GOOD FOR PRINT 270706

Towards
a global "Cultural Contract"
to counter trade-related cultural discrimination

"Cultural Treatment" and "Most-Favoured-Culture"
to promote cultural diversity vis-à-vis international trade regulations

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"On agit sur la réalité en agissant sur sa représentation."[1]

"The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them."[2]

Introduction

In this contribution, I shall argue that the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* approved by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on 20 October 2005, is, in fact, no real convention at all. In my opinion, this instrument is rather a mere declaration that has almost no legal effect beyond what UNESCO's Universal Declaration on Cultural Diversity already achieved in 2001.[3] This leads me to advocate that cultural diversity requires fair international trade and competition that would restrain unjustifiable protectionism from both public and private sources. In this context, I shall explain why the World Trade Organisation

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1 Michel Foucault, Les mots et les choses, Une archéologie des sciences humaines, Paris 1966, p. 93: "You act on reality by acting on its representation."

2 Edward W. Said, Culture and Imperialism, London 1994, p. xiii.

3 The preparatory documents and the various drafts of the UNESCO Convention on cultural diversity are available on the UNESCO website under the heading "Towards a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions" at http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html (status April 2005). The Swiss government engaged into a detailed consultation of the civil society to refine its position in the negotiations of this convention; the documents in French are on the Swiss UNESCO website at: http://www.unesco.ch/work-f/diversite.htm. Universal Declaration on Cultural Diversity, adopted by the General Conference of the UNESCO on 2 November 2001: http://www.ohchr.org/english/law/diversity.htm. For a brief discussion on the initial experts' draft Convention on cultural diversity of July 2004, see Christophe Germann, Culture in times of cholera. A vision for a new legal framework promoting cultural diversity, in: ERA Rechtszeitschrift der Europäischen Rechtsakademie Trier, ERA-Forum 1/2005, pp. 109–130.

(WTO) needs today a real competitor in the field of trade related culture (films, music, books, etc.) that would promote cultural diversity by levelling the playing field.

For this purpose, I envisage the creation of a World Cultural Diversity Organisation (wCDo) equipped with efficient legal tools that would be within reach for all countries and cultures without discrimination, be they economically rich or poor. I shall outline the rules of law that such an institution could use to achieve its objectives eventually: based on the new principles of Cultural Treatment (CT) and Most Favoured Culture (MFC) mirroring the WTO principles of National Treatment (NT) and Most Favoured Nation (MFN). I shall introduce CT and MFC as the core principles of an innovative *sui generis* normative framework relying on the international intellectual property system, and on certain national and regional competition laws and policies. In order to implement and enforce these principles, I shall propose to take inspiration from the WTO Dispute Settlement Understanding (DSU) as it was applied in the banana arbitration between Ecuador and the European Community.[4] Now more than ever, I believe that there is a great urgency to develop a truly effective system promoting cultural diversity in order to resist the ongoing "iconocide" perpetrated by private and public players who abuse their dominant positions in the local and global markets of cultural industries.

This chapter is divided into three parts: The first will critically assess the results of the UNESCO Convention on cultural diversity; the second will briefly outline the theoretical and practical bases of the cultural non-discrimination principles CT and MFC that I propose to introduce into the debate; the third will sketch out a *sui generis* legal mechanism based on intellectual property and competition rules for implementing and enforcing these principles.

This brief exploration of the legal issues at stake and their possible solutions should prepare the ground for further research on a world culture system that could interact on a level with the world trading system. At least, such further research could contribute to develop new rules providing a special and differential treatment of trade-related culture within the world trading system. In any case, the contemplated solutions should eventually enable the stakeholders to take advantage of positive spill-over effects from trade-related culture (in, for example, films, music and books) to non-commodified ones (for example, certain forms of folklore), and vice versa.

I will discuss these new approaches looking at the film industry, but they are similarly applicable to other branches of cultural industries such as music and books, and all can contribute to make the cultural policies at stake affordable for all countries, including those currently deprived of economic wealth. To my knowledge there has so far been little research on legal avenues in this respect.[5]

Is the UNESCO Convention on cultural diversity a "dead letter"?

Culture law and policy makers need to react to trade regulations and policies that may have a negative impact on the promotion of cultural identities and cultural diversity. From the legal perspective, there are two main approaches: nationalistic top down wishful thinking; and

[4] EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to arbitration under Article 22.6 of the DSU, Decision by the Arbitrators, 24 March 2000, WT/DS27/ARB/ECU; see also Fritz Breuss / Stefan Griller / Eric Vranes (eds.), The Banana Dispute - An Economic and Legal Analysis, Vienna / New York 2003.

[5] For a more detailed analysis, see Christophe Germann Diversité culturelle et libre-échange à la lumière du cinéma – Réflexions critiques sur le droit naissant de la diversité culturelle sous les angles du droit du commerce international, de la concurrence et de la propriété intellectuelle. This doctoral thesis on cultural diversity and free trade in the light of cinema from the perspective of culture, international trade, competition and intellectual property laws and policies is scheduled for publication in summer 2006.

bottom up action, driven by stakeholders, which reaches the global level. UNESCO seems to favour the first approach when it comes to promoting cultural diversity. In the Convention on cultural diversity that an overwhelming majority of UNESCO Members recently approved, states shall remain sovereign in dealing with cultural matters.[6] In other words, this Convention provides to its parties under Article 5 a right to pursue cultural policies that may conflict with obligations of the same parties under international trade regulations, such as the agreements of the WTO or other undertakings.

One can argue that the UNESCO Convention on cultural diversity cannot cause a genuine conflict of laws since a legal right can only conflict with a legal obligation if the right that contradicts the obligation is actually exercised.[7] The recent reduction of screen quota requirements in South Korea illustrates this point: the South Korean government decided that it would reduce by one-half the quotas which favour the national film industry, in order to open negotiations for a free trade agreement with the United States.[8] South Korea therefore chose not to exercise its right to preserve the full effect of its culture policy tool. South Korea made this concession in exchange for advantages from the United States in other trade areas. In view of the contemplated free trade agreement, South Korea therefore locked itself in with respect to trade liberalisation in the film sector: it entered into an obligation to partially remove its screen time quota regulation, a state intervention that is considered by the United States as an obstacle to international trade. No actual conflict of law occurred in this example, since South Korea did not exercise its right to maintain the cultural measure at stake, although it could have so done.[9]

The real problem with the UNESCO Convention is precisely the lack of lock-in mechanisms to promote cultural diversity. As a guiding principle, Article 2.2 states that the "States have,

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[6] The UNESCO Convention on cultural diversity was approved with 148 votes for, two against (United States and Israel) and four abstentions.

[7] Legal scholars adopting a strict definition of "conflict" covering only mutually exclusive obligations and excluding contradictions between an obligation and a right include Wilfred Jenk, Conflict of Law-Making Treaties (1953) 30 BYIL 401 at 426 and 451; Wolfram Karl, Conflicts between Treaties, in: R. Bernahardt (ed.), Encyclopedia of Public International Law, Amsterdam 1984, VII, p. 468; Hans Kelsen, Théorie générale des norms, Paris 1996, p. 166; Friedrich Klein, Vertragskonkurrenz, in: Karl Strupp / H.-J. Schlochauer (eds.), Wörterbuch des Völkerrechts, Berlin 1962, p. 555; Wilhelm Wilting, Vertragskonkurrenz im Völkerrecht, Cologne 1996, p. 2. Joost Pauwelyn, Conflict of Norms in Public International Law, How WTO Law relates to Other Rules of International Law, Cambridge 2003, p. 175 ff., defends a broader definition by equating "conflict" to "breach": "Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other." According to this author, one norm of international law may breach another norm either (i) in and of itself, by its mere conclusion or emergence, e.g. a breach of *jus cogens* ("inherent conflict"), or by granting certain rights or imposing certain obligations which, once exercices or complied with, will constitute a breach of the other norm ("necessary conflict" if such breach will occur necessarily, whenever either of the two norms is complied with as required; "potential conflict" if there is a margin of discretion and only if a State actually decides to exercise a right will the breach materialize). This author distinguishes between the definition of conflict and how to solve an alleged conflict. As opposed to Jenk, Pauwelyn opts for a broad definition of conflict in order not to prejudice the question of how to resolve the conflict that includes the "potential conflict" between an obligation and a right.

[8] International Network for Cultural Diversity, Newsletter, January 2006, Vol. 7 No 1, www.incd.net: South Korea announced in January 2006 that the government has responded to U.S. pressure and agreed, effective July 2006, to slash the screen quota to 73 days, only one-half of the original quota implemented in 1993. Enforcement of the original screen quota system resulted in a flourishing of the Korean movie industry, both creatively and economically. The market share of Korean movies increased from 16% to 47% in slightly more than a decade. The existence of the screen quota system has been the most significant impediment to further trade negotiations between Korea and the United States. Thus, it was not surprising that on February 1, 2006 the United States announced that it is launching free trade talks with Korea.

[9] This example is subject to the entry into force of the UNESCO Convention on cultural diversity for South Korea that was one of the parties to approve it.

in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory." Furthermore, in Article 5.1, the Parties "reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention." The only full obligations (phrased with "shall") set forth in this instrument are ancillary and concern reporting (Article 8.3), sharing of information and transparency (Article 9), promoting public awareness for cultural diversity (Articles 1.1 and 1.2), and complying with a general good faith principle (Article 20.1). In other words, the UNESCO Convention does not require any real discipline from the States to protect and promote cultural diversity beyond some vague "shall endeavour" obligations that the States can construe and implement to a large extent as mere discretionary rights to act.

It must be stressed that nobody can realistically oblige a state to exercise its rights and comply with its "shall endeavour" obligations to protect and promote cultural diversity under the UNESCO Convention if such State is not willing to do so for one reason or the other. Therefore, the UNESCO Convention is arguably not justiciable in practice. Eventually, most of the substantive terms and concepts of this instrument are subject to interpretation, first of all the definition of "cultural diversity" pursuant to Article 4.1. Since this treaty lacks of an effective dispute settlement mechanism that could generate case law interpreting and defining these terms and concepts, its content is likely to remain general and abstract. This instrument, even if it were justiciable, is therefore not sufficiently operational from the legal perspective, at least in a way that would be comparable to the effect of most trade treaties, in particular the WTO agreements.

The "traffic light" metaphor

Let us briefly go back to the time when the first cars appeared on the roads to summarise the key legal issues of the UNESCO Convention on cultural diversity. Let us imagine that a legislator of that time issued a new rule drafted as follows: "At road crossings, car drivers shall endeavour to comply with traffic lights." Let us further imagine that this legislator did not define the meaning of the colours of such traffic lights, for example, that red requires the car drivers to stop and that green allows them to move ahead. By doing so, the legislator left the car drivers without guidance. Let us also imagine that private road owners have developed their own rules clearly defining the meaning of the colours and strictly binding the car drivers. By doing so, the private road owners gave guidance to the car drivers. Eventually, let us imagine that the private road owners would have the means to enforce their rules whereas the legislator did not provide anything similar. Obviously, the private road owners' rules would be more effective than the legislator's: The car drivers have a right ("endeavour") to comply with the legislator's rule that is incomplete, whereas they have an obligation to comply with the private road owners' operational rules. Nobody will be surprised that the legislator's rule in this story becomes a "dead letter" as opposed to the private road owners' rules that enjoys compliance.

I would be surprised if the UNESCO Convention on cultural diversity will make a difference in the face of those trade rules contradicting cultural concerns that are applied and enforced.

Hard trade rules versus very soft culture law

The UNESCO Convention contains many rights and almost no significant obligations. One must be aware that the Parties are free not to exercise these rights. A Party can either violate an obligation contained in a trade agreement by exercising a given right granted by the

UNESCO Convention, or comply with a trade treaty by not exercising its right under the UNESCO Convention. Obviously, if there are effective sanctions provided by the trade agreement in case of a violation of its obligations, then the state that is party to both treaties will likely choose not to exercise its rights under the UNESCO Convention. There is not even an incentive to try negotiating a trade-off between culture and trade concerns when severe trade sanctions such as those provided under the WTO dispute settlement mechanism face vague state liability under the UNESCO Convention.[10]

A violation of an obligation under a trade agreement by the exercise of a right under the UNESCO Convention cannot be justified if the plaintiff state is not bound by the UNESCO Convention. According to Article 34 of the Vienna Convention on the Law of Treaties, a treaty does not create either obligations or rights for a third state without its consent. Thus, if a state is party to both the UNESCO Convention and a trade agreement, for example, a WTO agreement such as the GATT or GATS, and violates the latter by exercising a right under the former treaty, it cannot invoke any justification vis-à-vis a state that is a WTO Member and not a party to the UNESCO Convention. For example, New Zealand could not reintroduce its former broadcasting quota regulations to protect its audiovisual sector without fearing an action by the United States under GATS and the WTO Dispute Settlement Understanding.[11] New Zealand will most probably comply with its obligations under a WTO agreement without becoming effectively liable vis-à-vis other states that are parties to the UNESCO Convention for not exercising its cultural diversity rights.

Furthermore, the United States could invoke the Most Favoured Nation clause under GATT and GATS against a WTO Member that is bound by such clause and that grants advantages to another country pursuant to Article 12(e) of the UNESCO Convention. This provision states that parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions notably in order to encourage the conclusion of co-production and co-distribution agreements. In this context, one must remember Article 20.2 provides that nothing in the UNESCO Convention shall be interpreted as modifying rights and obligations of the parties under any other treaties to which they are parties. Accordingly, Article 12(e) would limit co-production agreements between parties of the UNESCO Convention to those states that are not bound by the Most Favoured Nation clause of a relevant WTO agreement. In other words, this provision does not improve the pre-existing situation, except as a weak incentive not to get rid of existing exemptions to the Most Favoured Nation clause under GATS in the audiovisual sector in accordance with Article 20.1 of the UNESCO Convention. This interpretation of Article 12(e) also means that the guiding principles of equitable access, openness and balance (Articles 3.7 and 3.8 of the UNESCO Convention) may function as a Trojan horse whenever Most Favoured Nation clauses are applicable under WTO law. This is very bad news since cultural diversity essentially relies on equitable access, openness and balance. Let me quote in this context André Lange of the European Audiovisual Observatory who observed in 2002 that access to the markets of the United States and the European Union was (and actually still is) very restricted for films from third cultural origins:

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[10] According to a more optimistic scenario, the soft law approach adopted by the UNESCO Convention may have some effect based on "name and shame" pressure as described in the context of implementing and enforcing WTO rules on special and differential treatment by the Organisation for Economic Co-operation and Development (OECD), Special and differential treatment in the global trading system: Status and prospects of Doha Round proposals, TD/TC(2005)8/FINAL, 30 March 2006, p. 50 – 52.

