Singapour, par exemple, ces dispositions sont celles relatives au commerce transfrontalier des services, aux services financiers, aux investissements, ainsi qu'aux réserves et exceptions que les parties ont pu établir au titre de ces chapitres. Quant au commerce des produits numériques, ces accords les définissent comme une catégorie à part, comprenant « computer

<sup>6</sup> Voir la sous-section II.2 du présent rapport.

<sup>7</sup> Pour un examen des accords de libre-échange conclus par les États-Unis avec la Jordanie, le Chili, Singapour, les pays ALECA+ (Salvador, Guatemala, Honduras, Nicaragua, Costa Rica et République Dominicaine), l'Australie et le Maroc, ainsi que leurs dispositions pouvant avoir un impact sur la diversité culturelle (incluses dans les chapitres sur le commerce des services, les investissements, la propriété intellectuelle et le commerce électronique), voir L. Richieri Hanania, *Diversité culturelle et droit international du commerce*, *op.cit.*, p. 210-220. Sur le commerce électronique, voir *ibid.*, p. 212, 218 et 219. Voir également L. Richieri Hanania, « Cultural Diversity and Regional Trade Agreements: The European Union Experience with Cultural Cooperation Frameworks », *Asian Journal of WTO & International Health Law and Policy*, vol. 7, no 2, septembre 2012, p. 423-456, aux pages 430-435, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2087639](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087639) (consulté le 18 octobre 2015).

*programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law* » (nos soulignés). L'application des réserves ou exceptions adoptées par les États parties à ces accords, dans le chapitre sur le commerce des services, afin de maintenir leur marge de manœuvre en matière de politique culturelle dans des secteurs comme celui des services audiovisuels, peut ainsi être immédiatement écartée lorsqu'il s'agit des produits numériques, notamment si ces réserves ne mentionnent pas expressément la fourniture en format numérique. Notons que la définition des produits numériques qui est intégrée au chapitre sur le commerce électronique incorpore d'ailleurs des services traditionnellement considérés comme appartenant au secteur de l'audiovisuel, ce qui peut être une source de confusion et d'insécurité juridique pour les Parties.

En effet, un régime juridique particulier s'applique à ces produits. Premièrement, l'imposition de tarifs douaniers sur les transmissions électroniques est interdite. Ensuite, les parties assument l'obligation de traitement national quant à ces produits. À ce sujet, une évolution dans le texte des accords peut être observée. L'accord avec le Chili, signé en juin 2003, prévoit à son article 15.4, § 1 : « [a] Party shall not accord less favorable treatment to a digital product than it accords to other like digital products, on the basis that: (a) the digital product receiving less favorable treatment is created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party; or (b) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party ». Dans les accords signés par la suite, la discrimination entre produits nationaux et étrangers est également interdite selon un critère plus large, correspondant mieux aux types de mesures et politiques culturelles adoptées généralement par les pays et qui visent à bénéficier aux produits nationaux, plutôt qu'à défavoriser les produits

d'un pays étranger en particulier. Ce critère se lit : « *so as otherwise to afford protection to the other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory* » (voir, par exemple, l'article 14.3, § 3 de l'ALECA). Enfin, le régime juridique applicable aux produits numériques dans les accords bilatéraux commerciaux récents avec les États-Unis prévoit également le traitement de la nation la plus favorisée. Toute préférence accordée aux produits numériques provenant d'un pays donné doit ainsi être étendue à ceux originaires des parties à ces accords. Si des réserves à ces obligations pouvaient être exigées par les partenaires commerciaux des États-Unis lors de la négociation de ces accords, en pratique les pays de l'Amérique centrale et le Maroc, par exemple, ne l'ont pas fait. Il sera intéressant de connaître sur ce point la position des États parties au Partenariat Transpacifique (PTP). Compte tenu du fait que les États-Unis ont participé à la négociation de ce partenariat impliquant douze États des Amériques, de l'Asie et du Pacifique, on peut s'attendre à ce que l'approche décrite ci-dessus soit reprise. C'est d'ailleurs ce qu'on peut déduire des informations diffusées jusqu'à présent, lesquelles laissent entendre que le chapitre sur le commerce électronique contient une obligation de non discrimination applicable aux produits numériques, sans pour autant exclure du champ d'application de ce chapitre les produits culturels numériques<sup>8</sup>.

En écartant la distinction entre produits et services et l'application des règles qui y correspondent respectivement (généralement plus souples en ce qui concerne le commerce des services), et en étendant ainsi l'application des principes de libéralisation commerciale à la nouvelle catégorie de

<sup>8</sup> Un « Résumé technique de cet accord » est disponible sur le site Internet d'Affaires étrangères, Commerce et Développement Canada, [www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/13-E-Comm.aspx?lang=fra](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/13-E-Comm.aspx?lang=fra) (consulté le 18 octobre 2015).

« produits numériques », les accords conclus avec les États-Unis réduisent fortement la marge de manœuvre en matière de politique culturelle des États concernés pour le marché du numérique. Les exceptions culturelles éventuelles qu'un partenaire commercial pourrait établir se limitent en substance aux secteurs culturels traditionnels. Par ailleurs, cette nouvelle catégorie de produits numériques remet en question non seulement la distinction entre le contenu distribué par voie électronique (les *core services*, couvrant les services les plus divers, y compris ceux présentant un contenu culturel) et le transport de ce contenu, mais aussi le postulat de neutralité technologique des accords commerciaux, défendu, on l'a vu, également par les États-Unis à l'OMC.

Quant aux accords de commerce négociés par l'Union européenne, les principes applicables au commerce électronique couvrent généralement<sup>9</sup> : la coopération accrue entre les partenaires commerciaux sur les sujets relatifs au commerce électronique (y compris en matière de réglementation), l'appel à l'application de standards internationaux élevés en matière de protection de données et le fait que la livraison ou fourniture par voie électronique n'est pas sujette à des tarifs douaniers.

Quant à l'engagement des Parties à coopérer en matière de commerce électronique, les accords avec l'Union européenne comprennent, entre autres, des sujets comme la reconnaissance de certificats de signature électronique, la responsabilité des fournisseurs de service dans la trans-

<sup>9</sup> Voir, par exemple, les articles 119 et 120 du chapitre 6 de l'Accord de partenariat économique (APE) avec les États du CARIFORUM ; les articles 7.1, 7.48 du chapitre 7 de l'Accord UE-Coree du Sud ; le Titre IV de l'Accord signé avec le Pérou et la Colombie, et notamment les articles 107, 109, 162-166 ; le Titre III de la Partie IV de l'Accord avec les pays d'Amérique centrale, et notamment les articles 159, 201-202, ainsi que l'article 56 du Titre VI de la Partie III de ce même accord, qui mentionne également la coopération et l'assistance technique entre les Parties en matière de commerce électronique ; le chapitre 18 de l'Accord UE-Canada ; et les articles 8.1, 8.57-8.61 du chapitre 8 de l'Accord UE-Singapour.

mission ou le stockage d'informations, le traitement des communications commerciales en format électronique, la protection des consommateurs, la protection des données personnelles et la sécurité des transactions électroniques.

Dans certains accords, le principe de non-imposition de droits de douane est expliqué du fait que la livraison par voie électronique doit être considérée comme de la fourniture de services, soumise ainsi aux règles applicables au commerce des services au titre de l'accord<sup>10</sup>. Tous les partenaires commerciaux de l'UE ne semblent toutefois pas partager l'avis sur la qualification de la livraison électronique en tant que commerce de services ou tout au moins n'ont pas souhaité trancher cette question dans le texte de l'accord commercial. Par exemple, l'Accord UE-Corée du Sud se limite à indiquer que les Parties conviennent de ne pas imposer des droits de douane sur les livraisons par voie électronique, une note de bas de page à l'article 7.48.3 expliquant que « *[t]he inclusion of the provisions on electronic commerce in this Chapter [sur le commerce des services, l'établissement et le commerce électronique] is made without prejudice to Korea's position on whether deliveries by electronic means should be categorised as trade in services or goods* ». L'article 201.3 de la Partie IV de l'Accord UE-Amérique Centrale et l'article X-01 du chapitre 18 de l'AECG entre l'UE et le Canada contiennent une disposition similaire qui se contente d'affirmer que les Parties n'imposeront pas de droits de douane sur les livraisons ou transmissions électroniques, sans toucher à la question de la nature de ces transmissions en tant que produits ou services. Selon l'AECG, la « 'livraison par voie électronique' s'entend « d'un programme informatique, texte, vidéo, image, enregistrement audio ou autre produit à codage numérique » alors que le « 'commerce électronique'

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<sup>10</sup> Voir l'article 119.3 de l'APE avec le CARIFORUM, ainsi que l'article 162.3 de l'Accord avec le Pérou et la Colombie et l'article 8.59 de l'Accord avec Singapour.

s'entend du commerce qui se fait soit exclusivement par voie de télécommunications, soit par voie de télécommunications et d'autres technologies de l'information et des communications » (article X-06). La distinction produit-service numérique demeure ainsi assez floue dans cet accord.

Cependant, les risques identifiés plus haut pour la marge de manœuvre des États en matière de politique culturelle, résultant des accords signés avec les États-Unis, semblent pouvoir être écartés dans le cadre des accords négociés par l'UE. Tout d'abord, les obligations de libéralisation applicables au commerce électronique dans les accords européens restent bien plus limitées que dans les accords négociés par les États-Unis : il n'y a pas d'obligation de traitement national ou de traitement de la nation la plus favorisée dans les chapitres sur le commerce électronique des accords négociés par l'Union européenne. Ensuite, l'applicabilité des droits de douane au commerce des services peut être considérée contestable par principe, y compris lorsqu'ils ne sont pas fournis en ligne. Enfin, la portée des exceptions culturelles (par exemple, pour le secteur des services audiovisuels) contenues dans ces accords a souvent été explicitement étendue aux dispositions sur le commerce électronique. Ainsi, dans l'AECCG, les Parties ont souhaité clarifier l'applicabilité de leurs exceptions culturelles au commerce électronique. Le chapitre sur le commerce électronique est en effet subordonné aux autres chapitres de l'Accord, l'article X-01 affirmant qu'en cas de contradiction, ces derniers prévalent sur le premier. Cela implique que les exceptions culturelles introduites par les Parties dans d'autres chapitres de l'Accord, comme pour les industries culturelles (Canada) ou les services audiovisuels (UE), sont applicables en ce qui concerne la fourniture de ces produits.

ou services par voie électronique<sup>11</sup>. L'Accord aurait pu, toutefois, être plus clair, particulièrement lorsqu'il indique que les exceptions générales de l'accord (comprises dans le chapitre 32) s'appliquent également au chapitre sur le commerce électronique, alors que ces exceptions générales ne font que « rappeler les exceptions culturelles » établies ailleurs dans l'AECG et ne mentionnent pas explicitement le commerce électronique.

Si l'article 8.58 de l'Accord UE-Singapour reprend également la formule raccourcie susmentionnée, se limitant à affirmer la non-application des droits de douane, un article spécifique sur la fourniture électronique des services (article 8.59) clarifie que « *[f]or greater certainty, the Parties affirm that measures related to the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of this Chapter [sur le Commerce des services, l'établissement et le commerce électronique] subject to any exceptions applicable to such obligations* ». Ces exceptions couvrent, entre autres, les services audiovisuels (articles 8.3 et 8.9). L'Accord UE-Singapour contient par ailleurs un complément intéressant à l'engagement des Parties de coopérer sur les sujets soulevés par le commerce électronique, en indiquant que « *both Parties should avoid imposing unnecessary regulations or restrictions on electronic commerce* » (article 8.57.2). La promotion et la facilitation du commerce électronique ne devraient toutefois pas empêcher les Parties à la CDEC de reconnaître la spécificité des produits et services culturels dans leurs accords commerciaux via des techniques juridiques d'exception des dispositions de libéralisation de ces accords, ce qui a été fait, au demeurant, dans le cadre spécifique de l'Accord UE-Singapour pour les services audiovisuels.

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<sup>11</sup> Pour un aperçu des exceptions dans l'AECG, voir L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique : quelle application pour la Convention de l'UNESCO sur la diversité des expressions culturelles au sein de l'économie créative ? », avril 2015, p. 5 et 6, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2600647](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600647) (consulté le 18 octobre 2015).

Enfin, dans l'Accord UE-Corée du Sud, si l'extension des exceptions culturelles au numérique peut sembler plus subtile, aucune disposition juridique de l'accord ne peut conduire à la conclusion selon laquelle l'intention des Parties aurait été de limiter ces exceptions aux services audiovisuels traditionnels. Tout d'abord, les dispositions sur le commerce électronique de l'accord ne créent pas d'obligation de libéralisation commerciale autre que celle de non-imposition de droits de douane commentée précédemment. Ensuite, lorsque les services audiovisuels sont exclus du champ d'application de la section de l'accord sur le commerce des services (article 7.4 (a)) et sur l'établissement (article 7.10 (c)), une note de bas de page (n.b.p. 8 et 17) indique que « *[t]he exclusion of audiovisual services from the scope of this Section is without prejudice to the rights and obligations derived from the Protocol on Cultural Cooperation* » (nos soulignés). Aucune référence similaire à celle-ci n'est faite à la section sur le commerce électronique de l'accord. Enfin, la déclaration de la Commission européenne sur le Protocole de coopération culturelle rappelle l'engagement de la Commission aux principes et dispositions de la CDEC, ainsi que « *the EU's policy that trade negotiations on cultural and audiovisual services should not affect the Union's cultural and linguistic diversity* ». Cette politique a toujours été associée par l'UE au principe de neutralité technologique des engagements adoptés dans le domaine des services et peut servir à interpréter l'intention de l'UE lors de la négociation de cet accord.

Bien que l'on puisse, certes, souhaiter plus de clarté de certaines dispositions examinées plus haut afin que le principe de neutralité technologique et la marge de manœuvre des États en matière de politique culturelle soient réaffirmés et consolidés dans la pratique de négociation d'accords commerciaux à l'ère du numérique, il est possible de voir la progression des accords européens dans cette direction, tout au moins en comparaison avec les accords nord-américains. L'approche fondée davantage

sur la coopération que sur la libéralisation en matière de commerce électronique dans les accords de l'UE susmentionnés semble encore appropriée pour permettre que les Parties, tout en s'impliquant via le dialogue dans ce thème et dans la solution des problèmes pratiques qu'il peut soulever, demeurent libres d'établir des exceptions dans les autres chapitres de l'accord commercial et maintenir leur marge de manœuvre en matière de politique culturelle. Elles permettent ainsi de prendre en compte et de promouvoir les objectifs et principes de la CDEC dans les accords internationaux de commerce, tel que prescrit par son article 21. Il reste la question de savoir de quelle manière le numérique et les nouvelles technologies en général peuvent se répercuter sur le choix des secteurs d'intervention étatique et, par conséquent, des secteurs où des exceptions peuvent être considérées nécessaires dans un accord commercial, afin de garantir une telle marge de manœuvre. Cette question est d'autant plus complexe que les nouvelles technologies bouleversent continuellement le fonctionnement des marchés, en promouvant non seulement la convergence entre secteurs économiques divers, mais également l'offre de produits et services tout à fait nouveaux.

(...)

### *II.3 L'extension de l'exception culturelle aux secteurs issus des nouvelles technologies*

La complexité liée à la classification des produits et services fournis en format numérique, ainsi que les difficultés de transposition des politiques culturelles traditionnelles à la réalité des nouvelles technologies, ont servi d'argument majeur pour que des pays comme les États-Unis contestent la pertinence du dispositif d'exception culturelle dans les accords commerciaux à l'ère du numérique (II.3.1). Les objectifs, les principes et la neutralité technologique consacrés par la CDEC permettent toutefois d'asseoir l'utilité d'un tel mécanisme (II.3.2).

### A. Les tentatives de sujéction des produits et services culturels numériques à la libéralisation commerciale

En décembre 2000, les États-Unis présentaient à l'OMC une Communication qui visait à promouvoir la libéralisation du secteur des services audiovisuels dans le cadre du Cycle de négociations commerciales de Doha<sup>12</sup>. Parmi les propositions avancées, figuraient la révision de la classification des services audiovisuels actuellement existante dans la Classification sectorielle des services de l'OMC (MTN.GNS/W/120) face aux technologies du numérique, ainsi que la négociation d'un cadre pour les subventions à l'audiovisuel comme moyen primordial de politique culturelle.

La première proposition, consistant en la révision du document W/120, visait à conduire à la prise de nouveaux engagements dans le secteur de l'audiovisuel ou des secteurs « liés à l'audiovisuel » (*« audiovisual-related services »*) par les Membres de l'OMC, fondée sur la possibilité pour ces Membres d'insérer dans leurs listes d'engagements des limitations et conditions spécifiques pour les nouveaux sous-secteurs. Tandis que les États-Unis y énuméraient « *the complex, diverse set of activities that may be considered to form part of today's audiovisual sector* » (nos soulignés), ils ne considéraient pas pour autant que toutes ces activités devraient être classées comme des « services audiovisuels » dans le document W/120<sup>13</sup>. En fin de compte, l'idée serait vraisemblablement de distinguer entre, d'une part, les services audiovisuels traditionnels, qui resteraient soumis aux listes positives d'engagements adoptées par les Membres (avec les limitations et conditions éventuelles indiquées par chaque Membre pour le secteur audiovisuel) et, d'autre

<sup>12</sup> OMC, « Communication from the United States - Audiovisual and Related Services », S/CSS/W/21, 18 décembre 2000. Voir, pour des commentaires sur cette Communication, L. Richieri Hanania, *Diversité culturelle et droit international du commerce*, *op.cit.*, p. 194-197.

<sup>13</sup> OMC, « Communication from the United States - Audiovisual and Related Services », *ibid.*, p. 4.

part, les nouveaux services audiovisuels permis par les nouvelles technologies et couverts par d'autres catégories sectorielles de l'AGCS ou encore par les règles de libéralisation applicables au commerce électronique. Bien que les États-Unis y soulignent qu'une telle révision doit respecter le principe de neutralité technologique de l'OMC, reconnu explicitement dans la communication nord-américaine comme principe fondamental de l'OMC (*« a fundamental tenet of the WTO »*)<sup>14</sup>, une telle proposition semble difficilement soutenir ce principe, lequel permet précisément aux Membres, comme mentionné précédemment, de ne pas devoir renégocier leurs obligations en raison de l'évolution technologique. Alors que les propositions nord-américaines de décembre 2000 ont été rejetées au niveau multilatéral par les Membres de l'OMC<sup>15</sup>, les États-Unis ont pu finalement les mettre en pratique au niveau bilatéral.

En effet, dans les accords bilatéraux récents signés par les États-Unis et examinés à la sous-section II.1, en parallèle à la libéralisation du commerce de la catégorie des « produits numériques », les États-Unis ont accepté que leurs partenaires commerciaux excluent les mécanismes de soutien financier à la culture (subventions) de l'application des chapitres sur le commerce des services et sur les investissements. Ils ont également accepté, dans une plus ou moins grande mesure, que leurs partenaires commerciaux introduisent des réserves ou exceptions à la libéralisation de secteurs comme les services audiovisuels ou de commu-

<sup>14</sup> *Ibid.*, p. 3, § 10.1.

<sup>15</sup> Il reste à voir comment cette question sera traitée au sein des négociations plurilatérales de l'Accord sur le commerce des services (ACS) à l'OMC, l'idée étant que certaines obligations, comme le traitement national, soient applicables de manière *top-down*, laissant aux parties le soin de s'assurer que toute exclusion est énumérée explicitement dans leurs listes respectives d'engagements. Le commerce électronique fait, entre autres, partie des thèmes de négociation. Voir : European Commission, *Negotiations for a Plurilateral Agreement on Trade in services*, MEMO/12/107, Bruxelles, 15 février 2013, [http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150552.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150552.pdf) (consulté le 18 octobre 2015).

nication traditionnels. Ces réserves sont énumérées par chaque partenaire commercial dans deux types d'annexes : une annexe couvrant des mesures existantes incompatibles avec les obligations de l'accord (Annexes A ou I, selon l'accord) et une deuxième annexe comprenant de nouvelles mesures ou des mesures plus contraignantes que la Partie en question souhaite pouvoir adopter à l'avenir (Annexes B ou II, selon l'accord). En pratique, la plupart des réserves établies par les partenaires commerciaux des États-Unis ayant trait aux produits ou services culturels apparaissent dans le premier type d'annexe<sup>16</sup>. Des restrictions autres ou plus élevées que celles expressément indiquées dans la liste de chaque partenaire sont désormais interdites pour ces pays dans leurs relations avec les États-Unis. Par conséquent, si d'autres restrictions ou des exigences plus strictes ou différentes de celles prévues (parfois n'étant pas envisageables au moment de la négociation de l'accord) s'avèrent nécessaires à l'avenir, notamment face à la réalité du numérique, les pays concernés se trouveront privés de la possibilité de les adopter.

L'ouverture des marchés dans de nouveaux secteurs a été également recherchée par les États-Unis via la libéralisation de services regroupés au sein de la catégorie « services de la technologie de l'information et de la communication » (services TIC) <sup>17</sup>. Malgré les approches divergentes identifiées plus haut entre les États-Unis et l'Union

<sup>16</sup> Voir, pour une liste des réserves adoptées dans les accords récents avec les États-Unis par leurs partenaires commerciaux : L. Richieri Hanania, *Diversité culturelle et droit international du commerce*, op.cit., p. 213-217.

<sup>17</sup> À ce sujet, voir : L. Richieri Hanania et H. Ruiz Fabri, « European Media Policy and Cultural Diversity at the International Level: The EU's role in Fostering the Implementation of the 2005 UNESCO Convention », dans K. Donders, C. Pauwels et J. Loisen (dir.), *The Palgrave Handbook on European Media Policy*, Basingstoke, Palgrave Macmillan, 2014, p. 493-508, aux pages 497-500 ; A. Vlassis et L. Richieri Hanania, « Effects of the CDCE on Trade Negotiations », dans L. Richieri Hanania (dir.), *Cultural Diversity in International Law. The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, New York, Routledge, 2014, p. 25-39, à la page 33.

européenne quant au commerce électronique dans leurs accords commerciaux, des principes de libéralisation commerciale ont été établis dans le domaine des services TIC entre ces deux partenaires commerciaux en 2011 et pourraient, d'ailleurs, influencer les négociations en cours dans le cadre du Partenariat transatlantique de commerce et d'investissement (*Transatlantic Trade and Investment Partnership – TTIP*). Dans les *Trade Principles for Information and Communication Technology Services*, adoptés en avril 2011 dans le cadre du *Transatlantic Economic Council* (TEC)<sup>18</sup>, l'UE et les États-Unis ont exprimé leur intention de promouvoir ces principes non seulement dans leurs rapports économiques bilatéraux, mais également vis-à-vis d'autres pays. Le paragraphe qui introduit la liste des principes affirme, de manière générale, que « *[governments seeking to enhance their national regulatory capacity and support the development of ICT networks and services should embrace the following principles and, as appropriate, work to integrate them, in a technologically neutral manner, into bilateral and multi-lateral trade disciplines* ».

