

**IMPLEMENTATION OF THE  
CONVENTION ON THE PROTECTION AND PROMOTION OF THE  
DIVERSITY OF CULTURAL EXPRESSIONS IN THE DIGITAL AGE:  
CHALLENGES, PRIORITY ACTIONS AND RECOMMENDATIONS**

Report presented to the Intergovernmental Committee of the  
Convention on the Protection and Promotion of the Diversity of Cultural Expressions  
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## FOREWORD

This report was drafted by six members of the International Network of Lawyers for the Diversity of Cultural Expressions (RIJDEC) under the direction of Véronique Guèvremont (Professor, Faculty of Law and Institute for Advanced International Studies, Université Laval). While a lively exchange of views occurred at each step of the drafting of this report, the special contributions of certain individuals in the drafting of each chapter deserve mention: Lilian Richieri Hanania (Lawyer, Associate Researcher, Université Paris 1 Panthéon-Sorbonne), the author of Chapter 1 on cooperation for development; Marie Cornu (Research Director, CNRS Paris), the author of Chapter 2 on national cultural policies; Mira Burri (Senior Research Fellow and Lecturer, World Trade Institute), the author of Chapter 3 on aspects relating to education, the participation of civil society and sustainable development; Véronique Guèvremont and Hélène Ruiz Fabri (Professor, Sorbonne Law School, Université Paris 1 Panthéon-Sorbonne, and Director, Joint Institute of Comparative Law of Paris), the authors of Chapter 4 devoted to relationships between international legal instruments. Ivan Bernier (Professor Emeritus, Faculty of Law, Université Laval) contributed to the overall drafting of the report and, particularly, to the wording of the recommendations accompanying each of the four chapters.

As part of the drafting process, a group of thirty-two African specialists selected in 2012 by the 2005 Convention Secretariat to participate in the capacity building programs of Cape Town (South Africa, October 2012) and Dakar (Senegal, November 2012) were consulted. The authors thank the four specialists who contributed more actively to the discussions: Jenny F. Mbaye (Senegal), Valérie Oka (Ivory Coast), Hans Ramduth (Mauritius), and Tojo Yharimanana (Madagascar).

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## INTRODUCTION

During its fourth ordinary session, the Conference of Parties to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*<sup>1</sup> called on “the Parties who so wished as well as civil society to submit their comments to the Secretariat on the development of digital technologies that have an impact on the Convention and proposals for actions for discussion by the Committee during its seventh session and asked the Committee to present the results of its work to its fifth session.”<sup>2</sup> The present report is a response to this invitation and, at the same time, a continuation of the research begun in Spring 2013 that led to the tabling of the report entitled *Preliminary reflection on the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the digital age*.<sup>3</sup> This previous report defined certain concepts and provided a synopsis of several key trends that characterize the evolution of the diversity of cultural expressions in our digital environment. It also looked at the relevant provisions of the 2005 Convention and proposed four topics for further discussion, topics that are examined here.

Given the vital importance and unparalleled potential of digital technology for development, Chapter 1 of this report is devoted to cooperation as a means to accelerate the digital shift in developing countries. Chapter 2 deals with the adaptation of national cultural policies to the particularities of the digital environment. Chapter 3 looks at how the reality of digital technologies must be taken into account when formulating measures concerning education and public awareness, the participation of civil society, and the integration of culture into sustainable development. Lastly, Chapter 4 is devoted to the promotion of the objectives of the 2005 Convention in other relevant negotiation forums.

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<sup>1</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, (2010), 2400 UNTS 311 (2005 Convention).

<sup>2</sup> UNESCO, *Conference of Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Doc. UNESCO CE/13/4.CP/Res. Paris, 14 June 2013, Res. 4.CP 13. § 6. This resolution followed the adoption of a decision by the Intergovernmental Committee at its December 2012 meeting. See Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, 6th ordinary session, Doc. UNESCO CE/12/6.IGC/Dec., 14 December 2012, Dec. 6.IGC 17, § 5.

<sup>3</sup> V. Guèvremont, *Preliminary reflection on the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the digital age*. Report presented at the 4th Conference of Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO, Paris, 11-14 June 2013, 28 pp.

Each chapter summarizes the main challenges facing the implementation of the provisions that have an impact on the digital universe, identifies priority action areas that the Parties may wish to explore to adapt the implementation of the 2005 Convention to the realities of digital technology and sets out recommendations for the Intergovernmental Committee and the Convention Secretariat with a view to launching the adaptation process.

This outline is subject to the following caveats. First, throughout the report and, in particular, in the “priority action areas” section of each chapter, actions are proposed for consideration by the Parties that do not necessarily appear in the Recommendations section. Second, it is important to mention that the recommendations set out in this report take into account the limited resources available to the 2005 Convention Secretariat and the Intergovernmental Committee to implement this instrument. For this reason, these recommendations are not intended to be an exhaustive list of the tools and means that should be used by the Parties to the Convention in order to adapt its implementation to the reality of digital technology, but rather a list of possible initiatives that could be undertaken, in the short and medium term, in order to get the adaptation process underway.

## CHAPTER 1

### COOPERATION AIMED AT ACCELERATING THE DIGITAL SHIFT IN DEVELOPING COUNTRIES

The Convention contains numerous provisions that target cooperation for the benefit of developing countries. First, Articles 9 and 19 provide for the strengthening of cooperation between the Parties (including the developing Parties) through the exchange of information, expertise, statistics and data, as well as best practices for the protection and promotion of the diversity of cultural expressions. Second, Articles 12 through 18 address the objectives of international cooperation and various ways to facilitate such cooperation, notably for the benefit of developing countries (*e.g.* via technical and/or financial assistance, partnerships, and the adoption of adapted institutional and legal frameworks). Since the Convention enshrines the principle of technological neutrality, its provisions are relevant regardless of the environment they apply to. Promoting their implementation to benefit developing countries in the digital age presupposes that the opportunities offered to and the challenges facing developing countries are taken into consideration (I). The next question is to determine how cooperation for development under the Convention can be implemented in the most effective way in a context marked by the growth of new technologies (II). The final section highlights some recommendations put forward in this chapter which could be implemented in the short and/or medium term by the Intergovernmental Committee and the Convention Secretariat (III).

#### I. CHALLENGES FACING DEVELOPING COUNTRIES WITH REGARD TO DIGITAL TECHNOLOGIES

On the one hand, digital technology appears to exacerbate the difficulties already facing developing countries in terms of the imbalance in cultural exchanges and their inability to get their works on the market. Digital technology further complicates the economy of the cultural sector and requires cultural industries to constantly evolve and adapt. However, the lack of resources that generally typifies developing countries hampers their responsiveness to new technologies and their investment in innovation. Moreover, the digital age requires the adaptation (and, for certain developing countries, the establishment) of a legal framework aimed at promoting the availability of a diversified cultural offering. Such a framework must encompass innovative cultural measures and policies that can quickly adapt to the changing market and the greater difficulty States face in controlling content.<sup>4</sup> It must also include

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<sup>4</sup> The regulation of content available in a given territory via the Internet is certainly difficult to implement, but the difficulties do not appear to be insurmountable. Companies such as Google comply with national legislation in countries where they provide services and use existing technological tools to prevent certain content from being made available in some countries. The dissemination of certain content, on YouTube for example, may occasionally also be blocked in certain countries or on certain devices (*e.g.*, mobile phones). Telecommunication service operators can also identify the precise location of an Internet connection when this is required to enforce regulations governing the protection of intellectual property rights. In addition,

provisions on the remuneration of artists (intellectual property, for example) and competition.<sup>5</sup> Despite the lower-cost storage, dissemination, and production capacity provided by digital technology, the trend toward the concentration of the cultural market—which is the result of the risks and need for major investments inherent to this sector—shows no sign of fading. The small number of global companies, such as Google, YouTube, Netflix, and Amazon, for example, that increasingly control access to cultural works in various markets makes the visibility and promotion of cultural works in under-represented languages and/or from countries that are already under-represented on the market even more problematic. These works are often overwhelmed in the midst of a growing mass of available information and works, a phenomenon that amplifies the “risks of imbalances between rich and poor countries” as noted in the Preamble of the Convention.

On the other hand, in developing countries and, more particularly, in regions with little traditional communication infrastructure, digital technology provides the opportunity for a remarkable technological leap forward in addition to greater production of and wider access to cultural expressions if the appropriate policies are implemented.<sup>6</sup> The availability of less expensive devices, not only for producing cultural works but also for providing individual access to them (mobile phones, tablets, e-readers, and other devices), and making them widely available to the public on the Internet encourages sharing and promotes creativity and innovation—factors that are fundamental to fostering the vitality of all economic sectors. This new reality could therefore provide significant opportunities when accompanied by innovative policies and initiatives to promote a diversified cultural offering on the national and international digital markets.

Boosting the capacity of developing countries to protect and promote the diversity of their cultural expressions in the digital age includes seizing the opportunities provided by these technological advances in order to not only create, produce and disseminate a diversified cultural offering but also to provide access to it. The “principle of international solidarity and cooperation” set out in the Convention (Article 2.4) refers directly to the first aspect by establishing that “[i]nternational cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.” The second aspect, regarding effective access, requires

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various websites have the technical means to locate a user and propose a Web page that is in the language of the country where the use takes place and that is even adapted to business transactions that comply with the applicable legislation of the country in question. These examples show that greater control of content offered on the Web is possible if the determination (and often the economic interest) is there. Please refer to Chapter 2 of this report for cultural policy measures adapted to digital technologies.

<sup>5</sup> See T. Yharimanana, “Contribution to the preliminary reflection on the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the digital age”, September 2013. See also, regarding the promotion of a diversified cultural offering via Competition Law, L. Richieri Hanania, *Diversité culturelle et droit international du commerce* (Cultural diversity and international trade law), CERIC, Paris, La Documentation française, 2009, pp. 334-386.

<sup>6</sup> See Y. Thièc, “From a Moratorium in the Conflict between Trade and Culture to the Creation of a Digital Deal for Cultural Diversity”, in L. Richieri Hanania (ed.), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Routledge (forthcoming, 2014).

accelerating the digital shift and reducing the digital divide and inequalities in these countries. As such, not only must the required technologies be made available, but individuals from all regions and all segments of the population must sufficiently master these means and have access to the support they need to truly benefit from them.

The explicit references to information and communication technologies (ICT), new technologies and the transfer of technologies associated with the provisions of the Convention dealing with the imbalances between rich and poor countries, as well as international cooperation for development (Preamble, Articles 12 and 14 (paragraphs b and c)) show that the negotiators were aware of the importance of taking the reality of digital technology into account to ensure the protection and promotion of the diversity of cultural expressions in developing countries. The ultimate goal of these provisions is to enable a rebalancing of cultural exchanges between countries at different stages of development in order that cultural expressions from developing countries have a greater presence on the digital market and that the people of these countries have access to them.

## **II. PRIORITY ACTION AREAS FOR COOPERATION FOR DEVELOPMENT ADAPTED TO DIGITAL TECHNOLOGY**

This section aims to explore how digital technology transforms and can strengthen the capacity to attain the objectives on cooperation for development set out in the 2005 Convention (II.1). The effect of digital technology is then examined in terms of the instruments provided for in the Convention that can be considered as contributing in a transversal manner to these objectives (II.2).

### **II.1. Leveraging digital technology to achieve the objectives of cooperation for development**

While interdependent, the objectives of the Convention for cooperation for development can be grouped into three categories, namely: reinforce partnerships; promote exchanges with a view to adopting and improving public policies affecting the cultural sector; and build the capacity of developing countries.

#### **A. Creating and reinforcing partnerships**

Creating and setting up partnerships between the public sector, civil society (including the private sector and non-governmental organizations), and intergovernmental organizations active in development and the fight against poverty should make it possible to develop and maintain sustained and coordinated support for the cultural sector. This appears crucial (i) to ensure the effective transversal integration of cultural considerations in all public policies from a sustainable development perspective and as part of a genuine strategy, and (ii) in order that all initiatives or policies adopted effectively fit the particular needs and challenges of each developing country. By promoting the coordination of and coherence between the initiatives



adopted and by combining the efforts of various stakeholders in a structured, strategic and efficient way, such partnerships can be invaluable for developing countries.

Paragraph 7 of the Operational Guidelines for Article 15 provides a number of useful ideas for developing partnerships that can also be applied to collaborations aimed at promoting cultural sectors that are the most affected by digital technologies, such as the music and the audiovisual sectors. These partnerships could concentrate more specifically on the development of new technologies in developing countries, as recommended in Paragraph 6.3.4 of the Operational Guidelines for Article 14 of the Convention. They should also allow for convergence and greater coordination of the work of various international organizations heading up projects to deploy infrastructure and develop ICT by combining the efforts of UNESCO (both the Culture Sector and the Communication and Information Sector) with those of the International Telecommunication Union (ITU) and/or the World Bank.

On a broader level, digital technologies can contribute to the establishment of more efficient partnerships by facilitating long-distance dialogues and exchanges as well as more substantial and cost-effective collaborations that allow for more efficient use of the partners' resources in a difficult budgetary context. The exchange of information on existing and potential partnerships via the UNESCO Secretariat (as set out in Paragraph 8 of the Operational Guidelines for Article 15) would also likely benefit from digital technologies by setting up an online database easily accessible by all interested Parties. Such a database could feature sections specifically devoted to digital partnerships and could build on the work accomplished to date by the Global Alliance for Cultural Diversity<sup>7</sup>.

Lastly, the co-production and co-distribution agreements encouraged in Article 12 of the Convention are also the types of partnerships that, on the one hand, could be easily applied to the digital media sectors and, on the other, would benefit from the facilitation of collaborative work made possible by new technologies.

## **B. Sharing best practices affecting the cultural sector**

Cooperation for development must lead to more dialogue on cultural policies and/or on policies that have an impact on the cultural sector. It must also strengthen the sharing of best practices implemented by countries faced with similar challenges and contexts. Digital technology facilitates networking and sharing, practices that have permeated the Convention since its negotiation.<sup>8</sup> Linked to the implementation of Article 10 (c) of the Convention, the sharing of information on policies implemented to protect and promote cultural diversity in the digital age in developing countries should thus also be facilitated.

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<sup>7</sup> See, on the Global Alliance for Cultural Diversity, <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/global-alliance-for-cultural-diversity/> (last accessed in November 2013).

<sup>8</sup> See C. Merkel, "The Power of Knowledge and Transparency – Networked Opportunities in Cultural Policies and Governance", in L. Richieri Hanania (ed.), *op. cit.*, Note 6 (forthcoming, 2014).

An online knowledge-sharing platform could be put in place with the assistance of international organizations active in the areas of sustainable development and the fight against poverty. This would provide developing countries with a regularly updated database of cultural policies and initiatives that are adopted in other sectors but that have an impact on cultural diversity. Examples include policies dealing with the working conditions of artists as well as policies and initiatives aimed at the formalization and professionalization of cultural sectors;<sup>9</sup> innovative legal frameworks for intellectual property rights that allow for greater balance between, on the one hand, the need to protect copyright holders and, on the other hand, the public interest to encourage creation and innovation based on access to a repertoire of culturally diverse works;<sup>10</sup> and measures to regulate the telecommunication sector, such as must-carry rules imposed on network operators that oblige them to broadcast or rebroadcast certain shows. Such a knowledge platform could offer research and comparison tools based on the year the policies were adopted; the cultural sector affected; the development stage of the country and the contribution of their cultural sectors to their GDP; on whether or not these policies apply to digital technologies; and their performance in terms of economic and social outcomes. A list of websites featuring data and statistics on the cultural sector could also be gradually assembled on the same platform.

In addition, online forums enabling representatives of parliaments, governments, civil society (including ICT experts) and international institutions to discuss the drafting of policies adapted to digital technologies in developing countries would undoubtedly be a way of promoting constructive dialogue and exchanges among Parties to the Convention.

### **C. Developing and building capacity**

This third category deals with optimizing the capacities of governments, cultural players and industries, as well as the public. Like the two previous categories, it stands to benefit from more exchanges between artists and other cultural professionals, including managers of cultural institutions and cultural projects. It requires, even more so for developing countries, investments in communication infrastructures; the transfers of knowledge and technologies needed for cultural management, creation and production; the creation of viable local and regional markets; and greater access of cultural products to national and international distribution channels. It was with this category of objectives in mind that the following three targets were proposed in the June 2013 report with respect to cooperation for development: (i) transferring digital technologies, (ii) fostering proficiency in these technologies, not just by creators of cultural content but also by the public in general, and (iii) improving digital cultural expressions from developing countries. Possible avenues for action are proposed below for each of these targets.

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<sup>9</sup> See L. Richieri Hanania, "Bringing Cultural Diversity to Discussions on Social and Labor Issues", in L. Richieri Hanania (ed.), *op. cit.*, Note 6 (forthcoming, 2014).

<sup>10</sup> See L. Richieri Hanania, *op. cit.*, Note 5, pp. 386-432, for a discussion on the search for such a balance in the digital age.

## i. Transferring digital technologies

The capacity to produce and distribute cultural works in developing countries can only be built if these countries possess the required infrastructures and equipment. The Telecommunication Development Sector (ITU-D) of the International Telecommunication Union (ITU)<sup>11</sup> is carrying out projects in this field. The mission of ITU-D is to promote international technical assistance and the creation and development of ITC equipment and networks in developing countries. Certain projects specifically target the communication sector (including audiovisual)<sup>12</sup> and encompass basic training and capacity building activities for developing countries in the digital age. The World Bank is also carrying out projects to upgrade communication infrastructures and information technologies.<sup>13</sup> Joint actions by the ITU and UNESCO, the World Bank and UNESCO and by all three organizations could further and explicitly integrate cultural diversity into these types of projects. This would not only lead to greater convergence of the projects undertaken by these organizations but would also enable the most effective use of available funds.