[11] On the removal of quota regulations in New Zealand, read Ivan Bernier, Chronique, Les exigences de contenu local au cinéma, à la radio et à la télévision en tant qu'outils de défense de la diversité culturelle : justifications et avenir, part II, January – March 2004, p. 17: www.mcc.gouv.qc.ca/diversite-culturelle/pdf/chronique04-01-04.pdf

> "European film professionals are never slow to regret the North American market's closure to foreign films. Admittedly the market share for European films in the United States remains weak (5.02% in 2001, against 4.51% in 2000) and the deficit in audiovisual trade between the European Union and the United States grows constantly: according to our estimations, it reached 8.2 billion dollars in 2000, as opposed to 7.2 billion in 1999. However, in any reflection on the imbalance of such exchanges, it is also pertinent to mention one of the lesser-known characteristics of the global market: the relative closure of the two principal Western markets (the North American and the European Union market) to films from other parts of the world. In the United States, the market share for films other than American or European varies according to the year between 1.5% and 3.0%. In the European Union, the market share of non-European, non-American films varies between 1.0% and 3.6%. In both cases, these market shares are composed chiefly by admissions to films from other developed countries (Japan, Australia, Canada, etc.) and by films from South-East Asia (Hong Kong, Taiwan, etc.). That is to say that the place accorded to films from other parts of the world is almost inexistent. (…). This illustrates clearly that for third countries other than the United States, Canada, Australia and Japan, the European market remains extremely closed, more impenetrable even than the North American market is itself for European films."[12]

A similar situation applies to the book and music sectors.[13] If a developing country claims a right of access to the European market based on the many provisions of the UNESCO Convention that may be invoked for this purpose (Articles 1, 2.8, 5, 7, 12, 14, 15, etc.), a European country that is both a party to this Convention and a WTO member will think twice before removing obstacles to trade of cultural goods and services.

Reinforcing creative autonomy against cultural imperialism

In order to avoid triggering the Most Favoured Nation clause under an applicable WTO agreement such as GATT or GATS to the benefit of, say, the United States, a developed country that is a party to the UNESCO Convention could induce the developing country not to exercise its rights under the Convention and instead to take advantage of the international fund for cultural diversity (Article 18). However, it is likely that this fund will be a weak means to compensate for the denial of access to the attractive markets of European countries where right holders enjoy enhanced and enforceable intellectual property protection, and consumers have greater purchasing power. In the worst case, this aid fund will be abused by the developed countries to keep the developing countries silent and out of sight without substantially improving the situation of cultural diversity. In this context, one must recall that protectionism, such as excessive denial of market access, may be beneficial to foster cultural identities, but is definitely detrimental to cultural diversity.

The provision on the international fund inviting rich countries to help poor ones therefore bears the risk of remaining without effect or, even worse, of becoming a kind of neo-colonialist tool that would allow the economically rich countries to dictate their cultural

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[12] André Lange, Harry, Billy, Amélie… and the others?, in: European Audiovisual Observatory (ed.), Focus 2002 World Film Market Trends, p. 5 -6: www.obs.coe.int/online_publication/reports/focus2002.pdf.en

[13] Report by Almeida/Alleman for Agence Intergouvernementale de la Francophonie et du Haut Conseil de la Francophonie, p. 23, with further references, see: www.agence.francophonie.org

preferences to the poorer ones and thus practice cultural imperialism.[14] One way to address these threats is to design a system based on the valuation of catalogues of intellectual property rights that have been generated by public aid in the North, in particular within the European Union. Under the current practice, the ownership of these exclusive rights is usually fragmented among a multitude of small and medium-sized private production, publishing and distribution companies that are the beneficiaries of subsidies from wealthy states. It is common practice with publicly funded research and development ("R&D") in the field of technology that patents on inventions belong to the academic institutions that financed this R&D.[15] This approach should also apply to copyright and other intellectual property right titles that are generated in the course of the publicly funded creation and production of cultural goods and services. A bundling of these rights and their collective management could contribute to fund new projects by attracting private money, catalogues of intellectual property rights serving as guarantees for financiers.[16]

I propose that Article 18 of the UNESCO Convention should be implemented by way of creating one or more global intellectual property rights catalogues of state-aided cultural contents that should be managed in a way that they can serve as a guarantee to finance the independent production and distribution of artistic works from all over the world. In other words, Article 18 should be implemented by way of bundling and collectively valorising intellectual property rights that were generated by state aid in order to increase the competitiveness of films, books and music from a great variety of cultural origins, and to provide an incentive for subsidised producers and publishers to find private financing in the market.[17]

A commitment not to commit oneself

In my "traffic light" metaphor above, there is an understanding between the legislator and the private road owners about the need to provide signals, but not on what the different signs mean: the various parties' views may differ on the colours and their meaning. Furthermore, would it be beneficial for the traffic over the roads of different owners if each road owner could develop and implement unique rules? Long distant car drivers would certainly object to this normative fragmentation. In other words, there is a threat to cultural diversity not only from rules-induced globalisation, but also from "nationalisation". The latter situation is often synonymous with protectionism when countries discriminate in favour of local content and content providers, whereas the former usually conditions countries to become more open by removing obstacles to trade.

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[14] Who pays for culture shapes it: In the early eighties, the authorities of Zurich decided to heavily fund the local opera house, and to shut down a place for alternative culture in the city. Many young people did not accept this cultural bias induced by the taste and influence of the wealthier tax payers that eventually caused several weeks of heavy riots in one of the richest cities of the world. In my opinion, the principle of international solidarity and cooperation (art. 2.4), the rules on international cooperation and development (art. 12 to 15), on preferential treatment for developing countries (art. 16) on the international fund for cultural diversity (art. 18) should be read in the light of this threat.

[15] As an alternative to patent protection, public universities may also chose to bring certain results of their R&D to the public domain by disclosing them.

[16] The Hollywood major film studios rely on their intellectual property assets to gather the huge amount of production and marketing money they invest each year for the worldwide promotion of their films. More generally on the role of intellectual property to attract borrowers and investors, see Roya Ghafele, Financing Technology on the Basis of Intellectual Property: The preliminary role of Intellectual Property in developing technology markets in countries in transition (not dated): www.oecd.org/dataoecd/60/41/34616910.pdf ; see also The Economist, Securitising intellectual property. Intangible opportunities, 17 June 2006, p. 77.

[17] See also Christophe Germann, Qualité et popularité en cinéma: "Soyons réalistes, demandons l'impossible!", in : Le Courrier of 30 June 2006, Geneva, p. 4.

Promoting cultural identities and cultural diversity needs both protection and openness. The challenge consists in finding the right balance. Article 7 of the UNESCO Convention provides that the Parties shall endeavour to create in their territory an environment which encourages individuals and social groups to have access to diverse cultural expressions from within their territory as well as from other countries of the world. In other words, cultural diversity also needs international trade in order to exist.[18] This requirement is in line with the basic principles of the WTO agreements requiring that members not discriminate between local and foreign goods and services.

In this context, one must quote Articles 2.2 and 5.2 of the UNESCO Convention that set forth the principle of sovereignty. States have the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory. This may open the door to a form of anarchy in favour of the economically and politically stronger countries which would be accountable only under international trade regulations and not under international law that specifically aims at promoting cultural diversity. This scenario is a long distance from what was contemplated when the parties started to elaborate and negotiate the UNESCO Convention on cultural diversity.

I therefore conclude that the UNESCO Convention implicitly is an ambiguous commitment not to commit oneself either to free trade or to cultural diversity. Since there are other enforceable treaties such as the WTO agreements under which the parties strongly commit themselves to progressively liberalise trade, cultural diversity remains outside the real agenda. Therefore, the UNESCO Convention does not fulfil its purpose, at least from the legal perspective, and since it was intended to be a legally binding instrument, there is no other perspective that should be considered relevant. Of course, the negotiating process had the positive side effect of increasing awareness about cultural diversity among a great number of states and in civil society. But mere conscience should not be the end of the story. For those who are not satisfied with the pyrrhic victory of the UNESCO Convention on cultural diversity, it is now time to take a great step forward.[19]

Weak faith in good faith

According to Article. 26 of the Vienna Convention, every treaty in force is binding upon the parties to it (*pacta sunt servanda*) and must be performed by them in good faith. Article 20.1 of the UNESCO Convention repeats and clarifies this good faith obligation. It requires its parties to foster mutual supportiveness between this Convention and the other treaties to which they are parties, and to take into account the relevant provisions of this Convention, when interpreting and applying the other treaties to which they are parties or when entering into other international obligations. This provision further expressly states that the parties shall not subordinate the UNESCO Convention to any other treaty. This sounds *prima facie* very much in favour of cultural concerns.

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[18] For instance, the Japanese audience became more familiar with the situation in ex-Yugoslavia by watching Danis Tanovic's “No Man’s Land” and, thus, enjoyed one of the advantages of cultural diversity. The Nippon public could see this film only because it was distributed in Japan. Vice-versa, the Bosnian moviegoer obtained a better insight into the dark sides of the contemporary Japanese society by watching Hirokazu Kore-Eda's “Nobody Knows”, provided that this movie was released or broadcasted in their country. These examples illustrate the truism that cultural diversity relies on international distribution, which, in turn, requires cross-border trade without undue obstacles.

[19] In 281 B.C., King Pyrrhus of Epirus landed on the southern Italian shore with 20 elephants and 25,000-30,000 men to defend his fellow Greek speakers against Roman domination. While Pyrrhus won the first battle, he lost half his men and ultimately, the war. The term Pyrrhic victory comes from this devastating battle.

There is room for scepticism, however, if one critically explores the meaning of this Article by taking the current realities of the relevant trade regulations into consideration. Even where a margin of manoeuvre exists in the context of interpreting existing undertakings or of negotiating new ones, the advocates of cultural concerns will face the fact that they have only very soft law to oppose hard trade rules. The UNESCO Convention is full of provisions containing vague terms and concepts that can be interpreted in many ways. This Convention furthermore has no dispute settlement system with an efficient sanction mechanism that will produce concrete interpretations of its terms and concepts in order to make its rules more predictable and transparent. The parties therefore have almost no incentive to clarify and develop law by litigation. One can quote the example of treaties dealing with intellectual property protection to illustrate this point: there was almost no international case law pertaining to the treaties administered by the World Intellectual Property Organisation (WIPO), such as the Berne Convention and the Paris Convention. This situation changed dramatically when these treaties were partially incorporated into the WTO agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Since TRIPS is enforceable through the WTO dispute settlement system it has generated a number of cases during the last ten years which have provided a better understanding and, consequently, a more binding interpretation of the rules at stake.

The UNESCO Convention therefore will face trade regulations that are most often clearer and more effective. It is very likely that WTO law will prevail over the rules of the UNESCO Convention, and the "good faith" requirement will probably be of little help for cultural concerns. Eventually, this Convention risks becoming irrelevant except to permit rich countries to preserve cultural policies based on subsidies, and maybe existing quota regulations like those contained in the Television Without Frontiers directive (however, the recent reduction of the South Korean screen quotas does not even support this optimistic forecast).

One may argue that keeping subsidies for culture is better than nothing. I question the good faith (in the sense of Article 20 of the UNESCO Convention) of predominantly rich governments arguing in this way: subsidies are needed to protect and promote the cultural identities of countries that can afford them. However, subsidies help to close these same countries from the cultures of weaker economies that usually cannot afford sufficient state aid for cultural industries, and this is detrimental to cultural diversity.

Cultural diversity versus cultural nationalism

Article 20.2 of the UNESCO Convention deals with conflicts of treaties by stating that nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.[20] During the negotiation process there was much discussion about an alternative phrasing of this provision on the relationship to other instruments, proposed in the initial experts' draft of July 2004 as follows:

> "The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions."[21]

[20] The principle that an earlier treaty prevails over a later one does ("lex posterior derogat anterior") as set forth in art. 30 para. 3 of the Vienna Convention does not apply pursuant to art. 20 para. 2 of the UNESCO Convention. The Parties to the UNESCO Convention that are WTO Members therefore remain fully bound by WTO law. The same applies with respect to bilateral trade agreements.

[21] Art. 19 Option A, para. 2 of the Preliminary draft of a convention on the protection

This stronger formulation, however, would not have changed anything. Obviously, it would have had no effect on the United States and like-minded countries that refuse to adhere to the UNESCO Convention, and it would arguably not have overcome the substantial shortcoming of the UNESCO Convention which is merely a "commitment not to commit oneself".

In many cases, state sovereignty in cultural matters is clearly inconsistent with the single undertaking approach adopted in the WTO agreements. Beyond trade concerns, however, unrestricted state sovereignty may be detrimental to the very cause of cultural diversity as well. When it comes to determining the right balance between protecting local cultures and welcoming foreign ones, that constitutes the essence of cultural diversity, who is more competent to assess whether the Leviathan does the right thing and whether it does the thing right than a fellow Leviathan? In other words, if France, for example, believes that its film policy is satisfactory from the perpective of promoting local content, Senegal, or any other country that would like to export its motion pictures to France, could challenge this view from the perspective of promoting cultural diversity.[22] I thus argue that a carefully designed limitation of state sovereinity in cultural matters could contribute to a better check and balance between the promotion of the cultural identity and the cultural diversity in any given state that would accept such restriction. In this context, the basic rules of the multilateral trade game could inspire the elaboration of a new world culture system in order to overcome an introverted and discriminatory attitude that today characterises many national cultural laws and policies. This innovative approach may contribute to realising the guiding principles of equitable access, and openness and balance as outlined in Articles 2.7 and 2.8 of the UNESCO Convention. It could provide clear, predictable and binding "traffic lights" for the dynamic interplay between private and public stakeholders from a great diversity of cultural origins.

For the time being, from the legal perspective, the UNESCO Convention is to a large extent a mere repetition of the UNESCO 2001 Declaration on Cultural Diversity, a simple programme without effective constraints. I expect that the UNESCO Convention will not generate any substantial results since this instrument has no real mechanism to develop case law; that is to confront law with reality, and to defend its objectives on a level playing field vis-à-vis the conflicting objectives of effectively enforceable trade agreements. As a matter of fact, there is nothing that should concern those who favour promoting trade liberalisation without taking account of cultural concerns. In this sense, the UNESCO Convention on cultural diversity does not reflect certain parties' initial intention and understanding that this instrument should actually go beyond the 2001 Declaration:

> "The appropriate terminology to be used to express the rights and obligations of States Parties under the Convention was the subject of an important debate. Out of respect for the principle of State sovereignty, the use of verbs such as "must", "shall" and "undertake" with States as subjects, and of expressions implying the obligation to perform specified actions (such as "States Parties are under the obligation [or have a duty] to…") was questioned. In response to this concern, th experts were reminded that the mandate given to the expert group was to produce a draft Convention and that, as a result, it was necessary to use terms expressing with some force the commitments of the States under the Convention. In the absence of the terminology appropriate to such an instrument, the document

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of the diversity of cultural contents and artistic expressions, CLT/CPD/2004/CONF-201/2.

[22] See in this context the above quoted statement by André Lange that is referred to in footnote 12, where the cited statistics indicate the existence of a "cultural fortress Europe".

> would become a series of statements of principles that would have the impact of a simple declaration. In view of the existence of the UNESCO Universal Declaration on Cultural Diversity, some members insisted on the need to go beyond the document adopted in 2001 by giving to the future Convention a binding character particularly expressed in the chapter on rights and obligations, which should be regarded as the core of the legal document under discussion."[23]

The negotiation process revealed the fact that many defenders of the cultural cause are not familiar enough with the contemporary logics of multilateral trade regulations that have been developed over the last fifty years. I perceive these trade logics as a challenge and, at the same time, as an opportunity for culture.

As a cultural diversity advocate (and not just an international trade lawyer) I dare to state the heretic opinion that the refusal of the United States and their fellow countries to adhere to the UNESCO Convention should actually be considered as an opportunity for the cause of cultural diversity. Universal approval of this instrument would have re-introduced the concept of "cultural exception" in its nationalistic understanding that was expressly rejected when the WTO members concluded the Marrakech agreements some twelve years ago. In my opinion, the concept of "cultural exception"; that is, that international trade regulations shall not apply to culture at all and, consequently, "cultural nationalism" shall prevail, will always fail to integrate the poor countries into a desirable world culture system where private and public players would be banned from practising cultural discrimination. In addition, one should not forget that true culture has essentially a universal vocation that stands in contradiction with an introverted attitude of nations. This perception of culture legitimates *inter alia* UNESCO's global engagement for culture as an international organisation.