La libéralisation des produits et services audiovisuels ne fait pas directement l'objet de ces principes, mais certains d'entre eux pourraient les affecter, notamment si l'on considère les tentatives des États-Unis de s'assurer du libre commerce dans les secteurs touchés par les nouvelles technologies et du potentiel économique de ces secteurs pour les entreprises nord-américaines.

Certes, les politiques culturelles que les États membres de l'UE pourraient souhaiter établir en faveur de la diversité des expressions culturelles à l'ère du numérique semblent avoir été protégées dans ce document par un certain nombre de dispositions. Tout d'abord, par l'incorporation d'une mention relative à la neutralité technologique. Ensuite, par l'affirmation selon laquelle ces principes sont sans préjudice

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<sup>18</sup> European Union–United States Trade Principles for Information and Communication Technology Services, 4 avril 2011, [http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc\\_147780.pdf](http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147780.pdf) (consulté le 18 octobre 2015).

*« to the policy objectives and legislation of the European Union and the United States in areas such as the protection of intellectual property, the protection of privacy and of the confidentiality of personal and commercial data, and the enhancement of cultural diversity (including through public funding and assistance) »* (nos soulignés). L'utilisation du terme « *including* » témoigne de la non-exhaustivité des deux moyens de promotion de la diversité cités dans cette disposition, à savoir le financement public (souvent considéré par les États-Unis, on l'a vu, comme une forme d'intervention acceptable dans le secteur audiovisuel) et d'autres mesures de soutien par l'État.

Cependant, le « renforcement de la diversité culturelle » reste un objectif assez vague qui, selon des pays comme les États-Unis, pourrait à la rigueur être recherché précisément par la libéralisation commerciale des secteurs culturels. La capacité de cette disposition de contrecarrer des tentatives de libéralisation des secteurs de produits et services culturels numériques est en soi assez faible, dépendant essentiellement de la volonté politique des parties. Par ailleurs, le document ne fait pas de distinction entre les services de contenu et les services d'infrastructure pour transporter ce contenu, la catégorie *Information and communication technology services* n'étant au demeurant pas définie. En raison de la convergence technologique et de l'interdépendance des secteurs des médias, les principes qui y sont établis pourraient avoir des effets sur des secteurs de contenu, en empêchant une Partie d'adopter, à des fins de diversité culturelle, des mesures considérées plus efficaces dans des secteurs connexes (e.g. des obligations de *must-carry* imposées à des fournisseurs de services de télécommunications). De nombreux principes de ce document visent, en effet, l'accès aux marchés, comme celui de « *Open Networks, Network Access and Use* » (« [governments should not restrict the ability of suppliers to supply services over the Internet on a cross-border and technologically neutral basis] »), « *Local Infrastructure* » (« [governments should not require ICT service suppliers to use local infrastructure, or establish a local presence,

*as a condition of supplying services. In addition, governments should not give priority or preferential treatment to national suppliers of ICT services in the use of local infrastructure, national spectrum, or orbital resources ») et « Foreign Ownership » (« [g]overnments should allow full foreign participation in their ICT services sectors, through establishment or other means »). Un principe de transparence encourage également la publication de tout acte législatif ou administratif pouvant affecter le commerce des services TIC, ainsi que des notifications publiques et la mise en place de procédures permettant la soumission de commentaires. Cela ouvre la voie à la participation (ou à l'intervention) d'autres États dans l'évolution législative d'un pays dans ce domaine, ce qui n'est pas anodin pour des sujets complexes comme celui touchant à la manière d'intervenir en faveur de la diversité des expressions culturelles dans le contexte du numérique.*

En somme, la libéralisation des services TIC peut aller au-delà des questions d'infrastructure et avoir des effets sur des industries de contenu culturel, avec pour corollaire un impact sur la diversité et le pluralisme culturels. Cela exige d'autant plus de vigilance que les nouveaux secteurs des médias ont une importance grandissante pour la promotion des valeurs de démocratie et de pluralisme auprès des jeunes générations.

L'engagement des Parties à la CDEC en faveur de la diversité des expressions culturelles doit se traduire par un positionnement solide et cohérent en faveur de la spécificité des produits et services culturels lorsqu'elles négocient des engagements commerciaux bilatéraux, y compris si nécessaire en dehors des secteurs traditionnellement considérés comme culturels. En effet, si des Parties comme l'UE et le Canada se sont efforcés de maintenir leurs exceptions culturelles (pour les services audiovisuels, dans le cas de l'UE, et plus généralement pour les industries culturelles,

du côté canadien<sup>19)</sup> dans leurs accords commerciaux négociés récemment, force est de se demander si la dynamique promue par les nouvelles technologies en termes de produits et services proposés est bien prise en compte par ces exceptions traditionnelles ou si le libellé de ces exceptions ne mériteraient pas d'être revu afin que cette dynamique soit pleinement reflétée dans les futurs accords commerciaux. Sur la base des dispositions de la Convention, la section suivante revisite le concept d'exception culturelle et la notion de spécificité des produits et services culturels dans les accords commerciaux afin de s'interroger sur les secteurs et les politiques à viser lorsqu'une Partie souhaite mettre en œuvre son obligation de promouvoir les principes et objectifs de la Convention dans des enceintes commerciales au titre de l'article 21.

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<sup>19)</sup> Les « industries culturelles » se réfèrent aux secteurs suivants: « (a) la publication, la distribution ou la vente de livres, de revues, de périodiques ou de journaux, sous forme imprimée ou exploitable par machine, à l'exclusion toutefois de la seule impression ou composition de ces publications ; (b) la production, la distribution, la vente ou la présentation de films ou d'enregistrements vidéo ; (c) la production, la distribution, la vente ou la présentation d'enregistrements de musique audio ou vidéo ; (d) l'édition, la distribution ou la vente de compositions musicales sous forme imprimée ou exploitable par machine ; ou (e) les radiocommunications dont les transmissions sont destinées à être captées directement par le grand public, et toutes les activités de radiodiffusion, de télédiffusion et de câblodistribution et tous les services des réseaux de programmation et de diffusion par satellite » (article 2107 de l'*Accord de libre-échange nord-américain*, Canada, Mexique et États-Unis, 17 décembre 1992, [1994] R.T. Can. no 2 (entrée en vigueur le 1er janvier 1994)). La même définition a été reprise dans les accords suivants négociés par le Canada, y compris l'AECG, qui se réfère à « *the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, except when printing or typesetting any of the foregoing is the only activity; the production, distribution, sale or exhibition of film or video recordings; the production, distribution, sale or exhibition of audio or video music recordings; the publication, distribution or sale of music in print or machine-readable form; or radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services* » (article X.01, chap. 32 de l'AECG).

### B. La pertinence de l'exception culturelle pour les produits et services culturels numériques

Le concept de diversité culturelle tel que compris par la CDEC renvoie à la présence, sur un marché donné, de produits et services culturels provenant d'une multitude d'origines. Contraire à la fermeture à d'autres cultures et au protectionnisme commercial (avec lequel la « protection légitime » d'intérêts publics ne doit pas être confondue), la diversité appelle à l'échange et à l'interculturalité. C'est afin de promouvoir la diversité de l'offre culturelle que de nombreux États ont considéré important d'adopter des politiques publiques permettant de corriger les dysfonctionnements du marché des produits et services culturels<sup>20</sup>. La légitimité de cette intervention étatique est reconnue par la CDEC dans ses articles 1 (h)<sup>21</sup>, 2.2<sup>22</sup>, 5<sup>23</sup> et 6,<sup>24</sup> ainsi que dans l'affirmation de la spécificité des produits et services

<sup>20</sup> A ce sujet, voir L. Richieri Hanania, *Diversité culturelle et droit international du commerce*, op.cit., p. 29-61.

<sup>21</sup> Parmi les objectifs de la CDEC, figure celui de « (h) de réaffirmer le droit souverain des États de conserver, d'adopter et de mettre en œuvre les politiques et mesures qu'ils jugent appropriées pour la protection et la promotion de la diversité des expressions culturelles sur leur territoire ».

<sup>22</sup> Cet article rappelle le « Principe de souveraineté », selon lequel « [l]es États ont, conformément à la Charte des Nations Unies et aux principes du droit international, le droit souverain d'adopter des mesures et des politiques pour protéger et promouvoir la diversité des expressions culturelles sur leur territoire » (nos italiques).

<sup>23</sup> L'article 5.1 de la CDEC se lit comme suit : « 1. [l]es Parties réaffirment, conformément à la Charte des Nations Unies, aux principes du droit international et aux instruments universellement reconnus en matière de droits de l'homme, leur droit souverain de formuler et mettre en œuvre leurs politiques culturelles et d'adopter des mesures pour protéger et promouvoir la diversité des expressions culturelles ainsi que pour renforcer la coopération internationale afin d'atteindre les objectifs de la présente Convention » (nos italiques).

<sup>24</sup> L'article 6.1 de la CDEC rappelle : « 1. [d]ans le cadre de ses politiques et mesures culturelles telles que décrites à l'article 4.6, et compte tenu des circonstances et des besoins qui lui sont propres, chaque Partie peut adopter des mesures destinées à protéger et promouvoir la diversité des expressions culturelles sur son territoire » (nos italiques).

culturels vis-à-vis d'autres produits et services<sup>25</sup>. La reconnaissance de cette légitimité peut soutenir politiquement les Parties à la CDEC qui le souhaitent à refuser de réduire leur marge de manœuvre en matière de politique culturelle par l'acceptation d'engagements de libéralisation des secteurs culturels dans leurs accords internationaux de commerce. Sur la base de la CDEC, ces Parties peuvent ainsi défendre, au sein de leurs accords de commerce, qu'un traitement juridique spécial soit accordé aux produits et services culturels en raison de leur spécificité.

Afin de maintenir leur marge de manœuvre la plus large possible dans les secteurs culturels, les Parties peuvent avoir recours à différentes techniques juridiques servant à exclure de leurs engagements commerciaux les secteurs dans lesquels elles souhaitent conserver la possibilité d'adopter des mesures et politiques culturelles, ou du moins à exclure de ces accords certains types de mesures et politiques culturelles. Une première technique apparaît dans les exceptions générales introduites dans un accord commercial ou au sein de chapitres spécifiques de ce type d'accord (*e.g.* pour le Canada, dont l'exception couvre les industries culturelles, et l'UE, dont les exceptions couvrent généralement uniquement le secteur des services audiovisuels). Un autre moyen d'exempter certains secteurs et/ou mesures spécifiques figure dans les réserves introduites par chaque partenaire commercial dans sa liste d'engagements, dans les cas où ces engagements sont adoptés par listes négatives (libéralisation *top-down*, lorsque les principes de libéralisation s'appliquent de manière générale, à l'exception de ce qui est indiqué explicitement dans les

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<sup>25</sup> Le Préambule de la CDEC affirme que « les activités, biens et services culturels ont une double nature, économique et culturelle, parce qu'ils sont porteurs d'identités, de valeurs et de sens et qu'ils ne doivent donc pas être traités comme ayant exclusivement une valeur commerciale ». L'article 1 (g) indique, parmi les objectifs de la Convention, celui « de reconnaître la nature spécifique des activités, biens et services culturels en tant que porteurs d'identité, de valeurs et de sens ».

listes de réserves ou limitations de chaque pays). Il s'agit, par exemple, de la technique utilisée dans les accords bilatéraux négociés par les États-Unis. Lorsque les engagements de libéralisation commerciale sont établis par voie de listes positives (*bottom-up*, la libéralisation commerciale se limitant à ce qui est explicitement inclus dans des listes d'engagements de chaque partenaire commercial), il suffit à chaque partie à l'accord de s'abstenir d'indiquer un secteur dans sa liste d'engagements pour que ledit secteur en soit exclu. À titre d'illustration, il s'agit de l'approche adoptée par un grand nombre de Membres de l'OMC pour le secteur des services audiovisuels dans leurs listes d'engagements à l'AGCS, ainsi que par l'UE dans une grande partie de ses accords bilatéraux et régionaux de commerce. Selon une connotation large et dans le langage courant, renvoyant à la reconnaissance de la spécificité des produits et services culturels dans un accord commercial, toutes ces techniques peuvent être considérées comme des démarches d'*« exception culturelle »*.

Dans un contexte d'économie créative, marqué par l'évolution et la convergence technologiques, ainsi que par l'importance de la créativité et de l'innovation dans un grand nombre de secteurs, allant au-delà des secteurs traditionnellement considérés comme culturels, il est pertinent de s'interroger sur les conditions d'applicabilité du traitement juridique spécifique pour les secteurs culturels tel qu'il découle des dispositions de la CDEC. L'évolution rapide des nouvelles technologies exige d'autant plus un traitement spécifique pour les produits et services culturels que la dynamique du numérique peut demander une plus grande réactivité, adaptabilité et flexibilité des États pour protéger et promouvoir la diversité des expressions culturelles.

Les dispositions de la CDEC répondent à ce besoin de flexibilité. Elles sont très souples quant aux mesures et politiques que les Parties peuvent adopter pour protéger et promouvoir la diversité des expressions culturelles. La CDEC ne limite pas non plus les secteurs que les Parties

pourraient considérer comme nécessitant des politiques ayant des objectifs principalement culturels. Au contraire, conformément à son article 13, qui rappelle la dimension culturelle du concept de développement durable, la culture devrait être intégrée de manière générale dans les politiques de développement des Parties<sup>26</sup>. Par ailleurs, la neutralité technologique de la CDEC a été démontrée à plusieurs reprises<sup>27</sup>. La spécificité des produits et services culturels vis-à-vis d'autres produits et services incorporée à la CDEC continue ainsi de justifier le recours à des techniques d'exception culturelle dans les accords commerciaux à l'ère du numérique et cela est sans doute un moyen pour les Parties de promouvoir les objectifs et principes de la Convention dans les enceintes internationales commerciales tel que prescrit par l'article 21.

Toutefois, le numérique soulève ou renforce de manière particulière certaines questions. Tout d'abord, il est utile de s'interroger sur les politiques et mesures devant être protégées dans le contexte numérique, alors que les États s'efforcent encore de comprendre la réalité créée par

<sup>26</sup> L'article 13 se lit comme suit : « [l]es Parties s'emploient à intégrer la culture dans leurs politiques de développement, à tous les niveaux, en vue de créer des conditions propices au développement durable et, dans ce cadre, de favoriser les aspects liés à la protection et à la promotion de la diversité des expressions culturelles ».

<sup>27</sup> Voir notamment V. Guèvremont, *Réflexion préliminaire sur la mise en œuvre de la Convention sur la diversité des expressions culturelles à l'ère numérique*, juin 2013, 27 p., ainsi que les précédents rapports du RIJDEC : *Les directives opérationnelles et autres techniques de mise en œuvre de la Convention sur la diversité des expressions culturelles dans un contexte numérique*, 9 juin 2015, 48 p., présenté à l'UNESCO lors de la Conférence des Parties de la CDEC de l'UNESCO en juin 2015 et *La mise en œuvre de la Convention sur la protection et la promotion de la diversité des expressions culturelles à l'ère numérique : enjeux, actions prioritaires et recommandations*, présenté au Comité intergouvernemental de la CDEC en décembre 2013. Les trois études sont disponibles sur [www.fd.ulaval.ca/accueil-rijdec](http://www.fd.ulaval.ca/accueil-rijdec). Voir également : L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique... », *op. cit.*, et L. Richieri Hanania, « The UNESCO Convention on the Diversity of Cultural Expressions as a Coordination Framework to Promote Regulatory Coherence in the Creative Economy », *International Journal of Cultural Policy*, 2015, DOI: 10.1080/10286632.2015.1025068.

les nouvelles technologies pour pouvoir y intervenir de manière effective. Ensuite et précisément afin de conserver la possibilité pour les États d'y intervenir, il se pose la question de savoir quels secteurs doivent être exclus des accords commerciaux dans l'environnement numérique. Par ailleurs, les nouvelles technologies ayant apporté des situations auparavant inconnues, certaines Parties pourraient se demander ce qu'elles peuvent faire lorsque des secteurs pouvant être touchés par des objectifs culturels aujourd'hui ont déjà été libéralisés dans leurs accords commerciaux précédemment négociés, que ce soit à l'OMC ou aux niveaux bilatéral et/ou régional. Les sous-sections suivantes apportent des éléments de réponse et de réflexion à ces questions.

### *1. Quelles politiques et quels secteurs ?*

La CDEC s'applique « aux politiques et aux mesures adoptées par les Parties *relatives à* la protection et la promotion de la diversité des expressions culturelles » (article 3 de la CDEC, nos italiques). L'article 4.6 définit les « politiques et mesures culturelles » comme celles « *relatives à la culture*, à un niveau local, national, régional ou international, qu'elles soient *centrées sur la culture* en tant que telle, ou *destinées à avoir un effet direct sur les expressions culturelles* des individus, groupes ou sociétés, y compris sur la création, la production, la diffusion et la distribution d'activités, de biens et de services culturels et sur l'accès à ceux-ci » (nos italiques). Par ailleurs, l'article 6.2 fournit une liste non exhaustive de politiques et mesures, laquelle n'offre aucune limitation en termes de types de mesures ou de secteurs pouvant être concernés. Par conséquent, des mesures et politiques ciblant primordialement la culture ou les expressions culturelles (« *centrées sur la culture* » ou « *destinées à avoir un effet direct sur les expressions culturelles* ») et en

accord avec les principes et objectifs de la CDEC peuvent être considérées comme légitimées et justifiées sur la base de cette dernière<sup>28</sup>.

Au sein de l'économie créative, nombreux sont toutefois les secteurs ayant un lien plus ou moins significatif avec la culture et la créativité. Sans modifier ou étendre le champ d'application de la CDEC (ce qui pourrait créer des confusions sur son objet et ses objectifs et, en fin de compte, nuire à sa crédibilité et à son effectivité), les défis et les opportunités apportés par les nouvelles technologies de l'information et de la communication peuvent exiger des mesures étatiques innovantes qui, tout en ciblant primordialement la culture ou les expressions culturelles, dépassent les secteurs traditionnellement classés comme culturels. Afin de promouvoir un plus grand équilibre dans les échanges des produits et services culturels, une Partie à la CDEC pourrait ainsi souhaiter impliquer davantage les fournisseurs d'accès à l'Internet, les opérateurs de téléphonie mobile, les plateformes de diffusion en ligne, ou d'autres futurs nouveaux acteurs dans les efforts en faveur de la diversité des expressions culturelles. Le champ de la notion d'« industries culturelles » telle que définie à l'article 4.5 (« industries produisant et distribuant des biens ou services culturels ») semble en pratique s'être élargi depuis l'émergence de ces nouveaux acteurs<sup>29</sup>.

Par ailleurs, la coordination et la cohérence entre différents domaines politiques exigées par le concept de développement durable renforcent cette conclusion. Afin de faire profiter au plus grand nombre des opportunités offertes par le numérique en termes de diversité et d'accès à une offre culturelle diversifiée, un État pourra ainsi souhaiter, par exemple, adapter ses politiques d'éducation, en introduisant des politiques et des programmes de

<sup>28</sup> L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique... », *op. cit.*, p. 4.

<sup>29</sup> Voir sur ces questions *ibid.*, p. 6-8.

développement des capacités, de sensibilisation à la diversité et de formation d'esprit critique des citoyens. Des politiques de promotion de l'innovation et de la créativité dans les secteurs économiques les plus divers pourraient également en théorie viser fondamentalement l'épanouissement de la richesse culturelle d'un pays<sup>30</sup>. Ceci est d'ailleurs compatible avec l'approche économique de la diversité culturelle contenue dans la CDEC, centrée sur les échanges des produits et services culturels et le développement des industries culturelles. L'article 21 a un rôle majeur à jouer afin que cette coordination entre différents domaines politiques réclamée par la CDEC soit répandue, reconnue comme nécessaire et mise en œuvre au niveau international, notamment au sein d'autres forums internationaux agissant en faveur du développement durable.

Il est toutefois impraticable et d'ailleurs peu souhaitable d'établir une liste figée de secteurs méritant l'utilisation d'une exception culturelle dans un accord commercial ou de définir une liste exhaustive de produits et services culturels ou ayant un lien avec la culture, surtout dans le contexte dynamique de l'évolution technologique<sup>31</sup>. La flexibilité des dispositions de la CDEC, le droit souverain des Parties en matière de politiques et de mesures culturelles réaffirmé à son article 5, les circonstances particulières des marchés des produits et services culturels de chaque Partie et l'étendue variée de leurs engagements commerciaux déjà existants conduisent à affirmer qu'il revient à chacune d'entre elles de sélectionner les secteurs

<sup>30</sup> Les liens entre la créativité et la diversité culturelle sont flagrants et ont été reconnus de manière explicite par la *Déclaration universelle sur la diversité culturelle*, 2 novembre 2001, Doc. UNESCO 31 C/Rés. 25, dans *Actes de la Conférence générale. 31e sess., Paris, 15 octobre – 3 novembre 2001*, vol. 1 « Résolutions », Paris, UNESCO, 2002, p. 73. La diversité culturelle y est reconnue comme « source d'échanges, d'innovation et de créativité » (art. 1) et une section (art. 7-9) y est dédiée à la corrélation entre la diversité culturelle et la créativité.

<sup>31</sup> Voir à ce sujet L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique... », *op. cit.*, p. 8 et 9.

où un traitement juridique spécifique lui semble nécessaire dans le cadre d'un accord commercial. Tout en prenant en compte les engagements qu'elles auront pu assumer précédemment, il leur incombera de rédiger soigneusement toute exception ou réserve pouvant leur garantir la plus grande marge de manœuvre possible dans le contexte des nouvelles technologies, en leur permettant d'adopter des mesures et politiques adaptées et efficaces dans un tel contexte. Cela dépendra bien évidemment de la volonté et de la stratégie politiques de chaque Partie, ainsi que de son pouvoir de négociation face à différents partenaires.