Cooperation initiatives instigated by public-private partnerships could also make it possible, for example, to provide computers, digital cameras, webcams, tablets, etc. to cultural institutions, schools and community centres. They could also assist in the installation of high performance computer networks and storage equipment that would facilitate the sharing and distribution of digital content. Partnerships with companies in the new technologies sector with an interest in familiarizing the public with the use of their products could also be integrated into cooperation initiatives promoted by the Parties to the Convention. In light of the dynamic nature of digital technologies, the transfer of these technologies to the benefit of the cultural sector of developing countries cannot however be simply limited to supplying equipment. As such, the establishment of new technology companies within the borders of developing countries should be promoted. However, technology transfers must be an integral part of a broader strategy that contributes to the sustainable development of these countries and the ongoing improvement of their technological know-how.<sup>14</sup> This also includes the need to invest in the development and deployment of open-source software in developing countries.<sup>15</sup>

Lastly, international cooperation should allow the countries that benefit from it to draft and implement telecommunication and new technology infrastructure development policies as well

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<sup>11</sup> See <http://www.itu.int/en/ITU-D/Pages/default.aspx> for ITU-D activities (last accessed in November 2013). See [www.itu.int/en/ITU-D/Projects/Pages/Portfolio.aspx](http://www.itu.int/en/ITU-D/Projects/Pages/Portfolio.aspx) for examples of projects by region (last accessed in November 2013).

<sup>12</sup> For example, the *Capacity Building and the Development of ORTM Regional Stations* project in Mali, [www.itu.int/ITU-D/projects/display.asp?ProjectNo=7MLI11004](http://www.itu.int/ITU-D/projects/display.asp?ProjectNo=7MLI11004) (last accessed in November 2013).

<sup>13</sup> For more information on World Bank ICT projects, see <http://www.worldbank.org/projects/sector?lang=en> (last accessed in November 2013).

<sup>14</sup> This would be corroborated by the measures recommended in Section 6.3.1 of the Operational Guidelines for Article 14 aimed at undertaking “regular assessments of evolving technological needs in terms of both physical resources and skills development with the intention of progressively addressing these, notably through international cooperation, in addition to supplying fair and favourable conditions for technology transfer to developing countries.” See UNESCO, Article 14 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Operational Guidelines. Cooperation for Development*, Conference of Parties, 2nd session, Paris, June 2009.

<sup>15</sup> This concern was vigorously raised by H. Ramduth in his contribution to the debate surrounding the challenges facing the Convention in the digital age (Email dated September 20, 2013).

as “digital strategies”<sup>16</sup> adapted to the circumstances of each of these countries, with the central and transversal goal of promoting innovation and a diversified cultural offering. Such strategies could be used to identify potential partners and plan R&D investments in the countries in question based on practices in developed countries and, when possible, on practices in developing countries whose experience could be replicated (North-South-South triangular cooperation and/or South-South cooperation). Such strategies should encompass a broad array of issues and policies, including foreign trade policies, such that developing countries maintain as much freedom as possible in the future to adopt cultural measures and policies that can adapt to the evolution of digital technologies.<sup>17</sup>

## **ii. Fostering proficiency in technologies**

The transfer of technologies must be accompanied by capacity building and a level of proficiency in these technologies by content creators as well as by the general public in order for the available offerings to be effectively accessible.<sup>18</sup> This is all the more important in developing countries where the use of digital technologies requires a major technological leap. The development of this proficiency involves providing training adapted to cultural trades that takes into account the use of digital technology for creative endeavours, new economic models and the means to promote and distribute cultural works on the Web (including training in Web-based marketing, communication and fund-raising techniques); making use of networking opportunities provided by digital technologies to expand exchanges between cultural professionals and practitioners, with the participation of ICT experts; as well as educational and public awareness measures to promote the optimal use of digital media from an early age.

International cooperation can make a significant contribution to the implementation of these three aspects, especially in developing countries. It could, for example, target the organization and availability of online training for creators that covers the entire process leading to cultural works, from creation and production to dissemination on broadcasting channels. It could also facilitate exchanges and networks between trainers and organize joint projects to promote digital creation combined with training in the use of new technologies.<sup>19</sup>

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<sup>16</sup> These strategies should be framed by an operational action plan drafted by the developing countries, as suggested in Section 5 of the Operational Guidelines for Article 14.

<sup>17</sup> See also Chapter 4 of the present report.

<sup>18</sup> See also Chapter 3 of the present report.

<sup>19</sup> An interesting example is an initiative in Brazil, implemented by a private telecommunications company, aimed at rewarding audiovisual creations produced on portable devices (such as mobile phones, webcams, digital cameras, etc.), promoting the use of audiovisual resources and innovation through the use of new technologies, as well as the improvement of productions through education. Educational material was produced and distributed in schools, NGOs, “culture points” and film societies throughout the country. Instituto Claro, Claro Curtas, [www.institutoclaro.org.br/projetos/claro-curtas/](http://www.institutoclaro.org.br/projetos/claro-curtas/) (last accessed in November 2013).

### iii. Improving digital cultural expressions from developing countries

Enhancing digital cultural expressions from developing countries requires innovative and reactive measures to ensure that these expressions are able to access and play an active role in the market. The quality of works and their profitability are certainly factors that go hand in hand. Digital technologies offer numerous opportunities in this regard, enabling the production of technically superior works at a lower cost and their dissemination on the Internet, if the required infrastructures are in place. On the other hand, for these works to be competitive on the global Internet market, measures are required to increase their visibility and value.

International cooperation can help by providing support (financial and/or technical) for the production and promotion of co-productions of new works; providing support for the digitalization of existing works that will bring certain cultural expressions to the attention of a broader public and create a public, in the medium and long terms, that appreciates them; implementing measures to improve artist remunerations and working conditions, while, at the same time, contributing to the professionalization and better governance of the cultural sectors.<sup>20</sup> Such measures must go hand in hand with the development of viable digital markets for these works that guarantee better access to distribution and broadcasting channels at the national and international levels. The granting of preferential treatment as set out in Article 16 of the Convention would also undoubtedly help.<sup>21</sup>

In addition, the implementation of measures pursuant to Article 6.2 (b) of the Convention (“measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services”) is all the more important for developing countries whose cultural expressions are not well known by the public. With the assistance of developed countries that are Parties to the Convention and that have implemented such measures, specific means could be put in place to orient and guide members of the general public who wish to have access to works that are representative of a broad diversity of cultural expressions from developing countries. While measures such as quotas are more difficult to apply in a digital environment, their intent and logic remain opportune and could be promoted by other means that are better adapted to digital technologies. Since the space for storing digital content is unlimited, it is not a question of preventing access to certain works of a given origin, but of guaranteeing that works from a given country or in a given language are given their share of space and visibility on the market.

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<sup>20</sup> With respect to this last aspect, the experience of the pool of experts in the field of cultural and cultural policy governance that is managed by UNESCO and funded by the European Union through its *Investing in People* program is an example to follow. See UNESCO, *Technical Assistance in Cultural Governance*, <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/technical-assistance/pool-of-experts/> (last accessed in November 2013); L. Richieri Hanania and H. Ruiz Fabri, “European Media Policy and Cultural Diversity at the International Level: The European Union’s Role in Fostering the Implementation of the 2005 UNESCO Convention”, in K. Donders, C. Pauwels and J. Loisen (eds.), *Palgrave Handbook on European Media Policy*, Palgrave MacMillan (forthcoming).

<sup>21</sup> See *infra*, sub-section II.2 B.

Cooperation could, for example, involve implementing measures to guide the public and to promote works available in a digital format from the widest range of origins possible. Public-private partnerships could also be established to set up online platforms that centralize information on various cultural events and direct the public to cultural content from various origins. It would also be possible to envisage using websites that have already been set up to promote specific cultural events in developed countries (festivals celebrating the culture of a given developing country, for example) as permanent platforms for disseminating new works and funding creators from that country via individual and/or corporate donations. Lastly, another possibility would be for the Parties to the Convention to negotiate partnerships with major existing online content platforms that would promote the commercialization of a diversified content and, in the process, benefit *inter alia* from their enhanced image as a company that respects diversity.

## **II.2. Using the Convention’s cooperation instruments in the digital age**

The actions required to achieve the objectives of cooperation for development discussed above hinge on major investments and various financial support measures. It thus appears essential to examine the impact of digital technologies on how international cooperation for the diversity of cultural expressions is funded. It is, moreover, necessary to determine how Article 16 (preferential treatment for developing countries) and Article 17 (international cooperation in situations of serious threat to cultural expressions) should be implemented in the digital age.

### **A. Financial support – articles 14 (d) and 18**

The types of financial support measures envisaged by the Operational Guidelines for Article 14 are fully applicable to the digital environment. They are aimed at integrating the cultural sector into framework plans for official development assistance, public and private funding and fiscal incentives to encourage the development of technological innovations.

Technological innovations could in turn be used to establish new models for remunerating artists and funding creation and cultural projects and events, which would breathe new life into the financial support provided for in articles 14 (d) and 18 of the Convention. Experiences in funding specific cultural projects and events by individuals via the Internet (*e.g.* crowdfunding mechanisms)<sup>22</sup>, as well as by the private sector, could serve as inspiration for the Parties and the UNESCO Secretariat. Targeted actions to extend fiscal exemptions to these types of financial support could also be considered. Greater dialogue between cultural actors and the private sector in general could also be promoted to clarify the expected return on investments in the cultural sector, including in terms of corporate image.<sup>23</sup> Digital technologies can, moreover, contribute significantly to fostering such dialogue.

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<sup>22</sup> For a few examples of this type of initiative, see *Kickstarter* ([www.kickstarter.com](http://www.kickstarter.com)), *KissKissBankBank* ([www.kisskissbankbank.com/](http://www.kisskissbankbank.com/)) and *Fundable* ([www.fundable.com/](http://www.fundable.com/)) (last accessed in November 2013).

<sup>23</sup> For proposals to this effect, see P. Kignel, “Private Sector Contributions to the Implementation of the CDCE in Brazil – A Case Study”, in L. Richieri Hanania (ed.), *op. cit.*, Note 6 (forthcoming, 2014).

This goes hand in hand with the need to adapt and promote the replenishment of the International Fund for Cultural Diversity through innovative sources of funding given the stagnation or reduction in national budgets. The recent steps taken by the UNESCO Secretariat to implement a fundraising strategy should be strongly applauded.<sup>24</sup>

## **B. Preferential treatment for developing countries – Article 16**

According to Article 16 of the Convention, developed countries shall facilitate cultural exchanges with developing countries by granting, through “the appropriate institutional and legal frameworks,” preferential treatment to artists as well as to cultural goods and services from these countries. Meeting the needs and priorities identified by the developing countries themselves is an essential element of such preferential treatment. The objective should thus be to create genuine opportunities for the goods and services of these countries in sectors where production already exists and which could therefore be more quickly promoted on the market, but also to help develop their potential in other sectors identified by them.

In the digital age, special emphasis must be placed on promoting access to the digital media markets of developed countries by the artists and the cultural goods and services of countries benefiting from cooperation for development. This objective naturally requires the adoption of the measures described above, such as the promotion of exchanges and dialogue, the delivery of digital technology training, the transfer of technology and the drafting of adapted policies. Measures specifically aimed at providing digital media market opportunities to developing countries could include providing “specific support and assistance schemes for the distribution and dissemination”<sup>25</sup> of products from certain of these countries online by, for example, making them available on popular platforms in developed countries; ensuring that projects for the development of cultural industries in developing countries are included in the development aid public policies of developed countries;<sup>26</sup> and promoting cultural events in order to create a public for productions from developing countries.

Special attention should be paid to preferential treatment through market access in developed countries. First of all, trade liberalization provisions granted exclusively to developing countries or certain developing countries must comply with the non-discrimination rules of multilateral (World Trade Organization – WTO), regional and bilateral trade agreements already in force between partner countries.<sup>27</sup>

WTO agreements certainly contain provisions on special and differential treatment of developing countries which could, backed by the Convention, be used by these countries in ongoing negotiations to protect their cultural sectors from greater liberalization. However,

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<sup>24</sup> It is nonetheless regrettable that the budget allocated to the Convention had to be reduced at the 192nd session of the UNESCO Executive Board, which was held in Paris from September 24 to October 11, 2013.

<sup>25</sup> UNESCO, Article 16 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Operational Guidelines. Preferential treatment for developing countries*, Conference of Parties, 2nd session, Paris, June 2009, § 3.3.2 (b) (iv).

<sup>26</sup> *Ibid.*, § 3.3.2 (b) (x).

<sup>27</sup> See Chapter 4 of the present report and, for more details, L. Richieri Hanania, *op. cit.*, Note 5, pp. 83-185.

these provisions do not impose any actual obligation on Members and remain dependent on their bargaining power during negotiations.<sup>28</sup> Article 16 of the Convention could be seen as a reiteration of the WTO special and differential treatment principle in cases where such treatment complies with specific and reasonable criteria and would be attributed in a non-discriminatory manner to other developing countries in the same circumstances. The preferential treatment described in Article 16 of the Convention could, for instance, justify the establishment of a framework for co-productions or technical assistance for the cultural sectors of developing countries, while allowing WTO Members to withdraw from the non-discrimination obligations that generally apply to them under WTO agreements. Such a framework could specifically apply to cultural industries impacted by digital technology as promising sectors for developing countries.

Moreover, when preferential treatment is only granted to certain WTO Members and when at least one of the parties in such a preferential relationship has not included an exemption to the most favoured nation treatment at the WTO,<sup>29</sup> another option for establishing preferential treatment with trade implications has been that used by the European Union (EU) with the CARIFORUM countries<sup>30</sup> under an Economic Partnership Agreement (EPA). The EU used a regional trade agreement to grant preferential treatment exclusively to these countries, in accordance with Article V (Economic Integration) of the *General Agreement on Trade in Services* (GATS).

While the implementation of the EPA still faces numerous challenges,<sup>31</sup> the provisions on cultural cooperation between the EU and the CARIFORUM countries under the Protocol on Cultural Cooperation (PCC) appended to the EPA provide an interesting example of a legal framework created to allow the granting of preferential treatment.<sup>32</sup> This PCC takes into account “the structural imbalances of cultural exchanges” that may exist between the Parties

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<sup>28</sup> See L. Richieri Hanania and H. Ruiz Fabri, “The 2005 UNESCO Convention and International Cooperation on Development”, in T. Kono and S. Van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions. A Tale of Fragmentation in International Law*, Helsinki, Intersentia, 2012, p. 336, and specifically Article 16, see *ibid.*, pp. 345-347.

<sup>29</sup> The absence of MFN exemptions in specific sectors under the *General Agreement on Trade in Services* (GATS) prevents the creation of special relationships with certain WTO Members to the detriment of other Members in those same sectors.

<sup>30</sup> Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Surinam, Trinidad and Tobago and the Dominican Republic.

<sup>31</sup> See KEA European Affairs, *Implementing Cultural Provisions. How Do They Benefit the Caribbean Cultural Sector?*, ECDPM Discussion Paper 118, Maastricht, June 2011, Executive Summary, 14 pp., [www.ecdpm.org/Web\\_ECDPM/Web/Content/Content.nsf/0/f3b58609a5d7c02dc12578af004b666ab?OpenDocument#sthash.gjS3xDy.dpuf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/f3b58609a5d7c02dc12578af004b666ab?OpenDocument#sthash.gjS3xDy.dpuf) (last accessed in November 2013). The organizational weakness and structural difficulties of the Caribbean cultural sector, the lack of knowledge of the provisions of the Protocol and their practical application by practitioners, the lack of information on the requirements for market access and on existing opportunities in both EU and CARIFORUM countries, as well as difficulties in complying with the conditions set out in the PCC for audiovisual cooperation, are some of the problems identified by the Caribbean cultural sector in the implementation of this Protocol. Measures are, however, underway to implement the EPA: The European Commission, *The CARIFORUM-EU Economic Partnership Agreement (EPA). A New Partnership for Trade and Development*, “Factsheet: How the EU is Putting the EPA into Practice,” April 2012, 9 pp., [http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149286.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149286.pdf) (last accessed in 2013).

<sup>32</sup> For a more complete review of the provisions of the PCC, see L. Richieri Hanania, “Cultural Diversity and Regional Trade Agreements – The European Union Experience with Cultural Cooperation Frameworks”, *Asian Journal of WTO & International Health Law and Policy*, Vol. 7, No. 2, 2012, pp. 439-456, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2087639](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087639) (last accessed in November 2013).



and its cultural cooperation objectives include the facilitation of exchanges of cultural activities, goods and services, particularly in the audiovisual sector (Article 1, Paragraph 1). Certain provisions are specifically aimed at integrating new technologies into the cooperation that the PCC aims to promote. To this end, Article 4 provides for technical assistance for CARIFORUM countries, including the transfer of technologies and know-how.<sup>33</sup> In addition, pursuant to Article 5, the Parties “reaffirm their commitment to the use of international and regional standards in order to ensure compatibility and interoperability of audiovisual technologies, contributing therefore to strengthen cultural exchanges” (§ 3) and shall endeavor to “facilitate the digitalisation of audiovisual archives in Signatory CARIFORUM States” (§ 5). The PCC also promotes access to the European market of cultural expressions from CARIFORUM partner countries by allowing EU-CARIFORUM co-produced audiovisual works to qualify as “European works” and benefit from quotas for European audiovisual works established under the European “Audiovisual Media Services without Frontiers Directive”<sup>34</sup> (which also covers new non-linear audiovisual services)<sup>35</sup>.