Distortion of trade and competition by private and public players

In 1994, the Uruguay round ended with the creation of the WTO as an international organisation and the conclusion of its agreements. This bundle of multilateral and plurilateral agreements covers trade in goods (GATT), trade in services (GATS), and trade related aspects of intellectual property rights (TRIPS).[24] The progressive liberalisation of international trade by legal means, which is at the heart of the normative globalisation as opposed to factual globalisation, is induced primarily by the WTO agreements, as well as by other multilateral, plurilateral and bilateral trade agreements.[25] These international treaties seek to remove barriers to cross-border trade that are erected by the States.

It is now well-known that international trade regulations represent a challenge and threat to regional and national laws and policies aimed at promoting local cultural identities and cultural diversity. Public aid for local contents is commonly considered as a distortion of

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[23] Report of the second meeting of experts (category VI) on the preliminary draft of the Convention on the protection of the diversity of cultural contents and artistic expressions of 30 March – 3 April 2004, p. 8.

[24] Most of the WTO agreements are the result of the 1986–1994 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions. Negotiations since then have produced additional legal texts such as the Information Technology Agreement, services and accession protocols. New negotiations were launched at the Doha Ministerial Conference in November 2001; see the WTO legal texts on: www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact For an introduction to WTO law and on its basic principles, read for example World Trade Organization (ed.), Understanding the WTO, Genève 2005: www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf For a deeper insight, read Thomas Cottier / Matthias Oesch, International Trade Regulations, Law and Policy in the WTO, the European Union and Switzerland, Cases, Materials and Comments, Berne / Londres 2005.

[25] Normative globalisation is primarily induced by rules of law, firstly the principles of National Treatment and Most Favoured Nation, wheras "factual" globalisation results mainly from technological developments in the areas of transportation and information technologies.

international competition and trade. By economically favouring local content and local content providers via tariffs, quotas and subsidies, state intervention grants them a competitive advantage vis-à-vis foreign content and content providers in the national market and, in the case of export relevant subsidies, international markets. However, the rules of the WTO and of many regional trade agreements and bilateral free trade agreements do not cover distortion of international trade and competition caused by private corporations dominating the market. This limited coverage of trade regulations is very relevant for cultural industries because, while these rules challenge trade distorting state intervention, they leave unsanctioned the often more harmful abuses of a dominant private position. The issue is here not so much the insufficiencies of the world trading system, but rather the lack of awareness of states to address distortion of competition and trade via national anti-trust legislation.

The rationale underlying the promotion of international trade by rules of law as a way to enhance welfare resides in the economic theory of "comparative advantage." This theory can conflict with the rationale of public policies aimed at promoting the creation and production of local artistic expressions. Such expressions contribute to building up cultural identities. Eventually, cross border exchanges of local artistic expressions reflecting various cultural identities is supposed to generate cultural diversity. In other words, without trade of cultural goods and services reflecting a variety of cultural identities cultural diversity is impossible to achieve.[26] When dealing with the question of the cross-border distribution of cultural goods and services, it therefore makes sense to take inspiration from trade-liberalising legal tools such as those developed under bilateral and regional free trade agreements, and under multilateral undertakings, foremost among which are WTO rules.

The removal of state erected obstacles to trade promotes cultural diversity if these obstacles hinder the free exchange of cultural goods and services. The issue with the current generation of WTO rules consists in considering cultural policies as a mere distortion of trade and competition if such policies favour local cultural content and content providers over foreign ones. The intervention by the state, however, is usually a response to market failure, the incapacity of the market forces to achieve a given policy goal, such as to promote local cultural identities and cultural diversity; for example, because local creators and producers of artistic expressions cannot take advantage of economies of scale enjoyed by their foreign competitors, or because they suffer from abuses of dominant market positions. In this case, many cultural creations and productions need the protection of the state in order to come into existence. Classical tools of state intervention in the sphere of culture are subsidies and quotas, in particular for films and music. It should be understood that quotas also translate into revenues for the producers and other right holders and thus essentially qualify as subsidies as well. This means that the local content providers are favoured vis-à-vis their foreign competitors who do not enjoy similar assistance from the state. This type of discrimination between local and foreign creators and producers of cultural goods and services may violate the national treatment principle. This discrimination may amount to a barrier to trade, provided the cultural goods and services that enjoy state protection are trade relevant.[27] In any case, the point is that cultural policy tools based on subsidies are in most cases out of reach for developing and least developed countries for obvious economic and political reasons, at least insofar as such aid is required to achieve a critical mass sufficient to influence market shares.

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[26] See footnote 18.

[27] A heavily subsidized opera house whose repertoire is mainly in the public domain typically is less trade relevant than a public broadcasting company that disseminates contemporary music from various origins, but this trade relevancy can vary in time. Furthermore, an opera house may promote local cultural identity to a lower degree than a radio station, e.g. the opera house of the Brazilian city of Manaus in the heart of Amazonas.

The WTO rules only address trade distortion by state intervention. As mentioned, they do not cover distortion of trade and competition caused by private entities since competition law is not part of these rules. From the cultural perspective, the systemic shortcoming of this legal situation is obvious if one considers that private entities dominating a given market may strangle the creation, production and distribution of local trade-related culture. In particular, the state may need to intervene against abuses of dominant positions held by private players. The typical instrument for this purpose is competition law that, at the moment, largely remains under the regulatory competence of states.[28]

A high degree of corporate concentration characterises the global cultural industries. Concentration leading to dominant market positions often translates into creative control over artistic expressions dedicated to mass audiences lying in the hands of a few culturally like-minded decision-makers. In this case, market forces commonly fail to achieve the public policy goals of cultural diversity. As a matter of fact, concentration can contribute substantially to harming the economic viability of a variety of cultural identities and their cross-border dissemination that would eventually generate cultural diversity. There is arguably neither a convincing economic nor a political or "cultural" justification for tolerating a situation where concentration of private players hurts cultural diversity. Classical state interventions based on quota regulations and subsidies usually fail to reach the critical mass needed to be really effective in correcting this market failure, notable exceptions being South Korea's screen time quotas and France's highly efficient tax system for the film industry. Furthermore, as mentioned, state aid based on subsidies remains out of range for most economies in transition, and developing and least-developed countries.

In summary, I consider the fact that competition laws and policies are, to a very large extent, outside of the scope of current WTO agreements, and therefore subject to national sovereignty, rather as an opportunity than as a threat for cultural diversity policies. To stress it again: so far, this opportunity has enjoyed little awareness among the states eager to promote this policy goal.

The case for multilateralism against "the law of the jungle"

From the legal perspective, liberalism as articulated by the principle of autonomy of private parties, risks becoming a form of totalitarianism when the rule of the strongest, "the law of the jungle", prevails in trade areas that are sensitive for generating and disseminating opinions and expressions among the people. Obviously, contractual freedom without safeguards, cannot guarantee freedom of speech. Unbalanced bargaining replaces deliberation on a level playing field, when one contract partner dominates the other in a way that allows the former to reduce or even break the autonomy of the latter. On the international level, bilateralism between a rich and a poor country in trade areas that are relevant for cultural diversity may demonstrate the rule of the strongest where it is aimed at replacing the public domain by the private one without efficient safeguards on the national level based on competition law. This

[28] This current state of trade law constitutes part of the so-called "Singapore Issues" with which the WTO has to deal. Paragraph 23 of the Doha Declaration recognizes that a multilateral framework could enhance the contribution of competition policy to international trade and development. Para. 25 provides for the Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of (a) core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; (b) modalities for voluntary co-operation, and (c) support for progressive reinforcement of competition institutions in developing countries through capacity building. However, no substantial progress has so far been made in integrating competition law into the WTO system.

can open the door to "cultural imperialism".[29] Indeed, obstacles to international trade caused by private interests are at least as detrimental to the cause of cultural diversity, and to the materialisation of the theory of "comparative advantage" underlying international trade regulations, as are state-erected barriers to the free movement of cultural goods and services.[30]

Drahos examined the way in which bilateral trade negotiations aimed at concluding bilateral investment treaties and bilateral intellectual property agreements are being used by the U.S. and the EU to build more extensive protection for intellectual property than that set out in TRIPS to the disadvantage of developing countries (the so-called TRIPS Plus standard). He used examples of U.S. and EU negotiations with countries such as Nicaragua, Jordan, and Mexico to illustrate how developing countries are being drawn into a highly complex multilateral and bilateral web of intellectual property standards over which they have little control. The author describes *inter alia* how these bilateral agreements are being used to intervene in the detailed regulation of a developing country's economy. Furthermore, he shows how the Most Favoured Nation principle within TRIPS combines with these bilateral agreements to set and spread new minimum standards of intellectual property faster than would have happened otherwise. Eventually, he concludes with a reminder of the benefits of multilateralism in trade and the dangers of bilateralism:

> "One of the important features of the WTO regime, including TRIPS, is that it commits states to a process of constant review and negotiation. Aside from these negotiations within the WTO, developing countries have been facing, beginning in the 1980s, increasing waves of bilateral negotiations from both the U.S. and EU on intellectual property. The nature of the standards to be found in BIPs suggest that developing countries are having very little success, if any, in halting the spread and strengthening of intellectual property norms. Even if developing countries possess the relevant IP expertise they have little real bargaining power in a negotiation in which they are seeking access to the U.S. or European market (especially if they wish to become members of the European Community or NAFTA). Almost certainly, developing country negotiators are acquiescing to the IP norms in BIPs as part of the 'standard deal' they have to accept as the price for gaining entry to the lucrative markets of Europe and the U.S."[31]

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[29] For definitions of "cultural imperialism", see for example Russell Smandych, Cultural Imperialism and Its Critics: Rethinking Cultural Domination and Resistance, p. 3 ff; Bernd Hamm, Cultural Imperialism: The Political Economy of Cultural Domination, p. 18 ff.; Katharine Sarikakis, Legitimating Domination: Notes on the Changing Faces of Cultural Imperialism, p. 80 ff.; Biyot K. Triparty, Redefining Cultural Imperialism and the Dynamics of Culture Contacts, p 301 ff., all in: Bernd Hamm / Russell Smandych (eds.), op. cit.

[30] Neither cultural diversity nor the theory of comparative advantage can effectively materialize where abuses of dominant position or other anti-competitive practices by private players hinder market access. This is the reason why the EC Treaty aims at removing state and private obstacles to trade between the Members of the European Union via the rules implementing the freedom of movement of goods (art. 23 – 38 of persons), and the freedom of movement of persons, services and capital and payements (art. 39 – 60 of the EC Treaty), and via rules on competition (art. 81 to 86 of the EC Treaty) and state aid (art. 87 – 89 of the EC Treaty). On the global level, the relationship between trade and competition was addressed in the case Japan - Measures Affecting Consumer Photographic Film and Paper, where the United States unsuccessfully argued that Japanese government's tolerance of an allegedly anti-competitive behavior by private actors was not consistent with WTO law, see Panel report WT/DS44/R

[31] Peter Drahos, Bilateralism in Intellectual Property, 2001, p. 2 and 15: www.maketradefair.com/assets/english/bilateralism.pdf

The findings of this analysis of trade-related intellectual property protection and development concerns arguably can be applied *mutatis mutandis* to the area of trade and culture in order to reveal an additional substantial weakness of the UNESCO Convention. Under this Convention, the parties remain sovereign in cultural matters and are not committed to any enforceable discipline to promote cultural diversity. This causes greater vulnerability for the parties individually to be pressured via bilateral trade agreements with the United States and other countries (possibly even other parties to the UNESCO Convention) to accept trade-offs that can be highly detrimental to their cultural interests in exchange of trade benefits in non-culture related sectors, for example, better market access for bananas or textiles.

The contemplated free trade agreement between South Korea and the United States illustrates this issue. The former country gave up 50 percent of the screen quotas that have contributed greatly to promoting its cultural identity domestically and abroad, in order to be in the position to negotiate advantages in other trade areas. In this light, multilateralism as applied by the WTO appears as a safeguard against the "law of the jungle", i.e. the law of the stronger party, whether this party is the more powerful economic lobby on the domestic level, or the economically wealthier country on the international level, or, as is most often the case, a combination of both. In comparison, within a multilateral system, the weaker parties can engage into alliances that allow them collectively to better defend their interests. The UNESCO Convention does not promote multilateralism since, in fact, it "nationalises" cultural diversity by allocating full sovereignty for cultural diversity questions to its Parties.

Classical state intervention to promote cultural identities and diversity

Market shares can serve as an indicator of the strength of domestic culture and cultural diversity. If we take the film industry as an example, we find four main types of market shares:

1) market shares resulting from an absence of state intervention because the local film industry dominates the domestic market (United States);

2) market shares resulting from an absence of state intervention because the state cannot afford consequential cultural policies (most developing and least developed countries);

3) market shares resulting from a state intervention mainly based on quotas (South Korea);

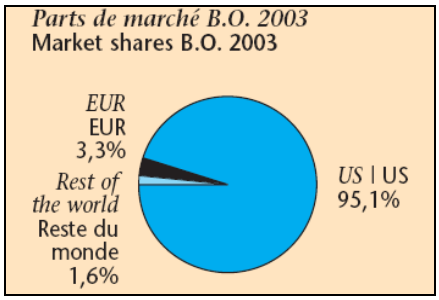
4) market shares resulting from a state intervention mainly based on subsidies (France and the European Union).[32]

In 2003, domestic films in the United States reached 95.1 percent market share, whereas films from Europe and the rest of the world attracted only 3.3 pervcent and 1.6 percent, respectively, of all American moviegoers.[33] In light of these figures, one can argue that the European taxpayers finance the tiny remnant of cultural diversity in the film sector of the

[32] The market shares in India and, more recently, Nigeria do not fit into any of these four categories whose domestic film industries a very succesful without subsidies or quotas.

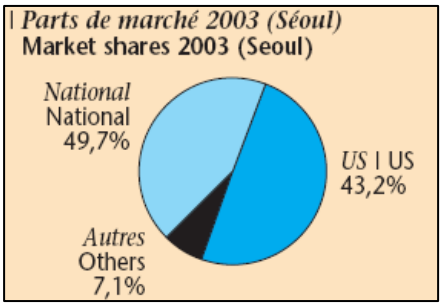
[33] The statistics are quoted from the European Audiovisual Observatory, Focus 2004, World Film Market Trends, on: www.obs.coe.int/online_publication/reports/focus2004.pdf.en For more recent figures, see Focus 2005: http://www.obs.coe.int/online_publication/reports/focus2005.pdf.en

United States. This latter country does not overtly subsidise local film production.[34] There, the game is left to a very large extent to private players, acting as an oligopoly in an allegedly free market, and arguably the situation in terms of diversity of the supply of cultural goods and services looks accordingly poor. I label this situation as "cultural uniformity":



Similar figures apply for countries that cannot afford cultural policies in the film sector, including most developing and least developed countries (most notable exceptions are India and nowadays Brazil where domestic films have a substantial market share).

If the state protects local content by quantitative restrictions to trade; that is, quotas or equivalent measures, it reduces the supply of cultural goods and services from foreign origins and, as a consequence, the overall diversity of cultural offerings. The screen time quota in South Korea for theatrical release has led, in 2003, to a market share of 49.7 percent (45.2 percent in 2002) for local content; 43.2 percent (48.9 percent in 2002) for content from the oligopoly of the Hollywood majors;[35] and 7.1 percent (0.8 perecent in 2002) for content from third cultural origins. I label this situation as "cultural duality".