Il n'existe donc pas un modèle ou libellé unique d'exception ou de réserve d'ordre culturel applicable à toutes les Parties de la CDEC. Il est toutefois possible d'avancer quelques réflexions qui pourraient leur servir de source d'inspiration. Un premier exemple pouvant étayer ces réflexions est celui de l'exception canadienne traditionnelle touchant aux industries culturelles. Alors que cette exception couvre une gamme plus large de secteurs culturels<sup>32</sup> que l'exception européenne, par exemple, ce qui peut être considéré comme étant très positif, l'on peut s'interroger sur sa capacité à prendre pleinement en compte la réalité continuellement changeante des nouvelles technologies. Ainsi, lorsque l'exception canadienne mentionne « la publication, la distribution ou la vente de livres, de revues, de périodiques ou de journaux, sous forme imprimée ou exploitable par machine », peut-on déduire que l'expression « exploitable par machine » couvre toute sorte de moyens technologiques ? Les produits auxquels cette exception se réfère, couvrent-ils les publications en ligne qui n'adoptent pas le format des livres, revues, périodiques et journaux traditionnels, comme les livres multimédias et/ou interactifs ? La « production, la distribution, la vente ou la présentation de films ou d'enregistrements vidéo » ou encore « d'enregistrements de musique audio

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<sup>32</sup> Voir *supra*.

ou vidéo », couvrent-elles toutes les activités économiques présentes aujourd’hui sur le marché et impliquant la mise à disposition du public de films, enregistrements vidéo et de musique ? Que dire des produits multimédias comprenant texte, image et musique à la fois ? Enfin, peut-on dire que le secteur des « radiocommunications dont les transmissions sont destinées à être captées directement par le grand public, et toutes les activités de radiodiffusion, de télédiffusion et de câblodistribution et tous les services des réseaux de programmation et de diffusion par satellite » englobe toutes les formes de transmission de contenu, comme les émissions radio sur Internet ou les services audiovisuels non linéaires, par exemple ? L’évolution technologique complexifiera progressivement les réponses à ces questions.

Les accords signés par la Nouvelle-Zélande fournissent un autre exemple de formulation d’exception culturelle méritant d’être examinée ici. Bien que certains éléments de cette exception demeurent problématiques, son libellé tente de répondre aux défis soulevés par les nouvelles technologies. À titre d’illustration, dans l’Accord de libre-échange ASEAN-Australie-Nouvelle Zélande (AANZFTA), l’exception figurant à l’article 1er du chap. 15 de l’accord se lit : « *[f]or the purposes of Chapter 8 (Trade in Services) and Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value* » (nos soulignés). D’un côté, le qualificatif « *of national value* » et l’exigence de « nécessité » semblent réduire la portée des mesures pouvant soutenir les « arts créatifs » au titre de cette exception. De même, les conditions exigées par cet article quant à la manière dont ces mesures peuvent être appliquées,

similaires aux chapeaux de l'article XX du GATT et de l'article XIV de l'AGCS, peuvent présager d'une mise en pratique peu profuse. D'un autre côté, la définition de « *creative arts* » contenue dans une note de bas de page couvre de manière large le contenu culturel numérique : « “*Creative arts*” include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities » (nos soulignés). Les concepts de « contenu créatif en ligne », de « médias interactifs », ou d'« œuvre d'art hybride » ayant recours aux nouvelles technologies sont autant de notions qui pourraient être explorées par d'autres Parties à la CDEC lors de la rédaction de leurs exceptions culturelles à l'ère du numérique.

## *2. Quelles perspectives pour les futurs accords commerciaux ?*

Lorsque des engagements commerciaux ont été précédemment adoptés pour des secteurs où une Partie souhaite intervenir en vue d'objectifs culturels fondés sur la CDEC, il demeure nécessaire de s'interroger sur les possibilités concrètes de mise en œuvre de cette dernière et en particulier de son article 21 lors de la négociation de nouveaux accords commerciaux.

Afin de déterminer l'étendue sectorielle d'une exception culturelle dans un accord commercial, un premier élément à conserver à l'esprit est le fait que la CDEC ne fait pas de distinction entre des secteurs culturels lorsqu'elle affirme la spécificité des produits et services culturels. Tous les activités, produits et services culturels véhiculent des identités, des valeurs et des sens et « ne doivent donc pas être traités comme ayant exclusivement une valeur commerciale » (Préambule de la CDEC). Certes, il incombe aux Parties de déterminer les secteurs à l'égard desquels elles

souhaitent établir des exceptions (voir *supra*), sur la base des intérêts publics valorisés par leurs sociétés respectives, leur stratégie politique, leur pouvoir de négociation, ainsi que les liens qui seront établis avec d'autres secteurs commerciaux au long de la négociation d'un accord international de commerce. La distinction entre secteurs ne provient, néanmoins, pas des dispositions de la CDEC elles-mêmes.

Une question qui peut se poser est donc celle de savoir si, sur la base de cette convention et depuis son entrée en vigueur, une Partie pourrait élargir son exception culturelle dans ses accords futurs<sup>33</sup>, en l'étendant à d'autres secteurs pour lesquels elle n'avait pas exigé une exception dans le cadre d'accords commerciaux précédents. A titre d'exemple, l'exception européenne touchant exclusivement les services audiovisuels pourrait aujourd'hui paraître insuffisante, ne prenant pas en compte d'autres secteurs culturels dont la spécificité a été également reconnue par la CDEC depuis son adoption en 2005. L'on sait que cette position traditionnelle de l'UE est justifiée par la reconnaissance de la double nature (culturelle et économique) du secteur audiovisuel et de son importance particulière d'un point de vue à la fois économique et social pour les sociétés contemporaines. Il faut se rappeler, par ailleurs, que certains États membres tiennent à défendre leurs intérêts économiques dans des secteurs autres que l'audiovisuel (*e.g.* le secteur du livre), ce qui justifie leur souhait de libéralisation de ces secteurs de la part des partenaires commerciaux de l'UE. Un argument juridique souvent mis en avant est également celui selon lequel certains États membres de l'UE ont déjà adopté des engagements de libéralisation commerciale (souvent assortis de limitations et conditions) dans d'autres secteurs

<sup>33</sup> Quant aux traités déjà existants, l'article 20.2 de la CDEC est clair lorsqu'il affirme que « [r]ien dans la présente Convention ne peut être interprété comme modifiant les droits et obligations des Parties au titre d'autres traités auxquels elles sont parties ». Les engagements pris par les Parties dans le cadre de traités précédents demeurent applicables dans les relations entre les parties à ces traités tant qu'elles n'auront pas convenu de les amender.

culturels (*e.g.* services de divertissement ou d'agences de presse) dans le cadre de l'AGCS à l'OMC ou d'accords bilatéraux<sup>34</sup>. Restreindre les engagements de l'UE lors de la négociation de nouveaux accords commerciaux, en étendant son exception culturelle à d'autres secteurs, a ainsi souvent été considéré comme inacceptable par certains États membres et par la Commission européenne.

On peut néanmoins s'interroger si, par exemple, dans un accord comme l'AECG entre l'UE et le Canada, l'exception canadienne pour les industries culturelles n'aurait pas pu tout simplement être applicable aux deux parties à l'accord. En excluant uniquement les services audiovisuels des chapitres de l'accord, l'UE offre en fin de compte à son partenaire canadien des engagements qu'elle n'exige pas en contrepartie<sup>35</sup>. Certes, l'UE est tenue de respecter ses engagements en la matière au titre de l'AGCS et cela à l'égard de tous les Membres de l'OMC, y compris le Canada. Cependant, dans une perspective de renforcement politique et de visibilité de la CDEC, et précisément, car juridiquement les engagements existants demeurent, il n'aurait sans doute pas été inutile de profiter de la négociation avec l'un des États les plus engagés en faveur de la mise en œuvre de la CDEC pour affirmer plus largement la spécificité des secteurs culturels<sup>36</sup>. Cela n'irait vraisemblablement pas à l'encontre des exigences de l'OMC à l'égard des accords régionaux de commerce au titre de l'article XXIV du GATT (élimination des barrières « pour l'essentiel des échanges commerciaux ») ou de l'article V de l'AGCS (couverture d'« un nombre substantiel

<sup>34</sup> L. Richieri Hanania et H. Ruiz Fabri, « European Media Policy and Cultural Diversity at the International Level (...) », *op. cit.*, pages 495 et 496.

<sup>35</sup> Et cela bien que l'on puisse soutenir que la technique utilisée dans cet accord pour l'établissement des exceptions culturelles (consistant en des exceptions chapitre par chapitre) a fini par permettre à l'UE d'obtenir un certain niveau de libéralisation de la part du Canada dans le secteur du livre.

<sup>36</sup> L. Richieri Hanania et H. Ruiz Fabri, « European Media Policy and Cultural Diversity at the International Level (...) », *op. cit.*, page 496.

de secteurs »), étant donné que de telles exigences peuvent être respectées par la libéralisation d'autres secteurs que les secteurs des produits et services culturels<sup>37</sup>. La mise en œuvre de la CDEC justifierait ainsi que des discussions soient mises en place au sein de l'UE avec des représentants des secteurs culturels autres que l'audiovisuel en vue de la préparation d'une stratégie politique consistante pour ces autres secteurs dans les futurs accords commerciaux. La même démarche pourrait être utilement entreprise par d'autres Parties à la CDEC.

Une autre manière de mettre en œuvre l'article 21 de la CDEC lorsque les Parties ont auparavant adopté des engagements commerciaux dans des secteurs où elles peuvent souhaiter agir aujourd'hui dans un contexte de nouvelles technologies est celle de la coopération culturelle internationale.

En effet, la CDEC adopte une approche systémique et globale qui dépasse la reconnaissance de la spécificité des produits et services culturels vis-à-vis d'autres produits et services couverts par des accords commerciaux. Tout en incorporant la notion d'« exception culturelle » en matière de politique commerciale des Parties, la CDEC appelle à des actions complémentaires également fondamentales pour l'objectif ultime de diversité culturelle, notamment dans les domaines de la coopération internationale et du développement<sup>38</sup>. De telles actions ne passent pas nécessairement par

<sup>37</sup> Par ailleurs, la pratique montre que ces exigences sont interprétées avec une certaine flexibilité et ont été peu appliquées par les Membres de l'OMC. Voir : OMC, *The Future of the WTO. Addressing Institutional Challenges in the New Millennium. Reinforcing the WTO to Meet its Institutional Challenges*, par P. Sutherland (dir.), Report by the Consultative Board to the Director-General Supachai Panitchpakdi, OMC, Genève, 2004, p. 21, [https://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm) (consulté le 18 octobre 2015).

<sup>38</sup> Voir L. Richieri Hanania (dir.), *Cultural Diversity in International Law...*, op. cit. ; L. Richieri Hanania, « The UNESCO Convention on the Diversity of Cultural Expressions as a Coordination Framework... », op. cit. ; L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique... », op. cit..

la libéralisation commerciale et des engagements d'accès aux marchés, bien qu'elles puissent jouer un rôle majeur dans le rééquilibrage des échanges des produits et services culturels, en contribuant à la promotion de la diversité des expressions culturelles en accord avec les dispositions de la CDEC. Au sein de cette dernière, la promotion des échanges de produits et services culturels via la coopération internationale figure comme un volet interdépendant, et non pas contradictoire, par rapport à la spécificité des produits et services culturels dans le domaine commercial<sup>39</sup>. Un exemple de tentative de mise en œuvre du volet de la CDEC sur la coopération internationale dans le domaine culturel lors de la négociation d'accords commerciaux est celui des protocoles ou accords de coopération culturelle négociés par l'UE avec certains de ses partenaires commerciaux<sup>40</sup>. Tandis que, dans la partie commerciale de ces accords, l'UE indique son exception habituelle pour les services audiovisuels, un protocole intégré au traité de commerce ou un accord indépendant de ce dernier contiennent des dispositions de coopération culturelle inspirées de la CDEC<sup>41</sup>.

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<sup>39</sup> Voir L. Richieri Hanania, « Le débat commerce-culture à l'ère numérique... », *op. cit.*, p. 5 et 6.

<sup>40</sup> Voir L. Richieri Hanania, « Cultural Diversity and Regional Trade Agreements... », *op. cit.*, aux pages 430-435, ainsi que C. Souyri-Desrosier, « EU Protocols on Cultural Cooperation. An Attempt to Promote and Implement the CDCE within the Framework of Bilateral Trade Negotiations », dans L. Richieri Hanania (dir.), *Cultural Diversity in International Law...*, *op. cit.*, p. 209-224.

<sup>41</sup> L'option d'un protocole, partie intégrante de l'accord commercial, ne s'est justifiée que lorsque les dispositions de coopération avaient des effets d'ouverture des marchés et que leur inclusion dans l'accord commercial bilatéral ou régional permettait d'écartier l'obligation de traitement de la nation la plus favorisée déjà assumée à l'OMC par certains partenaires, par exemple les pays du CARIFORUM et la Corée du Sud. En effet, puisque les dispositions de coopération culturelle négociées avec ces partenaires établissent un accès préférentiel pour des coproductions audiovisuelles, leur inclusion dans un accord régional de commerce permettait qu'elles soient couvertes par l'article V de l'AGCS et, par conséquent, exemptées de l'application du traitement de la nation la plus favorisée au titre de cet accord. Voir à ce sujet L. Richieri Hanania, « Cultural Diversity and Regional Trade Agreements... », *op. cit.*, aux pages 440 et 441.

Des dispositions de coopération culturelle sans effet d'accès aux marchés ou de libéralisation commerciale dans des secteurs culturels peuvent être adoptées indépendamment de tout engagement assumé dans le cadre d'accords commerciaux existants entre les parties. Le potentiel de ce type de dispositions pour la promotion de la diversité des expressions culturelles est immense et les possibilités de communication et d'échange accrues offertes par les technologies du numérique peuvent être grandement mises à profit pour favoriser la coopération culturelle<sup>42</sup>. Les Parties ayant déjà adopté des engagements d'ouverture commerciale dans des secteurs culturels dans le cadre de l'OMC ou dans un accord précédent avec des partenaires commerciaux ont ainsi sans doute un champ d'action à développer dans ce domaine. Enfin, la coopération culturelle internationale est également un moyen de promouvoir les échanges et l'interculturalité pour des Parties qui ne souhaitent pas s'engager davantage à libéraliser leurs marchés, afin de maintenir leur marge de manœuvre en matière de politique culturelle face au contexte évolutif des nouvelles technologies.

La section suivante examine des moyens juridiques supplémentaires permettant aux Parties de prendre en compte la spécificité des produits et services culturels consacrée par la CDEC dans le contexte des accords internationaux de commerce.

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<sup>42</sup> Voir, pour des exemples et propositions concrètes de coopération culturelle en faveur des pays en développement à l'ère du numérique, le rapport *La mise en œuvre de la Convention...*, op. cit., p. 11-20.

## Programa – I Jornada “Diversidade Cultural e Novas Tecnologias”

DATA E HORÁRIO: 2 de julho de 2015, das 9:00 às 18:00

Local: **Auditório “Prof. Oswaldo Fadigas Fontes Torres – USP, CeTI-SP**

Informações e inscrições: <http://cest.poli.usp.br>

9h-9h30	<b>Abertura oficial pelo Diretor da Escola</b>
9h30 – 10h00	<b>Introdução</b> <ul style="list-style-type: none"><li>• Apresentação dos trabalhos do CEST – <i>Maristela Basso (FDUSP, CEST/USP)</i> e <i>Edison Spina (CEST/USP)</i></li><li>• Apresentação breve da Convenção e das oportunidades e desafios trazidos pelas novas tecnologias para sua implementação. Apresentação breve dos temas dos painéis escolhidos para a Jornada – <i>Lilian Hanania (CEST/USP, Univ. Paris 1 – Panthéon-Sorbonne, Univ. de Rouen, U40)</i></li></ul>

10h00 – 11h30	<b>Painel I</b> – Novas tecnologias – desafios e oportunidades Moderador: <i>Mário Magalhães (CEST/USP)</i> (15 minutos por apresentação, 30 minutos de debate, 15 minutos para moderação com conclusões) <ul style="list-style-type: none"><li>• Internet da Coisas – <i>Gilson Schwartz (Professor ECA e FFLCH-USP)</i></li><li>• Desafios da comunicação digital – <i>Edson Perin (Jornalista)</i></li><li>• Privacidade de dados – <i>Vera Kerr (CEST/USP)</i></li></ul>
11h30 – 11h45	<b>Pausa para café</b>
11h45 – 13h15	<b>Painel II</b> – Novas tecnologias e criação cultural (15 minutos por apresentação, 30 minutos de debate, 15 minutos para moderação com conclusões) Moderador: <i>Piatã Kignel (U40, Gestor cultural)</i> <ul style="list-style-type: none"><li>• Iniciativa de “Makerspace” – <i>Gabriela Agustini (OLABI)</i></li><li>• Projeto “Mais diferenças” e o aplicativo WhatsCine – <i>Luis Mauch (Mais Diferenças)</i></li><li>• Projeto “Vídeo nas aldeias” – <i>Vincent Carelli (Video nas Aldeias)</i></li></ul>
13h15 – 14h15	<b>Pausa para almoço</b>

14h15 – 15h45	<p><b>Painel III</b> – Novas tecnologias e acesso à oferta cultural            (15 minutos por apresentação, 30 minutos de debate, 15 minutos para moderação com conclusões)            Moderador: <i>Guilherme Carboni (Doutor em Direito, Advogado)</i></p> <ul style="list-style-type: none"> <li>• Conciliar proteção de direitos de autor e acesso à diversidade – exemplo do Chile – <i>Daniel Alvarez Valenzuela (Advogado e fundador da ONG Derechos Digitales Chile)</i></li> <li>• Festivais online de cinema – exemplo do “My French Film Festival” – <i>Paule Maillet (Adida Audiovisual da França no Brasil)</i></li> <li>• A digitalização da Revista da Faculdade de Direito da Universidade de São Paulo – <i>Antonio Carlos Morato (Professor de Direito – FDUSP)</i></li> </ul>
15h45 – 16h00	<b>Pausa para café</b>
16h00 – 17h30	<p><b>Painel IV</b> – Novas tecnologias, cidadania e democracia            Moderador: <i>Maristela Basso (FDUSP, CEST/USP)</i>            (15 minutos por apresentação, 30 minutos de debate, 15 minutos para moderação com conclusões)</p> <ul style="list-style-type: none"> <li>• Desafios e oportunidades das novas tecnologias para a democracia: o exemplo dos Pontos de cultura e do caso Facebook x MinC – <i>Giselle Dupin (MinC)</i></li> <li>• Experiência do Laboratório Hacker da Câmara de Deputados – <i>Cristiano Ferri (LabHacker)</i></li> </ul>

17h30– 18h00	<b>Conclusões – Piatã Kignel (U40, Gestor cultural) e Edison Spina (CEST/USP)</b>
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## **Report – I Conference “Cultural Diversity and New Technologies”**

*(Original in Portuguese)*

**GUILIANA KAUARK & NISIO TEIXEIRA (U40 GROUP)**



July 2nd, 2015

### **Introduction**

**The 2005 Unesco Convention On The Diversity Of Cultural Expressions**

Lilian Richieri Hanania – (Attorney, CEST/USP, IREDIES/University Paris 1, CUREJ/University of Rouen)

The event *Cultural Diversity and New Technologies* was focused on commemorating the 10th Anniversary of adopting the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE).

Among several UNESCO conventions that approach culture issues and that ultimately aim at cultural diversity, the CDCE deals specifically with rebalancing international exchanges of cultural products and services. It adopts an economic perspective of cultural diversity, linked to the creation, production, distribution and access to cultural expressions disseminated by cultural activities, products and services. The provisions of the CDCE can be summarized into two major topics:

1. Recognizing the double nature (cultural and economic) of cultural products and services and, consequently, their specificity; this not only justifies the legitimacy of public policies to promote diversity but also a special legal treatment towards these products and services, including in international trade agreements.
2. The promotion of international cooperation, especially focusing on development issues. A key provision of the CDCE consists on the reaffirmation of culture as an integrating part of sustainable development, which demands that the Parties should guarantee the coherence of their actions and positions in the several national and international forums that approach the issue of sustainable development.

Some scholars have challenged the usefulness of the CDCE in the context of new technologies, in which traditional cultural policies, applied to sectors traditionally considered as cultural (e.g.: quotas for national content on the TV, in the movies, in radiobroadcasting, etc.), seem less

efficient. However, the Convention is technologically neutral, offering a legal framework to measures and policies related to the protection and promotion of the diversity of cultural expressions no matter which means and technologies used.

The implementation difficulties that the CDCE faces in the digital medium seem to result mainly from the difficulty to understand the reality created by new technologies in each one of the Parties that ratified the Convention. Indeed, if new technologies bring opportunities to cultural diversity, they also raise a series of questions and difficulties that appear in all stages of the cultural value chain, from cultural creation and production to the visibility of contents and access to cultural production.

The Conference held on July 2nd aimed to promote discussions and understanding of this new reality brought by new technologies and to share good practices of projects in which the use of new technologies is confronted with or associated to cultural diversity goals.

## Panel I

### New Technologies – challenges and opportunities

Moderator: *Mário Magalhães (CEST/USP)*

Challenges of the digital communication – the example of the digital book– *Edson Perin (Journalist)*

Privacy of data– *Vera Kerr (Lawyer, CEST/USP)*

Internet of Things – *Gilson Schwartz (Professor, ECA and FFLCH-USP)*

## SUMMARY OF THE PRESENTATIONS (General focus of the panel and report of each lecture)

### **Challenges of digital communication: the example of the digital book – Edson Perin (Journalist)**

Journalist Edson Perin's lecture focused on how to deal with the rise of new challenges for communication with the advent of digital technologies. At first, Perin presented what in his view would be the main aspects of the communication scenario of the contemporary age. They are the following: the enhancement of communication and culture through the internet; the new online media and social networks occupying the audience in proportions wider than the traditional media; the explosion in the number of communication media with audience pulverization and dispersion (videos on the web are better seen than in traditional media).

In Perin's viewpoint, what we can note in this new scenario is that *new technologies, the internet and the social networks allow people and companies to take the 'medias'*, that is, have the mass power. Thus, investing in advertising or press office has got an unlikely return. However, beyond this communication unpredictability nowadays, many opportunities for new companies can be noted. Among them, we can highlight: the capacity of promoting straight communication actions to different audiences and with personalized contents; the capacity to eliminate content mistakes and reduce communication costs; and the possibility of eliminating geographic barriers and enhancing the relationship with customers, suppliers, and collaborators.