The EU signed a PCC in 2010 with the Central American countries as well as an Agreement on Cultural Cooperation with Peru and Colombia in 2011<sup>36</sup>. These two instruments are not yet in force<sup>37</sup>. They are less detailed than the PCC signed with the CARIFORUM countries and do not include preferential treatment through access to the EU market. The two documents do, however, have a technical assistance provision similar to Article 4 of the UE-CARIFORUM PCC, but only the Agreement on Cultural Cooperation with the Andean countries contains an article on the digitalization of audiovisual archives as well. According to it, the Parties “shall endeavour to exchange best practices in the field of preservation, including restoration, and digitalisation of audiovisual archives” and “shall encourage the cooperation between their cinematheques.”<sup>38</sup>

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<sup>33</sup> Article 4 reads as follows: “1. The Parties shall endeavour to provide technical assistance to Signatory CARIFORUM States with the aim of assisting in the development of their cultural industries, development and implementation of cultural policies, and in promoting the production and exchange of cultural goods and services. 2. Subject to the provisions of Article 7 of the Agreement [regarding cooperation for development], the Parties agree to cooperate, including by facilitating support, through different measures, inter alia, training, exchange of information, expertise and experiences, and counselling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. Technical assistance may also facilitate the cooperation between private companies, nongovernmental organisations as well as public-private partnerships.”

<sup>34</sup> *Directive 2007/65/CE of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/CE on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*. J.O. L 332 of 18.12.2007, pp. 27-45 [Directive 2007/65/CE], updated by *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services* (Audiovisual Media Services Directive – AVMS. J.O. L 95 of 15.4.2010, pp. 1-24).

<sup>35</sup> Article 13 (1) of the 2010 AVMS Directive (Article 3i (1) of the 2007 AVMS) stipulates that “(w)here practicable and by appropriate means” a share and/or prominence be “reserved for European works in the catalogue of programmes offered by the on-demand audiovisual media service.” For more information on this Directive, see L. Richieri Hanania, *op. cit.*, Note 5, pp. 72, 73 and 236.

<sup>36</sup> An EU PCC was also signed with South Korea and has been provisionally applied since July 1, 2011. For more information on this PCC, which is based on a principle of reciprocity between the Parties due to the level of development of South Korea’s cultural industries, see L. Richieri Hanania, *op. cit.*, Note 32, pp. 444-452.

<sup>37</sup> See European Commission, *International Cultural Cooperation* [http://ec.europa.eu/culture/our-policy-development/culture-in-eu-external-relations\\_en.htm](http://ec.europa.eu/culture/our-policy-development/culture-in-eu-external-relations_en.htm) (last accessed in November 2013).

<sup>38</sup> See Article 7 (5) of the *Agreement on Cultural Cooperation* reached with Peru and Colombia, [http://ec.europa.eu/culture/our-policy-development/documents/agreement-cultural-cooperation-30092011\\_en.pdf](http://ec.europa.eu/culture/our-policy-development/documents/agreement-cultural-cooperation-30092011_en.pdf) (last accessed in November 2013).

The absence of preferential trade treatment through market access in these two instruments demonstrates the desire to establish preferential relations under Article 16 above and beyond this type of measure. Given the specificity that the Convention accords to cultural goods and services because of their dual nature (commercial and cultural), the implementation of Article 16 using trade measures might be legally delicate and politically problematic. The preferential treatment provided for under Article 16 should thus be promoted more by “purely” or “mainly” cultural cooperation measures, without necessarily having recourse to trade liberalization measures.<sup>39</sup>

### C. Assistance in situations of serious threat to cultural expressions – Article 17

The situations mentioned in Article 8 of the Convention are special situations where cultural expressions are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding. While the requirements of Article 8 make its application and that of Article 17 problematic in practice,<sup>40</sup> these articles could be explored further in the digital age. This will be all the more relevant as the digital market occupies an increasing place in national and international cultural exchanges and as the exclusion of certain cultural expressions from the digital market is considered a threat to their survival.

Since the situations covered by Article 8 must not be subject to the provisions of other UNESCO conventions in order for the 2005 Convention to be applied,<sup>41</sup> these situations could be flagged, for example, if the market is insufficient or if the profitability of a given cultural industry on the market is particularly low, and could ultimately threaten the viability or survival of certain cultural expressions. As such, if the digital market becomes crucial for certain cultural expressions to enter and maintain a presence on the cultural market, and if this entry or maintenance on the cultural market is threatened, the Parties would be able to turn to one of the situations in Article 8 and use the provisions of Articles 8 and 17.

Cooperation measures adopted to deal with these situations must target the same three categories of objectives mentioned earlier with, of course, a special emphasis on the aspect of serious threat in question. In these cases, it would be possible to envisage the use of cooperation measures that support the marketing of certain cultural works by providing financial and/or technical assistance. In the digital age, these measures could guarantee the

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<sup>39</sup> See L. Richieri Hanania, *op. cit.*, Note 32, pp. 439-452.

<sup>40</sup> See L. Richieri Hanania, “Protection Mechanisms for Cultural Expressions under Threat”, *Transnational Dispute Management*, Vol. 5, *Art and Heritage Disputes in International and Comparative Law* (accepted for publication), [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) (TDM, ISSN 1875-4120); L. Richieri Hanania, “Biens et services culturels menacés”, in V. Guèvremont (ed.), *Regards croisés sur le droit international de la culture : interactions et chevauchements entre les conventions relatives au patrimoine culturel immatériel et à la diversité des expressions culturelles* (accepted for publication); L. Richieri Hanania and H. Ruiz Fabri, “Article 8 – Measures to Protect Cultural Expressions” and “Article 17 – International Cooperation in Situations of Serious Threat to Cultural Expressions”, in S. von Schorlemer and P.-T. Stoll (eds.), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Explanatory Notes*, Berlin, Springer, 2012, pp. 223-243 and 457-463 respectively.

<sup>41</sup> See UNESCO, *Articles 7, 8 and 17 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Operational Guidelines. Measures to Promote and Protect Cultural Expressions*, Conference of Parties, 2nd sess., Paris, June 2009, § 5.1; L. Richieri Hanania, *Protection Mechanisms for Cultural Expressions under Threat*, *op. cit.*, Note 40.

viability of books written in rare or under-represented languages by creating online publication opportunities for the authors on special dedicated websites and on which donations could also be made to ensure that quality editions can be published and the authors remunerated.<sup>42</sup> They could also be used to guarantee access by native peoples to digital media in their language by providing the required know-how and technologies to make their cultural expressions available on the Internet and through various digital devices.

### **III. RECOMMENDATIONS TO THE INTERGOVERNMENTAL COMMITTEE AND THE CONVENTION SECRETARIAT**

With respect to cooperation for development in the digital age, the Intergovernmental Committee and the 2005 Convention Secretariat could, in general terms, encourage cooperation between the Parties (North-South cooperation, North-South-South triangular cooperation and/or South-South cooperation) in each of the action areas identified in Chapter 1. In the short/medium term, the Intergovernmental Committee and the Convention Secretariat could more specifically:

1. Give preference, in the next project funding cycle by the International Fund for Cultural Diversity, to projects related to the implementation of the Convention in the digital environment. Priority should be given not only to applications for funding to develop cultural measures and policies and/or projects likely to have a direct impact on the creation, production, dissemination and distribution of digital cultural activities, goods and services, but also to research projects aimed at exploring the contributions of digital technologies and identifying practical ways to better use them in order to foster the diversity of cultural expressions in specific developing countries.
2. In tandem with the initiatives of the Global Alliance for Cultural Diversity, establish an online database and knowledge-sharing platform that centralizes information on partnerships and policies that promote the diversity of cultural expressions in developing countries. This platform could contain sections specifically devoted to partnerships set up to protect and promote the diversity of cultural expressions in the digital age. It should also offer and promote the use of online technical tools that would allow representatives of parliaments, governments, civil society (including digital technology experts) and international institutions to discuss the drafting of policies adapted to digital technologies in developing countries. International organizations active in sustainable development and the fight against poverty should be key players in such a platform.
3. In conjunction with international organizations active in the field of digital technologies, such as the ITU and the World Bank, draft an action plan that explicitly integrates the

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<sup>42</sup> An interesting example is the *Words without Borders* initiative, <http://wordswithoutborders.org/> (last accessed in November 2013).

objective of protecting and promoting the diversity of cultural expressions into international ICT technical assistance projects such as those aimed at developing infrastructures, transferring technologies and building capacity.

## CHAPTER 2

### ADAPTATION OF NATIONAL CULTURAL POLICIES TO THE PARTICULARITIES OF THE DIGITAL ENVIRONMENT

Adapting cultural policies to the particularities of the digital environment is a shared concern, as attested to by many official national reports.<sup>43</sup> While this issue is mainly of concern to States that are developing their own cultural laws, it must also be posed given their membership in supranational legal orders. The fact is that cultural policies, if they pursue goals that are essentially cultural in nature, may sometimes touch on issues of market regulation, which means that the international and regional dimensions of the market may be affected by these measures. As noted in the Lescure Report, “most of the issues studied are governed by standards, some more binding than others, at the European (e.g., taxation and State assistance regulations, the e-commerce directive, ECH case-law on private copying, etc.) or international (e.g., WIPO treaties, the UNESCO Convention on Cultural Diversity, etc.) level. In addition, since the digital revolution largely transcends borders, any cultural policies designed in a purely national context are bound to fail.”<sup>44</sup>

Special attention must be paid to the EU framework since certain rules of EU law have a strong influence on the implementation of cultural policies and also since the EU ratified the 2005 Convention.<sup>45</sup> The idea is that creative cultural potential can occupy this new digital space.<sup>46</sup> In addition, while it is important to refrain from using the community approach as a model, it is nonetheless a useful example for linking the logic of the market with that of the preservation of the diversity of cultural expressions.

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<sup>43</sup> For example, in France, see Ministère de la Culture et de la Communication, *Mission Acte II de l'exception culturelle. Contribution aux politiques culturelles à l'ère numérique*, P. Lescure, Vols. 1 and 2, May 2013 [Lescure Report]; in Canada, the Canadian Public Arts Funders (CPAF) network, *Digital Transitions and the Impact of New Technology on the Arts*, D. Poole and S. Le-Phat Ho, June 2011; in Québec, the Société de développement des entreprises culturelles (SODEC), *Porte grande ouverte sur le numérique. Rapport sur la consultation. Option culture, virage numérique*, October 2011 [SODEC Report].

<sup>44</sup> Lescure Report, Vol. 2, *ibid.*, p. 3.

<sup>45</sup> Europe's digital strategy should, according to Neelie Kroes, the Vice-President of the European Commission and European Commissioner for the Digital Agenda, lead to “solutions that defend cultural diversity while, at the same time, recognize that we are living through a digital revolution,” <http://cblog.culture.fr/2011/01/31/la-strategie-numerique-pour-l-europe-selon-neelie-kroes> (last accessed in November 2013).

<sup>46</sup> See, for example, the reflections of the European Commission, *Green Paper. Unlocking the potential of cultural and creative industries*, COM(2010) 183/3, Brussels, 27 April 2010, in which the cultural and creative industries are tightly linked to the challenges and potentials of the digital environment.

## **I. ISSUES RAISED BY THE DIGITAL ENVIRONMENT IN TERMS OF NATIONAL POLICIES**

Cultural players must deal with major transformations all along the cultural chain, from creation to production and dissemination. These transformations affect the ways they operate from the point of view of economic models, the “abundance of foreign cultural offerings,” the creation and circulation of cultural content with the appearance of new ways to disseminate and share content and, lastly, the way cultural content is accessed and consumed.<sup>47</sup> Certain intermediaries are disappearing or are on the decline, notably because the public has more direct access to creation and cultural content. Artists self-produce and disseminate their work, bypassing traditional production and dissemination channels. At the same time, new modes are arising and new trades appearing. As highlighted in the SODEC report, these new intermediaries (legal content platforms, content aggregators, search engines) are brokering a new relationship between the artist, the producer and the public.<sup>48</sup>

Against the backdrop of these major transformations in the way cultural expressions are created, produced and disseminated and in the relationships between the various links in the chain, one of the major challenges of cultural policies is to find a way to create the conditions for a diversified quality cultural offering that engages all actors, artists, authors and creators as well as cultural enterprises and the public with respect to digital resources. This means not only combating illegal cultural offerings but also, on a more positive note, making legal offerings more accessible and more attractive. Since the abundance of cultural offerings jeopardizes certain national productions, another challenge is to preserve adequate visibility. Finding the right balance is a complex process insofar as cultural diversity requires keeping the cultural expressions of States or certain endangered cultural expressions alive while, at the same time, maintaining a policy of openness to foreign cultural expressions. These issues cannot obviously be restricted to a purely national dialogue. They necessarily involve a broader understanding of the problems that take various cross-border, regional and international concerns into account. The following objectives must be taken into consideration:

### **I.1. Promote a diversified digital cultural offering**

Promoting a diversified digital cultural offering is certainly the prime objective. This means encouraging not only the dissemination of existing works (in this respect, the issue of heritage digitalization is a major concern) but also the creation of quality cultural content. Appropriate measures could include several approaches (granting assistance directly to creators, the obligation to devote a share of this assistance to funding creative activities that would be borne by online services, assistance for new forms of funding such as crowdfunding whose legal and fiscal framework could be clarified<sup>49</sup>). With respect to this aspect, attention should be paid to the creation and dissemination of quality content, notably to “original content designed for and

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<sup>47</sup> See the SODEC report, *op. cit.*, Note 43, p. 4.

<sup>48</sup> *Ibid.*, p. 5.

<sup>49</sup> Suggestion proposed in the Lescure Report, t. 1, *op. cit.*, Note 43, p. 29.

adapted to the digital environment.”<sup>50</sup> These actions to promote creation must obviously be backed by actions to improve the tools and services for disseminating cultural offerings. As indicated in the European Commission’s Green Paper on the cultural and creative industries, “[t]he roll out of ITC depends on the availability of high quality and diversified cultural content.” This perspective raises the question of how national products should be encouraged. In this respect, the SODEC report mentions the decline in Québec products, and points out that “the presence of abundant and often free foreign offerings marginalizes Québec’s presence.”<sup>51</sup>

While it is generally agreed that assistance must be provided to national and regional productions to prevent them from becoming marginalized by the abundance of offerings, this assistance should be accompanied by a focus on quality, original content.

## **1.2. Increase the capacity for experimentation and innovation in all cultural sectors**

States should encourage the production of cultural content in the same way they encourage research and development. This aspect of encouraging innovation in the production of cultural content and digital tools is one of the recommendations that comes up again and again in many digital cultural strategy reports and studies. The SODEC report also recommends “establishing fiscal incentives to enhance marketing efforts” and refers to the “possibility of making new targeted digital commercialization expenditures eligible for tax credits.”<sup>52</sup> Assistance should also be provided for the development of tools and systems that facilitate and further the processing of and access to information.<sup>53</sup>

## **1.3. Make criteria for the diversity of cultural expressions more operational in national policies**

The aim here is not to revisit the notion of diversity as defined in the 2005 Convention but rather to examine how the criteria can be used to implement the Convention through national cultural policies. The notion of the diversity of cultural expression is linked to the idea that the creation and production of and access to cultural content are encouraged, notably on the Web, as suggested in the original study framework. The fact that States encourage cultural creations and productions is a potential source of diversity. However, this notion could also be seen as a criterion per se and open the door to certain funding mechanisms. These mechanisms, could, for example, focus on the diversification of cultural content offerings by operators or cultural services. This is what the Lescuré Report calls “diversity exposure.” This aspect of assistance could, for example, be used to promote the creation and/or production of multilingual content. The Operational Guidelines could therefore be used to determine the elements of the notion of diversity that should be taken into account by operators and to determine the anticipated

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<sup>50</sup> See the SODEC report, *op. cit.*, Note 43, p. 14, which places facilitating the creation and dissemination of these contents at the heart of the digital strategy.

<sup>51</sup> SODEC report, *op. cit.*, Note 43, p. 17.

<sup>52</sup> *Ibid.*, p. 19.

<sup>53</sup> *Ibid.*, p. 4.

impacts of such an approach. Assistance to enhance the diversity of cultural expressions could thus be promoted as such.

#### **I.4. Regulate and raise awareness of cultural consumption practices**

One of the main difficulties surrounding the issue of providing assistance for culture in the digital environment is educating consumers and the public with respect to accessing cultural content, especially illegal downloading.

The Lescure Reports points out that legal offerings suffer as much from competition from illegal offerings as they do from their own failings (lack of selection, lack of choice, costs that are sometimes prohibitive, use restrictions, lack of ergonomics).<sup>54</sup> The issue of ad pop-ups is also cited as a problem. A study published by Hadopi (Hadopi, cultural assets and Internet use: practices and perceptions of French Internet users) underscores the need to promote the criteria of legality accepted by Internet users, including access security, and “when the brand/name of the site is well known” and “when the site has a charter and conditions of use.”<sup>55</sup> The identification of well-known, branded sites could facilitate the promotion of good cultural consumption practices, especially in terms of respecting the rights of creators. The regulation of cultural content by administrative authorities (the protection of minors, the prohibition of incitement to hatred and violence, respect for human dignity) could also be a component of this educational process.<sup>56</sup>

The issue of media education is often raised in schools. But, it obviously goes beyond this framework. Many national portals set out to explore the issue of media education in and out of school and to identify the actors, initiatives and advances in this field. This is the case of mediaeducation.fr, the Québec Centre de ressources en éducation aux médias, the Belgian Conseil de l'éducation aux médias and e-media.ch, the portal in the French-speaking part of Switzerland.