The fourth model may be found in the European Union where, again in the same period of time, U.S. films achieved approximately 72.1 percent, whereas national films obtained 19.4 percent, European films outside their national market obtained 6.3 percent, and films from the rest of the world obtained 2.2 percent. Many of the EU members substantially subsidise their own local film industry. I label this situation as "quasi cultural diversity":

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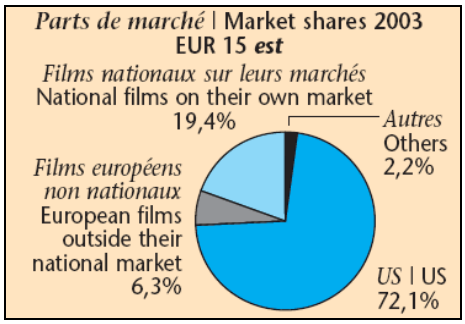
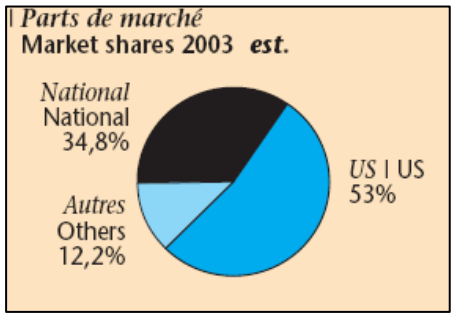
[34] It is likely, however, that the United States substantially subsidized their domestic film industry's export activities through the "Foreign Sales Corporations" tax scheme. This public aid was considered as inconsistent with WTO rules, see the Panel report United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW ; and the Appellate Body report United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW.

[35] The majors' oligopoly («Hollywood studios») includes Walt Disney Company, Sony Pictures Entertainment, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corp., Universal Studios, Inc. and Warner Bros.; for updates of this list, see the website of the Motion Picture Association, the Majors' trade organization at www.mpaa.org ; for the most recent data, see The US Entertainment Industry Market Statistics 2005: www.mpaa.org/researchStatistics.asp



On the national level, France is at the top of public aid through an efficient, sector specific tax system (so-called *taxe parafiscale*) that accumulates an annual aid of more than Euros 0.3 billion. This country levies a percentage from the revenues generated by the whole audiovisual sector, and distributes it mostly to local film producers (a small part of this aid is granted to film projects from transitional and developing countries via the *Fonds Sud* development programme, and other parts are spent on foreign films made according to international co-production agreements with France).[36] As a matter of fact, in France, public regulations cause Hollywood to co-finance local content and, thus, to contribute to more cultural diversity in the national film market. In 2003, the French taxes levied from 53 percent of the market share obtained by U.S. films in the Hexagon to be redistributed among French producers in subsequent years to preserve local film production. In turn, this production achieved approximately 34.8 percent of the share in their own national market (during that year, 12.2 percent of the market share was obtained by films from third countries, mainly European ones).



Let me critically analyse these various types of market shares from the point of view of public choice and healthy competition that would promote freedom of expression of creators and producers of cultural goods and services, and freedom of opinion for the audience.

Market shares and public choice

One can deduce from market share measurable elements to identify the state of cultural identity and cultural diversity in a given market. For example, based on the figures above, one can assess that South Korea, which relies mainly on quotas, has a stronger film cultural identity than does France, which relies mainly on subsidies. On the other hand, France seems to enjoy a greater circulation of films from the EU and from third countries and therefore has more cultural diversity than does South Korea, in terms of market share obtained by films of various cultural origins.

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36 Since it creation, the French "Fonds Sud Cinéma" set up by the Ministry of Foreign Affairs and the Ministry of Culture and Communication (Centre National de la Cinématographie - CNC) aided more than 300 film projects, see: www.diplomatie.gouv.fr/fr/

One may argue that the South Korean quotas restrict freedom of choice in the sense that it conditions the audience to watch local content at given times, or to abstain from going to the theatres.[37] It is interesting to stress that this argument would also apply in the context of the film market within the United States, where most of the audience has no choice other than to go to theatres that almost exclusively show motion pictures originating from the oligopoly of Hollywood majors. In this case, two main opinions prevail. According to the first, it is the demand that wants cinematographic works from one single, largely culturally uniform origin, and according to the second, the demand is predominantly supply-driven. In contrast, in France, the audience is not obliged to see subsidised domestic or foreign films since it can choose between them and those supplied by the Hollywood oligopoly. This greater choice is also available in most other European countries.

Of course, it is empirically difficult, if not impossible, to assess which opinion better reflects reality. If no other choice is provided to the audience in the market place, the audience is obliged to consume the cultural goods and services supplied by the Hollywood oligopoly. One ignores, however, whether this supply would also meet the demand in a context where unbiased cultural diversity would prevail; that is, where films from a variety of cultural origins would enjoy equivalent marketing investments and a distribution on a level playing field. If so, the supply-driven demand and the demand-driven supply would meet on more balanced terms; if not, the situation in terms of public freedom of choice would be worse than the one in South Korea.[38] As a matter of fact, from the perspective of the consumers, if you can only buy and read *Pravda*, it makes no difference whether the limited supply is imposed by the state or by a private publisher dominating the market to an extent that leads to the exclusion of all competitors. Any state facing the question of whether or not to intervene in the market in order to realise cultural diversity as a legitimate policy goal, should understand this truism.

The market share figures above confirm my interpretation that the UNESCO Convention on cultural diversity is essentially a tool for rich countries that can economically and politically afford expensive cultural policies to preserve some relatively modest market share of local content produced and distributed by cultural industries qualifying for state aid. The vast majority of countries remain out of the game. The guiding principles of solidarity and cooperation in Article 2.4 of the UNESCO Convention will arguably not be sufficient to address this situation in a satisfactory manner. Once the priority needs such as security and public health are satisfied, generally no or only very scarce state resources are left to

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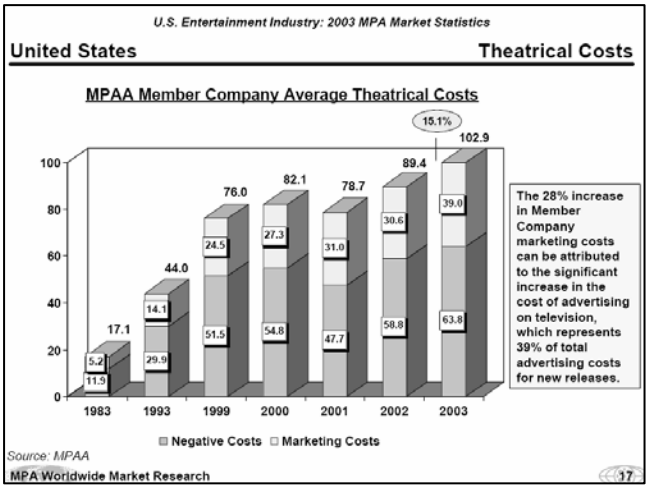
[37] A similar argumentation could apply to local content quotas imposed upon broadcasters according to the Television without Frontiere Directive and similar instruments. The main purpose of these types of State intervention is to provide exposure to the public for local contents and to generate revenues in favor of local content providers at a lower cost for the State than via direct public payements in order to secure the economic viability of these actors. If local content providers want to take advantage of the quotas they need to meet the demand in this protected environment at least to the extent that the targeted audience does not completely desert the supply, and at most to make profits.

[38] One must stress, however, that the South Korean quota system may be assessed as restraining to a much lower degree the freedom of expression of local filmmakers than a state intervention based on subsidies where the public aid is granted through an evaluation of the quality of film projects by a peer-review mechanism. Such a peer-review mechanism is in essence arbitrary and arguably often the cause of clientelism and corruption that eventually causes a low quality and popularity of the films subsidized in this way, and that could be considered as a form of hidden censorhip. One can quote the example of Switzerland during the last 10 years to illustrate the devastating effects of this mechanism: Most Swiss films had hardly any box office visibility and artistic recognition in the home market and none outside of the country. In contrast, the South Korean approach generated motion pictures that became very successful during the same period of time not only domestically, but also in foreign markets where no quota restrictions apply. In this context, one should recall that export results are one of the most objective indicators for the quality of a public funding scheme.

implement cultural policies in these countries, unless culture serves the purposes of the rulers, for example, as a means of propaganda, in which case it may enjoy a higher priority for obvious reasons.

Questionable cost efficiency of subsidies

The huge investment which Hollywood studios make in marketing (stars, prints and advertising) the films they produce and distribute creates market dominance for these films and largely prevents films from other cultural origins from having access to audiences. Given this reality, one may question the efficacy of many schemes in which rich states intervene in the market through subsidies.



If the average salary for stars of around US $20 million is accounted for under marketing expenses, each of the approximately 200 films produced and distributed yearly by the Hollywood studios costs approximately US $40 million to make (production or negative costs) and US $60 million to sell (distribution or marketing costs). Advertising is the main tool to lure the audience into theatres.[39] One can invest US $40 million to make a motion picture with little chance to access the public if no monies are left to promote it in a competitive manner. The same logic applies to the music and book industry.

In most countries, film distribution is today largely dominated by the oligopoly of Hollywood majors. Film distribution means the facility to invest in competitive marketing (stars and advertising), and to bring motion pictures to theatres with the appropriate number of copies (prints) to ensure maximum simultaneous exposure to the audience.[40]

The Hollywood studios spend their marketing money as follows:

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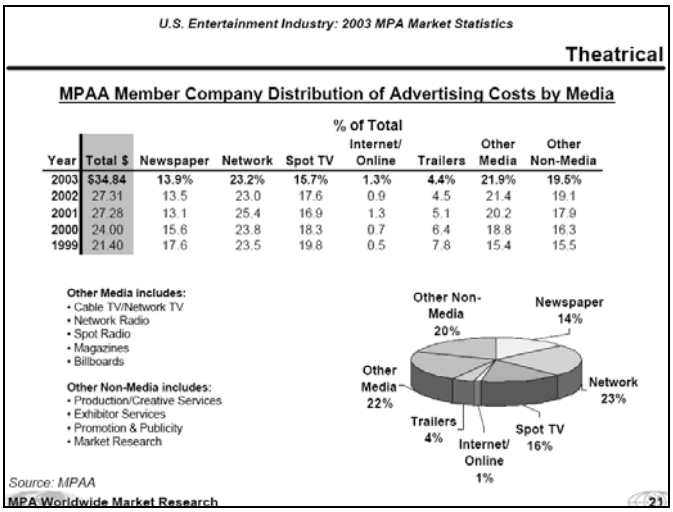
[39] Arthur De Vany Arthur. 2004, Hollywood Economics. How extreme uncertainty shapes the film industry, London / New York 2004, p. 122, describes the "blockbuster strategy" as follows: "The blockbuster strategy is based on the theory that motion picture audiences choose movies according to how heavily they are advertised, what stars are in them, and their revenues at the box office tournament. The blockbuster strategy is primarily a marketing strategy that suggests the movie-going audience can be 'herded' to the cinema. Where this theory is true, then the choices of just a few movie-goers early in a film's run would determine the choices of those to follow. This suggests that the early choosers are leaders or people on whom later choosers base their choices. They choose to follow these 'leaders' because they believe they are more informed than they are or because they neglect their own preferences in order to mimic the leaders. Audiences who behave this way are said to be engaged in a non-informative information cascade. It is non-informative because their choices are not based on the opinions of the leaders, only their revealed actions, and the followers do not reveal their true preferences when they choose only what the leaders chose."

[40] See footnote 5.



U.S. Entertainment Industry: 2003 MPA Market Statistics

Theatrical

MPAA Member Company Distribution of Advertising Costs by Media

Year	Total $	% of Total Newspaper	Network	Spot TV	Internet/ Online	Trailers	Other Media	Other Non-Media
2003	$34.84	13.9%	23.2%	16.7%	1.3%	4.4%	21.9%	19.5%
2002	27.31	13.5	23.0	17.6	0.9	4.5	21.4	19.1
2001	27.28	13.1	25.4	16.9	1.3	5.1	20.2	17.9
2000	24.00	15.6	23.8	18.3	0.7	6.4	18.8	16.3
1999	21.40	17.6	23.5	19.8	0.5	7.8	15.4	15.5

Other Media includes:
- Cable TV/Network TV
- Network Radio
- Spot Radio
- Magazines
- Billboards

Other Non-Media includes:
- Production/Creative Services
- Exhibitor Services
- Promotion & Publicity
- Market Research

Source: MPAA

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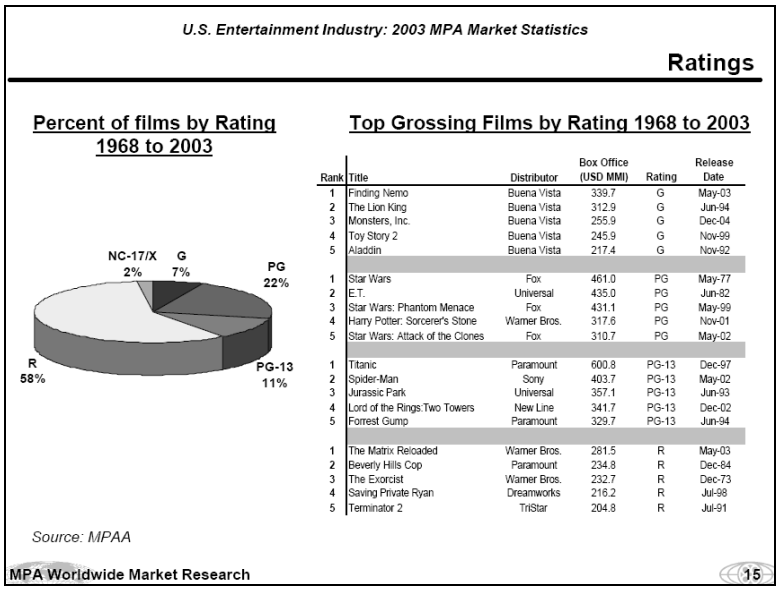
This figure illustrates the spill-over effects of a motion picture on other media. Marketing expenditures bring visibility for a particular film in other media, and those media not only gain revenues, they can use the exposure to increase their own visibility. This dynamic can impose largely uniform aesthetics and messages on the general population, and can destroy alternative forms and contents. Motion pictures that do not enjoy competitive marketing investments remain out of the sight of the public; when this situation is systemic, they become victims of an "iconicide". When films from one single, largely homogeneous, cultural origin have competitive advertising budgets, one must expect the box office results for all age categories of the audience as follows:[41]



U.S. Entertainment Industry: 2003 MPA Market Statistics

Ratings

Percent of films by Rating 1968 to 2003

Top Grossing Films by Rating 1968 to 2003

Rank	Title	Distributor	Box Office (USD MM)	Rating	Release Date
1	Finding Nemo	Buena Vista	339.7	G	May-03
2	The Lion King	Buena Vista	312.9	G	Jun-94
3	Monsters, Inc.	Buena Vista	255.9	G	Dec-04
4	Toy Story 2	Buena Vista	245.9	G	Nov-99
5	Aladdin	Buena Vista	217.4	G	Nov-92
1	Star Wars	Fox	461.0	PG	May-77
2	E.T.	Universal	435.0	PG	Jun-82
3	Star Wars: Phantom Menace	Fox	431.1	PG	May-99
4	Harry Potter: Sorcerer's Stone	Warner Bros.	317.6	PG	Nov-01
5	Star Wars: Attack of the Clones	Fox	310.7	PG	May-02
1	Titanic	Paramount	600.8	PG-13	Dec-97
2	Spider-Man	Sony	403.7	PG-13	May-02
3	Jurassic Park	Universal	357.1	PG-13	Jun-93
4	Lord of the Rings:Two Towers	New Line	341.7	PG-13	Dec-02
5	Forrest Gump	Paramount	329.7	PG-13	Jun-94
1	The Matrix Reloaded	Warner Bros.	281.5	R	May-03
2	Beverly Hills Cop	Paramount	234.8	R	Dec-84
3	The Exorcist	Warner Bros.	232.7	R	Dec-73
4	Saving Private Ryan	Dreamworks	216.2	R	Jul-98
5	Terminator 2	TriStar	204.8	R	Jul-91

Source: MPAA

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One may find cultural uniformity in the United States acceptable by arguing it reflects a strong cultural identity. However, one should arguably be concerned about similar figures in countries such as Senegal, Argentina, Thailand or Switzerland. In this context, one may better understand the relationship between "cultural identity" and "cultural diversity": One could interprete a very strong or a very weak cultural identity in a given place as expressing a lower degree of cultural diversity, and vice-versa.