In face of this scenario, the communication companies must even adapt themselves to new products. Thus, journalist Perin brings up digital books, online radios and online videos as examples. Perin concluded his presentation going over digital books.

### Data privacy – Vera Kerr (CEST/USP)

Lawyer Vera Kerr started her presentation on data privacy by emphasizing that in contemporary times it is necessary to think about the information society.

According to Kerr, such society is characterized by cost reduction of data transmission, which allowed access to the internet on a large scale, and by the use of simplified storage technologies – people do not need to have a special introduction to the technology to be able to use it. Such characteristics have informational explosion as a consequence, with the transmission of information in speed and quantity unimagined before, which has in turn allowed a certain deterritorialization of the world by nulling out barriers of time and space, making the virtual world so real as 'the real world'. Also, it guaranteed that the internet could go on to become a global public space. Within this new society context, rights must be thought about again.

Focusing on data privacy, Kerr says that, in spite of the fact that espionage is constant in societies, such issues have grown in importance in Brazil after Edward Snowden stated that the US spy on Brazilian leaders. This fact propitiated both the legal coverage of areas that had not been covered yet and the reactivation of the discussion around a "civil framework for the internet" in Brazil, which, after regulating the internet, deals with the data protection issue (though not being a text specific about privacy). It is worth

noting that the bill on the civil framework for the internet got out of the Agenda 25 times; however, after the US espionage episode, the law finally passed.

Furthermore, Kerr presented how Brazil is ensuring itself regarding data protection. For such, she spoke about some specific legislation, listed below:

*Law 12.737/12 (Law Carolina Dieckmann)* is considered the first data regulation framework in Brazil. After a virus stole information from actress Carolina Dieckmann's computer, Article 154-A of the Criminal Code was introduced and entered into force in March 2013, criminalizing the conduct of 'invasion of cyber device'. Until this law was enacted, the Brazilian criminal law did not provide for 'proper cybercrime' ('crime informático próprio'), which is characterized as the crime committed against an information technology system, and which differs from 'improper cybercrime', in which the technology is simply used to commit the crime.

*Law 12.965/14 (Civil Framework of the Internet)* is considered as the 'Constitution of the Internet', since it establishes the principles and rights related to the protection of registers, enacted in June, 2014. In these terms, contents may be revealed only under judicial order (such as telephone interception), ensuring the internet users' right to remain anonymous as well as his/her equilibrium in face of the commercial use of data (big commercial value of data) and its use for investigation and unlawful purposes. According to researchers, the framework touches the question of data protection and presupposes a specific future law about the issue.

Other legislations were mentioned, such as the positive register law (12.414/11), the consumer's code (specifically, Art. 31), and the law of access to information (12.527/11). None of them, however, is specific for data protection. According to Kerr, a draft bill about data privacy is on

the way. However, some researchers and jurists question whether this draft bill will affect the jurisprudence over commerce of data on credit among companies.

Kerr concluded her presentation questioning whether the technology will, in fact, be able to protect internet data. This reinforces the need for a technical and juridical alignment. It is necessary to understand the technological capacity of protecting data so as one can think about a coherent regulation which can be applied effectively.

### **Internet of Things – Gilson Schwartz (Professor, ECA and FFLCH-USP)**

Prof. Gilson Schwartz started by saying that, in face of the worldly diversity and inequality, it is pretentious to bring universality of natural sciences onto human sciences. However, what can be verified is that the technologies lead to a universalization of habits. The book technology, for instance, causes learning in Brazil or in Japan to have the same technology-based resource.

From this statement, Schwartz identifies that we experience a denser and denser extension of technologies, in which everything turns out to be information. There is, therefore, a confrontation among the universal, the particular and the flows of information. Thus, he puts forward some questions: To what extent does the informationalization of the world provide a human convergence towards universal values? Is that possible and desirable? How can one prevent the universalization of information technology (in which a certain particular element can become universal as much as a universal element can become particular) from being oppressive? Otherwise, how is it possible to make it emancipatory?

In fact, we will never have all the information we need, since part of this information is found in one 'no-place', which is the future. In face of this uncertainty as the future is concerned, the economy and the market create mechanisms to deal with this unpredictability, being the money one of them.

In Schwartz's viewpoint, money is the technology that universalizes trades. Money is the universal representation of value. It is what makes the main bridge between the universal and the particular. However, its effects on suppressing the differences and inequalities experienced within human societies are absolutely ridiculous. On the contrary, money makes inequalities wider and wider. We have been living a big crisis of capitalism in which money tends to favor the capital and not this bridge between the universal and the particular.

The big question brought to the lecture is to know how money will work in the digital and the internet age. Apart from the digitalization of transactions, there is something new about some money not created by a Central Bank but that creates a market in which it circulates within a digital scope. It means other models of representation of value. Thus, the universality of the value is put in a tight spot.

Closing his presentation, Schwartz showed a research project called *City of Knowledge*, in which experiments with non-conventional coins are carried out and the impacts upon the relationship between people are checked out. From this project, a second one is being created, the *Youth Portal*, which in turn will invite young people of São Paulo to create their own circulation coin through the internet.

#### SUMMARY OF THE DEBATE (main topics raised during the debate)

The following points were debated: social coins; insufficient education about digital rights; and, specialization of judicial courts to deal with technology-related cases.

In relation to the social coins, it was discussed how they symbolize the search for other models of value representation. Thus, the information that several banks, including the central banks, are open to money-related, social-technological innovations was brought up. The monetary crisis we live in is one of the reasons for that, thus opening new creation perspectives.

Concerning the insufficient curriculum of law schools about digital rights, it was brought up that, in fact, the studies of law and the internet are not yet being developed as a specific subject matter; only a few colleges are introducing this subject matter in graduation courses. One of the reasons is the big difficulty in finding professors with experience and background in this area and a little knowledge in technology as well, which would be necessary.

And last but not least, it was discussed that specialized lower courts in the technology area are necessary. In the debaters' viewpoint we still do not have judges prepared for that, and, thus, the cybercrimes today falls within any police station indiscriminately. Besides, there are jurisdiction-related issues, since most of the companies that dominate the internet, such as Google and Facebook, are located in other countries.

#### **FINAL COMMENTS (conclusions and recommendations referring to the Convention)**

The tone of the debate was around the new society context we live in, with the advent of the new digital technologies and the innumerable potentialities brought together (and still not fully developed) in the market sphere, including with respect to the use of money. How the society works today in a virtual world, which is as real as the so-called 'real world', also brings new challenges to regulation. Thus, the relation we can establish with cultural diversity and, more specifically with the 2005 Convention on the diversity of cultural expressions, is that this new pattern of social

relations also creates new values and new ways of creation that bounce directly into the way we live culture and its diffusion.

## Panel II

### New technologies and cultural creation

Moderator: Piatã Kignel (U40, Cultural manager)

Project "Mais diferenças" (approximate translation, *More differences*) and the App WhatsCine – Luis Mauch (*Mais Diferenças*)

Initiative of the "Makerspace" – Gabriela Agustini (OLABI)

Project "Video nas aldeias" (approximate translation, *Video in the Indigenous Villages*) – Vincent Carelli (*Video nas Aldeias*).

### SUMMARY OF THE PRESENTATIONS (General objective of the panel and report of each lecture)

#### Project "Mais diferenças" (approximate translation, *More differences*) and the App WhatsCine – Luis Mauch (*Mais Diferenças*)

Manager Luis Mauch presented the experiment of the NGO *Mais diferenças* (*More differences*) in the cultural political field, bringing up some basic concepts of the universe of accessibility, as well as some international treaties and national policies related to disabled people's rights. The institution is more than 10 years old and works on the production of accessible cultural goods and services, besides contributing to the construction of legislative policies and changes to include disabled people.

In the beginning of the lecture, and in an effort to identify an evolution line in this relationship, Mauch brought up the history of how the society has dealt with disability.

Initially, one can point out that there was a process of elimination of those individuals that were born disabled – which still remains in several cultures today. A second process observed was segregation, which means leaving on the sidelines of social life such individuals considered unable to live life to its fullest. In a first approach to these individuals, there was the process of integration, essentially with assistencialist policies and practices, and, eventually, one can identify the process of inclusion in the society going beyond medical assistance and onto the inclusive development of society, assuring that these individuals should have all the rights which are their own as human persons. In today's opinion, the problem does not lie on the individual but on the environment and society. In other words, one can perceive that the individual is 'more' or 'less' disabled depending on the environment or society he/she lives in.

Concerning specifically access to culture, Mauch brought up the data collected in 2007 from research developed under the request of the Ministry of Culture. In this investigation, one can note that the Brazilian society in general is excluded from the cultural life of its own country, showing very low percentages of audience in movies, museums and theaters. This problem becomes worse when the disabled audience is considered, since the cultural products as well as the cultural spaces accessible to the diversity of disabilities (hearing, visual, physical, and intellectual) are extremely rare. Furthermore, the speaker went over Article 30 of the UNESCO Convention that deals with the rights of disabled people. Such article refers specifically to the right to participate in cultural life. As from this norm, Mauch enumerated the possible inclusive cultural policies that must be developed. It is necessary to expand the offer of accessible cultural products by forming cultural producers and managers so as they can work with accessibility tools; moreover, it is necessary to enlarge the demand for such products, since the disabled people do not frequently go to these cultural spaces and, therefore, they must be

stimulated; also, it is necessary to foment the production of knowledge, experimentation, and systematization of cultural accessibility tools, as well as it is necessary to incorporate into the current legislation the rights related to the disabled people's participation in cultural life both as audience and creator. Thus, it is necessary to understand accessibility beyond assistance – for instance, to understand the audio-description of a show or a film as a 'narrative layer' turned to the visual disabled and other people interested in it as well – and require that the production of disabled artists should have an esthetic quality beyond an assistentialist reverence.

Mauch ended his presentation with the project *WhatsCine*, an app that brings up the possibility of watching a film by accessing audio-description tools, captions and *Libras* (the Brazilian sign language). This is a tool non-exclusive to disabled people, though serving to all people, but that specially ensures that disabled people have access to cinematographic works. Since it fundamentally works with interactivity, the app provides the creation of interactive advertisement actions, fidelity programs, and cellular games with movie screen among other capabilities. As it is estimated that more than 10 million people are in need for more accessibility, the app can increase viewers in the movie theater by 10%. Initially, the app was thought to be for audiovisual works; however, it can be adapted to other cultural formats.

### **Initiative of the "Makerspace" – Gabriela Agustini (OLABI)**

Manager Gabriela Agustini presented the OLABI experience, a space created about one year ago in Rio de Janeiro, and which is configured as a makerspace. The makerspace

is a blank space in which people can create. In the OLABI experience one seeks an appropriation of new technologies not only as a consumer but mainly as a producer.

The OLABI works by trying to enlarge access to new technologies, and it brings up the concept that the devices and technological apparatuses and digital tools that surround us can not only be consumed but created as well, and developed for several purposes. For this, a space was created with tools, robotics equipment, carpentry, electronics, 3D print and a series of components that provide people with experimenting/learning a new skill and also prototyping a product that may be developed and become an enterprise, an initiative of their own.

When providing this kind of access, one is seeking to bring diversity onto the production of new technologies, and how to think of an endogenous technological development. We live in a world in which a big part of the activities is mediated or based on technological tools and apparatuses produced in most part by few countries and mentalities ("the white men from the North"). Few are the producers of technology that the rest of the globe consumes.

When we perceive technologies and algorithms as non-neutral elements, that is, loaded with meanings and cultural components, we can understand how important it is to enlarge the access to this production and permit the South, the women and minorities to take ownership of these languages and tools. In other words, realizing that digital is the language that prevails in the 21st century, it is necessary to dispute the production of technologies as a way to bring to light other visions, strategies, and development ideas and beyond those hegemonically dominant. The technological empowering can be one of the possible paths to reach the necessary social justice.

In practical terms, the OLABI develops several projects focusing on women in low-income communities, and in cooperation with countries from the south of the globe. Some of them were indicated by Agustini, as the *Gambiar-*

*rafaela.tech*, in partnership with the Rio's Slums Observatory; the *Rodada Hacker*, designed for women and with a participation in the *Global Innovation Gathering*, a net that gathers experiences focusing on technologies to solve social problems, among others.

**Project “Vídeo nas aldeias” (approximate translation, Video in the Indigenous Villages) – Vincent Carelli (Vídeo nas Aldeias).**

Provoking the audience, Vincent Carelli started by saying that once he heard Daniel Mundukuru (Brazilian historian, philosopher, psychologist and writer, from the Brazilian indigenous nation Mundukuru) say, ‘In Brazil there is no such a thing as indigenous people’. And continued: in Brazil there are mundukurus, kaiapós, xavantes and 300 hundred more peoples and indigenous cultures which are reduced to just one denomination in the country. His project *Video in the Indigenous Villages* has as one of its objectives to register this cultural diversity so unknown to us.

With more than 30 years of age, the project *Video in the Indigenous Villages* mobilized the interest of the elders at first. When they discovered the audiovisual language, they realized there was a way to have a straight access to oral culture and that it represented a kind of sounding board for their cultural resistance. The young indigenous, so stimulated to disown their culture, obtained with the audiovisual resources a domestic revaluation of their knowledges, cultural features and even the elders’ recognition. Thus, quoting Carelli, the key question to the audiovisual resource for the indigenous is the possibility of safeguarding the memory of their cultural heritage.

During the workshops of the project *Video in the Indigenous Villages*, it is expected that, when taking hold of the audiovisual production tools and with the film-making

itself, an indigenous village should break up with the everyday life and some taboos and, consequently, open itself to new relations and new ways of diffusing knowledge and expression.

According to Carelli, each one of the indigenous peoples and each culture have its specific process. Everything that is discovered through the audiovisual production goes back to school, becomes an indigenous teacher's project, etc. Outside the indigenous villages, the circulation of the produced works bring up new impacts. It creates relationship with other communities, helps to know the identities of these peoples and in special it states the specificity of each of them, breaking up that standardizing concept of "Indian" and avoiding the fossilization of the idea of an indigenous that we hold till today.

Beyond the social and symbolic impacts, the project also forms indigenous video-makers (not film directors). The main point is to achieve a work of excellence and not compassion for these indigenous peoples. The work is developed continuously, having as a consequence the insertion of these emerging movies in the Brazilian cinematographic space. For this, one of the focuses of the NGO is to diffuse the produced material. Making this indigenous audiovisual production reach the Brazilian elementary and secondary education is a goal not achieved yet.

#### SUMMARY OF THE DEBATE (major topics raised during the debate)

In the debate, two points were talked over: first, how can we relate the Convention on the diversity of cultural expressions with the projects presented? And second, what are the possible cultural policies to be developed, having in view the experiences reported?

Concerning the first point, Guilherme Carboni shared the experience he had with the negotiation in Tupã, located in the western part of the State of São Paulo, about the

indigenous people's rights and the museum that is being created in the city. About the second issue, related to the new challenges in terms of cultural policies, Luis Mauch reminds us that cultural policies only recently started to incorporate the demands of the disabled such as accessibility to public libraries, recognition of the deaf culture, etc. Gabriela Agustini reinforces that we should not only repeat the molds already elaborated but create new ones as well. For such, it is necessary to build policies that foment this empowering of the technology and, furthermore, that ensures the continuity of these policies. For Agustini, our big problem is not the lack of public projects attentive to the diversity issue, but their instability and discontinuity. And last but not least, Vincent Carelli reinforced that we still have a long way to go to guarantee rights and respect to the precepts brought up in the several legal documents such as the Convention and even our Federal Constitution. An example of this is the indigenous people themselves.

#### FINAL COMMENTS (conclusions and recommendations with reference to the Convention)

In this panel we saw some cases of institutions and projects that have been using digital technologies as a way to enlarge the production and the distribution of culture in Brazil. The examples varied from the assisted technologies that make it easy for the disabled to access cultural products and spaces, the endogenous production of technology in partnership with countries from the south as a way to oppose the hegemonic production of technology that we live today, up to the cultural impacts of the Brazilian indigenous communities' audiovisual productions (not only digital). All the examples are aligned to the ideas of cultural diversity and demonstrate the necessity of an appropriation of the technology by the most varied social and cultural segments as a way to enhance diversity itself. Technology exerts strong interference into social life; however, one must keep in

mind that it is a creation and an instrument that can be used not only for standardizing and homogenizing culture but also it can substantially contribute to what is contrary to that, by promoting cultural diversity, heterogeneity of products and hybridization of identities.

### Panel III

#### New technologies and access to cultural offer

Moderator: *Guilherme Carboni (Doctor in Law, Lawyer)*

Conciliate protection of copyright and access to diversity – the example of Chile – *Daniel Alvarez Valenzuela (Lawyer and founder of the NGO Derechos Digitales Chile)*

Online Movie Festival – example “*My French Film Festival*” – *Paule Maillet (Audiovisual attaché of France in Brazil)*

Digitalization of the Journal of the Faculty of Law, University of São Paulo – *Antonio Carlos Morato (Professor of Law – FDUSP)*

#### SUMMARY OF THE PRESENTATIONS (General objective of the panel and report of each lecture)

#### Conciliate protection of copyrights and access to diversity: example of Chile – *Daniel Alvarez Valenzuela (Lawyer and founder of NGO Derechos Digitales Chile)*

In his presentation, the lawyer Daniel Alvarez Valenzuela defended a path to conciliate the protection of copyrights and access to cultural diversity. He started from the premise that copyright is a human right, and protection must be considered before when and with whom something is published. In his view, it is necessary to lead more debates about the access to this right, aiming at a greater equilibrium in its

protection. Thus, one can say that if, on the one side, there is a major necessity of safeguarding copyrights, on the other side, it is necessary to think over the limit within which copyright and authorial heritage will give more access to distinct audiences.

He emphasizes the Chile case as an example. From 1834 to 2010, what was basically and gradually achieved were laws that strongly focused on the protection of copyrights and very little on the possibilities of access to the authorial heritage. He points out two factors of equilibrium in this equation: one internal and one external. For the latter, it was assured to have freedom of expression, access to culture, education, information and knowledge – vital factors to enhance cultural diversity. For the other, the strengthening of public domain through time reduction (traditionally, it is 50 years after the author's death, but in many countries it is more than 70 years. Does that not restrict other interests?), digitalization of collections and the gradual negotiations of exceptions due to the social rights involved: from 2010 on, there has been an increase in permits for visual disabled, libraries, private use, executions and uses in a family scope; however, there are still several limitations to the access to and exercise of copyrights in Chile – and some are so restrict that they end up restricting the possibility of a new authorial creation starting from an existing one.

In Valenzuela's viewpoint, the CDCE remains neutral as digital technologies are concerned; but the negotiators of this Convention did not understand, and saw digital technologies as a threat. The latter, if on the one side they propitiate opportunities of democratization of and access to distinct works of authorial heritage, on the other side they allow detecting limits and obstacles such as uneven charges for connection all over the world, which prevent an equanimous access to this collection; lack of training of users for such and even the legal voids open to discussion such those relating to remixes, among others. Therefore,

the challenge lies on balancing how the copyright laws can stop having too much weight on protection and start favoring greater access.

### **Online film festival: example of the “My French Film Festival” – Paule Maillet (Audiovisual Attaché of France in Brasil).**

Audiovisual French attaché Paule Maillet started speaking about the role of Unifrance, an agency financed by the French government and that follows up possible actions to enhance audiovisual French culture, especially the cinematographic one such as the negotiation and sale of French films outside France, organizations of festivals, among other strategies. The agency also monitors these promotion activities.

Maillet starts with a scenario and a question; the scenario is given from some surveys that show the following: good French films that are not able to cross the boundaries; moviegoers outside the country that are getting old; and the number of movie theaters that is dwindling down. Then, the question is put forward: how can the new technologies help workaround the lack of movie theaters and the lack of exportation of the French films and catch even more the young viewers?

The answer is precisely the experience of the Festival mentioned in the title *My French Film Festival* (MFFF), an online film festival. It creates a website, offers a prize and organizes a jury. The films remain available for a month. The project cost 400 thousand euros, 300 thousand of which are sponsored by companies and 100 thousand referred to Unifrance's funds. There was a first moment of negotiations with exporters in order to move away concerns over piracy and the fact that the process is free of charge.

Thus, the commercial use of the rights to the video on-demand of the productions takes place, going 50% of the costs to the exporter and 50% to the MFFF platform or partnership. The technical costs are about 90 thousand (understanding, captions); 120 thousand (captions translated into 13 languages); 100 thousand (copyrights); and 90 thousand (other expenses). To put on an online festival, 10 feature films and 10 short films are necessary, and which normally happens between January 16 and February 16, with 207 countries in 13 languages, with a total of 560 thousand viewers, and Brazil being the second biggest country in 2014: 380 thousand.

### **The digitalization of the Journal of the Faculty of Law of the University of São Paulo – Antonio Carlos Morato (Professor of Law – FDUSP)**

Antonio Carlos Morato, professor and lawyer, started from the digitalization experience of the *Journal of the Faculty of Law*, USP, a concrete experience centered on the referred Faculty, the Federal University of Minas Gerais (UFMG), and the Federal Senate in face of the proposal that permits the use of works in private domain. The *Journal of the Faculty of Law*, USP, started on April 26, 1893.

Morato went over the presentation of his Chilean colleague, Valenzuela, and discussed copyright according to their patrimonial value and a moral perspective. The function of copyright is to recognize the patrimonial rights of the authors (assuring the maintenance of cultural creators) and the moral rights of the authors (referring to the authorship in the work) – the lecturer himself highlighted how a presentation is a protected lecture, according to Article 7 II of Law 9.610/98. The digitalization of the *Journal of the Faculty of Law*, USP, exemplifies the application of copyright

law to a legal entity (for collective works), ensuring that the legal person is the holder of the copyrights, in this case, USP, a legal entity of public right.

### SUMMARY OF THE DEBATE (main topics raised in the debate)

Mediator Guilherme Carboni, lawyer, proposes to approach the line that permeates the conflict protection vs. access. The idea is grounded on the individual author at the same time as it is presented as a historical construction; it is something that may be linked to authority. Thus, a question that arises from the contraposition above seems to arise around another one: the increase of limitations vs. alterations in the structure of the copyright.