This objective also requires an exploration of new consumption practices based on the use of digital networks for cultural purposes<sup>57</sup> and the creation of content and sharing through social networks.<sup>58</sup> Certain authors have identified a generation of consumers who create cultural content. Member States should share their experiences in managing and understanding these new practices.

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<sup>54</sup> Lescure Report, *op. cit.*, Note 43, pp. 57 et 61.

<sup>55</sup> *Ibid.*, p. 60.

<sup>56</sup> For example, France's Conseil supérieur de l'audiovisuel was tasked with regulating content.

<sup>57</sup> For a study on these uses, see the results of an international survey conducted by the Atelier BNP Paribas, *Nouvelles générations et culture numérique*, Atelier Conseil et Stratégie numérique for the Forum d'Avignon 2012, November 2012, 75 pp.

<sup>58</sup> The Atelier BNP Paribas raised a number of questions with respect to this point: “[w]ill the particularities of digital natives ultimately be the wellspring of an emerging creative middle class? If a creative middle class does emerge, what role will it play and how will it influence the development of culture and the economy in general? If the emergence of such a creative middle class is confirmed in 2013, what should we do to organize its expansion and take advantage of it for the development of culture?” (*ibid.*, pp. 11 and 12).



## II. PRIORITY ACTION AREAS FOR REDEFINING CULTURAL POLICIES IN THE DIGITAL ENVIRONMENT

In order for States to identify priority action areas to protect and promote the diversity of cultural expressions they must first determine the appropriate tools and levers and the ways to use them to benefit culture in the digital environment.

### II.1. Traditional tools and levers used by governments in the cultural field

Let us return now to the issues of protection and promotion in this chapter. For some of the measures envisaged in Article 6 of the 2005 Convention, it could be said that the idea of protection is essentially linked to the strategy of cultural exception, allowing States to implement various types of cultural content dissemination and production quotas (national content requirements, language quotas). The notion of protection also encompasses measures to protect certain sectors from the logic of the market. For example, the Convention refers to public financial assistance measures public service institutions and the non-profit sector,<sup>59</sup> which is essential for funding certain activities (live shows, for example). This aspect of public service institutions and non-commercial activities is equally important in the digital field even if the activities take on new forms. Lastly, protection is also aimed at cultural expressions “that are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding.”<sup>60</sup> This is the same logic as that developed under the 1972 World Heritage Convention.<sup>61</sup>

The “promotion” aspect has a significantly different goal that is based more resolutely and more positively on the idea of respecting diversity. This means that States must take into consideration all cultural expressions and endeavour “to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate and distribute and have access to their own cultural expressions”<sup>62</sup> as well as “to have access to diverse cultural expressions from within their territory as well as from other countries of the world.”<sup>63</sup> The goal here is for States to foster the emergence of multi-channel access to cultural expressions and to pay special attention to minority cultures that cohabit in their territory. A third aspect of the promotion of the diversity of cultural expressions also harkens back to the objective of “fostering interculturality in order to develop cultural interaction in the spirit of building bridges among peoples.”<sup>64</sup> The pursuit of this objective is notably based on the principle of equitable access, which means an “access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.”<sup>65</sup> While the ideas of protection and promotion are based on two

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<sup>59</sup> Article 6.2 (d) of the 2005 Convention.

<sup>60</sup> *Ibid.*, Article 8.

<sup>61</sup> *Convention concerning the Protection of World Cultural and Natural Heritage*, 23 November 1972, (1977) 1037 UNTS 174.

<sup>62</sup> Article 7.1 (a) of the 2005 Convention.

<sup>63</sup> *Ibid.*, Article 7.1 (b).

<sup>64</sup> Article 1 (d) of the 2005 Convention. See also Article 4, which states that “(I)nterculturality refers to the existence and equitable interaction of diverse cultures and to the possibility of generating shared cultural expressions through dialogue and mutual respect.”

<sup>65</sup> Article 2.7 of the 2005 Convention.

different logics in the implementation of national policies, they frequently co-exist and are simply two different ways to support cultural expressions.

Based on this two-fold perspective, what tools should be used to protect and promote the diversity of cultural expressions in the digital environment? To answer this question, it is worth examining articles 4.6, 6, 7 and 8, which define and illustrate cultural measures that the Parties can implement to achieve the objectives they set themselves under the 2005 Convention. While not exhaustive, these articles give a broad range of options that the Parties could use to implement their cultural policies. New measures that are specially designed to respond to the digital environment could be easily included in the categories of assistance identified in these articles.

Article 4, paragraph 6, refers to policies and measures relating to culture, whether at the local, national, regional or international level “that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies,” including “the creation, production, dissemination and distribution of cultural goods and services.” Article 6 lists a number of possible measures while Article 7 deals with the efforts that the Parties must make to create an environment that is favourable to the diversity of cultural expressions in their territory. Lastly, Article 8 deals with the protection of cultural expressions that are under threat. The Operational Guidelines illustrate the types of measures that the Parties can adopt, notably so-called structural laws, including laws governing broadcasting, copyrights and the status of artists, to which we could also add retail price maintenance laws for books and protection laws for languages.

The Operational Guidelines also refer to financial (tax incentives, grants) and cooperation levers (participation in discussions on various international normative measures, cultural expression import strategies, broadcast of cultural expressions in foreign markets). In fact, there are numerous levers, and we will return to them a little later. The combination of financial and legal levers creates a framework in which cultural expressions can flourish. Some of the Operational Guidelines refer to the digital context and new technologies. For example, the Operational Guidelines for articles 7, 8 and 17 of the 2005 Convention note that cultural policies should “foster the emergence of a dynamic cultural sector, taking into account all aspects of cultural activities, goods and services in their diverse modes of creation, production, dissemination, distribution and access, whatever the means and technologies used.” In terms of measures used to promote cultural expressions, the text also notes that “[b]earing in mind the technological changes underway in the field of culture and which have the potential to bring considerable change in matters related to the creation, production, distribution and dissemination of cultural content, Parties are encouraged to promote the following types of intervention: 3.1 place specific emphasis on measures and policies aimed at promoting the diversity of cultural expressions that are best adapted to the new technological environment; and 3.2 foster the transfer of information and expertise to help cultural professionals and the cultural industries, with particular regard for youth, to acquire the knowledge and skills required to benefit fully from the perspectives offered by these new technologies.”

This requires staying abreast of changes in the various sectors and rethinking cultural policies from the perspective of this new digital environment. However, in reality, the Operational Guidelines provide little guidance on how to develop new tools and means for achieving this.

## **II.2. Applying and transposing traditional tools and creating new tools adapted to the digital environment**

Based on the types of tools mentioned in Article 6.2 of the 2005 Convention, the need to adapt or redefine national cultural policies could be studied using the method described below.

First, we start with the traditional approach for integrating the notion of cultural diversity into national cultural policies in order to determine which tools remain relevant and whether some of the traditional tools can be applied as is. Second, we determine which tools can be transposed and adapted to the digital environment and which tools are ineffective and, as such, require the creation of new ones specifically designed for this environment. Due consideration is also given to how the digital environment affects public policies on the diversity of cultural expressions and what corrective actions should be taken. Lastly, we reflect on the creation of new tools specially designed for the digital environment, which also involves looking at new modes of production and dissemination, new actors and trades, new economies and new services and, lastly, new cultural practices from a public perspective.

### **A. Article 6.2 (b)**

This article deals with the “measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the languages used for such activities, goods and services.”

This first set of measures can be based on the quota approach used frequently in the audiovisual sector. Quotas can, for example, be based on language criteria or national content requirements. In principle, these measures can be applied to creation, production and dissemination activities in the digital environment. The challenge is not a technical one per se, since many cultural industry professionals agree that it is possible. The difficulty lies mainly in the ability to ensure compliance by operators and, eventually, to penalize them. The territorialization of these operators is also an issue in terms of the jurisdiction of States to regulate “dematerialized” activities. What we do know is that these measures carry weight as soon as they are envisaged, not only at the national level but also at the international and regional levels. In European Union law, the Television without Frontiers Directive stipulates that broadcasters must reserve a majority share of their transmission times for European works. The previous Directive (89/552/EC) was amended by Directive 2007/65/CE, which extends the quotas to on-demand services from media service suppliers. The rule is not very restrictive, but is considered feasible. Pursuant to Article 3 *decies*: “1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction

promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”

To the question of the feasibility of the quota technique in the digital environment we must add the matter of its usefulness in preserving cultural diversity. This issue must obviously be studied within a wider framework than the purely national framework. The Lescure Report refers to this need to maintain and update the notion of cultural exception, notably in bilateral and multilateral trade negotiations. “Future negotiations, especially those aimed at establishing a transatlantic partnership between the European Union and the United States must not be taken as an occasion to undermine these principles. Audiovisual services must be excluded absolutely and unconditionally,”<sup>66</sup> maintains the report. This point will be dealt with in greater detail in Chapter 4 of the present report.

## **B. Article 6.2 (c)**

This article deals with “measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services.” Concretely, this means supporting the informal sector and fighting production and dissemination monopolies in the audiovisual and book sectors, for example. Such measures will make it possible to maintain professional quality cultural activities, goods and services in the informal sector.

These policies must be retained in national laws, but they must also be adapted to the digital environment. For example, national regulations governing price maintenance for books must be adapted to e-books.<sup>67</sup> Some States have already adopted such measures,<sup>68</sup> though not without a struggle.

For example, a law on the price maintenance of e-books was adopted by the French parliament on May 17, 2011,<sup>69</sup> which requires all book publishers in France to set the retail prices of digital versions of the books they publish and requires all sellers to comply with these prices when they sell books to buyers in France (theoretically, the law thus also applies to foreign e-book websites that sell French books to French Internet users). The latter obligation, which is described as an extraterritoriality clause, was the subject of much debate. The French National Assembly felt that the adoption of this clause could weaken the entire project. It was especially concerned about the fact that it appeared to be totally incompatible with the principle of the freedom to

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<sup>66</sup> Lescure Report, Vol. 1, *op. cit.*, Note 43, p. 14.

<sup>67</sup> See the SODEC report, *op. cit.*, Note 43.

<sup>68</sup> This is the case in France. Discussions are underway in Québec.

<sup>69</sup> *Loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique*, J.O.R.F., 28.05.2011, p. 9234.

provide services.<sup>70</sup> The Senate argued that while the European Commission, in its opinion on France's *Loi sur le prix unique du livre numérique*, had issued strong reservations about this, it had not "closed the door" since it had asked the French government to respond to a series of questions that required "very well-reasoned answers" in order to assuage these reservations. It meant raising the awareness of Member States and European institutions of the need to examine the 2005 Convention more closely by revisiting the Directives mentioned in the European Commission's opinions. It would be necessary, in other words, to convince EC bodies that the disputed measure met an overriding imperative of a public nature that would justify restrictions to the free provision of services. This is the viewpoint reflected in the *Loi sur le prix unique du livre numérique*, which is still in force. A complaint was recently lodged with the Court of Justice concerning this Act, but it only touches on a secondary issue, that is, the reduced VAT applied to e-books.<sup>71</sup>

### C. Article 6.2 (d)

This article deals with "measures aimed at providing public financial assistance." Most States subsidize cultural activities, goods and services to various degrees. In developed countries, subsidies for audiovisual services are provided at practically every stage of the production and distribution process. This is especially true for the film and television industries. However, cultural subsidies are much less common in developing countries, and when they do exist, they only provide limited support. This is why articles 14 (d) (Cooperation for Development) and 18 (International Fund for Cultural Diversity) explicitly call on the developed Parties to contribute financially to the development of the cultural industries of developing countries.<sup>72</sup>

Unlike measures such as quotas and other quantitative restrictions, in the case of subsidies, the difficulty lies in adapting financial assistance programs to the creation of new modes of production and dissemination, new actors and new types of cultural content arising from digital technologies. An interesting example of how subsidies can be adapted to changes arising from the growth of digital technologies is support for the digitalization of the production and projection of films (digitalization of movie theatres).

Programs of this type have already been set up by certain States. For example, in 2011, the Austrian Ministry of Education, Arts and Culture announced a program to fund the digitalization of art houses and small local cinemas.<sup>73</sup> In France, the Centre national du cinéma et de l'image

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<sup>70</sup> France, National Assembly, *Rapport fait au nom de la Commission des affaires culturelles et de l'éducation sur la proposition de loi, adoptée avec modifications par le Sénat en deuxième lecture, relative au prix du livre numérique*, by H. Gaymard, 13th legis., 6 April 2011, No. 3318, [www.assemblee-nationale.fr/13/rapports/r3318.asp](http://www.assemblee-nationale.fr/13/rapports/r3318.asp) (last accessed in November 2013).

<sup>71</sup> Québec National Assembly, *Journal des débats de la Commission de la culture et de l'éducation*, 1st sess., 40th legis., 21 August 2013, *Consultations particulières et auditions publiques sur le document intitulé : Document de consultation sur la réglementation du prix de vente au public des livres neufs imprimés et numériques*, 9:30-10:00 a.m. (I. Bernier).

<sup>72</sup> See on this point, I. Bernier, *Article 6. Rights of Parties at the National Level*, in S. von Schorlemer and P.-T. Stoll (eds.), *op. cit.*, Note 40, pp. 179-198.

<sup>73</sup> UNESCO, *Austrian Report 2012 on Measures to Protect and Promote the Diversity of Cultural Expressions*, p. 6. According to this report, "[t]he purpose of this program is twofold: first, to safeguard the programming of independent and art house films in Austrian movie theatres and second, to ensure the future existence of local cinemas and therewith counter the continuing concentration of cinemas in major conurbations."

animée (CNC) set up a selective assistance program for the digitalization of heritage films. This “financial assistance program for the digitalization of films has a three-fold objective: make 20th century films available to the widest possible public using modern technologies and dissemination methods; foster the development of legal offerings on the Internet; and ensure the preservation and transmission of this heritage for future generations.”<sup>74</sup> At the regional level in France, the Pays de la Loire region has also created a digitalization assistance program for cinemas.<sup>75</sup> There are many other examples of such national and regional laws in developed countries, but it would be difficult to present an exhaustive list of them in this report.

Above and beyond these examples, it would perhaps be more important to examine the studies that detail the anticipated benefits of digitalizing cinemas<sup>76</sup> and, more generally, the digitalization of the entire film industry. Similar studies should, moreover, be carried out for all cultural industries. The anticipated benefits appear to be especially significant for developing countries and should encourage the Parties to take concrete actions to give these countries the means to fully benefit from digitalization.

#### **D. Article 6.2 (e)**

This article deals with “measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange of ideas, cultural expressions and cultural activities, and to stimulate both the creative and entrepreneurial spirit in their activities.” These measures include financial assistance for the associative sector, selective support measures for creation, and lower tax rates. These measures must also take into consideration transformations in the cultural production chain where certain intermediaries disappear and others appear.

Digital technologies and non-market services are another important focus in both the public (notion of general interest) and private sectors (sharing, exchanging, etc. as well as funding non-commercial cultural activities such as live shows). The distinction between non-commercial and commercial activities will undoubtedly have to be couched in different terms in the digital environment, hence the importance of examining this issue in greater detail. For example, some artists’ collectives use digital technologies to explore new forms of creation, especially collaborative creations. Public policies must pay special attention to these artistic expressions. It

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<sup>74</sup> Centre national du cinéma et de l’image animée, *Aide sélective à la numérisation des œuvres cinématographiques du patrimoine*, [www.cnc.fr/web/fr/aide-selective-a-la-numerisation-des-oeuvres-cinematographiques-du-patrimoine](http://www.cnc.fr/web/fr/aide-selective-a-la-numerisation-des-oeuvres-cinematographiques-du-patrimoine) (last accessed in November 2013).

<sup>75</sup> Conseil régional des Pays de la Loire, *Aide à la numérisation des salles de cinéma*, [www.paysdelaloire.fr/services-en-ligne/aides-regionales/aides-regionales-themes/culture-et-sports/actu-detaillee/n/aide-a-la-numerisation-des-salles-de-cinema/](http://www.paysdelaloire.fr/services-en-ligne/aides-regionales/aides-regionales-themes/culture-et-sports/actu-detaillee/n/aide-a-la-numerisation-des-salles-de-cinema/) (last accessed in November 2013).

<sup>76</sup> See, for example, M. Houle, *La numérisation du parc de cinémas : enjeux et perspectives*, Étude réalisée pour la Société de développement des entreprises culturelles (SODEC), Québec, October 2010, 52 pp. In this study, the author “generally considers that the cost of a digital distribution copy represents approximately 10% of the cost of a 35 mm distribution copy.” According to him, “savings in transportation costs can be added to savings in the cost of distribution copies. Even when provided on a physical medium, as is currently the case, a digital copy is much lighter and much smaller than a 35 mm copy, which results in substantial savings in transportation costs. The logistics will be even simpler when films are delivered by satellite, optical fibre or broad band high speed Internet.” (*ibid.*, pp. 13 and 14)

is thus important, as it is with new trades, to create an inventory of these new processes of digital creation. Attention could also be focused on cross-sectoral modes of creation and a dialogue between different forms of expression (film, plastic arts, music, etc.). The real question here is to determine whether the project to protect certain sector from the logic of the market is possible in the digital environment, especially since the modes of creation and dissemination of content on the Internet occasionally blur the lines between commercial and non-commercial activities.