41 For the meaning of the MPAA age related rating, see: www.mpaa.org/FlmRat_Ratings.asp

The motion picture *11/09/01 September 11* is a good illustration of the substantial value of cultural diversity in cinema and its possible indicators. Eleven filmmakers, each from a different country (Samira Makhmalbaf, Claude Lelouch, Youssef Chahine, Danis Tanovic, Idrissa Ouedraogo, Ken Loach, Alejandro Gonzales, Innaritu, Amos Gitaï, Mira Nair, Sean Penn, Shohei Imamura), were asked by the French producer Alain Brigand to create a short film relating to the terrorist attacks on New York and Washington on 11 September 2001.[42] The only artistic restriction was that each individual film must last precisely 11 minutes, 9 seconds and 1 frame. The resulting collaboration offers diverse cultural, artistic and ideological perspectives on those tragic events. A tentative list of the cultural diversity indicators to be deduced from this example would include the various languages of the dialogue, the acting, the cinematographic languages, the narrative structures, the contents of the stories and their ideological references, the music, the locations, and last but not least the overall mood of the films. By analogy, one may apply this tentative list of indicators in the context of other cultural goods and services such as books and music.

New fields of research and action

As an alternative to costly subsidies and quotas, one may envisage a set of rules prohibiting cultural discrimination to protect and to promote cultural diversity. This idea is inspired by the prohibition of trade-related discrimination based on national origin that underlies WTO law and that is articulated in the basic principles of National Treatment (NT) and Most Favoured Nation (MFN). The proposed new concept should contribute to establishing an institutional dialogue, to be developed via country reviews and case law, between the WTO and an international organisation that would take care of cultural diversity on a level playing field with the WTO, for example a World Cultural Diversity Organisation (wCDo).

In this context, I will further explore the potential of using competition and intellectual property laws and policies to protect and promote cultural diversity. Competition laws that take into account the economic specificity of cultural industries may contribute to the creation of a level playing field and grant equal distribution opportunities to content creators and producers from different cultural origins. As mentioned, competition laws and policies are at the moment outside of the scope of application of the rules of the WTO.[43] Therefore, for the time being, member states of the WTO remain fully competent to legislate in this area of law in order to provide safeguards against abuses of dominant market positions that may damage freedom of speech and, ultimately, the functioning of democracy.

A new step towards furthering cultural diversity requires a legal instrument that does not discriminate between economically rich and poor countries. This instrument should prohibit unjustified discrimination that arises from private or public players dominating a given market. More specifically, it should promote the dissemination of cultural identities on the domestic and international levels by focussing on trade-related artistic expressions (films, books, music, etc.), while improving positive spill-over effects from these expressions on non-commodified culture (for example, folklore), and vice versa.

The objective would be to elaborate a new instrument based on rules of law to implement the cultural policies at stake. In this context, I will explore legal means that are particularly suitable for countries with economies in transition, and for developing and least-developed countries that have insufficient financial resources for effective cultural policies. Intellectual property and competition laws and policies may be particularly appropriate for achieving this goal. This approach aims at putting law in context in order to broaden the discussion of legal

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42 See the Internet Movie Data Base: www.imdb.com/title/tt0328802/

43 See footnote 28.

theory and its implementation in the cultural, economic, social and political environments at stake.

Cultural diversity, competition law and intellectual property rights

There is little research available on the interactions between international trade rules and state intervention aimed at protecting and promoting cultural identities and cultural diversity on one side, and intellectual property and competition laws on the other.[44] These latter rules, if appropriately designed and implemented, can serve as good governance tools. One can argue that existing instruments, such as the WTO's TRIPS agreement, provide the necessary flexibility to protect and promote cultural identities, and as a desirable consequence thereof, cultural diversity. An appropriate level of intellectual property protection and adequate competition legislation can contribute to a balance between the complex interests at stake. Based on the principle of territoriality, states remain instrumental to protect and enforce intellectual property rights. Furthermore, one must also remember that WTO members remain sovereign in making, implementing and enforcing competition law. As a consequence, the existing legal framework grants to states that are eager to pursue cultural diversity policies considerable room for manoeuvre if they use their national intellectual property and competition laws and policies for these purposes. The debate on access to essential drugs for poorer populations in developing countries in connection and the role of intellectual property and competition laws and policies could be stimulating inspiration for exploring new legal means to promote cultural diversity.[45]

By granting subsidies, public financial aid dedicated to the achievement of certain tasks performed by private parties, states can specifically encourage the creation, production and distribution of local cultural goods and services. One main rationale underlying competition laws, in contrast, is to foster economic efficiency within the market among producers, to the benefit of consumers in particular and society in general (better quality and lower price). In many jurisdictions, including the European Community, regulations on subsidies are closely linked to competition law. It is indeed in the nature of subsidies to distort competition. On the other hand, subsidies are often the costly remedy to counter anti-competitive behaviour of private parties abusing their dominant market position. The history of the U.S. film industry in its domestic market is a sequel of anti-competitive practices that started with Edison's patent-based monopoly on early cinematographic instruments (cameras and projectors) at the beginning of film history and continuing with the high vertical integration of the majors that eventually led to the so-called "Paramount decrees".[46] In this landmark case, United States v. Paramount Pictures, et al., the U.S. Supreme Court found the five majors (Paramount, Warner Brothers, 20th Century Fox, Loew's, and Radio Keith Orpheum) guilty of restraint of trade, including vertical and horizontal price fixing.[47] The courts ordered both the vertical disintegration of the industry and, moreover, the divestiture of approximately one half of the more than 3,000 theatres owned at the time by the large circuits (which owned or controlled

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[44] Alan Story calls copyright as the "sleeping giant" on the international intellectual property agenda, see Alan Story, Study Paper 5: Copyright, Software and the Internet, attached to the Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, p. 4: www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf

[45] See e.g. Jonathan Berger, Advancing public health by other means: Using competition policy to increase access to essential medicines, 2004, UNCTAD-ICTSD, at: http://www.iprsonline.org/unctadictsd/bellagio/docs/Berger_Bellagio3.pdf See also Thomas Cottier / Christophe Germann, Intellectual Property and Competition Law, in: WIPO Academy Teaching Materials, forthcoming 2006.

[46] Compare David Puttnam, The Undeclared War, The Struggle for Control of the World's Film Industry, London 1997.

[47] U.S. 334 US 1. (1948).

all but a handful of the first run theatres in the largest twenty five U.S. cities). Some provisions of the consent decrees have more recently been relaxed.

Governments that want seriously to take care of cultural diversity in cinema are well advised to closely scrutinize the behaviour of the players dominating the market within their national jurisdictions, and, if necessary, adapt competition laws accordingly. Any move in this direction should take into account the fact that genuine competition may itself be an efficient instrument to promote real cultural diversity. True competition, in this context, would require implementing rules that provide a level playing field among competitors from different cultural origins at the marketing stage. This level playing field does not exist at the moment.[48]

Applying the "essential facilities" doctrine to marketing power

If cultural policy makers decide to activate competition law resources, they should explore the so-called "essential facilities doctrine" under U.S. and EU law. In a nutshell, this doctrine "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." The Supreme Court first articulated this doctrine in United States v. Terminal Railroad Association, 224 U.S. 383 (1912). In this case, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. The court held that this constituted both an illegal restraint of trade and an attempt to monopolise. Because it represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant access to an essential asset to its competitors. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors: (1) control of the essential facility by a monopolist; (2) the inability of the competitor practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

This test for antitrust liability has been adopted by virtually every United States court which has considered an "essential facilities" claim.[49] Opinions of these courts also suggest that antitrust liability under the essential facilities doctrine is particularly appropriate when denial of access is motivated by an anticompetitive animus – usually demonstrated by a change in existing business practices with the apparent intent of harming rivals. Given the varied contexts in which the essential facilities doctrine has been applied, courts have declined to impose any artificial limit on the kinds of products, services, or other assets to which the doctrine may appropriately be applied. As one court stated, the essential facilities doctrine does not unequivocally require that a facility be of a grand nature as suggested by the defendant, nor is the doctrine specifically inapplicable to tangibles such as a manufacturer's spare parts. The term "facility" can apply to tangibles such as sports or entertainment venues, means of transportation, the transmission of energy or the transmission of information, and to intangibles such as information itself.[50] The European Court of justice adopted a similar

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[48] One can even draw parallels between the former Soviet Union distribution system based on command economy and the Hollywood majors' centrally planned and globally effective motion picture economy of today to illustrate the lack of competition in the film industry.

[49] The European Court of Justice added a fifth criterion requiring the absence of legitimate business reasons to refuse the access to the facility, see below footnote 51.

[50] Germann Christophe, Content Indutstries and Cultural Diversity. The Case of Motion Pictures, in: Hamm, Bernd / Smandych, Russell (eds.), Cultural Imperialism, Essays on the Political Economy of Cultural Domination, Ontario 2005, p. 104 ff. with further references.

approach that is summarised in the Advocates General's opinion of 28 May 1998 in the Oscar Bronner case.[51]

It would be interesting to test before courts whether the current market situation that enables the majors to invest over U.S. $10 billion annually in marketing (stars, print and advertising) would qualify as an essential facility. Hollywood studios own substantial intangible assets in the form of catalogues of intellectual property rights that serve to guarantee the financing of this marketing. This huge intangible asset is one of the majors' main tools to dominate the markets on a sustainable basis. One must recall that in Europe, the ownership of such rights is fragmented among small and medium-sized producers, which are financed substantially by the state. Furthermore, the majors' corporate and contract-based control of domestic and international film distribution and exhibition should also qualify as an essential facility. One can therefore consider the majors' marketing power and distribution control as an essential facility that content providers from other cultural origins cannot duplicate without tremendous state aid. In light of the market structure and mechanisms currently prevailing in the film, music and book sectors, most of the providers of cultural goods and services which are denied access to this essential facility cannot reach the audience independently of the public appeal of their content. Either these creators and producers receive support from the state or they cannot continue in business.

This situation may inspire legislators and judges to elaborate and use competition rules based on the essential facilities doctrine that are specifically aimed at enhancing a level playing field among cultural content providers from a variety of cultural origins. Furthermore, by forcing market dominating private players to contribute to the policy goals at stake, such a solution may substantially contribute to implementing cultural diversity without unduly relying on taxpayers' money. It would therefore also constitute an affordable way for economically weaker countries to promote cultural diversity.

Arbitrary and misleading market definition for cultural industries

In my assessment, local agencies and courts have failed so far to use competition law to promote cultural diversity because they were unable to define adequately the relevant product and service market; that is, the goods and services and their suppliers competing with each other. Furthermore, competition authorities have so far faced the difficulty of defining and implementing cultural diversity in assessing merger and acquisitions. In my opinion, the main problem resides in the lack of clear criteria for cultural diversity as well as in the traditional definition of relevant markets.

I recommend using marketing investments made by competitors within cultural industries as the main criterion to assess anti-trust relevant situations and transactions (cartels, mergers and acquisitions, abuses of dominant position) which cause a concentration of market power that can harm cultural diversity.[52] In addition, competition authorities should gather a clear picture on how this investment relates to the cultural origin of films, books and music by

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[51] For an overview on the "essential facilities" doctrine with further references, see the opinion of the Advocate General Jacobs of 28 May 1998 in the case Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, Case C-7/97, ECR 1998 I-07791. The Court came to the conclusion that there was no essential facility in the case at stake. For an introduction to the similarities and differences between U.S. and EU competition law, see Elenaor M. Fox, US and EU Competition Law: A Comparison, in: Edward M. Graham / J. David Richardson (eds.), Global Competition Policy, Washington 1997, p. 339 – 354.

[52] See Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 , 09/12/1997, p. 5.

players dominating the market of cultural industries. This approach requires the elaboration of predictable and transparent rules to measure marketing investments and to define the cultural origin of the goods and services at stake.

As a recent example one can consider the decision by the European Commission on the merger between Sony and BMG in the music sector. In this case, the Commission subdivided the relevant market for recorded music (including A&R[53] and the promotion, sales and marketing of recorded music) into distinct product markets based on genre (such as international pop, local pop, classical music) or for compilations. The Commission left open whether these genres or categories constituted separate markets, "as the concentration would not lead to a creation or strengthening of a dominant position under any market definition considered."[54]

One must stress that the Commission did not assess this merger under Article 151, paragraph 4 of the EC Treaty. This clause requires that the Community shall take cultural aspects into account in its action under other provisions of the EC Treaty, in particular in order to respect and to promote the diversity of its cultures.[55] In my opinion, the Sony /BMG decision clearly violates the cultural clause of the EC Treaty. The Commission should have analysed the question whether the concentration between Sony and BMG could have a negative impact on cultural diversity. It should have assessed whether the possibly increased marketing power of the merged entities would have diminished the supply of recorded music from a variety of cultural origins in terms of competitive marketing investments. This assessment would have required analysing data on the link between marketing expenditures and the cultural origin of the recorded music. All other ways to subdivide the market, in particular on genres and compilations, is without significant relevance, eventually arbitrary, and misleading to assess market power in relation to cultural diversity. Furthermore, the Commission should have evaluated the effect of collective market dominance resulting from a more concentrated oligopoly on cultural diversity in a correct way. By judgment of 13 July 2006, the Court of first instance annulled this decision on the grounds that the Commission did not correctly assess the relevant facts and erred in law with respect to the question of a collective dominant position. The Court, however, did not question the Commission's definition of the relevant market, and did not further elaborate on the impact of the merger on cultural diversity.[56]

Marketing means as the main criterion for substitutability

If Article 151 paragraph 4 of the EC Treaty is to be workable for administrative and judicial procedures on cartels, abuses of dominant position, mergers and acquisitions, let me briefly describe the appropriate way to define the relevant market of cultural industries using the example of the film industry. First, the relevant competitors must be defined. For the cinematographic sector, which drives large parts of the audiovisual sector, there are several main markets in the exploitation cascade (theatrical market, various types of television and video markets). If a film is successful in the theatres, it will likely be broadcasted in prime time on television and become a video bestseller. Theatrical exploitation, as the primary market, includes three sub-markets, film producers (supply) and distributors (demand);

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53 A&R = Artist and Repertoire; the music industry's equivalent of research and development.