About access to authorial heritage, a topic in Daniel Valenzuela's speech, Morato recalled that excessive denials of use of copyrighted works may be appealed. Another intervention was around the negotiation to liberate the use of copyright for low-budget films – many times the copyright holders charge values equivalent to those of high-budget productions, and they do not get to see this diversity. (Moreover, if those low-budget productions decide to add the charges of high values to their spreadsheets in response to incentive programs, for example, they tend to be disapproved precisely for the high values charged). Morato reminded that there is always a subjective background for a decision and that in his professional experience he has already managed to negotiate values so as to please both parties.

Another point talked over in the debate on the mediator's side was the discussion around the protection of style – and not of works, properly – taken from a case mentioned about the *novela* Aritana, produced by former Brazilian TV station Tupi, in which the indigenous persons did not want to receive money, but to discuss whether the image of the indigenous people was to be used or not in the production.

Carboni, then, touched the point about protection of work or style (Giselle Dupin also mentioned an example from the *candomblé* culture) in face of the authorial identification issue: and, if the author has to be identified, there is then an identification problem, since a certain work or even a style can go back to other cultures and peoples.

And last but not least, Lilian Hanania made an observation to clarify the question of technological neutrality of the Convention in face of the new information and communication technologies, especially mentioned during Venezuela's presentation. Although the Convention does not have many detailed provisions on new technologies, some of them already mention those new technologies and show that the negotiators had the context of new technologies in mind. Several operational directives adopted to implement the Convention also take new technologies into consideration. It is seen in the preamble of the Convention, but also when the 'cultural diversity' concept is defined, 'any means and technologies employed' being expressly mentioned. Moreover, enhancing the use of new technologies is part of the objectives of international cooperation, as mentioned in Article 12; and the use and transfer of technologies are also a means of creating a dynamic cultural sector in developing countries according to Article 14 of the Convention. In the Conference of Parties held in June 2015, it was decided that the operational directives on the implementation of the CDCE in the digital environment will be prepared, among others, to give a bigger impulse to the effectivity of the Convention embracing the digital medium.

#### FINAL COMMENTS (conclusions and recommendations referring to the Convention)

The question of authorship and copyright and the question of cultural diversity and the facilitated access to productions and broadcasting – enhanced by the new information and communication technologies (ICTs) – seem to

have given the central keynote of the debate. While there is a concrete experience of the MFFF as something that propitiates, via ICTs, the respect for copyright and, at the same time, access to the diversity of audiovisual production of a country, there are, on the other hand, breaches and challenges imposed by these technologies, both in the sense of not being enhanced for more and bigger available collections and in the sense of fomenting skills and training, besides the use that can, in the name of access, affect the authorship in its moral dimension – a question that becomes even more complex if authorship is thought not as a particular and historical entity, but even more as a collective and recurrent entity. As seen above, these are challenges that are put forward not only for the specialists in Law in the segment but also in the discussions to implement the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

## Panel IV

### New technologies, citizenship and democracy

Moderator: *Edson Perin (Journalist)*

Experience of the *Hacker Laboratory* of the House of Representatives – *Cristiano Ferri (LabHacker)*

Challenges and opportunities of the new technologies for democracy: the example of the Culture Points and the Facebook x MinC case – *Giselle Dupin (MinC)*

## SUMMARY OF THE PRESENTATIONS (General objective of the panel and report of each lecture)

### **Experience of the Hacker Laboratory of the House of Representatives – Cristiano Ferri (LabHacker).**

Cristiano Ferri starts by explaining the presence of the defamiliarization of the word *hacker* in the name: the derogatory character is given because the word is confused with the *crackers*, those who effectively disrespect the laws of privacy to obtain data. The *hacker* would be more associated to the *nerd* of computing and technology. Someone that knows the technology so well that is able to change, alter, and disfigure something that is within some order. Thus, the *hacker* would have some equivalence to curiosity, innovation, fun, and creativity. A *hacker* ethics would then be in the sharing (which is a way to lose power...), opening, decentralizing, freeing access to technology, and improvement of the world.

The idea of the *Hacker Laboratory* is to think the government as a platform, a bazaar where public services will be defined in the interaction among actors. Public services are defined in interaction like a platform where there are suppliers and consumers. If some corporations think in these terms, why wouldn't the State take advantage of it? Citizens could give contributions of several kinds, and could also render services, translate the information of the State, and propose new pieces of information. Thus, the *Hacker Laboratory (LabHacker)* and the *Hacker Marathon* were created with the idea of using the open data of the House of Representatives and 'play' with them in the hacker way.

Some examples of tools developed in the *Hacker Marathon*:

- My National Congress – a platform that shows who spends more public money, on what companies, and with a link to the *street view* to spot the company's address and check whether it really exists, creating a clearer visual way to access information and giving back to the House a better way to understand their expenses.
- 'Watch the amendments' platform, which proposes the mapping of bill amendments;
- 'Parliamentary Rhetorics' – a page containing the speeches of the Representatives: the topics that the Representatives most talked about appear in bubbles, thus, clearly translating some information that not even the Representatives had.
- Portal and the app Android '*edemocracy*' – the Representatives use this public consultation portal to have the citizens' response towards the draft bills, article per article; the rapporteur receives the proposals and accepts some of them, allowing for crowdsourcing (incorporation of the collective intelligence) to take place.

The challenge is to think a *Hacker Laboratory* that can account for this experimentation aspect, allied to the limits and restrictions of public expenses.

### **Challenges and opportunities of new technologies for democracy: the example of the Culture Points and the Facebook x MinC case – Giselle Dupin (MinC).**

Giselle Dupin proposed to comment on two experiences: the culture points and the case of the photography involving censorship in the "Facebook v. the Ministry of Culture" case. About the culture points, the idea came up with the program *Cultura Viva* (approximate translation *Culture*

*Alive*) in 2004. On the occasion, former Minister Gilberto Gil proposed how, instead of creating, it could be possible to take advantage of the Brazilian cultural diversity and, stimulating several cultural points in the country, to perform a cultural *do-in* in Brazil. Important axles to the project: its symbolic, economic and citizenship-related nature. Instruments: culture points, big points (articulated especially via training), national registration, and focus on self-management. In 2015 there are 4 thousand points. The target for 2020: 15 thousand points. Challenges consist on the distribution and diffusion of production and on the sustainability of the points.

The Facebook vs. MinC (Ministry of Culture) case involved a photograph among so many of them made available in a report about the collection of the National Library. It is about a photograph dated of 1909 of the indigenous nation Botocudos, in which an indigenous woman appears showing her naked breasts. The photograph was taken off the MinC Facebook page by Facebook. The company claimed a kind of algorithm that can identify naked breasts, apart from the terms of use of Facebook, which also prevent that type of image, based on jurisdiction under Californian law (USA). Eventually, the photo came back to the site.

The current minister Juca Ferreira called a meeting to discuss the digital issue in the country. Among the initiatives of MinC as digital is concerned, there is a public consultation about digital governance promoted by MinC around access to information, service rendering and social participation; a public policy of digital collection with structures shared on the same platform (MinC is working on the sharing of the collections, which are today in different platforms); besides the proposal of an “identification name” for cultural matters – an individual or a legal person can sail in different systems of the MinC using the same password/identity so as to make the processes easy. Anyway, there are at least three challenges there: i) Management of the digital identity – how the State uses the data

available; ii) Ensure the neutrality of the net – there is a risk of slicing the access; and iii) Deepen the cultural rights on the net, including the protection of copyright in the web.

### SUMMARY OF THE DEBATE (main points raised during the debate)

Mediator Edson Perin launched the debate by asking what the possible criteria would be so as to work on citizenship and technology. Dupin highlights the transparency, consultations, and permanent consultation channels. Ferri insists on the experimentation freedom, which is not such a common thing as *governist* actions are concerned. Moreover, argumentation around the need for deep information on the decision processes, for instance, was raised, with experiences around participative budgets put forward. It is necessary to allow the effective participation with deep information on the political processes and direct ways of decision (going beyond public consultations in which the citizen only proposes but do not decide), with the use of new technologies. It is necessary to define an ecosystem of participation, mainly in a country where digital exclusion is still a big problem, to think of an inclusion of the “digital non-native” and not only the “digital elite”, and of the bureaucratic culture change and political change in order to drive away the fear of using integration channels.

Gabriel Souza asks whether the apps remain in the *LabHacker* site, to which Ferri responded positively, but indicating that only part of them. Giuliana Kauark asks, then, whether only those that are in the interest of the House are selected. Ferri said that not necessarily, for the idea of the laboratory is not to manage all the projects, but to make them available and provide those that were not absorbed with autonomy so that they can follow their own way. As a matter of fact, not all the apps created continue to be available, though. This is one of the problems of the Marathon, since it does not have continuity.

Lawyer Vera Kerr goes over the question of the Facebook case again, which was already the object of intervention in the morning. Article 19 of the Civil Framework of the Internet deals with the judicial order and Article 21 deals with exceptions (but which talks about pornographic nudity). The Civil Framework turned the removal of any content into a legal issue, in order to avoid the censorship of internet providers, requiring a judicial order for such. The provider is not made responsible, unless for nudity scenes and pornography. Facebook cannot really act as a censor. A practical problem comes, however, from the fact that it is an algorithm that is the one responsible for the content selection, though an algorithm cannot go beyond what is permitted by the law.

Then, Mario Magalhães from CEST ends the debate by problematizing whether, once in the net, and submitting this photo to another context, it cannot be legally understood as offensive, despite its time and nature, like, for instance, the possibility of showing it in social networks of some Arabian countries.

### FINAL COMMENTS (conclusions and recommendations referring to the Convention)

About the debate, it is interesting to highlight the governmental solutions around the appropriation of technologies. At the same time, a certain deviation concerning the continuity of good projects is perceived, either in the detail of some development necessary for the self-sustainability of culture points, or in the positive experiences of the *Lab-Hacker*. Even in function of and on behalf of transparency itself, the governmental machine can permit, by using technologies, mechanisms which are, at the end of the day, restrictive to such development. It is obvious that limitation here cannot be attributed only to the new technologies, but to the political-bureaucratic paths and decisions – which, by the way, the private initiative is also far from getting

away with. It is curious to note, then, in this counterpoint of the first and second sectors, the raise of the case of the Botocudos' photos and its censorship being discussed under the range, approach, and cultural context optics, and again the new information and communication technologies for its inclusion or exclusion. Such cultural context is re-problematized in the final question that seems to re-put forward an infinite question around how ample and global can or should be the laws and conventions to cope with the minutia of the cultural and/or artistic local place.

## CLOSING

Prof. Edison Spina and Piatã Kignel closed the event. Piatã thanked CEST on behalf of the U40 Group and partners for contributing with the discussion around new technologies and the 2005 Convention, pointing out that in the end of the year the inter-governmental committee of the Convention will go over the digital technologies, when the new directives about the topic aiming to implement the Convention will be elaborated.

## GENERAL COMMENTS

The event *Cultural Diversity and New Technologies* brought up very useful contributions and raised very pertinent debates relating the topic of cultural diversity with new technologies.

Undoubtedly, the event served to support awareness around the 2005 UNESCO Convention on the Diversity of Cultural Expressions on the occasion of its 10th Anniversary, responding to one of the main objectives of the U40 Group. Such awareness remains necessary in a country like Brazil, where the Convention is still very little known and not used in an explicit and even rigorous way.

The partnership developed between the U40 Group, an international professional net, and USP, the major Brazilian university, has a lot to contribute to the search for this objective in the country. Moreover, the multidisciplinary character of the topic “cultural diversity and new technologies” has perfectly fit into the interdisciplinary work developed by the Center for Studies Society and Technology (CEST) of the University of São Paulo.

**Colloque 11 décembre 2015 –  
programme et résumé des panels**

Faculté de Droit, Sciences  
Economiques et Gestion

## DIVERSITE CULTURELLE ET NUMERIQUE:

promouvoir la mise en œuvre  
de la Convention de l'UNESCO  
sur la diversité des expressions  
culturelles, dix ans après  
son adoption

**11 décembre 2015**

Faculté de droit, 3 avenue Pasteur - Rouen

University of  
Cultural Expressions

CUREJ

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UNIVERSITÉ  
DE ROUEN

## Ouverture et cadrage – 9h30-10h

Anne-Thida Norodom (Université de Rouen, CUREJ) – Les enjeux du numérique et le droit international

Lilian Richieri Hanania (CEST/USP, IREDIES/Univ. Paris 1, CUREJ/Univ. Rouen) – La prise en compte des technologies du numérique par la CDEC

## Panel I – 10h-12h – Les enjeux du numérique pour la diversité culturelle

Modératrice : *Lilian Richieri Hanania*

*Rostam Neuwirth* (Université de Macao) – L'économie créative, la convergence technologique et la diversité

*Yvon Thiec* (Eurocinéma) – Diversité culturelle et numérique : vers une évolution des droits de l'homme ?

*Pascal Rogard* (Société des auteurs et compositeurs dramatiques) – La mise en œuvre de la CDEC, l'internet et les droits d'auteur

*Luis Ferrão* (Commission européenne, DG communication Networks, Content and Technology, Creativity Unit) – Renforcer les industries créatives avec les nouvelles technologies

## Panel II – La prise en compte du numérique par les parties prenantes de la Convention

### 13h30 – 15h : (1ère partie) L'action aux niveaux interétatique et étatique

Modératrice : *Anne-Thida Norodom* (Université de Rouen)

*Rémi Gimazane (Chef du département de l'économie du livre, Ministère de la Culture et de la Communication) – L'adaptation des politiques de soutien au marché du livre numérique en France*

*Antonios Vlassis (FNRS, Université de Liège) – La coopération entre organisations internationales pour la mise en œuvre de la CDEC à l'ère numérique*

*Toussaint Tiendrébéogo (Organisation internationale de la Francophonie) – La promotion de la CDEC à l'ère du numérique par l'Organisation internationale de la Francophonie*

**Panel II – La prise en compte du numérique par les parties prenantes de la Convention**

**15h15-16h45 : (2ème partie) La diversification des acteurs impliqués**

Modérateur : Stéphane Pessina-Dassonville (Université de Rouen, CUREJ)

*Pascale Thumerelle (Vivendi) – La contribution à la diversité culturelle par le secteur privé*

*Charles Vallerand (FICDC) – Le rôle de la société civile dans la promotion de la Convention à l'ère du numérique*



Conférence « Diversité culturelle et numérique : promouvoir la mise en œuvre de la Convention UNESCO sur la diversité des expressions culturelles, dix ans après son adoption »

11 décembre 2015

## Ouverture du colloque

Rapporteur : Elsa Edynak

Damien Féménias (Université de Rouen)

Ce colloque a été ouvert par le vice-Président de l'Université de Rouen aux questions culturelles, Damien Féménias, qui a souligné les deux dimensions dans lesquelles s'inscrivait ce colloque. La première est purement universitaire et la seconde situe cette journée d'étude dans une préoccupation qui sort du cadre strictement de l'Université, par la prise en compte des enjeux actuels de notre société. Cette démarche induit dès lors des transferts de connaissances indispensables à la compréhension de cette matière. En effet, cette recherche, parrainée par l'UNESCO, ne s'arrêtera pas à la fin du colloque. D. Féménias rappelle que ce colloque donnera lieu à une publica-

tion numérique qui permettra aux connaissances dans ce domaine de se développer davantage et de sensibiliser le plus grand nombre. Ainsi, le savoir des spécialistes en la matière sortira du cadre spatio-temporel de cet évènement.

## Ouverture et cadrage

9h30-10h

Anne-Thida Norodom (Université de Rouen, CUREJ) – Les enjeux du numérique et le droit international

Lilian Richieri Hanania (CEST/USP, IREDIES/Univ. Paris 1, CUREJ/Univ. Rouen) – La prise en compte des technologies du numérique par la CDEC

## Résumé des présentations

### **Les enjeux du numérique et le droit international – Anne-Thida Norodom (Université de Rouen, CUREJ)**

Après avoir rappelé de manière générale les enjeux du numérique, A.-Th. Norodom énonce que, pour le droit, l'enjeu du numérique est d'appréhender toute la complexité du phénomène, qui résulte à la fois de son *ambivalence*, en tant que technique et moyen de communication, mais aussi parce que c'est un progrès technologique qui peut entraîner des dérives (ex : Big Data) ; et de sa *diversité*, qu'elle soit géographique, dans les usages, à travers la multitude de services proposés ou encore dans les différentes conceptions nationales du numérique entraînant une multitude de régimes juridiques, alors que le numérique se veut transnational par nature.

La question qui se pose quant au rôle du droit international face à cette ambivalence et cette diversité du numérique est de savoir si ce dernier peut réglementer le numérique sans constituer un obstacle à la diversité. A.-Th. Norodom propose alors d'appréhender le numérique en tant que technique, puis comme moyen de communication avant de se demander si, au regard de ces deux dimensions, le numérique constitue finalement une limite par rapport au droit.

I. La prise en compte du numérique comme *technique* emporte deux conséquences sur le droit : une valorisation de la place de l'expert et une évolution du droit international du fait de la technicité croissante des normes. On observe à la fois une privatisation des sources du droit, ainsi qu'une prolifération du droit mou. Ce changement constitue une évolution formelle du droit international avec l'émergence d'une *lex electronica* qui ne se caractériserait ni par ses sources, ni par ses auteurs, mais par son objet : le numérique.

II. Le numérique pris comme *moyen de communication* peut être difficile à appréhender car il est transversal et transnational. Il est *transversal* car il s'applique à tous les secteurs et est dans toutes les branches du droit international. On voit même émerger des principes propres à l'Internet. Mais l'élaboration de ces principes fondamentaux ne suffit pas à constituer une branche du droit international, même si on constate l'émergence aujourd'hui d'un ordre public numérique national et international. La deuxième difficulté du numérique réside en son caractère *transnational*, posant la question de la délimitation des frontières dans le cyberspace, entraînant des difficultés de qualification et rendant problématique l'élaboration du régime juridique des activités numériques.

III. Le numérique peut constituer une limite au droit international et ce pour deux raisons principales.

*Le temps du droit et du numérique* sont différents. Le droit ne doit pas chercher à aller aussi vite que le numérique car il y aurait un risque d'obsolétescence trop rapide des règles. Il faut élaborer des principes généraux applicables plus facilement et limitant le risque de désuétude selon A.-Th. Norodom.

*Les questions juridique et numérique sont complémentaires.* Plusieurs exemples sont cités pour illustrer cette idée à la fois dans la protection des internautes et celle des Etats. Si la protection de la vie privée est efficace juridiquement, elle ne le sera pleinement dans le domaine numérique que si elle intègre des mécanismes techniques comme des outils informatiques qui permettent de ne pas être tracé numériquement par exemple.

A.-Th Norodom conclut que le numérique ne constitue pas une vraie limite au droit, à condition que les solutions proposées soient à la fois numérique et juridique, internationale et nationale. Ces observations générales peuvent être déclinées dans le domaine de la culture, reste à savoir si la CDEC a su prendre en compte cette ambivalence et cette diversité du numérique.

### **La prise en compte des technologies du numériques par la CDEC - Lilian Richieri Hanania (CEST/USP, IREDIES/Univ. Paris 1, CUREJ/Univ. Rouen)**

Lilian Richieri Hanania débute son intervention en clarifiant l'idée que la CDEC est technologiquement neutre. Les négociateurs avaient bien à l'esprit toute cette complexité, ainsi que l'évolution rapide des technologies.

Le Préambule parle déjà de ce changement et le concept de diversité culturelle est écrit dans la CDEC de manière explicite, par l'utilisation de l'expression « quels que soit les moyens et technologies utilisés ». Par ailleurs, l'article 12 sur la coopération internationale cite la promotion de

l'utilisation de nouvelles technologies ; et l'article 14 sur le partenariat avec les pays en développement cite aussi la formation relative à l'usage des technologies comme moyen pour promouvoir le secteur culturel. Les nouvelles technologies sont également mentionnées déjà dans des directives opérationnelles adoptées pour la mise en œuvre de la CDEC.

L'aspect numérique est donc intégré dans la CDEC. La Convention offre un cadre juridique approprié, souple et fondé sur un soutien politique plutôt que sur des obligations juridiques, mais qui dépendent pour beaucoup de la volonté politique des Parties. Toutefois, de manière générale, peu d'exemples de mesures de politiques spécifiques au numérique sont citées dans la CDEC ou dans ses directives opérationnelles. Même quand ces dernières sont plus précises, afin de donner une impulsion plus forte à l'adoption de politiques fondées sur la CDEC, il semble manquer encore le mouvement politique qui doit les suivre.

Lilian Richieri Hanania pose alors plusieurs questions :

– Si le numérique implique des défis mais aussi des opportunités, comment en tirer le meilleur profit ? Et quels acteurs doivent être impliqués ?

– Concernant la spécificité des biens et services culturels garantis par la Convention, comment la notion d'exception culturelle apparaît-elle dans le contexte numérique ? Quelles sont les politiques et secteurs devant être couverts par une telle exception ? L'article 4.6 de la CDEC définit les « Politiques et mesures culturelles » en les indiquant de manière assez large. Comment doivent donc être rédigées ces exceptions ?

Etant donné la lenteur de la production de nouvelles directives opérationnelles spécifiques pour le numérique au sein de l'UNESCO face à la dynamique des nouvelles technologies, il est impératif de ne pas se contenter uniquement des directives. L. Richieri Hanania préconise l'élaboration de programmes de coopération internationale, et une meilleure collaboration entre les organisations inter-

nationales et, de manière générale, entre les différents acteurs impliqués. Par ailleurs, la culture doit être intégrée dans toutes les politiques de développement et les compétences spécialisées de chaque organisation internationale doivent être mises à profit pour répondre à l'avantage du numérique.

## Panel I

Rapporteur : Adam Abdou-Hassan

### **10h-12h – Les enjeux du numérique pour la diversité culturelle**

Modératrice : *Lilian Richieri Hanania*

*Rostam Neuwirth* (Université de Macao) – L'économie créative, la convergence technologique et la diversité

*Yvon Thiec* (Eurocinéma) – Diversité culturelle et numérique : vers une évolution des droits de l'homme ?

*Pascal Rogard* (Société des auteurs et compositeurs dramatiques) – La mise en œuvre de la CDEC, l'internet et les droits d'auteur

*Luis Ferrão* (Commission européenne, DG communication Networks, Content and Technology, Creativity Unit) – Renforcer les industries créatives avec les nouvelles technologies

## Résumé des présentations

### **L'économie créative, la convergence technologique et la diversité – Rostam Neuwirth (Université de Macao)**

Cette intervention propose de confronter la CDEC aux futures technologies, sous l'angle des conséquences possibles sur la culture. Dans cette optique, une identification des

défis et opportunités apportés par ces nouvelles technologies est d'abord effectuée. Cette présentation révèle ainsi une accélération générale de la perception, entraînant de nombreux paradoxes ayant des conséquences sur le langage, la cognition et la logique de raisonnement mais également sur le sens et la sensibilité.