The issue of the distinction between commercial and non-commercial also applies to heritage content access policies in the public sector (libraries, museums) and their relationships with private operators such as online publishers, for example. The Lescure Report calls for “the harmonious co-existence between commercial offerings and library offerings that respects the place of both links in the book chain.”<sup>77</sup>

More generally, regulations concerning cultural economic activities that take the requirement for cultural diversity into account must undoubtedly be continuously adapted to the digital environment as new digital industries come to the fore. Measures could be financial in nature, with assistance based on respect for the diversity of cultural expressions. This would involve a targeted reflection on the criteria for cultural diversity in the digital environment. This assistance could also involve easing certain legal requirements for cultural services that promote cultural diversity. The Lescure Report calls for the emergence of “virtuous digital cultural services”<sup>78</sup> as well as a reflection on “diversified service ecosystems.” As such, one of the main challenges facing cultural exception in the digital age is “to promote the development of a fabric of independent and innovative digital cultural services that respects cultural diversity.”<sup>79</sup> The Lescure Report also notes that “virtuous players, who agree to undertake, above and beyond their legal obligations, commitments to promote cultural diversity (funding creation, exhibiting works that reflect diversity, social tariffs, partnerships with public institutions with respect to non-profit cultural offerings) will benefit in terms of access to public assistance, works and consumers.”<sup>80</sup> If we take the example of France, “(t)his approach could be applied to all digital cultural services, regardless of the field, status or location in the European Union. It could be based on an agreement with the Conseil supérieur de l’audiovisuel (CSA), whose jurisdiction would be widened and whose means of intervention would be adapted to the challenges of the digital convergence: the agreement would establish the general framework and would task the CSA with defining, for each category of services, the balance between voluntary commitments and concessions that have been granted.”<sup>81</sup> This approach could be replicated either in national policies and/or extended to regional organizations. This could be one of the fundamental pieces of legislation governing the digital environment.

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<sup>77</sup> Lescure Report, Vol. 1, *op. cit.*, Note 1, p. 192.

<sup>78</sup> *Ibid.*, pp. 9 and 10.

<sup>79</sup> See the summary of the Lescure Report.

<sup>80</sup> Lescure Report, Vol. 1, *op. cit.*, Note 1, p. 13.

<sup>81</sup> *Ibid.*

## E. Articles 6.2 (f) and (g)

Article 6.2 (f) deals with “measures aimed at establishing and supporting public institutions, as appropriate” while Article 6.2 (g) deals with “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions”. These measures, while rather broadly defined, refer more specifically to two categories of beneficiaries. On the one hand, the mention of public service institutions bolsters a sector that is crucial to the economic survival of the system insofar as public service institutions (which may be private but have a public service mandate or mission) host and/or fund many cultural expression activities. On the other hand, for artists and all those involved in the creation of cultural expressions, these measures go to the heart of the Convention, because artists are designated as the primary creators of content that convey cultural expressions.

To the extent that protecting artistic expressions is one of the main objectives of the 2005 Convention, it is worth bearing in mind that this objective must imperatively be maintained and adapted to the digital environment. Support for artists and assistance for public sector institutions that disseminate content in the digital environment must obviously be maintained. Setting up public sector institutions on the territory of or placing them under the jurisdiction of a State or government should not pose any major problems. However, the issue of selective criteria for artists, natural persons and legally constituted entities has to be examined. **National rules already in force need not be substantially modified.** The focus should be on cultural and artistic criteria and differentiating between financial assistance for creations and the production of creations intended for traditional media that are disseminated in the digital environment and financial assistance for digital arts. In Member States of the European Union, the criterion of nationality only applies to European cultural activities and not to national cultural activities.

New means of production, especially those that rely on crowdfunding must obviously also be examined. The general definition of the assistance and measures mentioned here leaves room for new forms of assistance that are better adapted to the new ways of creating and financing cultural content in the digital environment.

## F. Article 6.2 (h)

This article deals with “measures aimed at enhancing diversity of the media, including through public service broadcasting.” These measures refer to the establishment of a media chronology that involves determining the timeline of “the exclusivity of the various modes of dissemination.”<sup>82</sup> Measures that restrict media concentration must also be included in this section.

According to the Lescure Report, this is undoubtedly the most difficult measure to put into practice given the terms in which it is traditionally couched. Deemed by some as an “essential

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<sup>82</sup> E. Treppoz, *Diffusion des œuvres cinématographiques : quelles mutations pour la chronologie des médias?*, *Jurisartetc.*, April 2013, p. 38.



part of the French ecosystem,” it is weakened by the phenomenon of fragmentation in the digital environment. However, it does not invalidate the very general mechanism provided for in the Convention. The Lescure Report suggests adapting the system, taking care not to cannibalize the traditional means of dissemination. The idea is, for example, to link broadcasting licences to commitments that ensure the diversity of content (by funding the creation, production and promotion of films that are less commercially successful). The Report suggests, among other things, fast-tracking the release of on-demand videos for services that agree to commit to funding and exhibiting diversity.

Based on a review of the various measures provided for in the 2005 Convention, it is apparent that the general and open-ended terms in which they are defined means that they can be applied without difficulty to the digital environment, including through the development of new ways of intervention by States. It is precisely on this aspect of national policies that the reflection must focus.

### **II.3. Copyrights and respect for the diversity of cultural expressions in the digital age**

Generally speaking, the extrapolation of the notion of cultural diversity to forums for reflection other than those pertaining to cultural policies in the strictest sense can also provide valuable insights. A number of approaches are described in subsequent chapters of the present report.<sup>83</sup> This chapter on national cultural policies will briefly touch on the theme of copyrights.

We cannot ignore the issue of copyrights when implementing national policies since they necessarily come into play when accessing and using cultural content in the digital environment. In particular, one of the approaches could be to integrate cultural diversity into copyright protection policies. In fact, some European and French texts dealing with copyrights already contain references to the diversity of cultural expressions. While these references may be more about going through the motions than anything else at this point, it is important to ask how rules governing copyrights can best incorporate and promote cultural diversity.<sup>84</sup>

Some Community and national texts posit that protecting copyrights also means protecting cultural diversity. However, this argument has not gained much traction when it comes to seriously testing the idea of cultural diversity in a copyright protection system.<sup>85</sup> Two examples can be given here: resale rights, and orphan works. In the first example, resale rights were designed as an individual right to benefit the author and, on his or her death, the right-holders. However, the devolution of rights can be viewed as contributing to contemporary creation, thus promoting the diversity of creation. The issue is not the same for the second example where the

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<sup>83</sup> Since cultural diversity can also be taken into account in other national policies such as education policies (especially on access to cultural content) and social policies, this approach merits special attention. The question also arises as to how economic policies can also include a cultural dimension. The European Parliament has pointed to articles not only affecting European Industrial Policy (Art. 173), competition policy (Art. 101 to 109) and trade policy (Art. 206 and 207 TFUE) but also culture (Art. 167 TFUE) as possible legal bases for a digital strategy. The theme of education will be explored in greater detail in Chapter 3.

<sup>84</sup> On this issue, see, for example, L. Richieri Hanania, *op. cit.*, Note 5.

<sup>85</sup> On this point, see, for example J. Smiers, *Arts Under Pressure. Promoting Cultural Diversity in the Age of Globalisation*, The Hague, Hivos, 2003, pp. 59 and s.

beneficiaries are unknown. Why not, in this case, also consider giving meaning to the notion of cultural diversity?

### **III. RECOMMENDATIONS TO THE INTERGOVERNMENTAL COMMITTEE AND THE CONVENTION SECRETARIAT**

In matters of adapting cultural policies to the particularities of the digital environment, the Intergovernmental Committee and the 2005 Convention Secretariat could:

- Draw up an inventory of new cultural trades and services linked to the development of digital technologies as well as new modes of production and creation based on these technologies using a questionnaire sent to all Parties. Drawing up an inventory is essential for developing truly coherent, forward-looking cultural policies. It could also provide a better understanding of how non-commercial sectors are created in this environment and of the impact of digital technologies on the dematerialization of media in the various sectors (the music and book industries, for example). It could also include an inventory of new cultural consumption practices, notably in terms of accessing, sharing and creating cultural content, which will most certainly require the development of policies governing educational institutions.<sup>86</sup>
- Seek the collaboration of civil society to document and report on the difficulties encountered by artists and cultural professionals in obtaining financial assistance and grants in the new context brought about by the proliferation of digital technologies in the cultural industry sector. A request to this effect could first be sent to the International Federation of Coalitions for Cultural Diversity (IFCCD). Based on the information obtained, new approaches to regulatory and financial assistance systems that take the changes in question into account could then be developed. We believe that artists and cultural professionals are the first to be impacted by these mechanisms and that they must therefore be able to provide input on their needs in this respect.
- Launch a call for input from the universities of the Parties with a view to organizing an international conference attracting cultural policy specialists from State governments and civil society to discuss strategies, best practices and new regulatory models adapted to the evolution of digital technologies in the cultural sector, notably based on the information in the quadrennial reports and the responses to the questionnaire regarding Article 21. This conference could give prominence to identifying digital sector cultural policies that are best adapted to the reality of developing countries.

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<sup>86</sup> On this issue, see, for example, *Nouvelles générations et culture numérique – Atelier Conseil et Stratégie numérique*, for the Forum d'Avignon 2012, *op. cit.* Note 58.

## CHAPITRE 3

### EDUCATION, PARTICIPATION OF CIVIL SOCIETY AND SUSTAINABLE DEVELOPMENT IN THE DIGITAL CULTURAL EXPRESSIONS AGE

Education, participation of civil society and sustainable development have been specified as discrete fields for the implementation of the 2005 Convention (Articles 10, 11 and 13 respectively). These are areas that are admittedly not at the centre of conventional cultural policies but rather situated in the periphery. Yet, their importance may be increased in the digital age, as it demands a better interlinked and integrated approach towards cultural diversity policies. Their essential contribution to the objective of protecting and promoting cultural diversity may also be augmented in the longer term, if we conceive of its attainment as a continuous, cross-domain and cross-generational process, which ultimately leads to mainstreaming of diversity policies.

In discussing possible avenues for better implementation of the 2005 Convention in these domains in the digital era, and as a common thread to this report, we seek to clarify two important aspects. On the one hand, we conceptualize digital media (and the Internet in particular) as a *tool*—a means for the better and more efficient attainment of the stated policy goals; on the other hand, digital media create a *specific environment*, which may demand policy changes and new approaches towards ensuring a vibrant culturally diverse environment that is also sustainable over time. Aware of these different effects and instrumentalizations of digital media, as well as cognizant of the practices, which have evolved in various ratifying parties to the Convention in the period since the Convention's coming into force, we seek to formulate recommendations for each of the domains noted – (1) education; (2) civil society participation; and (3) sustainable development. We start with a brief description of the issue areas in light of the legal basis given by the 2005 Convention and then identify the actions needed in the digital era. It may very well be the case that there are overlaps in the implementation strategies – these are only to be interpreted as fruitful, positive feedback effects.

#### I. CHALLENGES

##### I.1. Education

Although Article 10 of the 2005 Convention is framed under the broad title of 'Education and public awareness', its core message is in fact rather narrowly construed. It is meant above all to stir the Convention's parties to "encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, inter alia, through

educational and greater public awareness programmes.”<sup>87</sup> Parties are to engage in cooperation with other Parties, international and regional organizations in achieving the purpose of this article,<sup>88</sup> as well as more concretely, “encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries.”<sup>89</sup>

The Article 10 Operational Guidelines, which were adopted by the Conference of Parties in 2011, do not necessarily go beyond this narrowly defined mission and only specify that the “educational and public awareness-raising programmes and measures should highlight the distinct characteristics of this Convention and bring out its specificities in comparison to other UNESCO normative instruments in the field of culture.”<sup>90</sup> Yet, the possibilities of better interfacing cultural and educational policies are also mentioned,<sup>91</sup> and in this sense, one could argue that a basis for more comprehensive and further-reaching implementation of the 2005 Convention in the educational domain is created. Indeed, paragraph 3 of the Article 10 Guidelines refers explicitly to the necessity of adopting an integrated approach in the design and implementation of educational programmes that promote the objectives and principles of the Convention, and this “should involve strengthening the ties between culture and education at the policy, programme and institutional levels.”

The second line of implementing Article 10 of the Convention, as elaborated in the Operational Guidelines, is through the professions in the field of cultural industries, which have undergone and continue to undergo rapid changes. While this is not a particularly broad but rather a focused undertaking, it is one of the rare cases, where digital media are specifically targeted and the need to identify “skills required and gaps in training, particularly related to digital expertise”<sup>92</sup> mentioned. New information and communication technologies (ICT) are also identified as one of the channels for raising public awareness.<sup>93</sup>

## **I.2. Participation of civil society**

The 2005 Convention is a treaty between states but it is also one of the first documents at the international level that acknowledges the fundamental role of civil society<sup>94</sup> and attempts to

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<sup>87</sup> Article 10 (a) of the 2005 Convention.

<sup>88</sup> *Ibid.*, Article 10 (b).

<sup>89</sup> *Ibid.*, Article 10 (c).

<sup>90</sup> UNESCO, *Article 10 of the Convention. Operational Directives on education and public awareness*, Conference of Parties, 3rd sess., Paris, June 2011, § 2.

<sup>91</sup> *Ibid.*, §§ 3, 5 and 6.

<sup>92</sup> *Ibid.*, §§ 4.

<sup>93</sup> *Ibid.*, § 7.

<sup>94</sup> See on this point, V. Guèvremont, *The Convention on the Diversity of Cultural Expressions: Implementation and Followup – The Challenge of Concerted Action by Civil Society*, Ministère de la Culture, des Communications et de la Condition Féminine, Québec, 2007, 20 pp. For the purposes of the UNESCO Convention, civil society is defined as ‘non-governmental organizations, non-profit organizations, professionals in the culture sector and associated sectors, groups that support the work of artists and cultural communities’. See UNESCO, Article 11 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expression. Operational Directives. Role and Participation of Civil Society*, Conference of Parties, 2nd sess., Paris, June 2009, § 3.

mobilize it towards the attainment of the Convention's core objectives.<sup>95</sup> The Article 11 Operational Guidelines specify that civil society plays an essential role in the implementation of the Convention as it "brings citizens', associations' and enterprises' concerns to public authorities, monitors policies and programmes implementation, plays a watchdog role, serves as value-guardian and innovator, as well as contributes to the achievement of greater transparency and accountability in governance."<sup>96</sup> In this sense, Parties should encourage civil society's participation by associating it by appropriate means on cultural policy-making, by facilitating access to information relating to the protection and promotion of the diversity of cultural expressions, and strengthening the capacities in this field. Parties could foresee the provision of ad hoc, flexible and effective mechanisms in this regard.<sup>97</sup>

The potential of civil society to act as an innovator and agent of change in the implementation of the 2005 Convention should also be fully utilized. Parties should encourage civil society to bring new ideas and approaches to the formulation of cultural policies, as well as to the development of innovative cultural processes, practices or programmes that help achieve the objectives of the Convention.<sup>98</sup> In a manner, previously unknown in UNESCO procedures, civil society may also contribute to the work of the organs of the Convention according to certain set criteria.<sup>99</sup>

### **I.3. Sustainable development**

Sustainable is such development "that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>100</sup> Indubitably, sustainable development has emerged as one of the guiding policy principles of the 20th and 21st centuries.<sup>101</sup> Culture is recognized as one of its fundamental dimensions, although the cultural aspect was added only at a later stage and its precise meaning and policy implications still

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<sup>95</sup> Article 11 of the 2005 Convention. Reference to civil society is made, explicitly or implicitly, in several other provisions of the Convention, including articles 6, 7, 12, 15, and 19.

<sup>96</sup> Operational Guidelines Article 11, § 4.

<sup>97</sup> *Ibid.*, § 5.

<sup>98</sup> *Ibid.*, § 6.

<sup>99</sup> Operational Guidelines, Article 11, §§ 7-10 and Annex.

<sup>100</sup> World Commission Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, Part 1, Section 2, § 1.

<sup>101</sup> *Id.* The sustainability framework that emerged from discussions subsequent to those of the Brundtland Commission is made up of three elements considered to be of equal significance: (i) *economic development* – reducing and seeking to eradicate income poverty, achieving higher levels of prosperity and enabling continued gains in economic welfare; (ii) *social development* – reducing and seeking to eradicate other dimensions of poverty; improving the quality of education, health, housing and other aspects of the welfare of individuals and communities; and enhancing the quality of social interaction, engagement and empowerment; and (iii) *environmental protection* – reducing pollution and other negative impacts on the environment, mitigating the effects of industrialization and human activity, and seeking to achieve sustainable use of resources in the interest of future generations. Two further elements were added subsequently: *cultural diversity* – the continuance of diverse human cultures from past to future within a context of the globalization of communications, economy and society and the more intensive intercultural interactions that result, and *governance* – the institutional mechanisms, rules and norms that encompass decision-making and behaviour by governments, businesses and citizens, the interactions among these stakeholders and among different policy domains. See D. Souter, *ICTs, the Internet and Sustainability: A Discussion Paper*, in D. Souter and D. MacLean (eds.), *Changing our Understanding of Sustainability: The Impact of ICTs and the Internet*, Winnipeg, CA, International Institute for Sustainable Development, 2012, p. 5.

remain somewhat fuzzy.<sup>102</sup> Article 13 of the 2005 Convention was meant to create a clear link to sustainable development initiatives. It urges the Convention's Parties to "endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions." In addition, sustainable development features as one of the key principles of the UNESCO Convention and is thus meant to guide and inform all its implementation activities.<sup>103</sup>

The Article 13 Operational Guidelines clarify amongst other things that "[s]ince economic, environmental, social and cultural systems are interdependent and cannot be considered separately, sustainable development policies and measures should be formulated, adopted and implemented in concert with all the relevant public authorities in all sectors and at all levels."<sup>104</sup> The integration of culture into sustainable development policies should in particular entail acknowledgment of: (i) the fundamental role of education for sustainable development and the inclusion of culture in the different aspects of educational delivery to foster an understanding and appreciation of diversity and its expressions; (ii) recognition of the needs of women, of the various social groups mentioned in Article 7 of the Convention, and of disadvantaged geographical areas; and (iii) the use of new technologies and the expansion of networked communication systems.<sup>105</sup>

In addressing the challenge of operationalizing culture as part of sustainable development, David Throsby has suggested putting particular stress on 5 aspects. These include providing for *intergenerational* and *intragenerational equity*; underscoring the *importance of cultural diversity* (similarly to biodiversity); *approaching risk-averse situations* which may lead to destruction of cultural heritage or extinction of valued cultural practices; and considering *interconnectedness*, i.e., approaching holistically economic, social, cultural and environmental systems because of their inherent linkage.<sup>106</sup> The strategies for implementation are multi-faceted and may affect various policies<sup>107</sup> – digital technologies have not so far been instrumentalized in any particular way.