54 See the decision of the European Commission of 19 July 2004, C(2004) 2815, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case No COMP/M.3333 – Sony/BMG, OJ 62/30, 9.3.2005: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_062/l_06220050309en00300033.pdf or, for the full length version, http://www.solv.nl/nieuws_docs/1259SONY-BMG%20merger.pdf

55 OJ C 325/33, 24 December 2002

56 Case T-464/04, Independent Music Publishers and Labels Association (Impala) v Commission; see this judgment at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-464/04

distributors investing in print and advertising (supply) and exhibitors investing in the screening facilities and local advertising (demand); and eventually exhibitors (supply) and the cinema audience (demand). The most significant theatrical sub-market is the one between the distributors (supply) and exhibitors (demand), since it conditions, to a large extent, what will be available for the public to consume in the theatres, on television and for home sale and rental, as well as in parallel markets such as books and music which sometimes spin-off from the success of a movie. The territorial market between distributors and exhibitors is international, since, in theory, a local exhibitor can rent a film for screening in his theatre from distributors around the world who are usually acting through local subsidiaries or independent contractors. I will therefore take the second theatrical sub-market between distributors and exhibitors to explore the definition of the product or service relevant market.

According to my thesis, the definition of the product and service market needs to take into account the economic specificity of cultural industries. The common approach under competition law is to assess the substitutable character between goods or services from the perspective of the demand, in order to determine whether such goods or services are in a competitive relationship with each other. According to European Community case law, the relevant product or service market encompasses all products or services that the consumer considers as substitutable or interchangeable with each other based on (1) their physical characteristics, (2) their price, and (3) the use to which they are dedicated.[57] These criteria make limited sense when they are applied to mass cultural goods and services. Films, books and music often show little price differentiation, their physical characteristics are difficult or even practically impossible to define without an arbitrary recourse to aesthetic and content related considerations, and their intended use is commonly entertainment, perhaps combined with personal enlightenment. From the perspective of the exhibitors, the rental price of a film is generally based on a percentage of the box office results, aesthetic and content related aspects are largely irrelevant as long as the use of the film for screening purposes attracts as many moviegoers as possible into their theatres. Therefore, the most relevant criterion for substitutability from the perspective of the exhibitors' demand is the audience appeal of a given film. This appeal is largely unpredictable prior to the launching of the film in the market if one relies on a subjective criterion such as the characteristics (aestetic and content) of the film. Competitive investments in the marketing of a film will provide more confort to the exhibitors, and therefore condition their choices.

I therefore suggest that competition authorities replace the criteria of physical characteristics, price and intended use by the more objective one of the amount of investment in print and advertising when they assess the substitutability of films. One should adopt the same market definition for music and books, where hits and bestsellers are also largely conditioned by huge investments in advertising and distribution. In the Sony/BMG case, this approach would make the cultural clause of the EC Treaty operational.

"Like" marketing and distribution

A similar approach may be used in the context of international trade rules where a violation of the NT or MFN principles requires, among other conditions, that the discriminatory treatment takes place between "like products" or "like services".[58] As a rule, the application of the principle of equal treatment in trade includes a "substitutability" or "interchangeability" test as one of its basic prerequisites. One compares products or services that are "similar" to each other in order to assess whether there is a level playing field for the purposes of competition

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[57] See OJ C 372, 9 December 1997.

[58] See Won-Mog Choi, 'Like Products' in International Trade Law, Towards a Consistent GATT/WTO Jurisprudence, Oxford 2003, 11-90.

and cross border trade. Based on the economic specificity of cultural industries, I argue that cultural goods and services that do not enjoy comparable marketing investment are not "like" goods or services.

In the area of human rights, equal treatment of men and women or black and white people relies on the assumption that men and women or black and white people are "like" human beings. From the perspective of the rule of law, when using the principle of equality, this analogy makes sense if one considers that gender, race and culture have in common the challenge of assimilating diversity without causing uniformity. The prohibition of discrimination therefore imposes a similar approach on the normative level between different individuals, communities and cultures to enable their factual diversity to flourish. This abstract rule of law is most often made concrete in practice with respect to economic activities: for example, equal salary for equal work by men and women or equal job opportunities for black and white people. The long standing legal experience of many jurisdictions in this respect could inspire legislators who want to promote cultural diversity by enforceable rules of law. In this sense, economic activities related to culture should be the primary subject matter of the principle of equality of treatment or, at least, the principle of prohibition of discrimination.

One can illustrate these principles applied to trade-related culture by examining film distribution in a small country like Switzerland. It is typical of a U.S. film distributed in this territory by a local subsidiary of a Hollywood major to be released with over 50 copies, and advertising expenditures of more than over 300,000 Euros. In addition, such a film normally enjoys global promotional goodwill, thanks to the worldwide investment in its stars. In comparison, a film that is not distributed by a major will normally be released with not more than 10 copies and less than 50,000 Euros available for its advertising. In addition, such a film does not enjoy any additional goodwill induced by advertising abroad (such as the value of international stars) to appeal to the audience. In the theatrical submarket between distributors and exhibitors, it is obvious that the exhibitors will tend to rent the film which enjoys the more competitive marketing investments since they are more likely to attract a greater audience into their theatres. In turn, the better box office results achieved during the theatrical release will generate a higher visibility for the film in the subsequent markets; it will cause prime time television exposure, boost video sales and rentals, and increase the demand in subsequent or parallel markets, such as merchandising, books and music. The visibility that a film can acquire in the theatrical market translates into increased public appeal. This visibility triggers media coverage which multiplies this visibility.[59] According to my thesis, the expenditure in marketing to induce visibility is the most objective indicator to assess substitutability or a like character between cultural goods and services. It allows us to define whether two cultural goods or services are in competition with each other or not (substitutability test).[60]

I therefore argue that the allocation of expenditures on marketing should be the main measurable criterion to assess compliance by private players with cultural non-discrimination principles.

This thesis can be further illustrated by the example of two films that were launched on 2 February 2006 in the German speaking market of Switzerland. They achieved approximately

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[59] See Sandra Vinciguerra, "Hollywood pratique une discrimination culturelle à l'échelle planétaire", in: Le Courrier, 13 October 2003, available at: http://www.lecourrier.ch/modules.php?op=modload&name=NewsPaper&file=article&sid=2858

[60] See footnote 52.

the same box office results after nine weeks of theatrical release with more than 114,000 admissions each. The Swiss film *Vitus,* by the Berlin International Film Festival lifetime achievement award winning director Fredi M. Murer (*Höhenfeuer),* starring Bruno Ganz (*Himmel über Berlin, Pane e Tulipiani, Hitler*), was distributed by a Swiss independent company with 24 copies and a marketing budget of less than 150,000 Euros.[61] At the same time and in the same territory, the film *Walk the Line*, a biography of country singer Johnny Cash by James Mangold, starring Joaquin Phoenix (*Gladiator*), which was marketed by the local subsidiary of a Hollywood major, presumably enjoyed a substantially higher investment in advertising, and more screening venues and time.[62]

Bruno Ganz has arguably a higher marketing value than Joaquin Phoenix in Switzerland. However, Johnny Cash's international notoriety may have compensated this advantage. Therefore, the number of prints and the investment in advertising constitutes the primary measurable difference in terms of competitiveness in the commercial distribution circuit. This difference did not influence the box office results in the German speaking market of Switzerland, where film director Fredi M. Murer is well-known and triggered reasonable media coverage. However, this difference is likely to penalize *Vitus* vis-à-vis *Walk the Line* in markets outside Switzerland where *Vitus* will no longer have a "home field advantage" and competitive advertising.[63] In this context, it must be recalled again that visibility acquired during a successful theatrical release usually conditions the subsequent commercial exploitation chain such as DVD sales and rental, dissemination via television, and ancillary revenues (from book adaptation, music, video games, etc.).

One can conclude that the intrinsic quality, including unbiased audience appeal, of a given cultural good or service is not as relevant as marketing power from the perspective of the consumers, at least during the first release. This conclusion (which should be empirically tested) is meaningful in view of the fact that cultural goods and services, understood as mass expression, may heavily influence public opinion. Freedom of speech is in danger where such public opinion is based on films, books and music from one single, largely uniform, cultural source. In other words, there is little freedom of speech if there is little cultural diversity. In my opinion, the main purpose of state intervention aimed at promoting cultural diversity is therefore to prevent public and private players from having a dominant market position which restricts the creators' freedom of expression and the consumers' freedom of opinion.

In the context of assessing abuses of dominant positions, competition authorities and courts should obtain a clear view of marketing expenditure by cultural origin of the films, books and music supplied in a given geographical market. For example, if, prior to the merger, Sony and BMG each invested 80 per cent of their international advertising budget in blond, blue-eyed stars who sing in English and reflect a mainstream WASP ideology, and only20 percent in musicians from other ethnic origins, languages and cultural traditions, one can conclude that the private policy of these corporation regarding cultural diversity was quite modest.[64] If,

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61 See the Internet Movie Database: www.imdb.com/title/tt0478829/

62 See the Internet Movie Databas: www.imdb.com/title/tt0358273/

63 One can also compare the box office results of "Vitus" with the ones of "Da Vinci Code" by Ron Howard starring Tom Hanks and Audrey Tautou (see the Internet Movie Database: http://www.imdb.com/title/tt0382625/). Eventually, both films attracted more than 160'000 people into the Swiss theatres (status as of June 2006); however, whereas it took "Vitus" more than three months to achieve this result, "Da Vinci Code" (with presumably more than 60 copies and more than Euro 1 milion in local advertisement) obtained it within three days only inspite of generally bad critics.

64 WASP is the abbreviation of "White Anglo-Saxon Protestant"; according to the Cambridge Advanced Learner's Dictionary, Americans having their origins in the North of Europe and belonging to the most influent and rich part of the society in the United States are considered as WASP.

after the merger, this ratio is changed to the further disadvantage of world musicians, one will conclude that this concentration worsened the state of cultural diversity. There is also the possibility that the increased promotion of WASP culture by the newly merged corporation could lead the competitors within the oligopoly to do the same. Eventually, if one calculates the respective ratios of marketing investment to cultural origin for all the music majors before and after the Sony/BMG merger, one could find even more worrying results. This approach should be adopted for all forms of commercial exploitation that are currently practiced in the music industry, from recorded music to online music distribution markets. Conceptually, this proposed shift of paradigm to be specifically applied to cultural industries would allow clearer revealing and assessing abuses of a dominant position based on a culturally discriminatory business practices.

Intellectual property against cultural diversity

The discussion on culture and trade mainly focuses on GATT and GATS, the WTO agreements on trade in goods and services. However, WTO members must also comply with the minimum standards of intellectual property protection as provided in the third pillar of WTO, the TRIPS agreement. This instrument offers a specific approach to deal with the relationship between trade and non-trade concerns that should be explored in the context of promoting cultural diversity. Furthermore, one must stress that intellectual property protection has not only positive affects on cultural diversity, but can also be a threat.

States seem to have a better understanding of the relationship between intellectual property and biological diversity than between intellectual property and cultural diversity, although they agree that both forms of diversity are equally important. According to the first article of the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, “as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.”

Article 16.5 of the Convention on biological diversity of 5 June 1992, provides that the parties shall cooperate in relation to patents and other intellectual property rights in order to ensure “that such rights are supportive of and do not run counter to its objectives” while complying with national and international laws. In comparison, the preamble of the UNESCO convention on cultural diversity merely acknowledges the importance of intellectual property rights in sustaining those involved in cultural creativity.

WTO members gained valuable experience in the context of finding a balance between patent protection and health concerns, in particular around access to essential drugs for the poorer population in developing countries. From the perspective of developing countries, higher standards of protection and enforcement of intellectual property rights could be detrimental to public health and nutrition policies. In the Declaration on TRIPS and Public Health, WTO members recognised the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.[65] Ministers stressed that it is important to implement and interpret TRIPS in a way that supports public health, by promoting both access to existing medicines and the creation of new medicines. They issued a separate declaration designed to respond to concerns about the possible implications of TRIPS for access to medicines.

[65] For a overview on this question, see World Health Organization (ed.), Commission on Intellectual Property Rights, Innovation and Public health (CIPIH), The Report of the Commission: Public Health, Innovation and Intellectual Property Rights, April 2006: www.who.int/intellectualproperty/documents/thereport/en/index.html

One should highlight in this context Article 5(a) of the Declaration on TRIPS and Public Health, based on Article 17 of the WTO Doha Declaration requiring that, in applying the customary rules of interpretation of public international law, each provision of TRIPS shall be read in the light of the object and purpose of TRIPS as expressed, in particular, in its objectives and principles (Articles 7 and 8)[66]

Furthermore, Article 19 of the Doha Declaration requires that the Council for TRIPS examines, *inter alia*, the relationship between TRIPS and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments. In undertaking this work, the Council shall also be guided by the objectives and principles set out in TRIPS Articles 7 and 8 and shall take fully into account the development dimension.

I argue that one should learn from the Doha process on TRIPS and health to explore critically the impact of intellectual property protection on cultural diversity. This would be especially advisable to take into account the perspective of economically weaker countries. TRIPS Articles 7 and 8, as well as its preamble, could serve as a starting point for this approach.

Article 7 provides the objectives of the Agreement. It provides that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 provides the principles of the Agreement. It enables WTO members, in formulating or amending their laws and regulations, to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of TRIPS. Furthermore, this provision empowers the WTO members to take appropriate measures, provided that they are consistent with the provisions of the Agreement, in order to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Articles 7 and 8 refer variously to "technological innovation", "transfer and dissemination of technology", "technological knowledge", and to "socio-economic and technological development". Construed in a narrow sense, these provisions seem to address only those forms of intellectual property protection that are technology related: patents and layout designs of integrated circuits, copyright protection for software, and protection of undisclosed information. Consequently, on first reading, one could interpret Articles 7 and 8 as not applying to the other subject matters of intellectual property protection (copyright and related rights for artistic and literary works, rights in industrial design, trademarks, trade names, geographical indications and database protection). I argue, however, that both provisions also protect the public interest in these latter fields. Such interpretation follows from the objective to contribute "to a balance of rights and obligations" and the reference to "social and

[66] Doha Declaration of 14 November 2001, WTO Document WT/MIN(01)/DEC/1; Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WTO Document WT/MIN(01)/DEC/2; Decision on Implementation-Related Issues and Concerns of 14 November 2001, WTO Document WT/MIN(01)/17; Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health of 30 August 2003, WTO Document WT/L/540. See WTO, TRIPS and public health, at: www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm

economic welfare" (Article 7), to the "public interest in sectors of vital importance" to the members' socio-economic and technological development (Article 8), as well as from the fifth recital of the TRIPS preamble that recognises "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives." Since the list of public policy objectives mentioned in this recital is not exhaustive, there is ground to consider that Articles 7 and 8 also cover forms of intellectual property protection other than those related exclusively to technology. This interpretation arguably is consistent with Articles 31.1 and 31.2 of the Vienna Convention on the Laws of Treaties. Concretely, this would mean that the protection and enforcement of intellectual property rights based on the TRIPS Agreement should also contribute to the promotion, transfer and dissemination of non-technological content, such as cultural goods and services, in a manner conducive to social and economic welfare.

The rationale of intellectual property law is to provide an incentive for innovation and creation by granting a competitive advantage in the form of exclusive rights. Levels of protection that are too low may lead to a situation where intangible assets risk being used excessively (the so-called, "tragedy of the commons").[67] On the other side, levels of protection that are too high may deter creators, innovators and users because many owners may impede each other (the so-called "tragedy of the anticommons").[68] A careful balance between protection and public domain is thus required in order to avoid inappropriate levels of protection both for technological innovation and for artistic creation.

The protection of intellectual property on the international level, as contemplated by Article 7 must achieve a balance between the private right holders interests in an efficient and effective protection of their rights abroad on one side, and the larger public interest on the other side. In this sense, both insufficient and excessive standards of protection can be seen as detrimental to the policy goal of cultural diversity. The TRIPS Agreement aims at ensuring that creation and innovation are not unduly restricted by the protection and enforcement of intellectual property through exclusive private rights, but are effectively and efficiently encouraged, in order to improve general welfare in social and economic terms.