Néanmoins, une certaine convergence est observée entre les nouvelles technologies et la culture, donnant lieu dans un second temps à quelques propositions juridico-politiques concrètes pour faire face à ces nouveaux défis, qui demandent de chercher des solutions sur le fond de la pensée juridique. Il semble dès lors nécessaire de mettre en place une véritable coopération intellectuelle, ainsi que des techniques règlementaires novatrices. Parmi ces dernières, certaines existent d'ores et déjà et sont à utiliser, telle l'exception culturelle ; alors que d'autres sont à développer. C'est le cas par exemple de la création d'un droit global de la concurrence intégrant le standard de la diversité culturelle ou encore la convocation de conclaves sur la gouvernance.

Rostam Neuwirth suggère ainsi que les initiatives futures de l'UNESCO dans le domaine de la coopération intellectuelle comprennent la convocation d'un conclave, composé des directeurs généraux de toutes les organisations internationales pour affronter avec succès la complexité croissante des affaires mondiales.

### **Diversité culturelle et numérique : vers une évolution des droits de l'homme ? – Yvon Thiec (Eurocinéma)**

Les technologies sont des usages sociaux qui embrasent la société. Si elles comportent de nombreux aspects positifs, notamment au niveau des services quotidiens (Airbnb,

Tripadvisor etc.), Yvon Thiec souligne qu'il est néanmoins nécessaire de réfléchir à une méthode pour mieux les comprendre et donc mieux les appréhender.

Pour ce faire, Y. Thiec propose de réfléchir en termes épistémologiques et avance pour exemple une méthode de *répertoriation* exhaustive des activités menées sur le net, à l'instar de l'Encyclopédie du XVII<sup>e</sup> siècle. Cette technique permettrait ainsi de faire valoir les aspects positifs du numérique tant sur la culture que sur les droits de l'Homme (en tant que moyen pour pallier l'insuffisance des technologies traditionnelles en Afrique, comme outil de formation sur la santé publique à l'attention des femmes au Bangladesh, etc.).

Mais cette approche met également en avant les aspects négatifs de ces nouvelles technologies, qui appellent notamment à la nécessité de sécuriser les entreprises. Yvon Thiec suggère de désectorialiser, de créer un type de règle universelle. Ces remèdes pourront en outre être transposés au secteur culturel, étant donné le lien direct entre le fonctionnement de la diversité culturelle et les problèmes d'accès au marché.

### **La mise en œuvre de la CDEC, l'internet et les droits d'auteur – Pascal Rogard (Société des auteurs et compositeurs dramatiques)**

Dans un premier temps, Pascal Rogard constate que l'analyse de la réglementation sur la culture et le numérique laisse apparaître que l'internet a la caractéristique de permettre de passer outre les règles nationales établies en matière de politique culturelle, et notamment son système d'autorisation. Cette pratique est en partie liée à l'opacité entourant la législation en la matière (*voy.* l'avis du Conseil d'Etat français sur le projet de loi pour une République

numérique), et a pour conséquence d'inciter les grandes entreprises à s'installer dans des pays à faible fiscalité, entraînant des situations de concurrence déloyale.

Dans ce contexte, Pascal Rogard considère que la CDEC apparaît comme un exemple de réussite normative, en ce sens qu'après deux ans de négociations pour être adoptée, elle a su produire des effets juridiques (ex : CJCE, Affaire C-222/07, 5 mars 2009, *Unión de Televisiones Comerciales Asociadas* (UTECA)). En revanche, la position actuelle de la Commission européenne semble freiner la dynamique politique.

C'est pourquoi le « *combat* » doit continuer selon Pascal Rogard. Les nombreux enjeux du numérique en lien avec la culture exposés dans un second temps (droit d'auteur, disponibilité des œuvres sur internet, propriété intellectuelle, etc.) ne font qu'appuyer cette nécessité. Or, si on ne peut nier l'existence d'une certaine dynamique législative (fin 2015, le parlement français a voté une obligation d'exploitation suivie des œuvres), il faut à présent combler les lacunes. P. Rogard suggère d'organiser la portabilité de l'internet (puisque la territorialité est désormais acquise) et d'inventer de nouveaux mécanismes, tel un système de licence globale pour remplacer le droit d'auteur ; bien qu'en vertu de la littérature spécialisée, il semblerait que les grands principes du droit d'auteur soient facilement transposables aux services internet. Reste à savoir s'il existe une capacité politique de régler les problèmes et de trouver les solutions de régulation nécessaires.

## **Renforcer les industries créatives avec les nouvelles technologies – Luis Ferrão (Commission européenne, DG communication Networks, Content and Technology, Creativity Unit)**

Le domaine numérique serait un « *changeur de jeu* », en ce sens qu'il bouscule les règles établies par la complexité qu'il induit. La numérisation et l'accessibilité en ligne créent un bouleversement des modèles traditionnels, transforment les chaînes de valeur et appellent à de nouvelles approches du patrimoine culturel. Ainsi, le numérique est un « *changeur de jeu* » pour la *culture* (environnement connecté à l'échelle mondiale, moyens inédits de recherche, etc.), mais également pour la *créativité* (via l'émergence des interactions et d'effets systémiques) et enfin pour le *secteur culturel et créatif* dans son ensemble (avec des possibilités inédites pour les institutions culturelles dans la préservation, la diffusion et la réutilisation du patrimoine culturel).

Or, ces nouvelles formes hybrides sont difficiles à maîtriser, elles donnent lieu à de nouveaux usages et le cadre juridique n'en fixe pas complètement les contours du fait de sa nouveauté. Il faut toutefois reconnaître que pour faire face à ce changement, l'Union européenne dispose déjà d'une véritable « boîte à outils » (recommandations de 2011 sur la numérisation et l'accessibilité en ligne du matériel culturel, communication vers une approche intégrée du patrimoine culturel européen (2014), directive 2013 sur la réutilisation de l'information du secteur public, plateformes comme *Europeana*, supports financiers, etc.).

Le numérique et les nouveaux outils de communication apportent des possibilités inédites d'accessibilité et de partage de ce patrimoine, qui enrichit l'offre de contenu culturel de manière permanente et simple. Luis Ferrão préconise de faciliter le flux global de données afin de profiter des potentialités inhérentes au numérique.

## Résumé des débats

Le débat s'ouvre sur deux questions centrales posées par les organisatrices du colloque.

Premièrement, en ce qui concerne les accords commerciaux, étant donné la difficulté de comprendre la réalité numérique, la position défensive fondée notamment sur l'exception culturelle paraît logique. Lilian Richieri Hanania demande alors comment dépasser cette position défensive pour pouvoir aller plus loin en termes d'accessibilité et de partage, tout en garantissant une rémunération juste des auteurs et en passant par la coopération internationale ?

Deuxièmement, étant donné que la logique binaire du droit s'oppose à la pensée paradoxale du numérique, la révolution numérique évoquée par les intervenants nécessite-t-elle une révolution juridique ? Anne-Thida Norodom interroge les intervenants sur la question de savoir si cette révolution au jour le jour nécessite une révolution du droit ou s'ils jugent possible de continuer d'utiliser les instruments existants.

L'échange qui suivit fit effectivement ressortir les problèmes liés aux normes, notamment pour les entreprises, pour lesquelles il faut recréer un cercle vertueux. Yvon Thiéc considère que les remèdes sont simples puisqu'ils ne demandent pas forcément de réviser le droit – dans ce cas, la CDEC -, il faut y voir une opportunité pour repenser les normes.

Par ailleurs, Rostam Neuwirth confirme l'idée d'une révolution de la pensée juridique, car avant qu'il y ait un changement dans les actions, il est nécessaire de trouver les mots exacts pour encadrer ce développement. Il est donc peut être encore trop tôt pour en tirer des conclusions.

Le débat a ensuite porté sur la décision de la CJUE sur la TVA du livre numérique et ses effets sur le développement de cet outil. Il fit ressortir le véritable problème de la fiscalité numérique, consistant en ce que la même chose – un livre – est traitée de manière différente selon la façon

dont elle est délivrée. On a voulu privilégier la lecture mais ce qui est fait dans le monde physique doit se faire dans le numérique. Il y a un vrai sujet de fiscalité, qu'elle soit directe ou indirecte. Il faudrait changer de mode de fiscalité pour passer à une fiscalité sur les données et soumettre les services numériques à l'imposition et à la réglementation du pays auquel ils s'adressent. Dans le cadre de l'UE, il semble y avoir deux solutions pour soutenir la création, d'une part, une réglementation forte au niveau des directives européennes et, d'autre part, la renationalisation. Selon Pascal Rogard, la territorialisation serait un moyen de résoudre le problème pour régulariser le net. Luis FERRÃO rappelle que l'établissement d'un cadre juridique à la nouvelle réalité numérique constitue un défi qui dépasse tous les hommes, c'est pourquoi il est si difficile à l'appréhender avec une approche purement sectorielle.

### **Analyse conclusive du panel I**

Le premier temps de ce colloque a mis en avant la complexité du numérique. En effet, qu'il soit pris comme technique ou moyen de communication, le numérique est ambivalent, diversifié, transversal, transnational et évolutif. En outre, l'internet a la caractéristique de permettre de passer outre les règles nationales établies en matière de politique culturelle. En bousculant les règles établies de par sa complexité, il devient ainsi un « changeur de jeu », tant pour la culture et la créativité, que pour le secteur culturel dans son entier. Le numérique constitue dès lors en même temps un défi en termes de protection normative. Mais sa nature donne lieu à une réalité nouvelle, difficile à appréhender et dont les contours ne sont pas clairement fixés par le droit.

Si la question du rôle du droit international face à cette complexité du numérique se pose, la source considérable d'opportunités qu'il constitue rend absolument

nécessaire son encadrement par le droit. Les différents intervenants ont démontré à quel point le droit international avait formellement évolué dans cette optique. Néanmoins, des lacunes restent à combler et il semble qu'il faille notamment chercher des solutions sur le fond de la pensée juridique, en utilisant ce qui existe déjà, mais également en mettant en place des techniques réglementaires novatrices. Les intervenants ont d'ailleurs été force de proposition en ce sens, l'avantage étant qu'après l'appréhension du numérique, les mécanismes rencontrés seront facilement transposables au secteur culturel. Dans ce contexte, la CDEC apparaît comme un exemple de réussite normative.

Finalement, le temps du droit étant différent de celui du numérique, c'est le juge qui devra assurer la protection des acteurs du numérique par la mise en œuvre de textes non spécifiques avant l'adoption, à l'échelle internationale et nationale, de la réglementation nécessaire. Ce sera également à lui d'assurer l'effectivité de principes nouveaux face à des situations et pratiques inédites. Il ne faut pas penser la protection de manière chronologique ; en étant prise par le juge, elle s'effectuera en parallèle du travail législatif. Le juge est amené à jouer un rôle central dans ce domaine et la complexité du numérique s'appliquera à lui également ; d'autant plus qu'il devra assurer la sauvegarde des valeurs d'un monde physique dans un univers virtuel.

## Panel II

Rapporteur : Sandie Batista

**La prise en compte du numérique par les parties prenantes de la Convention**

**13h30 – 15h : (1ère partie) L'action aux niveaux interétatique et étatique**

Modératrice : Anne-Thida Norodom (Université de Rouen)

*Rémi Gimazane (Chef du département de l'économie du livre, Ministère de la Culture et de la Communication) – L'adaptation des politiques de soutien au marché du livre numérique en France*

*Antonios Vlassis (FNRS, Université de Liège) – La coopération entre organisations internationales pour la mise en œuvre de la CDEC à l'ère numérique*

*Toussaint Tiendrébéogo (Organisation internationale de la Francophonie) – La promotion de la CDEC à l'ère du numérique par l'Organisation internationale de la Francophonie*

## RÉSUMÉ DES PRÉSENTATIONS

La première partie de ce panel se penche sur les méthodes de prise en compte du numérique par les acteurs étatiques et les organisations internationales dans la mise en œuvre de la Convention.

### **L'adaptation des politiques de soutien au marché du livre numérique en France – Rémi Gimazane (Ministère de la Culture et de la Communication)**

Rémi Gimazane commence par présenter la diversité des fonctions du Ministère de la Culture et de la Communication. Dans ce cadre on relève que les missions du Ministère rentrent dans les objectifs de la Convention. En France, l'action publique en direction du livre et de la lecture est une action qui s'applique au secteur économique. C'est pourquoi les initiatives du département de l'économie du livre du Ministère s'orientent autour de deux grands axes :

– le contrôle, l'évaluation, la conception de toutes les politiques d'intervention, c'est-à-dire un système de redistribution qui permet de financer la publication et la circulation des ouvrages.

– la régulation, qui est le versant le plus structurant. La régulation du secteur du livre s'effectue dans une sphère libérale qui a une double nature, c'est-à-dire une régulation à la fois économique et une régulation par le droit d'auteur. Ainsi, l'arrivée du numérique dans le secteur du livre a permis de règlementer le prix du livre numérique et d'encadrer l'exploitation des livres numériques indisponibles.

La régulation économique du livre numérique s'est opérée avec la loi n°2011-590 du 26 mai 2011 sur le prix unique du livre numérique. Il s'agit, selon Rémi Gimazane, d'une politique visant à défendre les acteurs déjà présents sur le marché et à éviter le changement brutal et les effets désastreux observés avec l'arrivée du numérique dans le monde de la musique. La loi de 2011, qui concrétise le rapport de Bruno Pinto sur le livre numérique du 30 juin 2008, est un instrument autonome et spécifique qui encadre aussi les activités de nouveaux acteurs nés de l'apparition du livre numérique. Ces nouveaux acteurs peuvent maximiser leurs profits en vendant le livre à zéro euro et profiter des moyens connexes au livre pour se rémunérer. R. Gimazane partage la perspective selon laquelle la loi sur le prix unique du livre numérique n'est pas attachée à un état de la technique et elle vise à prévenir la concentration dans ce domaine afin de promouvoir sur le marché des œuvres nouvelles.

La régulation par le droit d'auteur s'est effectuée principalement par la loi n°2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles au XXe siècle. Pour le représentant du Ministère de la Culture et de la Communication, cette législation ambitionne d'aller au-delà d'une politique défensive et conservatrice avec la promotion d'un objectif d'intérêt général par la numérisation des œuvres. Le numérique sert ainsi à préserver le patrimoine, la mémoire nationale et il peut être le seul moyen pour accéder au savoir pour certaines personnes atteintes de handicaps dans le domaine des troubles du langage et des apprentissages. Rémi Gimazane relève que cette opération

a fait naître des contentieux relatifs à la protection du droit d'auteur, du fait notamment de la numérisation d'ouvrages encore sous droits d'auteur par Google.

Ces deux exemples de régulation du livre numérique permettent d'appréhender les politiques publiques dans le champ de la diversité de la production éditoriale et des titres publiés en France.

### **La coopération entre organisations internationales pour la mise en œuvre de la CDEC à l'ère numérique – Antonios Vlassis (FNRS, Université de Liège)**

Antonios Vlassis se penche ici sur la question de la place de la coopération entre organisations internationales à l'ère du numérique concernant la CDEC.

Pour lui, il subsiste une spécificité de l'Union européenne qui a participé à la rédaction de la CDEC et l'a ratifiée. Il note qu'une résolution a été adoptée à la cinquième session de la conférence des Parties de la CDEC pour poursuivre la coopération avec les organisations internationales.

Au niveau du comité intergouvernemental et de la conférence des Parties de la CDEC, A. Vlassis revient sur la participation de certaines organisations multilatérales à la CDEC en tant qu'observateurs. Entre 2005 et 2015, exception faite de l'Union européenne qui est Partie à la Convention, 11 organisations multilatérales étaient présentes à au moins une de ces sessions. L'Organisation internationale de la Francophonie est la plus active aux côtés de l'Union internationale des télécommunications, l'Organisation mondiale de la propriété intellectuelle, la Conférence des Nations Unies sur le commerce et le développement, la Banque mondiale ou encore l'organisation arabe pour l'éducation, la culture et les sciences, etc.

Ensuite, il expose les objectifs de la coopération entre organisations multilatérales dans le cadre de la Convention de 2005, lesquels concernent essentiellement : l'assistance technique, l'assistance financière, la construction de cadres conceptuels et la collecte de données et expertises. Si les partenariats dans ces quatre domaines ne sont pas strictement liés à la Convention de 2005, les organisations internationales utilisent cette dernière comme instrument de légitimation et de justification de leurs coopérations.

Enfin, pour Antonios Vlassis, les raisons d'une telle coopération entre ces organisations multilatérales sont multiples : domaines d'activités partagés, dépendance mutuelle des ressources pour aborder un enjeu et la nature multidimensionnelle de l'enjeu, la pression extérieure, le leadership politique, la nécessité d'améliorer la visibilité de l'organisation multilatérale, avec comme élément déclencheur la Convention de 2005.

### **La promotion de la CDEC à l'ère du numérique par l'Organisation internationale de la Francophonie – Toussaint (Organisation internationale de la Francophonie)**

Pour Toussaint Tiendrébéogo, l'Organisation internationale de la francophonie (OIF) bénéficie d'un rôle prééminent dans le cadre de la CDEC. C'est la première organisation à avoir adopté une résolution sur la nécessité d'un instrument sur la protection de la diversité culturelle dès 1999. Elle est la première organisation internationale à avoir adopté une résolution en 2014 sur les défis du numérique pour la Convention. Ce rôle de l'OIF s'effectue dans le cadre de son double mandat d'acteur des relations internationales et de la mise en place d'un espace de solidarité et de coopération.

Toussaint Tiendrébéogo cite l'article 12 de la CDEC qui promeut la coopération internationale et l'OIF s'attèle à mettre en œuvre le principe énoncé par cet article avec le renforcement des capacités des pays francophones fragiles par la consolidation de leurs industries culturelles. Ce soutien aux industries culturelles des pays francophones du Sud s'exécute en deux volets :

– la gouvernance. Par le moyen d'un programme qui appuie les politiques culturelles dans le but de renforcer leurs capacités d'encadrement, de régulation et de financement des politiques culturelles. Et un autre volet portant sur la gouvernance d'internet, en intégrant notamment les points de vue des pays francophones du Sud au niveau de l'ICANN (*Internet Corporation for Assigned Names and Numbers*).

– le renforcement des capacités dans le domaine de la production et de la préservation d'accès à des contenus numériques. L'intervention de l'OIF se fait ici essentiellement par le biais d'un fonds sur l'innovation du numérique pour accroître des contenus en français sur internet. Elle soutient aussi la numérisation des contenus et la production et la diffusion de films numériques.

Toussaint Tiendrébéogo a ainsi dressé un tableau des multiples interventions de l'OIF dans le cadre de la mise en œuvre de la Convention de 2005.

## RÉSUMÉ DES DÉBATS

Les points débattus lors de cette première partie de ce panel concernaient : le rapport sur les industries créatives au niveau onusien, les activités de l'OIF relatives à la traduction automatique d'autres langues, la coopération entre l'UE et les pays d'Afrique, des Caraïbes et du Pacifique (ACP) et les perspectives d'avenir de la mise en œuvre de la Convention à l'ère du numérique.

Il existe une collaboration des organes de l'ONU dans le cadre des industries culturelles, principalement entre le PNUD et la CNUCED. Le rapport sur les industries créatives est une initiative basée principalement sur l'UNESCO. Si l'article 21 de la Convention insiste sur la concertation et la coordination internationales entre les Parties dans d'autres enceintes internationales en ce qui concerne ses objectifs et principes, l'on remarque qu'au-delà de l'UNESCO, il n'y a aucune coopération.

Toussaint Tiendrébéogo rappelle que si l'OIF a un mandat de promotion de la langue française, elle prend en compte la question du multilinguisme. Elle travaille notamment avec d'autres communautés linguistiques (la communauté des langues portugaises et la communauté des langues espagnoles).

Dans les relations ACP-UE, au niveau de l'accord entre l'UE et le CARIFORUM, il existe un protocole sur la coopération culturelle ; on pousse les États qui n'ont pas ratifié la Convention de 2005 à le faire rapidement. Un des effets de ce protocole fut une ratification de celle-ci par 9 ou 10 pays des Caraïbes entre 2008 et 2010.

Les perspectives d'avenir de la mise en œuvre de la Convention à l'ère numérique au niveau français passent par une réouverture au niveau de l'UE de la question de l'unification du cadre du droit d'auteur. Selon A. Vlassis, au niveau des organisations internationales la coopération est nécessaire par la mobilisation de facteurs comme : une complémentarité des ressources, une pression intergouvernementale et la promotion de la Convention au-delà du cadre de l'UNESCO. Au niveau de l'OIF, l'on réfléchit à l'idée de résorber l'asymétrie entre les industries culturelles du Nord et du Sud et une politique culturelle non basée sur la notion de territoire.

## **ANALYSE CONCLUSIVE DE LA PREMIÈRE PARTIE DU PANEL II**

On relève une approche fragmentée de la prise en compte du numérique par les parties prenantes de la Convention tant au niveau étatique qu'au niveau interétatique. Le processus d'éclatement et son résultat, c'est-à-dire un droit fragmenté, s'expliquent par la spécialisation des organisations internationales et la diversité des acteurs et des intérêts au niveau national. L'article 14 de la Convention sur la coopération pour le développement aurait pu servir de levier pour établir une coopération transversale entre les différentes organisations internationales, d'autant plus que l'année 2015 correspondait au renouvellement des objectifs du millénaire pour le développement en objectifs du développement durable, à l'année européenne du développement et à l'anniversaire des dix ans de l'adoption de la Convention. La mise en œuvre efficace de l'échange, l'analyse et la diffusion de l'information prévue par l'article 19 de la Convention par le biais du numérique peut revigorer le caractère transnational de ces questions. L'idée de « complémentarité » posée à l'article 20 de la Convention peut aussi permettre d'aller au-delà de politiques nationales défensives. Toutefois, comme le souligne Antonios Vlassis, la réussite de ces préconisations est une question politique et c'est le rôle de la société civile d'arriver à l'insérer dans la construction du débat public.