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<sup>102</sup> UNESCO, *Culture in Sustainable Development: Insights for the Future Implementation of Article 13*, by D. Throsby, UNESCO Doc CE/08/Throsby/Art.13, 14 January 2008.

<sup>103</sup> Article 6 (2) of the 2005 Convention.

<sup>104</sup> UNESCO, *Operational Guidelines on Article 13 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Integration of Culture in Sustainable Development*, Conference of Parties, Second session, Paris, June 2009, § 7.1.

<sup>105</sup> Operational Guidelines, Article 13, § 7.3. For a more detailed list of activities, which serve the goal of sustainable development in the field of culture, see also Operational Guidelines, Article 13, paragraph 8. In order to better evaluate the role of culture in sustainable development, Parties are also encouraged to facilitate the elaboration of statistical indicators, the exchange of information and the dissemination and sharing of best practices (*ibid.*, § 9).

<sup>106</sup> Throsby, *supra* Note 102. For an analysis of the principles of sustainable development application culture, see also V. Guèvremont, *Le développement durable : ce gène méconnu du droit international de la culture*, *Revue Générale de Droit International Public*, Vol. 116, No. 4, 2012, pp. 801-834.

<sup>107</sup> *World Report, Investing in Cultural Diversity and Intercultural Dialogue*, UNESCO, Paris, 2009, pp. 191–219.

## II. PRIORITY ACTION AREAS

### II.1. Education

To be sure, an effective and sustainable implementation of the 2005 Convention requires that beyond the few experts and policy makers involved, as well as the special agencies appointed to carry on activities related to the Convention's implementation, larger parts of society at all its levels understand the treaty and its purpose. The concept of "cultural diversity" does lend itself to creating a positive echo in society, and can be overtime mainstreamed and viewed as an essential element in all facets of societal life. Digital media are a superb tool for the achievement of this objective – either in targeted educational programmes or as a generic means of raising the public awareness and fostering intercultural dialogue.<sup>108</sup> As digital media can be disseminated at a relatively low cost to a large number of people and permit modularity and follow-up innovation around existing content, they can not only inform about cultural diversity but also foster creativity and exchange in their own right. As a concrete example for educational uses, one can envision for instance, in the extension of certain initiatives already undertaken by UNESCO, the creation of cultural diversity educational toolkits for early school years, which can be distributed over the Internet (or used to develop applications for digital tablets) and can through interactive forms increase knowledge and understanding of cultural heritage, contemporary cultural expressions, as well as the importance of their diversity and how this diversity can be in fact practiced and sustained.

When thinking about education as a channel to foster cultural diversity in the Internet age (in addition to clarifying and promulgating the 2005 Convention's objectives), two topics appear particularly important. The first has to do with the intensified but also appropriate use of digital media in educational programmes. The second is media literacy and we share the conviction that media literacy may indeed be central to many of the objectives of the Convention in spurring creativity but also in ensuring equity and development that is sustainable. As a caveat, it should be noted that while stressing these two themes, we leave aside multiple issues, which can be situated at the intersection of culture and education. In particular, we do not tackle those issues, which stem from addressing diversity in education with respect of minorities, traditional communities and languages, which are generally aimed at understanding and nurturing the influence of cultural processes to improve learning outcomes in the schoolroom and education policies.<sup>109</sup>

With regard to aspect of using digital media in education appropriately, it should be acknowledged that digital media are already part of the curriculum in schools and in higher education almost in all industrialized countries in multiple and diverse utilization forms (such as educational software, curriculum materials, gaming, mobile computing, and social networks).<sup>110</sup>

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<sup>108</sup> *Ibid.*

<sup>109</sup> See UNESCO Office in Santiago, *Cultural Diversity in Education*, <http://www.unesco.org/new/en/santiago/education/cultural-diversity-in-education/> (last accessed in November 2013).

<sup>110</sup> See, for example, European Commission, *Survey of Schools: ICT in Education: Benchmarking Access, Use and Attitudes to Technology in Europe's Schools*, Study prepared for the European Commission, 2013.

It has been argued that digital media have in many senses transformed learning and classroom practices.<sup>111</sup> While this report does not permit an in-depth elaboration of the implications of digital media use in education, we would like to stress that as a matter of long-term fostering of creativity and active cultural expressions, there is a distinct need to adequately address and accommodate the perceptions and wants of the *digital natives*, i.e., those generations of young people born post-1980, with both access to digital technologies and the skills to use them.<sup>112</sup> Digital natives may function differently in the new media environment and have profoundly different understandings of engaging in cultural processes, both online and offline.<sup>113</sup> In some instances, this may call for active engagement by the state or state agencies in new media platforms, or for the creation of specialized platforms with a public interest objective, also for the protection and promotion of cultural diversity.

There is a delicate balance that needs to be attained in this exercise. Key values, such as privacy and prevention of hate speech, must be appropriately addressed, so as to create an environment that is conducive to cultural exchange but is also trusted and secure. At the same time, the degree of intervention must not be so high as to prevent forms of innovation and expressive freedom.<sup>114</sup> There may also be a need to review elements of the existing copyright law, so that access to and use of educational materials is facilitated and uninhibited learning processes enabled.<sup>115</sup> Best practices on open access policies need to be developed and continuously improved.<sup>116</sup>

In designing such policies, there will be a marked difference between developed and developing countries. With regard to shaping policies in developing countries, as well as to cooperation between developed and developing countries in the field of education and digital media, the first-tier of issues will primarily relate to bridging the digital divide.<sup>117</sup> Questions of providing for connectivity will be critical and aid should aim at providing a basic level of networks, hardware and software, so that access to the Internet is adequately secured. This does not however mean that measures, which ensure providing a computer or a mobile phone connected to the Internet

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<sup>111</sup> See, for example, C.N. Davidson and D.T. Goldberg, with the collaboration of Z.M. Jones, *The Future of Thinking. Learning Institutions in a Digital Age*, Cambridge, MIT Press, 2010, 316 pp.; M.J. Chien, *Digital Media's Transformative Role in Education: Beyond Potential to Essential*, Ph.D. thesis, University of Denver, November 2012.

<sup>112</sup> J. Palfrey and U. Gasser, *Born Digital. Understanding the First Generation of Digital Natives*, New York, Basic Books, 2010, 400 pp.

<sup>113</sup> *Id.*; also M. Ito, et al., *Hanging Out, Messing Around, and Geeking Out. Kids Living and Learning with New Media*, Cambridge, MIT Press, 2010, 419 pp.

<sup>114</sup> J.C. Maclay, G. Beger, U. Gasser and J. Palfrey, *Digital Safety for Young people: Gathering Information, Creating New Models and Understanding Existing Efforts*, UNICEF, *The State of the World's Children 2011: Adolescence: An Age of Opportunity*, New York, UNICEF, 2011, pp. 50 and 51. See also all publications by the Youth and Media project of the Berkman Center for Internet and Society, available at <http://youthandmedia.org/publications/papers/all/> (last accessed in November 2013).

<sup>115</sup> See, for example, W. McGeeveran and W.W. Fisher, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, Berkman Center Research Publication Coll., No. 2006-09, Berkman Center for Internet and Society, August 2006.

<sup>116</sup> See, for example, S. Shieber and P. Suber (eds.), *Good Practices for University Open-Access Policies*, Cambridge, Harvard Open Access Project et Berkman Center for Internet and Society, 30 September 2013.

<sup>117</sup> See, for example, P. Norris, *Digital Divide. Civic Engagement, Information Poverty, and the Internet Worldwide*, Cambridge, Cambridge University Press, 2001, 303 pp. See also Chapter 1 of the present report.



would necessarily and automatically close the gap. To the contrary, over the years, it has been acknowledged that there exist no ‘one-size-fits-all’ solutions, as developing countries have proved to be profoundly diverse with starkly different economic, social and institutional conditions, and technology adoption patterns.<sup>118</sup> There has been a growing understanding that measures for bridging the global digital divide must use tailor-made tools<sup>119</sup> that are meant to provide not only one-off aid but also conditions for sustainable access to information, which go far beyond cheap computers to involve local capacity-building and deeper social and institutional reforms.<sup>120</sup> The parties to the 2005 Convention should follow the existing best practices in this respect and contribute to a better understanding of which tools work and how they relate to active participation in cultural processes within local and global communities.<sup>121</sup>

It should above all not be forgotten that connectivity is nothing but the first tier. As the Internet becomes ubiquitous and penetrates all facets of contemporary societal life, new and different tiers of division and discrimination seem to emerge. In the national context of industrialized countries, experience shows that what was considered the original digital divide is largely resolved and today ‘the digital divide resides in differential ability to use new media to critically evaluate information, analyze, and interpret data, attack complex problems, test innovative solutions, manage multifaceted projects, collaborate with others in knowledge production, and communicate effectively to diverse audiences – in essence, to carry out the kinds of expert thinking and complex communication that are at the heart of the new economy’.<sup>122</sup>

This “second” digital divide presents a much greater challenge. It relates in essence to *digital literacy*, i.e., to the set of skills needed to efficiently and effectively navigate in cyberspace, to create, contribute, distribute, access, use and re-use content.<sup>123</sup>

Although the use of digital media in contemporary societies is on the rise, there should not be an automatic presumption for digital literacy: “People who play Farmville on Facebook may (or may not) have the skills they need to search for information about jobs, education and health care. For young people today, it is vital that formal education begin to offer a bridge from the

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<sup>118</sup> See, for example, J. Cave and al., *Trends in Connectivity Technologies and their Socioeconomic Impacts*, Cambridge, Rand, 2009, p. iii.

<sup>119</sup> See, for example, B. Sanyal and D. Schön, “Information Technology and Urban Poverty: The Role of Public Policy,” in D. Schön, B. Sanyal and W.J. Mitchell (eds.), *High Technology and Low-Income Communities. Prospects for the Positive Use of Advanced Information Technology*, Cambridge, MIT Press, 1998, pp. 371-394, in particular pp. 375-376.

<sup>120</sup> World Bank, *Building Local Capacity for ICT Policy and Regulation: A Needs Assessment and Gap Analysis for Africa, the Caribbean, and the Pacific. Supply Analysis*, Working document No., January 2008, [http://www.infodiv.org/infodiv-files/resource/InfodivDocuments\\_508.pdf](http://www.infodiv.org/infodiv-files/resource/InfodivDocuments_508.pdf) (last accessed in November 2013); ITU and UNCTAD, *World Information Society Report 2007. Beyond WSIS*, Genève, UIT, 2007, pp. 56-78. For a theoretical analysis, see M. Warschauer and M. Warschauer, “Whither the Digital Divide?,” in D. Lee Kleinman et al. (eds.), *Controversies in Science and Technology*, Vol. 2, *From Climate to Chromosomes*, New Rochelle, Liebert, 2008, pp. 140-151, in particular pp. 147–149.

<sup>121</sup> The above paragraph is based on M. Burri, *The Global Digital Divide as Impeded Access to Content*, in M. Burri and T. Cottier (eds.), *Trade Governance in the Digital Age*, Cambridge, Cambridge University Press, 2012, pp. 396-420.

<sup>122</sup> M. Warschauer and T. Matuchniak, *New Technology and Digital Worlds: Analyzing Evidence of Equity in Access, Use, and Outcomes*, *Review of Research in Education*, Vol. 34, No. 1, 2010, pp. 179-225, in particular p. 213.

<sup>123</sup> E. Hargittai, *Digital Na(t)ives? Variation in Internet Skills and Uses among Members of the “Net Generation”*, *Sociological Inquiry*, Vol. 80, No. 1, 2009, pp. 92-113. For other digital inequality classifications, see M. Warschauer, *Reconceptualizing the Digital Divide*, *First Monday*, Vol. 7, No. 7, 2002; M. Warschauer, *Technology and Social Inclusion. Rethinking the Digital Divide*, Cambridge, MIT Press, 2003, 274 pp.

often insular and entertainment-focused digital culture of the home to a wider, broader range of cultural and civic experiences that support their intellectual, cultural, social and emotional development.”<sup>124</sup>

At the same time, it should also be acknowledged that digital literacy has become key in the national cultural and educational policies of many countries,<sup>125</sup> very often as a subset of a media literacy agenda, which does not discriminate between online and offline media but approaches them in a technologically neutral manner. The European Union (EU) is a leading example in this regard. The EU has identified media literacy as a priority for the 21st century and taken a number of measures to enhance it across generations. Amongst other things, focus is put on the active involvement of the industry, including all types of media, in the promotion of media literacy initiatives; on the role that the education system can play to promote media literacy as the ability to access media and to understand, critically evaluate, create and communicate media content in the context of EU Member States’ lifelong learning strategies; as well as on initiatives to encourage greater consensus on media literacy, by supporting the analysis and exchange of good practices between Member States and the development of better tools to measure levels of media literacy across Europe.<sup>126</sup> The UNESCO *Lifelong Learning and E-Learning* initiatives could use these measures to develop new strategies for the use of digital technologies.

With regard to educational activities to harness media literacy, it is particularly noteworthy that “cultural awareness and expression” is underscored as one of the key competences.<sup>127</sup> Following this model, it should be noted that there is overall a need to prioritize digital literacy and to design efficient measures that address it in educational, community and cultural contexts, so that not only literacy is enhanced and appropriately used in everyday life but so that the benefits from the expanding media landscape are spread to all.<sup>128</sup>

Finally, as to the last strategic component mentioned in Article 10 with regard to encouraging creativity and production in the cultural industries, there has been some experience already with digital media, and this has been evaluated as highly positive. Indeed, digital media have been conceptualized in many countries as the way to improve efficiency and enhance innovation in the creative industries, often as an element of broader policy agendas.<sup>129</sup> Even in high-cost cultural sectors, like film and TV production, digital media can be beneficial. The UK

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<sup>124</sup> R. Hobbs, *Digital and Media Literacy. A Plan of Action. A White Paper on the Digital and Media Literacy Recommendations of the Knight Commission on the Information Needs of Communities in a Democracy*, Washington, Aspen Institute, 2010, p. 25.

<sup>125</sup> See, for example, D. Frau-Meigs and J. Torrent (eds.), *Mapping Media Education Policies in the World. Visions, Programmes and Challenges*, New York, United Nations Alliance of Civilizations, 2009.

<sup>126</sup> See Council conclusions on media literacy in the digital environment, 2978th Education, Youth And Culture Council meeting, Brussels, 27 November 2009.

<sup>127</sup> See *Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning*, O.J. L 394, 30.12.2006, p. 12.

<sup>128</sup> H. Jenkins et al., *Confronting the Challenges of Participatory Culture. Media Education for the 21st Century*, Cambridge, MIT Press, 2009; also Study Commission on the Internet and Digital Society, *Media Literacy*, Second Progress Report, German Bundestag, 17th legis., 21 October 2011, No. 17/7286.

<sup>129</sup> See, for example, UK Department for Culture, Media and Sport, *Digital Britain*, Final Report, June 2009, particularly pp. 105–134.

example for industrialized countries and Nollywood for developing ones are illuminating.<sup>130</sup> The growing importance of the digital games industry can also be mentioned as an illustration in this regard.<sup>131</sup> Parties to the 2005 Convention can build upon best practices in these areas. A caution may be voiced as to the need to keep up a balance between economic and cultural interests (this may be compromised, e.g. by providing tax breaks to game production companies, which do not necessarily deliver diverse content<sup>132</sup>). Finally, in order to allow true innovation, which uses fully the affordances of digital technologies, there is also a strong need for legal certainty for creative businesses. This need is particularly felt in the field of copyright – for instance, with regard to licensing, orphan works and intermediaries’ liability.<sup>133</sup>

## II.2. Participation of civil society

Digital media have an important role to play in all key aspects of enhanced participation of the civil society mentioned in Article 11 of the 2005 Convention. We address in particular the potential given by digital technologies to foster participation of the civil society, so that transparency and debate on the implementation of the Convention are advanced. On the other hand, we stress the role of civil society in suggesting and implementing innovative practices using digital technologies to better and more efficiently contribute to the achievement of the Convention’s objectives.