Article 7 attempts to reconcile the public interests underlying the grant of intellectual property rights to inventors, creators and entrepreneurs; that is, the stimulation of, and access to, innovation and creation. Beyond these purposes, I argue that Article 7 also requires taking into consideration non-trade concerns, such as cultural diversity policies, since this provision expressly mentions "social welfare".[69]

Article 7 requires the parties to contribute to a balance of rights and obligations that pertains to the whole system of multilateral trade rules, including trade in goods and services (GATT, GATS and the other WTO Agreements). In other words, this balance is notconfined to the

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[67] See Garrett James Hardin, The tragedy of the commons, dans Science 162, 1968, 1243-1248, and Achim Lerch, Property rights and biodiversity, dans : European Journal of Law and Economics 6, 1998, p. 285–304.

[68] See Michael A. Heller/Rebecca S. Eisenberg, Can Patents Deter Innovation? The Anticommons in Biomedical Research, in : Science 280, mai 1998, 698-701.

[69] Whereas the overall balance shall be achieved by the application of the national treatment and the most-Favoured-nation principles to trade related intellectual property protection and enforcement, the rationales that are specific to the intellectual property system and to non-trade concerns are articulated in the TRIPS agreement through the restrictions and limitations of protection for each of the forms of intellectual property (e.g. art. 13 for copyright or art. 30 for patents). One has therefore to distinguish, on one hand, between the balance among individual right holders and users, and, on the other hand, the overall equilibrium that the TRIPS Agreement is supposed to establish in terms of trade related intellectual property rights and obligations of the Member States.

trade-related intellectual property protection of TRIPS.[70] This distinction can be illustrated by the example of the trade sanctions that Ecuador was entitled to take as a consequence of the arbitration ruling in the EC Banana Case.

In the EC Banana Case, the arbitrators authorised Ecuador to suspend the protection of European performers, producers of sound recordings and broadcasting organisations (TRIPS Article 14) in its territory as a means of cross retaliation for a MFN violation under GATS concerning the distribution of bananas.[71] Cross retaliation hence implies that TRIPS aims at achieving an overall equilibrium of rights and obligations not only within the area of intellectual property protection, but beyond that within the whole set of WTO multilateral agreements.[72] Furthermore, this interpretation arguably is in line with the negotiating history of TRIPS during which developing countries accepted trade-offs requiring enhanced intellectual property protection and enforcement in exchange for better market access under other agreements and trade areas such agriculture and textile.

Whereas the first paragraph of Article 8 refers to the rationale underlying the protection of trade-related intellectual property protection, its second paragraph enables WTO members to take appropriate measures against the abuse of intellectual property rights or unreasonable restriction of international trade and transfer of technology provided that they are consistent with TRIPS.[73] The exercise of exclusive rights provided by intellectual property law can cause market segmentation, for example, licensing practises can restrain trade. Such a situation is not compliant with the rationale of TRIPS Article 8.2 and thus entitles the members to restrict the exercise of intellectual property rights in such cases. Measures under Article 8.2 have to comply with the principle of proportionality, actions must be "appropriate" and confined to "unreasonable" trade restraints.

Article 8.2 of the TRIPS Agreement entitles WTO members to take measures against adverse effects of intellectual property rights that are detrimental to technology transfer. Article 66.2 of the TRIPS Agreement requires members to promote and encourage such transfers to least-developed countries in order to enable them to create a sound and viable technological base. The Council for TRIPS adopted a decision on 19 February 2003 to put in place a mechanism for ensuring the monitoring and full implementation of Article 66.2.[74] From the perspective of sustainable development, the protection should contribute to a legal environment which encourages foreign right holders to make investments and technology transfers. On the other

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[70] In Canada – Protection of Pharmaceuticals, the Panel construed art. 30 of the TRIPS Agreement that addresses exceptions to patent rights. In this context, the Panel stated that the words of art. 7 and 8 of the TRIPS Agreement should be borne in mind in terms of context, but that the three limiting conditions of Art. 30 make clear that the TRIPS Agreement negotiators did not intend for a re-negotiation of the basic balance of the Agreement (Paras. 7.24-26).

[71] See footnote 4. The WTO Dispute Settlement Understanding (DSU) establishes a system of multilateral review of cross retaliations, which applies if invoked by the non-complying defendant on the grounds set out in its Art. 22.3. This provision lists a set of conditions to be followed in the case where a party applies for authorisation to suspend concessions or other obligations as a means of retaliation via trade sanctions. If the conditions under Art. 22.3 of the DSU are met, a party can request an authorisation to retaliate across WTO agreements ("cross retaliation").

[72] Based on this interpretation, it becomes acceptable from the perspective of WTO law that cross retaliation involving TRIPS obligations means a violation of WIPO administrated agreements (e.g. the Berne Convention in the case of art. 14 TRIPS).

[73] Since art. 8 para. 2 requires that such measures must be consistent with the other provisions of TRIPS, it must be considered as a *lex generalis* with respect to those provisions of the TRIPS agreement that more specifically allow the Members to limit the protection of intellectual property rights.

[74] Decision on Implementation of Article 66.2 of the TRIPS Agreement of 19 February 2003, WTO Document IP/C/28.

hand, this protection may also be detrimental to the economic interest of developing countries that transfer licence fees abroad, without satisfactory transfer of technology in return. I argue that abuses of dominant market positions that affect cultural diversity and that are based on, or reinforced by, intellectual property rights fall under Article 8 of the TRIPS Agreement.

The reason to apply the non-discrimination principles of National Treatment and Most-Favoured-Nation to intellectual property law, and to reinforce a substantive and procedural harmonisation at a minimum level of intellectual property protection, is to facilitate the transfer and dissemination of technology, knowledge and trade-related culture. From the perspective of developing countries, one may argue that inappropriately high standards of protection of intellectual property rights could hinder this goal. It is difficult for these countries to assess precisely the costs and benefits of implementing intellectual property according to TRIPS in the medium and long-term. This economic assessment is even more difficult if one takes into consideration the bilateral pressures on developing and least developed countries in the field of intellectual property protection. This bilateralism can substantially reduce the flexibilities granted under TRIPs and disturb its delicate equilibrium.[75]

Based on these considerations, I propose to use the TRIPS preamble, as well as Articles 7 and 8, and, by analogy, Article 66.2 as an anchor to elaborate and negotiate rules on special and differential treatment that would be specifically designed to promote cultural diversity within the relevant WTO agreements.[76]

Analogies between film and pharmaceutical majors

The Commission on Intellectual Property Rights that was set up by the British government to look at how intellectual property rights might work better for developing countries summarised its findings on copyright protection as follows:

> "There are examples of developing countries which have benefited from copyright protection. The Indian software and film industry are good examples. But other examples are hard to identify. Many developing countries have had copyright protection for a long time but it has not proved sufficient to stimulate the growth of copyright-protected industries. Because most developing countries, particularly smaller ones, are overwhelmingly importers of copyrighted materials and the main beneficiaries are therefore foreign rights holders, the operation of the copyright system as a whole may impose more costs than benefits for them. (…)"[77]

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[75] See Peter Drahos, op. cit., footnote 31.

[76] This approach of developing appropriate rules on special and differential treatment may also apply to other fields of tensions, e.g. trade and agriculture.

[77] Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, Executive Summary, p. 20: www.iprcommission.org The idea of the Commission on Intellectual Property Rights originated in the UK Government's White Paper on International Development "Eliminating World Poverty: Making Globalisation Work for the Poor" published in December 2000 (paragraphs 142-149). The aim was to look at the ways that intellectual property rules need to develop in the future in order to take greater account of the interests of developing countries and poor people. The Commission was asked to consider:
- How national IPR regimes could best be designed to benefit developing countries within the context of international agreements, including TRIPS.
- How the international framework of rules and agreements might be improved and developed, for instance in the area of traditional knowledge - and the relationship between IPR rules and regimes covering access to genetic resources.

If we apply these conclusions to the film industry, we could question whether it makes sense to protect an investment of U.S. $60 million in stars, prints and advertising to sell a motion picture of a Hollywood major by means of copyright and other relevant exclusive rights, when this investment keeps films from other cultural origins out of the market. When intellectual property rights are used for predatory competition leading to cultural uniformity they arguably no longer fulfil their very purpose.

One can take the example of the pharmaceutical industry of the United States to discuss the right balance of patent protection and translate this discussion into the field of copyright protection for cultural industries.[78] Abbott questions the pharmaceutical majors' arguments that they will not be in a position to provide new medicines based on very costly research without relief from price controls and without patent protection against competition:

> (1) The pharmaceutical majors in the United States benefit from an enormous public subsidy. The National Institute of Health has a budget of $28 billion per year, most of which goes into funding research into medical technologies. The results of that research are channelled back to the pharmaceutical companies which pay very limited royalties for its use. The pharmaceutical industry is the beneficiary of a tremendous amount of basic research being conducted at universities, teaching hospitals and research institutes.
>
> (2) The pharmaceutical majors today have a weak record of innovation and this phenomenon appears to be driving a trend toward consolidation. Only few new chemical entities are being discovered.
>
> (3) The pharmaceutical majors focus their attention on blockbuster discoveries — drugs with a market potential of over $1 billion per year – and heavily promote drugs such as Viagra and Cialis based on potential market demand, rather than public health requirements.[79]

This author comes to the conclusion that the "golden goose" of pharmaceutical innovation is cooked only partly in pharmaceutical majors' laboratories. He stresses that none of this is to say that "the U.S. pharmaceutical industry does not play a useful role in the development of new medicines." It is rather to say that "one should be cautious about over-simplifying the situation by reducing it to a phrase like 'killing the goose that lays the golden eggs'."[80]

In my opinion, one can apply these arguments on the malfunctioning of intellectual property protection for pharmaceutical majors *mutatis mutandis* to the film, music and book majors,

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- The broader policy framework needed to complement intellectual property regimes, including for instance controlling anti-competitive practices through competition policy and law.

[78] Several studies have shown that U.S. "copyright industries", including movies, TV, home video, music, publishing and computer software, generate revenues that are, for example, five times the export revenues of the U.S. drug and pharmaceutical sector and that the total foreign sales and exports of US copyright-protected products totalled USD 79.85 billion in 1999. The overall value of "copyright industries" to the gross U.S. domestic product has increased an astounding 360 per cent between 1977 and 1999 and currently totals more than USD 460 billion; for references see Alan Story, op. cit., p. 11.

[79] The major expenditures and risk for the pharmaceutical industry lie in clinical trials – part of the process in which new drugs obtain marketing approval from the U.S. Food and Drug Administration and foreign regulatory authorities. According to Abbott, his is where investors risk their capital.

[80] Frederick M. Abbott, Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism, in: Journal of International Economic Law 8(1) 2005, 77–100.

and learn from the experience of the health industries with trade and development in order to improve the situation for cultural industries with respect to trade and cultural diversity.[81]

The first argument revolves around the allocation of intellectual property rights that are generated by film production in Europe. The funding schemes maintained by the 25 EU members and the European Union (Media programme) grant over 1 billion Euros each year to local film production and distribution companies. Most of the intellectual property rights holders in the European Union are heavily subsidised private players. Since these are small and medium-sized enterprises, there is a great fragmentation in the ownership of the rights. In my assessment, this fragmentation causes the European film industry to be substantially less competitive than the U.S. industry in which ownership of intellectual property rights catalogues is highly concentrated. This critical mass of concentration allows the Hollywood majors to attract the huge capital that is necessary to feed considerable production and marketing costs.[82] Full private ownership of rights substantially generated via public funds therefore makes little sense from the economic perspective. Furthermore, the currently prevailing allocation of intellectual property rights raises questions of equity: why should private producers and distributors who are substantially aided by the state own the exclusive rights generated by the collective creative efforts involving many different artistic professions (screenwriters, directors, actors, etc.)?

The second argument deals with the major firms in film, music and books which focus their activities mainly on mainstream cultural goods and services, that is, on content to which the broad audience is already accustomed as a consequence of marketing. Creative innovation typically comes from small independent creators and cultural entrepreneurs, and it feeds the majors' production allowing them to pick and choose without significant entrepreneurial risks. The small and medium-sized players have much higher economic risks due to the prototype nature of their cultural goods and services, considering that audience tastes for new and original content are more unpredictable. Given the rationale underlying the grant of intellectual property rights, the considerable protection that majors enjoy should provide much greater benefits for creativity, if it is to work as a real incentive for taking the creative risks so vital to the economic sustainability of cultural industries.

Eventually, the third argument is also relevant for cultural industries. Highly valuable contents from a great variety of cultural origins may be marginalised as a result of the heavily advertised "feel good" entertainment which essentially reflects the economically dominant culture and ideology. Is this form of cultural discrimination consistent with the very purpose of intellectual property protection and in particular of copyright and related rights?

Elaborating cultural non-discrimination principles

Under WTO law, Member States must refrain from practicing trade-related discrimination based on nationality.[83] This obligation is based on two fundamental rules, the National Treatment (NT) principle which prohibits discrimination between local and foreign goods and services and providers thereof, and the Most Favoured Nation (MFN) principle which

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81 Except for the last argument dealing with health security motivated approval procedures by regulatory authorities that is not relevant for cultural goods and services. Instead one can add the argument that the cultural majors' marketing investments drive cultural contents and content providers from diversified cultural origins out of the market if they do not enjoy comparable investments in print and advertisement.

82 Furthermore, the majors' high corporate concentration allow them to better manage the huge enterpreunerial risk that are inherent to cultural industries mainly dealing with prototype goods and services: The majors can compensate huge losses from the many flops by the revenues from few (around 5%) blockbusters, hits and bestsellers.

83 See footnote 24.

prohibits discrimination between countries. MFN means that if country A grants a trade advantage to country B, country A must also grant the same advantage to country C; country A cannot discriminate between country B and country C. NT means that, for example, if Turkey taxes the cinema tickets only of foreign films, or taxes them at a higher percentage than those of local films, it violates the National Treatment principle vis-à-vis other WTO members, because it discriminates between national and foreign films in a way that causes a competitive disadvantage to the latter ones in the domestic market.[84] If the European Community favours bananas from certain African countries in relation to bananas from Latin America, it infringes the Most Favoured Nation principle.[85] This basic rule obliges the European Community not to discriminate between countries from Africa and countries from Latin America. WTO law, in particular the National Treatment and the Most Favoured Nation principles, therefore serve to remove obstacles to trade through a prohibition to discriminate economically based on the national origin of the goods and services and of their suppliers.

Given the economic specificity of cultural industries, one can argue that not only states, but also private players with a dominant market position can restrict the free movement of mass market cultural goods and services. In other words, private dominant market positions, such as those enjoyed by oligarchic multinational corporations, are in the position to control cross-border trade of cultural goods and services. For the time being, cultural commercialisation arguably keeps the gate open for the films, books and music from one single, largely homogeneous cultural source, and keeps the gate closed for the contents from all other cultural sources. It therefore makes sense to use a combination of competition, intellectual property and "free culture" laws on these private sector players. As a matter of fact, intellectual property protection is the *nerf de la guerre* of cultural industries. This protection relies on state action, such as on the elaboration and implementation of national and regional legislation and policies in copyright, neighbouring rights, trade marks, trade names, etc. The protection of copyright, related rights, trademarks and trade names is the Achilles heel of private and public cultural players which abuse their dominant market position and practice systematic cultural discrimination. The economically weakest state can hit this heel to force such players to contribute to the promotion of cultural diversity on its territory.