### **Panel II**

**La prise en compte du numérique par les parties prenantes de la Convention**  
**15h15-16h45 : (2ère partie) La diversification des acteurs impliqués**

Modérateur : *Stéphane Pessina-Dassonville* (Université de Rouen, CUREJ)

*Pascale Thumerelle (Vivendi)* – La contribution à la diversité culturelle par le secteur privé

*Charles Vallerand (FICDC)* – Le rôle de la société civile dans la promotion de la Convention à l'ère du numérique

## RÉSUMÉ DES PRÉSENTATIONS

La seconde partie de ce panel se penche sur la diversification des acteurs impliqués et particulièrement sur la place de la société civile dans la promotion de la diversité culturelle.

### **La contribution à la diversité culturelle par le secteur privé – Pascale Thumerelle (Vivendi)**

Pascale Thumerelle débute son intervention en indiquant que Vivendi a célébré les 10 ans de la CDEC et que ce texte est très important pour l'entreprise. Elle présente brièvement l'entreprise Vivendi qui est un acteur majeur des médias et plus largement de la diffusion de la culture. La directrice de la responsabilité sociétale de l'entreprise explique ensuite que Vivendi défend la créativité pour des raisons économiques ; en effet, sa mission est de découvrir et d'accompagner des nouveaux talents au niveau international afin d'offrir une offre originale au public. Garantir la diversité des contenus culturels et la croissance économique de l'entreprise sont, aux yeux de Vivendi, indissociables.

L'entreprise défend la diversité culturelle et lui fait une place importante en l'intégrant dans la politique de responsabilité sociétale de l'entreprise (RSE). Chez Vivendi la politique de RSE est composée de quatre critères stratégiques :

l'accompagnement de la jeunesse à l'ère numérique, le partage des connaissances, la protection des données personnelles et la diversité culturelle. Cette RSE est une réponse des entreprises au développement durable constitué par l'équilibre entre la croissance économique, la cohésion sociale et le respect de l'environnement.

Pascale Thumerelle indique que l'intégration de la diversité culturelle dans la RSE traduit bien le fait qu'il s'agit d'un enjeu majeur pour l'entreprise. C'est la raison pour laquelle Vivendi qualifie la diversité culturelle de droit de l'homme. Elle est ainsi située au plus haut niveau de gouvernance de Vivendi et afin de la garantir, elle l'accompagne d'un *reporting*. En 2004, l'entreprise a émis un protocole à destination de ses sociétés de diffusion de la culture afin de savoir comment celles-ci garantissaient la diversité culturelle. Pascale Thumerelle explique que lorsque le critère de diversité culturelle n'était pas satisfait, le pilier économique s'affaiblissait. Elle fournit ensuite quelques chiffres en précisant que plus de 89% du chiffre d'affaires d'Universal Music est issu du numérique. Les responsables des sociétés relevant du groupe Vivendi doivent donc s'assurer que le contenu qu'ils diffusent particulièrement via le numérique respecte la diversité culturelle. Si ce critère n'est pas rempli, la partie variable de la rémunération des dirigeants se voit impactée. Ainsi, Universal Music doit rendre compte de son investissement relatif à la découverte de talents locaux et aux dépenses de marketing faites en leur faveur. Par ailleurs, la dimension « genre » est aussi prise en compte par Vivendi puisque le *reporting* impose de chiffrer la participation des femmes à la découverte, la participation, la production ou la réalisation des œuvres de culture.

Enfin, P. Thumerelle ajoute qu'il existe un dialogue constructif entre toutes les parties prenantes grâce notamment au lancement d'un site internet « *Cultures with Vivendi* ». Ces parties prenantes sont les investisseurs, les ONG, les artistes, les pouvoirs publics ou encore les autres entre-

prises. Ce site, lancé en 2012, a notamment permis de récolter différentes études prouvant que la culture est facteur de cohésion sociale et de progrès économique.

Pascale Thumerelle conclut son intervention en précisant qu'assurer la diversité culturelle est une responsabilité partagée pour faire de la culture un levier de cohésion sociale et une nécessité pour construire le vivre ensemble d'aujourd'hui.

### **Le rôle de la société civile dans la promotion de la Convention à l'ère du numérique – Charles Vallerand (FICDC)**

Charles Vallerand commence par rappeler que les Parties à la Convention ont l'obligation de remettre un rapport quadriennal faisant état de leur application de la Convention. La présence de la société civile lors des réunions et assemblées, et particulièrement la présence de la société civile aux cotés de l'administration reste assez inhabituelle. La raison évoquée par Ch. Vallerand tient à la difficulté pour les représentants de cette société civile de s'entendre sur des enjeux de « commerce/culture ». Ces représentants connaissent des problèmes pour déterminer ce qui entre ou non dans la notion de « diversité culturelle », chacun craignant que la définition du contenu de cette notion se fasse au détriment de sa propre expression culturelle.

Charles Vallerand aborde ensuite le numérique en indiquant que c'est un domaine aussi vaste de potentialité de bien ou de mal. Il insiste sur le fait que la mobilisation des Parties et particulièrement celle des Etats du Sud est très difficile car les rédacteurs de la Convention, et l'UNESCO plus largement, n'ont pas nécessairement porté leur attention sur leur situation spécifique et sur leur rapport au numérique. Il est donc indispensable de remobiliser

les Etats du Sud autour du numérique. C'est précisément l'un des éléments sur lequel la société civile, notamment représentée par la FICDC, tente d'attirer l'attention.

Cependant, Charles Vallerand a relevé que c'est justement la place de la société civile qui pose problème puisque les Parties à la Convention ne reconnaissent pas, dans la pratique, son importance. Lors des débats, la société civile intervient toujours à la fin, lorsque les Etats se sont déjà décidés. Le Secrétariat de la Convention s'est saisi du problème et désormais chaque réunion sera l'occasion de faire un point sur la place de la société civile dans la promotion de la diversité culturelle.

Outre la place de la société civile, Ch. Vallerand a relevé un autre problème qui tient au caractère non contraignant de la Convention. La seule obligation qu'elle impose aux Parties est de soumettre des rapports quadriennaux. Cette absence de contrainte pourra peut-être changer avec l'ouverture aux Etats du Sud, si certains en font la demande. Selon Charles Vallerand, ce qui permettra de garantir la promotion de la diversité culturelle, ce n'est pas la Convention, mais la volonté des Etats de mener une politique proactive pour la culture.

## RÉSUMÉ DES DÉBATS

Stéphane Pessina-Dassonville insiste sur la nécessité d'une collaboration multilatérale entre toutes les agences des Nations Unies. Il établit un parallèle avec l'Organisation mondiale de la propriété intellectuelle (OMPI) qui, de 2006 à 2010, a travaillé en lien avec les représentants de la CDEC et avec ceux de l'OIF. Il faut avoir à l'esprit que c'est au sein de l'OMPI que se négocient depuis 2006 des traités sur la protection des savoirs traditionnels qui renvoient eux-mêmes aux expressions culturelles traditionnelles. Il y a un lien très fort entre d'autres organisations et conventions

internationales d'une part et la diversité culturelle d'autre part. Il fait remarquer que tous les intervenants ont signalé qu'il faut arrêter de continuer à vivre dans ce monde fragmenté où l'on dissocie tous les sujets, où nous avons tendance à disjoindre les logiques pour les faire traiter par des institutions différentes : OIT, UNESCO, OIF, etc. S. Pessina-Dassonville indique qu'il est d'accord avec l'idée selon laquelle il faudrait créer une institution plus large de réunion car il serait bien plus logique de faire travailler ces organes les uns avec les autres que séparément, même si cela pose des difficultés. Le numérique peut alors être une clef d'émancipation. Il établit ensuite un parallèle avec le mouvement international des peuples autochtones où le numérique a permis de créer un mouvement et de fédérer des personnes. Cet intérêt lié au numérique doit s'accompagner d'un effort pour intégrer ces connaissances et expressions culturelles traditionnelles dans la logique plus large des expressions culturelles « tout court ».

Charles Vallerand rappelle que la Convention ne s'applique qu'aux Parties et qu'elle n'est pas la Convention de tout le monde. Concernant la difficulté d'intégrer la société civile et d'avoir une approche globale de la diversité culturelle, selon lui, une partie de la réponse vient du fait que deux logiques sont à l'œuvre : une logique commerciale et une logique de confrontation culturelle. La FICDC agit pour trois choses : protéger le patrimoine, l'actualiser et le dynamiser. Il faut le sortir des musées pour l'utiliser et le partager et, selon lui, il faut davantage faire œuvre de promotion que de protection de la diversité culturelle.

Anne-Thida Norodom admet que la coopération entre les organisations internationales est un objectif souhaitable mais que cela est très difficile à mettre en œuvre car chaque organisation est fondée sur un principe de spécialité. Ainsi la coopération entre organisations est compliquée, chacune devant rester dans le cadre de ses compétences. Il existe un Conseil des chefs de secrétariat pour les organes des Nations Unies qui coopèrent d'une part et

il existe, d'autre part, sur des problématiques particulières, des comités inter-organisation. Mais au-delà de cet aspect de spécialisation, il est compliqué d'avoir une lecture transversale et de faire travailler toutes les organisations sur un même sujet. A.-Th. Norodom établit un parallèle avec le domaine de l'environnement, dans lequel s'est posée la question de savoir s'il fallait créer une organisation propre ou s'il fallait laisser cette problématique transversale être traitée de manière sectorielle par toutes les organisations. L'inconvénient d'avoir une organisation propre est que cela isolerait la problématique de toutes les autres.

Une question a été posée à Pascale Thumerelle relative au contexte qui a amené Vivendi à intégrer la diversité culturelle dans ses objectifs. Il s'agissait aussi de savoir quel rôle la Convention avait joué pour Vivendi et enfin si d'autres sociétés avaient adopté le même comportement. Pascale Thumerelle a commencé par distinguer entre la RSE et le mécénat. Le fait de promouvoir la diversité culturelle est une stratégie économique, il s'agit pour Vivendi d'anticiper les modèles économiques sur le long terme. La notion de « risque » est très importante car l'obésité intellectuelle ou la pollution d'esprit sont les risques de la non-diversité culturelle. En termes économiques, Vivendi ne pourra pas prospérer si elle n'anticipe pas ce risque. Les indicateurs du *reporting* sont indispensables afin de savoir comment les sources créatives sont accompagnées et afin d'être sûr qu'elles le soient correctement pour renouveler l'offre de culture. Concernant la deuxième partie de la question, Pascale Thumerelle indique que la Convention a été la bienvenue car peu de textes traitaient de la diversité culturelle. Mais elle reconnaît aussi que ce texte n'est pas assez exploité dans la communication alors qu'il est l'un des rares à expliquer que sans cette diversité culturelle la cohésion sociale, la dignité et le respect des personnes sont menacés. D'autres industries ont fait de la diversité culturelle un pilier et cela reflète véritablement l'existence d'une approche

europeenne. Pour garantir le développement durable ainsi qu'un esprit critique, les plus jeunes doivent avoir accès à une offre de contenus diversifiée et équilibrée.

Enfin, Toussaint Tiendrébéogo, représentant de l'OIF, a pris la parole afin d'indiquer qu'il existe également une difficulté pour les Etats eux-mêmes à prendre en compte la transversalité de certaines problématiques.

## **ANALYSE CONCLUSIVE DE LA SECONDE PARTIE DU PANEL II**

La diversité culturelle est une problématique transversale aussi bien en termes de sujet d'étude qu'en termes d'acteurs impliqués, qu'ils soient publics ou privés. Nous avons pu voir à l'issue de ce panel que la société civile a bien une place dans la promotion de la diversité culturelle. Mais il est aussi ressorti des différentes interventions la nécessité d'impliquer davantage la société civile dans cette promotion. Les organisations internationales et le droit international de manière générale ont tendance à aménager une place de plus en plus grande aux représentants de la société civile, qu'ils s'agissent d'ONG ou de professionnels. A côté de ces questions relatives à la place des acteurs privés, place qui est appelée à s'accroître, le débat a mis en exergue la difficulté née de l'absence d'harmonisation ou simplement de coopération entre les différentes organisations internationales. La fragmentation et la sectorisation des sujets nuisent à une approche cohérente et efficace en matière de diversité culturelle. Ce constat soulève certaines questions : si le cadre de compétence des organisations internationales connaît des difficultés pour intégrer cette problématique transversale qu'est la diversité culturelle, quelle place ces mêmes institutions peuvent-elles donner à la société civile pour traiter de cette problématique ? Comme l'a énoncé Ch. Vallerand lors de son intervention, la place et l'importance

accordées à la diversité culturelle ne dépendent pas de la Convention mais de la seule volonté de faire ou de ne pas faire des Etats. Il apparaît que cela vaut également pour la place et l'importance accordées à la société civile.

**Programme and Report – II Conference  
“Cultural Diversity and New  
Technologies”**

*(Original partially in Portuguese)*

**LILIAN RICHIERI HANANIA & GIULIANA KAUARK**

**19.05.2016**



Escola Politécnica da USP



Faculdade de Direito da USP



Instituto dos Engenheiros  
Eletroeletrônicos

**8:30 – Credenciamento** dos participantes e café de boas-vindas

**9:00 – 9:30 – Abertura e Introdução**

Abertura:

- Prof. Dr. John Sydenstricker-Neto (CEST/USP)
- Prof. Dr. Luiz Natal Rossi (CEST/USP)

Introdução:

- Dra. Lilian Richieri Hanania, CEST/USP, Univ. Rouen, Univ. Paris 1 (vídeo)

**9:30 – 11:00 – Painel I – Diversidade de expressões culturais na Internet**

Moderação: Piatã Kignel (Gestor cultural, U40)

- Prof. Dr. Luis A. Albornoz (IIGG, UBA/CONICET, Argentina)
- Audiovisual na Internet: homogeneização ou diversidade cultural?

- Prof. Dr. Carlos Affonso Souza (ITS Rio) – Liberdade de expressão, neutralidade da rede e diversidade cultural na Internet.

- Prof. Dr. Demi Getschko (CGI) – Quais medidas técnicas para medir e promover a diversidade na internet?

Debates com o público

**11:00 – 11:20 – Coffee Break**

**11:20 – 12:40 – Painel II: The role of private companies providing cultural content online in fostering the diversity of cultural expressions**

Moderação: Mario Magalhães (CEST/USP)

- Octavio Kulesz (Teseo) (vídeo)

 <p><b>KΠΘΜΑ</b> Laboratório de Engenharia do Conhecimento</p>  <p><b>U40</b> CULTURAL DIVERSITY 2030</p>	<p>– Dr. Heritiana Ranaivoson (iMinds-SMIT, Vrije Universiteit Brussel) (videoconferência) – Me. Lucas Lago (CEST/USP)</p> <p><b>Debates</b> com o público</p> <p><b>12:40 – 13:00 – Conclusões</b> – Dra. Lilian Richieri Hanania (CEST/USP, Univ. Rouen, Univ. Paris 1) (vídeoconferência)</p> <p><b>13:00 – Encerramento</b></p> <p>Inscrições no E-mail: <a href="mailto:cest@usp.br">cest@usp.br</a></p> <p>Transmissão online: <a href="http://www.ipv.com.br">www.ipv.com.br</a></p>
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**Local:** Auditório Prof. Oswaldo Fadigas Torres – Av. Professor Luciano Gualberto, 71, tv. 3  
Cidade Universitária, Butantã, São Paulo – SP, CEP 05508-010

## II CONFERENCE “CULTURAL DIVERSITY AND NEW TECHNOLOGIES”



May 19, 2016

### Introduction

**Dra. Lilian Richieri Hanania (video)  
(CEST/USP, IREDIES/University Paris 1, CUREJ/University of Rouen)**

In introducing the event, Lilian Hanania recalled that the UNESCO Convention on the Diversity of Cultural Expressions (CDCE), with 144 Parties (143 States + European Union) in June 2016, approaches culture and the objective of cultural diversity from an economic viewpoint, focused on the creation, production, dissemination, distribution and access to cultural expressions conveyed through cultural goods and services. The CDCE deals with cultural and creative industries, as well as the market of cultural goods and services. It responds appropriately to what we call today “creative economy”.

The negotiation of this convention was initially put forth to allow for discriminatory cultural policies – for protection of local culture, or according specific countries a preferential treatment based on a historical and/or cultural link, for example – to continue being adopted and developed, assuring a marketplace for national production and a greater diversity of goods and services offered. Diversity exists when consumers have effective access to a diversified content offer, originating both in and out of their country. The 2005 Convention offers support in this sense. It reaffirms and legitimates the States' right to adopt and maintain cultural policies and offers a framework for "policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions". Through appropriate policies based on this convention, it aims at greater diversity and balance in the exchange of cultural goods and services. With the same objective, a second facet of the CDCE consists in the promotion of international cooperation in the cultural area, including in favor of development. It reaffirms the role of culture as part of sustainable development and recognizes the necessity of integrating culture into all development policies.

Moreover, the 2005 Convention is technologically neutral: the diversity of cultural expressions is taken into consideration whatever means and technology used. However, from the perspective of the diversity and balance in cultural content :

- On the one hand, new technologies bring in opportunities, among which are the limitless space to make cultural content available on the Internet (bigger quantity of goods and services) and greater potential for cooperation and collaboration among different cultures.

- But, on the other hand, challenges for cultural policies are brought in, too:

- How to promote the diversity of origins of films, music, books or other forms of artistic expression on the Internet?
- How to transpose, for example, the logic of “national content quotas” for TV, cinema or radio into this new reality?
- Internet naturally seems to help by making a bigger amount of varied cultural goods and services available; but, are these products and services visible? Are they easily spotted by the consumer?
- How to act on the online diversity in consumption?

Before launching the presentations and debates, Lilian Hanania highlighted the topicality of the matter within UNESCO: the Convention implementation in the digital age is presently being discussed at UNESCO in order to prepare specific operational guidelines to promote the implementation of the CDCE in the digital environment.

## Panel I

### 9:30 – 11:00 – Panel I – Diversity of cultural expressions on the Internet

Moderator: *Piatã Kignel* (Cultural manager, U40)

- *Prof. Dr. Luis A. Albornoz* (IIGG, UBA/CONICET, Argentina) – Audiovisual on the Internet: homogenization or cultural diversity?
- *Prof. Dr. Carlos Affonso Souza* (ITS Rio) – Freedom of speech, Internet neutrality and cultural diversity on the Internet.
- *Prof. Dr. Demi Getschko* (CGI) – Which technical measures to measure and promote diversity on the Internet?

## SUMMARY OF THE PRESENTATIONS

### **Audiovisual on the Internet: homogenization or cultural diversity? – Prof. Dr. Luis A. Albornoz (IIGG, UBA/CON-ICET, Argentina)**

Luis A. Albornoz organized his speech around three central ideas related to homogenization or audiovisual diversity on the Internet.

At first, he recalled that the homogenization issue regarding culture and communication is not new. In his view, it is directly related to the internationalization processes of cultural industries, especially in cinema and broadcasting, both developed in the last century. To exemplify his assertion, Albornoz presented some historical facts related to the communication and culture fields, as follows: the inauguration of screen quotas systems by Great Britain as a way to protect its domestic market from the expansion of North-American movies in 1927; the organization of intergovernmental conferences on cultural policies between 1970 and 1980 by UNESCO, with the purpose of discussing the control of information flows by central countries in opposition to the protection of diversity and national identities, against culture commodification; the proposal, also within UNESCO in the years 1980's, of a New World Order of Information and Communication that, all in all, was not implemented.

Afterwards, Albonoz mentioned the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as a valuable tool for contemporary cultural policies, mostly by recognizing the specific nature of cultural goods and services and reaffirming the States' sovereign right to protect and promote cultural expressions. When presenting such legal instrument, the researcher highlighted its origin in the "cultural exception" debate in commercial agreements and negotiations within the World Trade Organization. Ten years after the convention was approved, continued Albonoz, a plurality of

elements to assess its impacts were made available, such as: catalogs of good practices; quadrennial implementation reports; projects funded by the International Fund for Cultural Diversity; Operational Guidelines on articles of the Convention; among others.

Finally, Professor Albonoz highlighted that the new digital ecosystem is one of the major challenges that the 2005 Convention has to face. According to the lecturer, a *technodeterminist* discourse is now in vogue, in which it is stated that “more digital technologies automatically generate more cultural diversity”. Contrary to this view, Albonoz asserts that such a discourse disregards the relevance of new digital intermediaries. The latter have the power to restrict access and content disseminated through the Internet and have a huge economic and political power in the current information society – among the most profitable corporations in the world are Google (in second place), besides Apple, Facebook, and others. In closing his speech, Professor Albonoz highlighted the position of the United States as an example of an issue regarding homogenization and cultural diversity on the Internet, since the country that most concentrates the main world producers of digital cultural services and promoters of digital commerce strongly refused to sign the 2005 Convention.

#### **Which technical measures to measure and promote diversity on the Internet? – Dr. Demi Getschko (CGI)**

Demi Getschko, of the Brazilian Internet Management Committee (*Comitê Gestor da Internet – CGI*), started by highlighting that the Internet generated a rupture in many areas, yet not properly measured. In his view, it affects all countries, breaks legal barriers, allows for the survival of cultural expressions and will still have several other consequences, difficult to foresee.

Getschko argued over the idea that the Internet homogenizes everything. In his opinion, the tools allowed by the Internet at the international level may be used by local communities and cultures, mostly small ones. In

relation to the intermediaries, Getschko believes that it is possible to work with them, provided that the most diverse products are favored.

The Lecturer believes that it is necessary to strengthen concepts, such as: the diversity of the network, innovation and, most of all, network neutrality. For such, the CGI, composed equally of government and civil society representatives, created the so-called "Decalogue" in defense of the Internet – Principles for the Governance and Use of the Internet ([www.cgi.br](http://www.cgi.br)).

As a private institution, the CGI does not have regulation power. However, for ten years it has been developing statistics related to how Brazilian Internet works (e.g. research about the Brazilian user's profile) that on its turn contributes to establishing priorities for public policies. Closing his speech, Getschko announced that research related to culture dissemination on the Internet will be published biannually ("TIC Cultura").

#### **Freedom of speech, Internet neutrality and cultural diversity on the Internet – Dr. Carlos Affonso Souza (ITS Rio)**

In introducing his speech, Carlos Affonso Souza explained that the notion of "Internet freedom" does not mean the inexistence of laws that regulate it. On the contrary, it is exactly by means of regulations that freedom on the network is assured. In this context, the laws must protect the freedom allowed for by technologies, preventing it from being destroyed by new business models.