First, it should be noted that digital technologies through their intrinsic characteristics of low entry thresholds, global reach and instantaneous communication to millions, have significantly transformed patterns of social participation, of engagement, community building and cohesion in national and global contexts.<sup>134</sup> Overall by changing the economics and logistics of information and communication, the Internet has offered powerful facilities for groups and organizations operating outside conventional power structures. Civil society institutions have been “early adopters” and have successfully used the digital technologies’ affordances to further their goals in critical areas such as human rights, development and climate change, as well as in discrete topics immediately relevant to the 2005 Convention, such as the protection of traditional cultural expressions and minority languages.<sup>135</sup> We have seen a proliferation of both communities and online activities, including for the exercise of social accountability, crowdsourcing of activism, enabling of international solidarity, and real-time organization of

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<sup>130</sup> See generally M. Burri, *Cultural Protectionism 2.0: Updating Cultural Policy Tools for the Digital Age*, in S. Pager and A. Candeub (eds.), *Transnational Culture in the Internet Age*, Cheltenham, Edward Elgar, 2011, pp. 182-212; see also S. Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?* in S. Pager and A. Candeub (eds.), *ibid.*, pp. 262-287.

<sup>131</sup> PWC, *Global Entertainment and Media Outlook: 2013-2017*, London, PricewaterhouseCoopers, 2013.

<sup>132</sup> See C.B. Graber, *State Aid for Digital Games and Cultural Diversity: A Critical Reflection in the Light of EU and WTO Law*, in C.B. Graber and M. Burri-Nenova (eds.), *Governance of Digital Game Environments and Cultural Diversity. Transdisciplinary Enquiries*, Cheltenham, Edward Elgar, 2010, pp. 170-201.

<sup>133</sup> See, for example, *Digital Britain*, *supra* Note 129; see also *Creative Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document of the European Commission, 22 October 2009, 21 pp.

<sup>134</sup> B. Cammaerts, *Critiques on the Participatory Potentials of Web 2.0*, in *Communication, Culture and Critique*, Vol. 1, No., 2008, pp. 358-377; Y. Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom*, New Haven, Yale University Press, 2006, 527 pp.; C.R. Sunstein, *Republic.com 2.0*, Princeton, Princeton University Press, 2007, 272 pp.

<sup>135</sup> J. Naughton, *Contested Space: The Internet and Global Civil Society*, in H. Anheier, M. Glasius and M. Kaldor (eds.), *Global Civil Society 2001*, Oxford, Oxford University Press, 2001, pp. 147-168.

offline protest.<sup>136</sup> The voices of the civil society have in the digital networked environment become more audible, as some recent cases, such as the contestation of the Anti-Counterfeiting Trade Agreement (ACTA) and its subsequent effect on real politics, have proved.<sup>137</sup>

The picture is however complex and there are also negative sides to be considered. The democratizing potential of the Internet is seriously undermined by the digital divide: the gap between the 'information rich', concentrated mostly in developed countries and the 'information poor' in the rest of the world is still alarmingly wide.<sup>138</sup> This unequal distribution of resources leads to unequal representation of interests and topics in the online space, which naturally impacts overall public discourse. The global civil society may be therefore often insufficiently strong for any actual institutional change and for real action towards sustainable provision of global public goods.<sup>139</sup>

Linking up to the digital literacy discussion, it appears also that the level of sophistication of the digital skills is critical to ensure real participation, as users' behaviour studies,<sup>140</sup> as well as the acts of mobilizing communities in the recent Arab revolutions<sup>141</sup> show. A recent more comprehensive study has also found that digital media literacy education is associated with increased online political engagement and increased exposure to diverse perspectives.<sup>142</sup> In this sense, there is a strong need to understand and redress the noted imbalances as integral part of economic, social, and cultural development policies.<sup>143</sup>

In addition, awareness ought to be raised with regard to multiple activities by authoritarian but also some democratic governments to control the Internet, often justified by references to national security and crime prevention, and exercised through ever more sophisticated means of surveillance, censorship and blocking of access.<sup>144</sup> More generally, as the importance of the Internet for all domains of societal life increases, the number of interventions and attempts to change its architecture in order to render the system more closed and controllable also steadily grows.<sup>145</sup> The benefits of the Internet as an enabling space for participation of the civil society, as well as for cultural expression, communication and exchange may be thereby seriously diminished. These debates have so far remained somewhat distant to core cultural diversity policies but there may be an urgent need to holistically approach these topics, also because this

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<sup>136</sup> Civicus. World Alliance for Citizen Participation, *State of Civil Society 2013: Creating an Enabling Environment*, 2013, 303 pp.

<sup>137</sup> See, for example, *Freedom on the Net 2012. A Global Assessment of Internet and Digital Media*, Washington, Freedom House, 2012, 662 pp.

<sup>138</sup> J. Naughton, *op. cit.*, Note 135.

<sup>139</sup> I.M. Hoofd, *Ambiguities of Activism. Alter-Globalism and the Imperatives of Speed*, Abdington, Routledge, 2012, 148 pp.

<sup>140</sup> E. Hargittai, *op. cit.*, Note 123.

<sup>141</sup> See, for example, *Profile: Egypt's Wael Ghonim*, *BBC News*, 9 February 2011.

<sup>142</sup> J. Kahne, J.T. Feezell and N. Lee, *Digital Media Literacy Education and Online Civic and Political Participation*, DML Central Working Papers, Youth & Participatory Politics, 9 December 2010, 25 pp.

<sup>143</sup> J. Naughton, *op. cit.*, Note 135.

<sup>144</sup> R. Deibert et al. (eds.), *Access Denied. The Practice and Policy of Global Internet Filtering*, Cambridge, MIT Press, 2009, 472 pp.; R. Deibert, J. Palfrey, R. Rohozinski and J. Zittrain (eds.), *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, Cambridge, MIT Press, 2010, 634 pp.; R. Deibert, J. Palfrey, R. Rohozinski and J. Zittrain (eds.), *Access Contested: Security, Identity, and Resistance in Asian Cyberspace*, Cambridge, MIT Press, 2011, 432 pp.

<sup>145</sup> J. Naughton, *op. cit.*, Note 135; see also J. Palfrey, *Four Phases of Internet Regulation*, *Social Research*, Vol. 7, No. 3, Fall 2010, Berkman Center Research Publication Collection, No. 2010-9, Berkman Center for Internet and Society, pp. 1-22.

may be absolutely critical to sustaining the diversity of cultural expressions in a digitally networked environment.<sup>146</sup>

Civil society may be an important agent of change and innovative entrepreneur on the plan to adapt the 2005 Convention to the digital environment. As civil society representatives are often locally based yet globally connected, they may be better positioned than state agencies to engage in a bottom-up manner and protect and promote cultural practices in ways that both better suit the local communities and are more cost-efficient. Digital technologies may be an excellent tool to both amplify voices and serve local needs, and examples from community radio projects, multilingual blogging or indigenous music promotion illustrate this.<sup>147</sup> Communities, such as *Global Voices*,<sup>148</sup> which brings together more than 700 authors and 600 translators who report on blogs and citizen media from around the world, with emphasis on voices that are not ordinarily heard in international mainstream media, are indeed the very expression of such an engagement and actively contribute to diversity.

### II.3. Sustainable development

Before we discuss selected aspects of the policies integrating culture and sustainable development, where digital media appear of immediate relevance, it should be noted that although there is a clear link between the changing ICT environment and sustainability and although potentially there can be significant improvements to our current approach to sustainable development due to ICT advances, there is still insufficient attention paid in practice.<sup>149</sup> The matrix of ICT, sustainable development and culture is practically unexplored so far.

In this sense, we would like to first stress the need to better understand the impact of digital technologies on the present and future of cultural practices and the effect on the diversity of cultural expressions in sub-national, national, regional and global contexts. It is also critical to raise the awareness of the intrinsic link between cultural diversity and sustainable development, and how it can be enhanced under the conditions of digital media. To be sure, understanding the relationship between digital media and sustainability demands a comprehensive analysis, which “must concern itself with the long-term structural changes that evolve as a result of iterative and recursive interactions between those technologies, societies, economies, power structures and cultural identities.”<sup>150</sup>

Without any claim for exhaustion, in the following we would like to stress a few channels, which may be particularly advantageous for sustaining cultural diversity in the digital age. Keywords in this context are *access*, *creativity* and *digitally connecting the past, present and the future*.

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<sup>146</sup> M. Burri, *op. cit.*, Note 130.

<sup>147</sup> See, for example, M. Burri, *op. cit.*, Note 121.

<sup>148</sup> Global Voices, <http://globalvoicesonline.org/about/> (last accessed in November 2013).

<sup>149</sup> D. Souter and D. MacLean, *ICTs, the Internet and Sustainability: Where Next?*, in D. Souter and D. MacLean (eds.), *op. cit.*, Note 101, p. 13. See also D. Souter et al., *ICTs, the Internet and Sustainable Development: Towards a New Paradigm*, Winnipeg, International Institute for Sustainable Development, 2010, 40 pp.

<sup>150</sup> D. Souter and D. MacLean, *op. cit.*, Note 101, p. 7.

## A. Access

Digital technologies have certainly had an impact on the ways cultural content is created, distributed, access and consumed, as discussed earlier. Some have even argued that the abundance of content is such that it renders cultural policy redundant.<sup>151</sup> While we disagree with this suggestion, we should acknowledge that content (taken broadly in the sense of words, sounds, moving and still images) is now critical. Content is the driver of digital infrastructures, technology and services, of new business and consumer behaviour patterns, and not the other way around. Demand for high-quality, enriched digital content is also expected to continue to grow and so its importance for other fields of governance.<sup>152</sup>

While under the conditions of the digital networked environment, content may have proliferated, this does not automatically mean that it is readily accessible. There are barriers of different types: (i) placed at the infrastructural level (e.g. no access to broadband Internet or failing networks); (ii) placed at the hardware/software level (e.g. lack of interoperability between different types of platforms or software); or (iii) placed at the content level (e.g. due to copyright protection or other fences imposed for instance, through technological protection measures, such as digital rights management systems [DRM]). The barriers could also be of societal character. We conceptualized lacking media literacy as a key hindrance in this regard.

All of these barriers impede the access to cultural content, the engagement in active intercultural dialogue or various creative activities, thus distorting the conditions for a vibrant culturally diverse environment. The trouble when designing appropriate measures to dismantle these barriers to cultural content and foster participation is that they fall in different, often disconnected, policy areas. So, while core cultural policy instruments in the field of protecting cultural heritage remain valid and needed, it could be that in the digital age, many of the critical decisions affecting the conditions for cultural diversity and its sustainability will fall outside the classic cultural policy domain. Questions of telecommunications networks, of standards, of intermediaries' liability and Internet governance may become immediately relevant. This clearly calls for adopting a holistic approach and interlinking policy domains, so that appropriate instruments and measures are designed. Appropriate governance mechanisms, also perceived as fundamental dimensions of sustainable development, appear in this sense crucial.

## B. Creativity

When thinking more broadly about creativity as the parameter that would secure sustainable cultural diversity in the long run, the challenge is even bigger. Although it is widely recognized that culture, creativity and innovation are core factors in social and economic development, few countries have managed to integrate these concerns into a single coherent approach, or to incorporate them into mainstream policy-making. This is partly related to the different

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<sup>151</sup> See, for example, C. Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York, Hyperion, 2006, 256 pp.

<sup>152</sup> See, for example, a study produced for the European commission, *Interactive Content and Convergence: Implications for the Information Society*, by Screen Digest, October 2006, 88 pp.

regulatory histories and different lobbying groups, and the path dependencies associated with each of these domains.<sup>153</sup> As the Economy of Culture in Europe study acknowledges fostering creativity requires thinking and operating in a transversal manner as it touches upon many policy areas, such as education, social policy, innovation, economic growth, and sustainability.<sup>154</sup>

In terms of promoting creativity, it should also be acknowledged that once established, digital capacity is exploited in all sorts of ways, including many that are unexpected. Today's huge expansion of digital creativity, often on a private, personal and non-commercial basis, may have little economic impact, but has a huge social and cultural impact.<sup>155</sup> Policy-makers should make sure that their actions support and do not restrict such developments.<sup>156</sup> In application of the precautionary principle, policy-makers should carefully observe the evolving processes and sometimes adopt a "do no harm" stance, rather than intervene with consequences potentially detrimental to creativity. At the same time, as earlier noted, a level of trust and security is also important for the unfolding of creativity online.

When confronted with such complex, multi-directional developments, Parties to the UNESCO Convention should compare data and instruments, assess their impact, and move towards best practices in discrete policy areas, as well as in cross-domain holistically designed agendas. As an element of uncertainty remains, such policies should also be adaptive and allow for correction mechanisms.<sup>157</sup> The UNESCO Convention Parties should also use these policy initiatives to continuously underscore the critical impact of culture in creativity.<sup>158</sup>

### C. Digital memory institutions

Digitalization allows all sorts of data – be it audio, video, text or still images – to be expressed in binary digits, in lines of zeroes and ones. This offers the unprecedented opportunity to digitize all cultural heritage, making it available and connected to present cultural processes, as well as retrievable for future generations. This opportunity has been seized by many nations, although developing and poorer countries are clearly lagging behind because of the resource intensive character of digitalization projects. The EU has been amongst the leading actors. It has emphasized the political objective of making Europe's cultural heritage and scientific records accessible to all, while at the same time bringing out its full cultural and economic potential. Various initiatives have followed up this objective leading towards *Europeana*: the European Digital Library, as a multilingual common access point to Europe's distributed cultural heritage.<sup>159</sup> *Europeana*<sup>160</sup> was launched in November 2008 and allows Internet users to search

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<sup>153</sup> European Parliament, *Cultural and Creative Industries*, IP/B/CULT/FWC/2006\_169, 31 May 2007, p. iii.

<sup>154</sup> KEA European Affairs, *The Economy of Culture in Europe*, Study prepared for the European Commission, October 2006, p. 199.

<sup>155</sup> See, for example, Y. Benkler, *op. cit.*, note 134; see also E. Von Hippel, *Democratizing Innovation*, Cambridge, MIT Press, 2005, 216 pp.

<sup>156</sup> See, for example, *Cultural and Creative Industries*, *op. cit.*, Note 152, p. 6.

<sup>157</sup> See, for example, D. Souter et al., *op. cit.*, Note 149.

<sup>158</sup> KEA European Affairs, *The Impact of Culture on Creativity*, Study prepared for the European Commission, June 2009.

<sup>159</sup> European Commission, *Europeana: Next Steps*, COM(2009) 440 final, 28 August 2009; also European Commission, *i2010: Digital Libraries*, COM(2005) 465 final, 30 September 2005.

<sup>160</sup> Europeana, <http://europeana.eu> (last accessed in November 2013).

and get direct access to digitized books, maps, paintings, newspapers, film fragments and photographs from Europe's cultural institutions. Presently some 29 million objects from more than 2,200 institutions from 36 countries are made available on *Europeana* with numbers constantly rising.<sup>161</sup> The content is also socially connected in various sites and platforms, available through an iPad app, downloadable and malleable under different copyright licensing regimes (such as the creative commons licence). In this sense, *Europeana* not only aggregates content but builds an open, trusted source of cultural heritage, which is also meant to engage users in new ways of participating in their cultural heritage, facilitate knowledge transfer, innovation and advocacy in the cultural heritage sector. The user-friendly format very often also involves teaching basic digital literacy skills, so that users can make the best of both the digital affordances and the content available.

The challenges related to digitalization projects like *Europeana* are however multiple. Some of them may be of technical character relating for instance to compatibility of different formats and standards, or to the availability and quality of metadata. Many others stem from the intellectual property barriers to digitalization – to access to contemporary works and dealing with orphan works. These issues are by no means trivial and demand discussions with various stakeholders, so that solutions that serve both public and private interests are found.<sup>162</sup>

The Parties to the UNESCO Convention may foster these debates, as well as make sure that know-how is shared with developing countries too. Building upon such examples, one can also argue that digital media can be seen in general as an opportunity for policy innovation in the field of cultural policy-making, which is often somewhat path-dependent.

### **III. RECOMMENDATIONS TO THE INTERGOVERNMENTAL COMMITTEE AND THE CONVENTION SECRETARIAT**

In matters of education, civil society participation and the integration of culture into sustainable development, the Intergovernmental Committee and the 2005 Convention Secretariat could:

- Encourage “digital literacy,” which is understood as “ensuring greater mastery of the new information and communication technologies, which should be seen both as educational discipline and as pedagogical tools capable of enhancing the effectiveness of educational services” (paragraph 9 of the Action Plan appended to the 2001 Universal Declaration on Cultural Diversity). This initiative must not lead merely to a one-time project, but rather to a flexible and more evolutive approach by educational institutions and similar organizations. As such, careful consideration must be given to determining the tools best suited to enable individuals and groups to participate actively in the creation, distribution and use of cultural content. Statistically documenting the impact of

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<sup>161</sup> *Europeana, Facts & Figures*, <http://pro.europeana.eu/web/guest/about/facts-figures> (last accessed in November 2013).

<sup>162</sup> See *Europeana Strategic Plan 2011-2015*, [www.pro.europeana.eu/c/document\\_library/get\\_file?uuid=c4f19464-7504-44db-ac1e-3ddb78c922d7&groupId=10602](http://www.pro.europeana.eu/c/document_library/get_file?uuid=c4f19464-7504-44db-ac1e-3ddb78c922d7&groupId=10602) (last accessed in November 2013).



the digital divide on the mastery of new technologies would be a good first step. This task could be entrusted to the UNESCO Institute for Statistics (UIS).

- Formulate a strategy to use social media to stimulate a more active involvement of civil society in the implementation of the 2005 Convention. Given that civil society representatives are often in closer touch with local communities and better connected at the international level, they can represent the concerns of artists and cultural professionals more efficiently and more faithfully and, at the same time, respond to their needs.
- Prepare an action plan to encourage the Parties to implement Paragraph 7.3 of the Operational Guidelines for Article 13, which specifies that “[t]he integration of culture into sustainable development policies entails acknowledgement, in particular of [...] the use of new technologies and the expansion of networked communication systems.” As a first step, the Parties could be asked to inform the Intergovernmental Committee of measures they have already adopted in this respect. After studying the responses, and if few measures have been implemented, such an action plan could be drawn up.