If a state is eager to promote cultural diversity on its territory, it should make the receipt of public support by private sector firms contingent on their contributing to the state's cultural policy goals. I concretely envisage a "Cultural Contract" according to which the states should protect the intellectual property of a rights holder having a dominant market position only if the rights holder contributes commercially to preserving and promoting cultural diversity in that state's territory. On the other hand, if such a rights holder systematically discriminates on the basis of the cultural origin of films, music or books, that is, if it violates the principles of

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[84] Turkey — Taxation of Foreign Film Revenues Turquie, WT/DS43/3. This request for consultations by the United States, dated 12 June 1996, concerned Turkey's taxation of revenues generated from the showing of foreign films. The United States alleged the violation of art. III GATT. On 9 January 1997, the United States requested the establishment of a panel. At its meeting on 25 February 1997, the Dispute Settlement Body (DSB) established a panel. Canada reserved its third-party rights to the dispute. On 14 July 1997, both parties notified the DSB of a mutually agreed solution.

[85] In this arbitration case, the WTO Dispute Settlement Body authorized Ecuador to suspend intellectual property protection for right holders from the EC as sanction against the EC's violation *inter alia* of the Most Favoured Nation clauses concerning the distribution of Ecuadorian bananas into the EC (GATT and GATS violation were "cross retaliated" by a suspension of protection granted under TRIPS). In other words, this ruling legalized in Ecudaor the copying of films, music and books of European right holders without their consent and without remuneration for determined period of time. This suspension of intellectual property protection meant a retalliation against the European Community's discrimination between African and Latin American bananas. See the reference in footnote 4.

"Cultural Treatment" or "Most Favoured Culture" outlined below, the state should be entitled to refuse to grant intellectual property protection to its works, by analogy to the cross retaliation applied in the banana arbitration procedure between Ecuador and the European Community.[86]

Why should such a sanction be available against an infringement of international trade rules, and not against a violation of the desirable prohibition of cultural discrimination? I believe states should be entitled to suspend the application of the National Treatment principle to trade-related intellectual property rights of foreign rights holders if they have a business practice that is detrimental to cultural diversity.

In order to structure this new approach, I propose to distinguish between:

- factors of creation and production of cultural goods and services (artists, creative technicians and producers),

- factors of commercial distribution and exhibition (marketing) of cultural goods and services (distributors and others who invest in marketing and exhibition), and

- factors of consumption of cultural goods and services (audiences and other media which uses the original content in other forms and markets).[87]

The first and last category of factors of the film, music and book markets are affected by the distribution "bottleneck" of the second category where distribution and exhibition (marketing) commercially and culturally filter mass cultural goods and services.

A new balance should be implemented between the factors of creation and production, distribution, and consumption of cultural goods and services based on new principles of law prohibiting "cultural discrimination".[88] These "meta-rules" which I shall label "Cultural Treatment" and "Most Favoured Culture" principles would mirror the WTO principles of National Treatment and Most Favoured Nation. To illustrate this proposal, I have adapted GATS Articles II and XVII as follows:

Article I
Most Favoured Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and production of another cultural origin treatment no less favorable than that it accords to like cultural goods and services and their suppliers of any other cultural origin.

Article II
Cultural Treatment

Each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural

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86 See footnote 4.

87 "Factors" means here labor and capital in the context of creation, production, distribution and exhibition, whereas it means intermediary or end consumers in the context of consumption. "Distribution and exhibition (marketing)" includes all forms of supply and communication to the public.

88 For the relationship between intellectual property and competition law, see European Court of Justice, Judgement of 6 April 1995, Magill, C-241/91 P and C-242/91 P, Rec. p. I-743, and European Court of Justice, Judgement of 29 avril 2004, IMS Health GmbH & Co. OHG / NDC Health GmbH & Co. KG, C-418/01, Rec. 2004. See also footnote 51.

goods and services from a cultural origin having a dominant market position shall accord to cultural goods and services and to factors of cultural creation and production of any other cultural origin, in respect of all measures affecting the distribution and exhibition (marketing) of cultural goods and services, treatment no less favorable than that it accords to its own like cultural goods and services and like factors of cultural creation and production.

Article III
Maintenance of a culturally discriminatory measure

The public, private or mixed-economy factors of distribution and exhibition (marketing) of cultural goods and services having a dominant market position may maintain a measure inconsistent with articles I and II provided that such a measure is effectively demanded by the factors of consumption.

This tentative formulation of the principles of Cultural Treatment and Most Favoured Culture require more comprehensive elaboration. Private and mixed-economy factors will be bound under these principle by the states that grant them the protection of their intellectual property rights. In other words, the states that adhere to these principles will no longer protect the intellectual property rights of private and mixed-economy factors engaged in commercial activities on their respective territories if these factors do not comply with these principles.

The parties to the GATT and, since 1995, the members of the WTO, have developed the National Treatment and Most Favoured Nation principles over half a century, and the full meaning of these rules needs still to be further explored. This relatively long period of time illustrates the complexity of non-discrimination principles applied to trade. It will presumably require similar time to fully develop the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

A new *sui generis* system to implement cultural diversity

Given that states are the source of rules of law, it would be contradictory to seek to centrally impose cultural diversity. This policy objective should rather start to flourish from grassroots initiatives and find its way up to the international level. I envisage a three step approach starting from local action over national legislation and concluding with the international system. First, local public bodies such as cities or rural collectives would set up moot courts where creators, producers and consumers of cultural goods and services could sue private and public players having a dominant market position that are suspected of discriminating culturally. In such trials, the court would hear the stakeholders in order to establish the relevant facts and apply the principles of Cultural Treatment and Most Favoured Culture to these facts. The procedural rules could be inspired by those of the WTO Dispute Settlement Understanding.[89] If a moot court comes to the conclusion that a corporation or a state practices cultural discrimination that affects the jurisdiction where the court is located, such a court can order the entity to change its behaviour in an appropriate way.

Concretely, this could mean that the convicted players would be required to open their marketing and distribution facilities to contents from a greater variety of cultural origins. If such players refuse to follow the moot court ruling, the court could order as a sanction that the intellectual property of the infringer would no longer be protected in the jurisdiction of the court for a given period of time. This sanction should be commensurate with the damage incurred to local cultural diversity.

This trial and error process based on litigation would generate case law which would refine over the years what is a coherent Cultural Contract between the cultural creators, the cultural

[89] See footnote 24.

industries and the public. This non-binding but authoritative case law could be transformed progressively into state law by a codification on the national level as constitutional and legal norms. Once this codification process is achieved, the moot courts would become instruments of hard law, and their moot rulings and moot sanctions would become enforceable. Arguably, this approach would be consistent with the Preamble and Articles 7 and 8 of the TRIPS Agreement, and would rely on national competition laws appropriately constructed to address cultural diversity concerns.

Eventually, WTO members would negotiate the integration of cultural diversity law developed via moot courts and national courts into the multilateral trading system in a similar way as public health concerns were addressed in the Doha round. UNESCO and WIPO, as well as other relevant international, regional governmental and non governmental organisations, would be invited to contribute to this process which is aimed at elaborating rules on special and differential treatment to promote cultural diversity in the context of trade liberalisation.[90] According to a more ambitious vision, this process would ultimately lead to the creation of a World Cultural Diversity Organisation (wCDo) which would develop a world culture system based on a global Cultural Contract with predictable and enforceable rules. This system would enable the wCDo to act on a level playing field as a counterpart to the WTO and other relevant international institutions. The Cultural Contract would adopt a single undertaking approach as opposed to the anarchy of rules based on state sovereignty and the resulting law of the jungle of the economically strongest countries that is contemplated *de facto* by the UNESCO Convention on cultural diversity.

From grass root action to a global Cultural Contract

Let me summarise this scenario using the hypothetical example of the fictional city of Terraperta in the small and poor country of Utopia located in Africa. In this city, you find that 95 percent of the market share of cultural goods and services is occupied by U.S. films, music and books, and the rest is productions from the European Union. Utopia has many very talented artists, but they are not marketed and distributed within the country on a level playing field. As a WTO member, Utopia is eager to comply with the TRIPS Agreement. For this purpose, it obtained technical assistance from WIPO to reduce piracy. WTO, WIPO, UNESCO, many regional organisations and developed countries have led Utopia to believe that the situation of its local filmmakers, musicians and writers would improve if it provided better protection for intellectual property rights. Furthermore, they argued that stronger implementation of copyright and other exclusive rights would increase Utopia's tax revenues to subsidise local culture creation. Utopia followed this advice and, after a few years, it discovered that the "promised land" remained out of reach, although infringement of intellectual property rights became as serious as stealing a car in the minds of Utopia's law enforcement agencies and its citizens.

A group of artists and cultural rights activists launches a case before the Culture and Entertainment Moot Court (CEMC) of the city of Terraperta against Sony and France. The plaintiffs observed that France and Sony had a dominant position in Utopia's market of cultural goods and services. They claim that the defendants are abusing their marketing and distribution power effectively to exclude from the market local content and content originating from third cultures.

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[90] See Thomas Cottier, From Progressive Liberalisation to Progressive Regulation in WTO Law, NCCR Working Paper IP3, Berne 2006: www.nccr-trade.org/ For a selection of further papers on special and differential treatment, see: www.ictsd.org/issarea/S&DT/resources/

As opposed to the European Commission in merger case Sony/BMG, the CEMC of Terraperta would apply a definition of the relevant market that was not based on arbitrary criteria referring to genres, aesthetics and other largely irrelevant categories.[91] The CEMC of Terraperta would apply a measurable criterion by defining that cultural goods and services were substitutable from the demand perspective if they enjoyed similar investments in advertising, including stars. This new definition allows the plaintiffs *inter alia*, to demonstrate that the supply of cultural goods and services from Sony and France was able to control local access to cultural goods and services without genuinely reflecting local demand. In fact, the public of Utopia wants to purchase films, music and books in languages other than English and French, and they want sights and sounds from other cultural origins, including local ones.

The CEMC of Terraperta would apply the Cultural Treatment and Most Favoured Culture principles to the facts as found by the trial, and order Sony and France to grant access to their essential marketing and distribution facilities within the territory of Terraperta, for artists and artistic content from local and third cultures. France eventually would comply with this ruling because it accepted the CEMC's argumentation and would adapt its *Fonds Sud* and similar cooperation and development programmes in Utopia.[92] Sony, on the hand, would refuse to play the game. The CEMC of Terraperta therefore would suspend national treatment for Sony's with respect to its trade-related intellectual property rights and declare that these rights will no longer be protected in its jurisdiction.[93] For a period of time, it therefore would became legal in the city of Terraperta to copy Sony's cultural goods and services without compensation and to export these contents to all jurisdictions that accepted the CEMC's ruling.

This trial would be widely imitated by other cities and regions, and the WTO, WIPO as well as all the other concerned organisations, countries and stakeholders would begin to think twice about the relationship between cultural diversity and intellectual property. In many countries, these moot courts would transform into real courts applying real law with real sanctions. Eventually, Sony would announce that it would no longer culturally discriminate as a matter of private policy. This corporation could then most likely make even more money than before, from films, music and books from a great variety of cultural sources. The city of Terraperta and other like-minded cities and regional bodies in the world would re-establish an efficient protection of Sony's intellectual property rights. As a consequence, the prohibition of cultural discrimination would serve to elaborate special and differential treatment clauses in the WTO Agreements that would be relevant to trade-related culture.

Eventually, the wCDo would be established as an institution administering a World Culture and Entertainment Dispute Settlement Body implementing a global Cultural Contract based on the Cultural Treatment and Most Favoured Culture principles.

Conclusions

Cultural diversity is a complex matter and the awareness of its full significance remains low.[94] The UNESCO Convention on cultural diversity celebrates "the importance of cultural diversity for the full realisation of human rights and fundamental freedoms proclaimed in the

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91 See footnote 54.

92 See footnote 36.

93 See footnote 4.

94 See in particular Joost Smiers, Arts under pressure, Promoting culturel diversity in the age of globalization, Londres / New York 2003, and Fábio de Sá Cesnik/Priscila Akemi Beltrame, Globalização da Cultura, Barueri SP 2005.

Universal Declaration of Human Rights and other universally recognised instruments" (Preamble, fifth recital). According to the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, this policy goal is as important as biological diversity. Whereas biological diversity is essential to the physical existence of humankind, cultural diversity plays a comparable role with respect to the spiritual and emotional life of individuals and communities worldwide. Most recently, the subject matter received attention from a broader public when the General Conference of UNESCO approved the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in fall 2005, an international normative instrument that will enter into force three months after its ratification by 30 states.[95]

Obviously, culture is a vast field, and accordingly definitions that are operational for legal purposes are difficult to elaborate. In this chapter, I focused on the role of so-called "cultural industries" including the film, book and music industries, as well as other forms of production and distribution of art, entertainment and information. From the legal perspective, however, one should consider that there is a complex interplay between such trade- related culture and "non-commodified" cultural expressions and political information. This dynamic relationship arguably conditions not only the collective mindsets and emotions within society – the audiences' common imagination – but also shapes the opinion-building and decision-making processes within democracies.

Cultural diversity must exist, if individual freedom of opinion and expression are to flourish wherever intellectual and emotional content in the form of artistic expressions, which may include entertainment and political information, is disseminated. For this purpose, the state, as the democratically legitimate collective power, must ensure vis-à-vis private and public players, the supply of information, entertainment and art from culturally diverse sources. This state action constitutes a safeguard against uniform thinking and feeling and thus reduces the risk of audiences being manipulated. Furthermore, this public policy objective benefits from the inherent values of cultural identity and diversity as public goods.

The advantage of having a strong local content industry is not limited to economic aspects; it also contributes to fostering cultural identity and, as a consequence, to social cohesion. Cultural industries in particular can contribute substantially to identity building, especially in nations that are not culturally homogeneous.

Cultural goods and services arguably have both a cultural and an economic component, since they typically qualify as high risk "prototype industries".[96] The feature of cultural specificity that commonly provides the main argument for a so-called "cultural exception" from trade regulations or, at least, for special and differential treatment of cultural goods and services, may be paraphrased by quoting the European Commission on the significance of the audiovisual sector:

> "The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies

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95 See footnote 3.

96 The "economic specificity" of cultural goods and services comes from the considerable entrepreneurial risks that are related to the prototype character of these contents. This business reality causes the cultural industries to use cross-financing schemes that allow the costs of the many flops to be offset by the revenues of the statistically rare blockbusters, bestsellers and hits. In other words, within cultural industries, the factors of commercialization such as distributors typically play a pivotal role with respect to risk management ensuring a sustainable economic viability for the sectors at stake.

> cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. (...) They therefore help to determine not only what we see of the world but also how we see it. The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods."[97]

States should be entitled to take measures, in their respective territories and legitimate spheres of influence, against the insufficiencies of supply of cultural goods and services from a diversity of national and cultural origins. In view of the important concerns at stake, however, the UNESCO Convention on cultural diversity will not be sufficient. Consequently, I recommend a radical paradigm shift based on a new legal instrument establishing the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

The paradigm shift proposed in this chapter is likely to face resistance from those conservative private and public players within the cultural industries who are satisfied with the status quo, i.e. the private players dominating the markets and the rich states granting subsidies to implement cultural policies that weaker economies cannot afford. Its feasibility will depend on the strength and perseverance of progressive actors who are genuinely engaged in promoting cultural diversity without discrimination. If the conservative forces should prevail over the progressive ones, the creative people and publics from all cultural origins, especially from transitional, developing and least developed countries, would be the big losers, and with them society at large.

[97] COM 1999 657.