Several principles of governance on the Internet in Brazil found in the CGI "Decalogue" (mentioned in the previous lecture) were incorporated into the Brazilian Internet Civil Framework. And, in the Professor's view, if there is a fundamental right that appears clearly and repeatedly in this legislation, it is the freedom of speech. In fact, freedom of speech is asserted in five situations along the Civil Framework, which are: Art. 2; Art. 3; Art. 8; Art. 19; in the Caput; and in Paragraph 2.

Bringing the issue of freedom of speech into more technical debates about the Internet, Souza infers that the idea of network neutrality – that is, of no discrimination of what travels on the web, of equal treatment of the whole *datagram* –, is a way to deal with freedom of speech in a technical manner. By referring to the Constitution of the United States, the lecturer considers the discussion regarding network neutrality as a discussion on the 1st Amendment in the 21st Century.

Parallel to the issue of freedom of speech on the Internet, Souza also strengthens the right to oblivion. According to such concept, Internet content providers are obliged to remove contents upon request by a third party. Real examples were presented, involving search tools, such as Google, and indicating that removals sometimes should be applied not only in the applicant's country, but in searches made in other parts of the world.

The lecturer closed his speech by suggesting that legal means should be formulated in order to guarantee freedom, neutrality and diversity. If the Internet is neutral, with no intermediaries interfering with access to data, it has potential to generate positive impacts upon cultural diversity.

## SUMMARY OF THE DEBATE

The following points were debated: neutrality and freedom; reterritorialization of the Internet by copyright; and neutrality within apps and social networks.

On the first point, neutrality was stressed as the basic principle of the Internet governance. From a technical viewpoint (Demi Getschko), Internet providers should not at all interfere with the content they offer – both in the sense of discriminating or filtering contents (clearly negative), and of improving web browsing for their users (supposedly positive).

Concerning the second topic, Professor Luis Albonoz explained that, in fact, services are not all present in all markets. There remain national markets and international markets in the digital world, and such separation results mostly from the copyright operating models, since, and so far, there have been no transnational or multiterritorial licenses. Contributing to the debate, Professor Carlos Affonso Souza asserted that copyright is the driving force of Internet fragmentation. It is possible to analyze it, therefore, from a copyright contractual viewpoint, according to which what is available on the Internet is fragmented, since an author's work may be available in one country, but not in others. Finally, the lecturer pointed out that to guarantee due respect towards global flows of Internet data, it is imperative that national laws incorporate the IT concept of "interoperationalization".

Relating to neutrality within apps and social networks, the third topic brought the three lecturers into the debate. Firstly, Getschko explained that apps themselves should not be neutral. According to him, neutrality must exist in the access to all apps by users. In agreement with this viewpoint, Souza stressed that instead of neutrality in apps and social networks, we should be attentive to principles of diversity. In the case of apps, diversity strengthens creation and innovation; regarding social networks, diversity prevents the formation of bubbles, through filters that provide users with their own mirror (same ideas, same tastes, etc.). Finally, Albornoz's contribution highlighted that the major issues refer to commodification, control, and surveillance of the Internet, through data provided by all users in exchange of services free of charge (they exchange their privacy for such services). On the one hand, there are users that are unfamiliar with the digital services terms and States are absent from an effective regulation on the use of digital data; on the other hand, new key values appear in the current digital economy, which are the users' data and profiles that are now commercialized.

## FINAL COMMENTS

The changes brought by new technologies into the market of cultural goods and services are profound – the Internet brings in major ruptures, as Demi Getschko said. The whole cultural sector value chain has been affected by digital technologies in the last years, and technological evolution will certainly bring in even more transformations. These transformations imply opportunities for the diversity of cultural expressions, but obstacles and new threats/new risks as well. Among the latter, the economic and political power of multinational companies and the reintermediation within the digital scenery, as Luis A. Albornoz mentioned, as well as market concentration in the hands of the big platforms (see also Octavio Kulesz in panel II).

A big problem concerns the visibility of the contents available on the web (the “invisible long tail” – Luis A. Albornoz). The questions to be faced are whether people are familiar with what exists on the Internet, with the abundance of contents online; and how often they come across content they enjoy, but they were not aware it existed. This is a dynamic, moving process that requires appropriate public policies, able to react fast to transformations and also guide them towards diversity.

## Panel II

### 11:20 – 12:40 – The role of private companies providing cultural content online in fostering the diversity of cultural expressions

Moderator: *Mario Magalhães* (CEST/USP)

– *Octavio Kulesz* (Teseo) (video)

– *Dr. Heritiana Ranaivoson* (iMinds-SMIT, Vrije Universiteit Brussel) (videoconference)

– *Me. Lucas Lago (CEST/USP)*

## SUMMARY OF THE PRESENTATIONS (original in English)

### **Octavio Kulesz (Teseo)**

Octavio Kulesz provided in his video an overview of the impact of digital technologies on cultural industries. He presented the opportunities and challenges (obstacles and threats) brought by digital technologies regarding cultural diversity:

#### Opportunities:

- lower costs,
- easier distribution,
- new (cheaper and easier) business models,
- possibility to take advantage of the “*long tail*” of products on the market.

#### Obstacles:

- infrastructure (connectivity, availability of hardware and software),
- lack of know-how and necessary skills for cultural industries, particularly SMEs – training is needed in the future.

#### Threats:

- the behavior of web-giants, i.e. platforms having a huge impact today (Apple, Amazon, Alibaba, etc.). These companies choose a specific starting point in the value-chain and expand towards the sides, becoming the chain itself. There are “marketplaces” like Android, Apple Store, Amazon, etc., where the player becomes the market, thus resulting in market concentration. This may represent in the future a serious risk for diversity, since diversity is needed in the supply of

products but also among suppliers; otherwise, there is a sustainability problem, with supply eventually shrinking.

**Dr. Heritiana Ranaivoson (iMinds-SMIT, Vrije Universiteit Brussel)**

Heritiana Ranaivoson addressed via videoconference the economic impact of digital technologies on cultural industries. All sectors are impacted, one of the first being the music sector. Specifically, regarding the diversity of cultural expressions, he focused on online platforms and started by explaining the Stirling model, according to which diversity is composed of 3 elements – variety (number of product categories), balance (the way products are spread among categories) and disparity (difference among products available). He then used the Theories of Superstars and analysis of the Theory of the Long Tail (decreasing importance of superstars and increase of products in the “tail”) in order to reframe it.

The impact of the Long Tail may be seen in the possibility of access to more content and the existence of new services with innovative business models. The greater beneficiaries are, nevertheless, online platforms, which compete with traditional intermediaries and have a negative impact on the latter. But the real question is: does the Long Tail really exist? Is there an increase in supplied diversity? Theories of Long Tail and Superstars say “yes”. But usually studies on the subject look at variety, balance, but rarely at disparity.

Moreover, opposite conclusions exist regarding consumed diversity. Technology certainly helps reducing costs of production, distribution and also allow for a virtually unlimited amount of information. But do we have access to it? Filters can lead either to superstars (like recommendations of algorithms have been doing, according to research on this aspect) or to the tail (search functionalities could

contribute to this). But measurement of the tail still does not take “disparity” into account; there are no tools to measure that aspect, which is fundamental though.

Online platforms have a competitive advantage that should be explored: they are able to provide larger diversity. However, research is still lacking on the long-term role of platforms on diversity, and how they reconfigure cultural industries. And there is a need for researchers and policy-makers to have access to data relating to those platforms, which is hardly available. Maybe an obligation to make such data available could be a useful step.

#### **Me. Lucas Lago (CEST/USP)**

Lucas Lago started his presentation by explaining Heuristics and Cognitive Biases. Heuristics are algorithms, filters by our brains, allowing us not to be overwhelmed by data received from the environment. However, they may have undesirable effects, i.e. cognitive biases: deviations from what would be logical conclusions, by ignoring or interpreting wrongly the information provided.

The huge amount of information available on the Internet requires ways to filter it and algorithms serve that purpose. They are used to determine which information is actually relevant for us. One of the most famous algorithms was Edge Rank, created by Facebook, and based on only three key criteria (current Facebook algorithms are way more complex): i. Age of the information; ii. Popularity of the information; and iii. Similarity of the information to what was marked with a “Like”.

Other examples are found in the following platforms:

- Google: personalizes search results. In more than 90% of searches, people never click on the second results page.
- YouTube: has an initial page with recommendations and “related videos”. The “related videos” option is responsible for about 30% of video traffic.

- Netflix: creates a personalized initial page with suggestions based on previously watched movies; 75% of the movies/series watched on Netflix result from these recommendations.
- Yahoo news: creates a front page that uses past news clicked on and a personalized front page with what the reader might like, instead of more objectively considered “relevant news”.
- Spotify: creates a personalized playlist with songs chosen by an algorithm, even if apparently it does not influence search results.

The importance of algorithms in the visibility of online content leads to the “Filter Bubble Theory” by Eli Pariser, who suggests that the extended use of filters would result in the creation of a “bubble of information” where we are never challenged by controversial topics and everyone has its own version of Internet – everything is customized; so the Internet is not the same for everybody.

Applied to cultural diversity matters, one may ask the following questions:

- would the fact that someone knows nothing about French movies make Netflix assume the person would not want to watch one?
- would the fact that someone enjoys Led Zeppelin make Spotify hide music from other genres?
- if someone watches a Donald Trump interview on YouTube, would the latter hide videos with/on other candidates?

He then quoted Walt Whitman, recalling that “we contain multitudes” and this is not understood by algorithms. They create biases that need to be avoided or at least contained in their effects.

In order to allow for more diversity:

- transparency in the use of algorithms on the internet is necessary;
- we should be allowed to opt-out of these filters, in order to easily use internet tools without filters (in Google there is no way to access a search page without such customization, except by using a private mode in the browser);
- we should be able to see what would be our search results without such customization (and see how Internet is “for everybody”);
- and we need to write algorithms that have both the capacity of filtering noise and unwanted content, while still being able to allow for novelty and serendipity in the filtered web.

## SUMMARY OF THE DEBATE

The panel brought in a rich debate. The questions asked and the discussions that followed are summarized below.

1st question (Lilian Hanania) Lucas Lago talked about algorithms that would allow for novelty and serendipity – how hard would it be in practice to create such algorithms from an engineering and software development viewpoint?

- (Lucas Lago) it is very hard to even comprehend algorithms used today (a hundred thousand parameters are presently on Facebook), even for engineers;
- (John Sydenstricker-Neto, CEST) thinking about statistical models, we would need a lower number of parameters to explain a phenomenon; filters are definitely necessary; but using the 3 elements pointed out by Heritiana Ranaivoson might help change the way we look for information.

2nd question: Should there be regulation, parameters, to control the outcome of social media? Or should it be left to private companies?

- (Lucas Lago) algorithms are invisible; we can only see their results. So even if we had a law that determined that they should increase discoverability, there is practically almost no means to check compliance; online platforms would need to show how their search is done, but they would never accept to do it. In any case, any choice of algorithms would take us to a certain kind of bias.
- (Heritiana Ranaivoson) the first important thing is that people need to realize that filters exist. Moreover, policy-makers could act on this matter through competition policy.
- (Lucas Lago) the paradox of choice is that no matter how great the choice we have is, we keep choosing the same thing to be “on the safe side”. A good technical way to change it would be an algorithm that proposes diversity; this would lessen the effect of that paradox.

3rd question (Edson Perin) It seems that platforms with their algorithms and policies are not talking to each other – how to improve the link between the two?

- (Lucas Lago) lawyers and engineers need to work together.
- (Rodrigo Filev, CEST) we need access to the database of companies (“deep web” – not available on Google or other browsers) – but a question remains: how to create such access?
- (Heritiana Ranaivoson) this is a big policy issue – policy makers need information on those algorithms.

4th question (Lilian Hanania) How to better involve private companies and particularly big internet platforms in the promotion of the diversity of cultural expressions? We may ask for more transparency of algorithms or the creation of algorithms that allow for greater diversity and the “discoverability” of diverse content, leading the consumers

to a wider range of cultural contents. But options could maybe be found in “prominence” tools on those platforms to promote national production, through advertising and identification of works (as defended by Mira Burri in her article to be published in L. Richieri Hanania & A.-T. Norodom (dir.), *Diversity of cultural expressions in the digital era*), or “diversity” labels, for example using the brand of a specific cultural institution, and/or as a tag to facilitate search (Mira Burri, same forthcoming article).

- (Lucas Lago) Netflix in Brazil already has a “Brazilian tag” and it did not really work; to increase consumption of Brazilian content, Netflix is investing in national content / series. An issue (raised by Heritiana Ranaivoson also) is the fear of things we do not know.

5th question (Lilian Hanania) There seems to be a need for awareness-raising among companies but also the public at large, as well as for “creation of public” for diverse cultural content. Economic advantages deriving from making diversity an objective to be pursued in corporate social responsibility should be highlighted (an interesting example is Vivendi’s experience on this matter). Investing in diversity improves not only the image of a company before consumers and investors, but also trust in the media company concerned regarding the quality of the content, its independence and authenticity (Mira Burri, same forthcoming article).

- (Lucas Lago) this is something doable, that could indeed be “sold” to those companies.
- (Heritiana Ranaivoson) cultural diversity has an economic value; but there remains the need to check such diversity and this requires having more data than we presently have.

- (Mario Magalhães, CEST) we should pay attention to “reversal censorship” – allowing something to be seen that is not your choice – we should not force the consumer to watch anything.
- (Piatã Kignel, U40) it is however necessary for the consumer to know what exists outside (things that we do not know and that we might actually enjoy). We are living an interesting movement of the cultural sector in Brazil with the extinction (and then rehabilitation) of the Ministry of Culture – it is an opportunity for mobilization and to influence companies’ profits (and therefore decisions) through changes in our consumption behavior.

## FINAL COMMENTS

Legislators and policy makers need to be creative, open to future transformations, and at the same time attentive to and committed to the principles and objectives wished for by society, and pursued before these transformations. In the case of today’s subject: the objective of the diversity of cultural expressions. For policies aiming at diversity within the digital environment to be properly re-thought, it is necessary to:

1. Determine and evaluate such diversity, through:
  - Collecting pertinent statistic data about the market of digital cultural content and the visibility of such content – the publication “TIC Cultura – Supply and demand of cultural content on the Internet” will certainly be extremely useful for Brazil and for the work carried out around the 2005 Convention.
  - Developing mechanisms to measure “disparity”, as presented by Heritiana Ranaivoson; and
  - Having access to data referring to cultural content consumption on the big platforms online.

2. Involve all the participants in the market of digital cultural content, guiding their actions towards the objective of diversity:

- In the first document outlining the operational directives that will be examined in December 2016, the 2005 Convention Secretariat recalls that protection to human rights implies freedom of speech, information and communication on the Internet, including artistic freedom and access by citizens. The principle of universality of the Internet requires that everybody, including private sector companies (as the new intermediaries of the Internet), respect the principles of the Convention, and, in a more general manner, human rights recognized by the United Nations (CE/15/9.IGC/7 – page 8 §9).
- We have seen some proposals for measures and mechanisms that might be useful in this sense (see debates in Panel II above).
- We have to find means for having larger access to data on cultural consumption online – could we think of an obligation to make these data available?
- It would be interesting if these companies were more directly involved in preparing the operational directives by the CDCE Secretariat.

3. Mobilize civil society, which has a very important role to play, both in developing concrete projects for cultural diversity and by its capacity of supervision and coordination at the national and international levels.

4. At the international level, foster coherence when acting within international organizations working on digital-related cultural questions, but also, in a more general manner, on the sustainable development issue.



# **Index – Contributions by Sector**

## **I – Film**

1. Luis A. Albornoz & Azahara Cañedo – The Audio-visual Technology Hub Programme and TV Diversity in Argentina
2. Paule Maillet – “My French Film Festival” Project (video in Portuguese)
3. Vincent Carelli – “Video in Indigenous Villages” Project (video in Portuguese)
4. Luis Mauch – “More Differences” Project (video in Portuguese)
5. Patricia Marenghi, Marina Hernández Prieto & Ángel Badillo – Diversity of the Audio-visual Industry in the Digital Age: The Challenges Entailed in its Measurement.

## **II – Music**

1. Paulo Assis – A Brief Overview of the Evolution of Musical Technology: Promises and Risks for the Diversity of Cultural Expressions.
2. Nísio Teixeira – The Contribution from the Music Collection of *Instituto Moreira Sales* Site to Diversity. A Case Study: Brazilian Christmas Carols.
3. Leandro de Carvalho & Maria de Fátima Rodrigues Makiuchi – The Music PEC: An Analysis of the Law-makers’ Position: Tax Waiver to the Benefit of Access to Culture or Market Reserve?

### **III – Book**

1. Justine Martin – The Digital Book and Cultural Diversity: Stakes and Perspectives.
2. Rémi Gimazane – The Adaptation of Support Policies to the Digital Book Market in France (video in French)

## **Index – Contributions by Author**

### **Abdou-Hassan, Adam**

Report of the Conference “Cultural Diversity and Digital Technologies: How to Promote the Implementation of the UNESCO Convention on the Diversity of Cultural Expressions, Ten Years after its Adoption”, organised on December 11, 2015 in Rouen by the CUREJ.

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“Makerspace” Project (video in Portuguese)

### **Albornoz, Luis A.**

The Audio-visual Technology Hub Programme and TV Diversity in Argentina.

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### **Alvarez Valenzuela, Daniel**

How to Reconcile the Protection of Authors’ Rights with Access to Diversity (video in Spanish)

**Assis, Paulo**

A Brief Overview of the Evolution of Musical Technology:  
Promises and Risks for the Diversity of Cultural Expressions.

**Badillo, Ángel**

Diversity of the Audio-visual Industry in the Digital Age:  
The Challenges Entailed in its Measurement.

**Batista, Sandie**

Report of the Conference “Cultural Diversity and Digital Technologies: How to Promote the Implementation of the UNESCO Convention on the Diversity of Cultural Expressions, Ten Years after its Adoption”, organised on December 11, 2015 in Rouen by the CUREJ.

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Exposure diversity as a new cultural policy objective in the digital age.

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The Audio-visual Technology Hub Programme and TV Diversity in Argentina.

**Carbó Ribugent, Gemma**

Educational policies and the diversity of cultural expressions in the digital era.

**Carelli, Vincent**

“Video in Indigenous Villages” Project (video in Portuguese)

**Carvalho, Leandro de**

The Music PEC: An Analysis of the Lawmakers’ Position: Tax Waiver to the Benefit of Access to Culture or Market Reserve?

**Cruz, Paula**

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**Dupin, Giselle**

Challenges and Opportunities of the New Technologies for Democracy: The Example of the *Pontos de cultura* and the Facebook vs. MinC case (video in Portuguese)

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Report of the Conference “Cultural Diversity and Digital Technologies: How to Promote the Implementation of the UNESCO Convention on the Diversity of Cultural Expressions, Ten Years after its Adoption”, organised on December 11, 2015 in Rouen by the CUREJ.

**Ferrão, Luis**

Strengthening Creative Industries with New Technologies  
(video in French)  
Interview (text in French)

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Hacker Laboratory in Brazil’s Chamber of Deputies (video in Portuguese)

**Fontaine-Skronski, Kim**

Transversal Operational Guidelines as a Road towards a Diversified Networked Culture.

**Gimazane, Rémi**

The Adaptation of Support Policies to the Digital Book Market in France (video in French)  
Interview (video in French)

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Diversity of the Audio-visual Industry in the Digital Age:  
The Challenges Entailed in its Measurement.

**Kauark, Giuliana**

Considerations on the Relations between Authors' Rights  
and Cultural Diversity in Brazil's Digital Environment,  
based on the Analysis of the Civil Framework of the Inter-  
net

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New Technologies, organised on July 2, 2015 in São Paulo  
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Report of the Second Conference on Cultural Diversity and  
New Technologies, organised on May 19, 2016 in São Paulo  
by the CEST/USP (text available in Portuguese and English)

**Kulesz, Octavio**

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digital era (video in English).

**Maceiras Gómez, Guillermo**

Educational policies and the diversity of cultural expres-  
sions in the digital era.

**Maillet, Paule**

“My French Film Festival” Project (video in Portuguese)

**Marenghi, Patricia**

Diversity of the Audio-visual Industry in the Digital Age:  
The Challenges Entailed in its Measurement.

**Martin, Justine**

The Digital Book and Cultural Diversity: Stakes and Perspectives.

**Mauch, Luis**

“More Differences” Project (video in Portuguese)

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Creative Economy, Technological Convergence and Diversity (video in French)

The UNESCO Convention and Future Technologies: A Journey to the Centre of Cultural Law and Policymaking”  
The Information Technology Agreement (ITA) (text in English)

Interview (video in English)

### **Norodom, Anne-Thida**

Introduction – Diversity of Cultural Expressions in the Digital Era.

The Stakes of Digital Technologies and International Law  
(video in French)

### **Ranaivoson, Heritiana**

The Internet platforms' impact on the Diversity of Cultural Expressions: to the Long Tail, and beyond!

### **Richieri Hanania, Lilian**

Introduction – Diversity of Cultural Expressions in the Digital Era.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (text in English)

The Convention and the Opportunities and Challenges to its Application Brought about by the New Technologies  
(video in Portuguese)

Digital Technologies in the CDCE (video in French)

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Transversal Operational Guidelines as a Road towards a Diversified Networked Culture.

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Is Cultural Diversity Adapted to the Digital Era?  
The CDCE’s Implementation, Internet and Authors’ Rights  
(video in French)  
Interview (video in French)

**Schwartz, Gilson**

Iconomy, Cultural Diversity, and Ludic Monetization on the Internet of Things.

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**Thiec, Yvon**

Cultural Diversity and Digital Technologies: An Evolution of Human Rights? (video in French)

Interview (video in French)

**Tiendrébéogo, Toussaint**

The promotion of the CDCE in the Digital Era by the International Organisation of La Francophonie (video in French)

Interview (video in French)

**Vallerand, Charles**

Will Digitisation Help Remobilise Civil Society?  
The Role of Civil Society in the Promotion of the Convention in the Digital Age (video in French)  
Interview (video in French)

**Vlassis, Antonios**

Cooperation between International Organisations for the Implementation of the CDCE in the Digital Age (video in French)  
Convention on the Protection and Promotion of the Diversity of Cultural Expressions (text in English)  
Inter-organizational networking in the digital age: Lessons from international organizations'purposes and practices in the cultural era.  
Interview (video in French)