## CHAPTER 4

### TRADE NEGOTIATIONS AND OTHER DISCUSSION FORUMS RELEVANT TO THE DIVERSITY OF DIGITAL CULTURAL EXPRESSIONS

#### I. CHALLENGES

The 2005 Convention is evolving in a constantly shifting legal environment. Even before the Convention saw the day, agreements negotiated and implemented in various fields of international law were already having an impact on the diversity of cultural expressions, which raised the international community's awareness of its fragility and vulnerability. It is against this backdrop that negotiations on a binding legal instrument to protect and promote the diversity of cultural expressions began in 2003.

Ten years later, the diversity of cultural expressions remains fragile and vulnerable. Prior and subsequent treaties continue to have an impact on the policies and measures implemented by States to protect and promote this diversity. The provisions of Part V of the 2005 Convention devoted to the "relationship to other treaties" are thus crucial for managing the interactions and overlaps between relevant legal instruments. In addition, while other instruments may restrict the rights that the Parties recognized in adopting the 2005 Convention, they can also be major levers for disseminating its objectives and principles within other international forums.<sup>163</sup>

Digital technologies do not significantly affect the implementation of the provisions of Part V, however they encourage the Parties to revisit instruments that may have an impact on the diversity of digital cultural expressions. This section proposes a few areas that the Parties to the 2005 Convention should concentrate on when implementing articles 20 and 21 and makes some recommendations in this regard.

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<sup>163</sup> This dissemination is also driven by the recognition of the cultural dimension of sustainable development, as set out in Article 13 of the 2005 Convention. On this point, see V. Guèvremont, *La reconnaissance du pilier culturel du développement durable : vers un nouveau mode de diffusion des valeurs culturelles au sein de l'ordre juridique mondial*, *Annuaire Canadien de Droit International*, Vol. 50, 2012, pp. 163-195.

## II. PRIORITY ACTION AREAS

Articles 20 and 21 of the 2005 Convention are at the junction of the commitments of the Parties to protect and promote the diversity of cultural expressions and the pursuit of other objectives in various international cooperation forums and compliance with their commitments under other agreements. This linkage and quest for coherence in the evolution of international law, which the Parties envisaged in terms of “mutual supportiveness, complementarity and non-subordination,”<sup>164</sup> is of particular importance for the negotiation and implementation of multilateral, regional and bilateral trade agreements (II.1). They also apply to the objectives set out in other legal instruments in various international cooperation forums (II.2).

### II.1. Trade agreements

#### A. WTO multilateral trade agreements

Despite the Doha Round impasse, the Members of the World Trade Organization (WTO) have been working on an “e-commerce” program for some fifteen years.<sup>165</sup> An Activity Report published in 1999 documents developments in the first year of work and the common interpretation reached on the following aspects of e-commerce linked to services: “electronic services delivery (ESD)” falls under the jurisdiction of the General Agreement on Trade in Services (GATS)<sup>166</sup> since the Agreement “applies to all services regardless of the means by which they are delivered;” “the GATS is technologically neutral” in the sense “that the electronic supply of services does not alter specific commitments unless otherwise specified” in the commitments of the Members; and the application of “all the provisions of the GATS [...] concerning the electronic delivery of services.”<sup>167</sup> A list of ten topics to be discussed in greater detail was drawn up, including the classification of new e-commerce services and their inclusion in schedules; a distinction between modes 1 (cross-border trade) and 2 (consumption abroad) in the case of electronic services delivery; and the issue as to whether certain electronically delivered products must be considered as goods (with the consequence that they would then be subject to the disciplines of the GATT rather than to those on services).<sup>168</sup> Since the publication of this Report, very little progress appears to have been made in these areas.<sup>169</sup> A number of

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<sup>164</sup> Article 20 of the 2005 Convention.

<sup>165</sup> The *Work programme on electronic commerce* was adopted by the General Council on 25 September 1998, [http://www.wto.org/english/tratop\\_e/ecom\\_e/wkprog\\_e.htm](http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm) (last accessed in November 2013). For program purposes, the term “electronic commerce” is understood to mean “the production, distribution, marketing, sale or delivery of goods and services by electronic means.” (§ 1.3). The adoption of the Work programme followed in the wake of the *Declaration on Global Electronic Commerce* adopted at the Ministerial Conference in Geneva, WT/MIN(98)/DEC/2, 25 May 1998.

<sup>166</sup> This interpretation was confirmed in the Appellate Body report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005 and *China – Audiovisuals*, WT/DS363/AB/R, 21 December 2009.

<sup>167</sup> WTO / Council for Trade in Services, *Work Programme on Electronic Commerce. Progress Report of the General Council*, S/C/W/8, 31 March 1999, pp. 1 and 2.

<sup>168</sup> *Ibid.*, p. 2.

<sup>169</sup> The WTO web page discussing the *Work Programme on E-Commerce* states that “[t]he current state of play [...] is still best summed up by a progress report produced by the GATS Council in 1999.” The page also mentions that “the service negotiations appear to be proceeding under an implicit assumption that e-commerce is an integral part, rather than a separate item, of what

issues thus still need to be addressed concerning the applicability of WTO rules and the legal effects of the use of digital technologies in the trade of goods and services. There are still a number of unanswered questions concerning trade in digital cultural goods and services.

Trade in cultural goods and services is regulated by WTO multilateral trade agreements. It has long been recognized that cultural goods fall into the field of application of GATT while cultural services are governed by GATS. However, the dematerialization of certain cultural goods (such as books and films) and the emergence of new cultural goods and services (applications for digital tablets, for example) could create problems for classifying these products (goods and/or services) and applying the relevant regulations.<sup>170</sup> While certain disputes have led the WTO Appellate Body to advocate the cumulative application of GATT and GATS,<sup>171</sup> this approach could make it difficult to interpret the commitments of Members when a given product, that may fall within the scope of both agreements, is subject to different commitments under the two texts.<sup>172</sup>

The emergence of new digital cultural products also raises questions about the classification systems used to date by Members to draw up their schedules of commitments. For trade in commodities, the Members use the nomenclature of the Harmonized Commodity Description and Coding System (HS) of the World Customs Organization (WCO).<sup>173</sup> While this system is used as a reference by most States and other organizations like the European Union, despite the numerous changes made to it since its inception, it poses certain difficulties with regard to the classification of new products, especially when these products involve digital technologies.<sup>174</sup>

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is being covered by rule-making and access negotiations.” WTO, GATS Training Module, *Work Programme on E-Commerce*, [http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c6s5p2\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c6s5p2_e.htm) (last accessed in November 2013).

<sup>170</sup> The OECD report entitled *Multilateralizing Regionalism: the Case of E-Commerce*, Working Party of the Trade Committee, TAD/TC/WP(2009)42/FINAL, 27 July 2010, p. 8, notes for example that WTO members “were unable to reach a common understanding on whether digital products, specifically those products such as software, music, films, etc., which can be either downloaded or traded in physical form, are goods or services, hence covered by GATT or GATS. The categorization of audiovisual downloads, which have been subject to less sweeping liberalization under GATS by members such as the EU and Australia, is one of the sensitive issues of these discussions. “It has not gone without notice that treating digital products under GATT rules would provide for automatic extension of national treatment, which, in the GATS, is a negotiated commitment.”

<sup>171</sup> In the *Canada – Certain Measures Concerning Periodicals* dispute (WT/DS31/AB/R), 30 June 1997, pp. 20 and 21, the Appellate Body ruled that “[t]he ordinary meaning of the texts of GATT 1994 and GATS as well as Article III:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.” However, the Appellate Body did not rule “on the issue as to whether there may be overlaps between GATT 1994 and GATS.”

<sup>172</sup> For example, while GATT has covered “cinematographic films” since 1947, could a digital film projected in a digital theatre be subject to screen quotas under Article IV of GATT? *A priori*, Article IV would appear to apply. In the event such quotas are maintained or implemented by a Member that has completely liberalized its audiovisual sector in its schedule of commitments under GATS, could another Member withdraw from such quotas by arguing that the screening of a digital film is a service and must, given the conditions of use (screening in a cinema), be placed in the “cinematographic film” category (within the meaning of Article IV of GATS) by claiming technological neutrality?

<sup>173</sup> World Customs Organization, *What is the Harmonized System (HS)?*, <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (last accessed in November 2013). The HS “comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure [...]. This system is used by over 190 countries as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the HS.”

<sup>174</sup> See, for example, WTO, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998. In this case, the crux of the issue was whether “data-processing machines and units thereof” should be considered LAN equipment (headings 84.71 and 84.73 of the HS) or telecommunication equipment (heading 85.17 of the HS), given that the applicable customs tariffs are different for each of these categories of goods.

Since all goods are subject to the same GATT rules, the challenge is to determine which customs tariffs apply to these new products.

The classification of services that fall within the scope of GATS poses a challenge of another sort. While certain rules apply to all services (MFN status, for example, subject to the schedules of exemptions drawn up by Members that may cover certain cultural policies), market access and national treatment rules only apply to sectors subject to commitments undertaken by Members that are specified in their schedules. The demarcation of the various categories of services in the schedules of commitments thus has a major impact on how Members define the scope of GATS.<sup>175</sup>

To date, most WTO Members have used the Services Sectoral Classification List,<sup>176</sup> prepared by the GATT Secretariat in consultation with the Parties to the Uruguay Round, to clarify their commitments in the various service sectors. Cultural services are covered in the “communication services” category, which includes “audiovisual services”<sup>177</sup> and “recreational, cultural and sporting services.”<sup>178</sup> The list, which was drawn up in 1991, is not binding but it nonetheless remains the main reference document used by WTO Members to structure their service commitments. Since digital technologies have since transformed cultural service offerings that may be traded, commitments negotiated solely on the basis of this list could become a source of legal uncertainty for WTO Members. It is for this reason, and because the service categories in the current list are relatively broad, that some Members may want to define the scope of their commitments by refining the categories of services in their schedules of commitments. In addition, since each services sector has a residual category called “other,” Members could use this flexibility provided by the current classification to include new cultural services in their commitments.

This could be done on an individual basis or through multilateral negotiations. The current stalemate of the Doha Round makes it illusory to think that all WTO Members will support the development of a new, refined and updated list in the short term. A Member could, however, take the initiative of unilaterally clarifying the services for which it would be willing to undertake

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<sup>175</sup> The classification of services in the schedules of commitments drawn up under GATS has already been the subject of dispute. In the *China - Certain Measures Affecting Electronic Payment Services* dispute, WT/DS413/R, 16 July 2012, §§ 7.63 and s., the United States and China placed electronic payment services under two different headings on China’s schedule of commitments, each alleging that they were different commitments. In the *China – Audiovisuals* dispute, *op. cit.*, Note 166, §§ 338 and s., the United States defended the idea that “sound recording distribution services” included both physical and electronic distribution (by the Internet for example) while China alleged that its commitments with respect to such services were limited to distribution in physical form (via CDs for example). In *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *op. cit.*, Note 166, §§ 158 and s., the dispute involved determining whether gambling and betting services were in the “sporting services” category, for which the United States had not undertaken any commitments, or in the “other leisure activities” category, for which the United States had undertaken certain commitments.

<sup>176</sup> GATT, *Services Sectoral Classification List*, MTN.GNS/W/120, 10 July 1991.

<sup>177</sup> Communication services include the “D. Audiovisual Services,” category, which in turn includes: a. Motion picture and video tape production and distribution services; b. Motion picture projection services; c. Radio and television services; d. radio and television transmission services; e. Sound recording services; and f. Other.

<sup>178</sup> These services include the following categories: A. Entertainment services, including theatre, live bands and circus services; B. News agency services; C. Libraires, archives, museums and other cultural services; D. Sporting and other recreational services; and E. Other.

liberalization commitments. In this regard, a distinction must be made between commitments already undertaken by Members and their future commitments.

In the case of current schedules, the use of a new cultural service classification by a Member should not lead to modifications in the commitments already undertaken under GATS. Such modifications could open the door to a negotiation process and compensation could have to be paid to other Members whose commitments under GATS are affected.<sup>179</sup> The unilateral adoption of an interpretative declaration might make it possible to clarify the commitments of a Member without formally modifying its schedule. Such a “unilateral claim,” while shedding some light on the Member’s commitments under GATS, could nonetheless give rise to objections from other Members.<sup>180</sup>

In terms of future negotiations, Members would have more latitude to use an updated list of cultural services or to adopt a new structure for commitments based on new categories and sub-categories of services. If WTO should decide to update the Services Sectoral Classification List, which is plausible since this item was specifically included in its *Work Programme on Electronic Commerce*, it would be appropriate for the Parties to the 2005 Convention to examine the potential impact of these changes on their ability to preserve the right to develop and implement their cultural policies in the audiovisual and other cultural services sectors. In this case, it would be worth considering setting up a committee to study this issue and to report back to the Intergovernmental Committee.

Lastly, the phenomenon of convergence spurred by the evolution of digital technologies in the telecommunication sector and cultural industries should encourage the Parties to the 2005 Convention to show the same vigilance with respect to the evolution of their commitments in the telecommunication sector. Digital technologies are merging the historically fragmented telecommunication (traditionally centred on “media” and “networks”) and audiovisual (that generally refers to various types of “content”) market segments. Digital technologies thus link the availability of content to network accessibility.<sup>181</sup> They transfer power to the players in the telecommunication sector, players that are being called on to take on a growing role in making digital content available, notably through the Internet access services they provide. As a result, commitments under GATS in the telecommunication sector could have unexpected effects on the supply and control of audiovisual content, and vice-versa.<sup>182</sup>

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<sup>179</sup> *General Agreement on Trade in Services*, Art. XXI. Such a scenario could well become a reality. The transformation of certain “traditional” cultural services into services supplied by digital technologies could raise questions about the application of current commitments with respect to these new types of services and, as such, force States to reconsider their commitments. The supply modes 1 (cross-border) and 2 (consumption abroad) could be especially affected.

<sup>180</sup> A unilateral declaration should not be used to surreptitiously modify commitments, but rather should be used coherently and in good faith. Since all Members could use such a tool, any Member that gets the ball rolling should be ready to react and even object to the declarations of other Members.

<sup>181</sup> It would be wrong to think that this is a distant hypothesis. At the end of the 1990s, the United States was already insisting in their telecommunication negotiations with certain States on future agreements that content restrictions be eliminated. See I. Bernier, *Content Regulation in the Audio-visual Sector in the WTO*, in D. Geradin and D. Luff (eds.), *The WTO and the Global Convergence in Telecommunications and Audio-Visual Services*, Cambridge, Cambridge University Press, 2004, pp. 215 and s.

<sup>182</sup> The WTO *Work Programme on Electronic Commerce* does not deal in a comprehensive way with this problem. It nonetheless covers issues related to “[t]he need to classify and improve the scheduling of Internet access and related services and to clarify

## B. Regional and bilateral agreements

The paralysis of the Doha Round, which was intended to extract new multilateral trade commitments from WTO Members, contrasts with the effervescence of bilateralism and regionalism in the same field of international law. The dynamism of the States is reflected not only in the number of agreements reached and the number of negotiations launched since the early 2000s, but also in the emergence of new trade agreement models based on groundbreaking bilateral and regional agreements. Unlike the multilateral trade system within which States must grapple with existing rules to seize the opportunities offered by digital technologies, bilateral and regional approaches give trade agreement negotiators much more flexibility to formulate rules adapted to the particularities of e-commerce. This flexibility in negotiating new agreements undoubtedly explains why many bilateral and regional agreements contain provisions that specifically deal with e-commerce.<sup>183</sup> This bilateral and regional flexibility does not, however, eliminate the risk inherent to negotiations between a limited number of trading partners, especially when the negotiations are between developing and developed countries. The e-commerce of cultural goods and services warrants special attention in this respect.

However, the challenge facing the Parties to the 2005 Convention remains unchanged, that is, to preserve their flexibility in adopting and implementing cultural policies intended to protect and promote the diversity of cultural expressions, an objective that requires that provisions be formulated to reflect the dual nature of cultural goods and services. So, while this objective remains unchanged, the reality of digital technologies combined with the evolution of bilateral and regional agreement models affect efforts to achieve it. Agreements reached over the course of the past fifteen years have, in fact, used various techniques. They can be placed in three main categories.

The first category is made up of agreements that exclude all cultural goods and services from their scope, whether traditional or e-commerce.<sup>184</sup> Only the inclusion of such a “general cultural exception” aimed at all cultural goods and services, traded in a traditional or electronic manner, allows States to preserve their right to adopt and implement the cultural policies and measures of their choice, a right that the Parties to the 2005 Convention recognize. This approach, while certainly the most prudent, does not, however, preclude the Parties to the Convention from being cautious about scoping such a cultural exception. The impact of digital technologies on the evolution of cultural content, including the emergence of new types of cultural goods and

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their relation to commitments dealing with telecommunications and the obligations arising from the Annex on Telecommunications” as well as those related to “[t]he need to clarify the scope of the Annex on Telecommunications in relation to access to and use of Internet access and other related services,” (*Work Programme on Electronic Commerce. Progress Report of the General Council, op. cit.*, Note 167, p. 2).

<sup>183</sup> According to the OECD, *op. cit.*, Note 170, p. 10, “[w]e estimate that 30 to 40 [regional trade agreements] contain provisions related to electronic commerce.” For a typology of these provisions, see *ibid.*, pp. 12 and 13.

<sup>184</sup> For instance, Article 2206 of the *Canada-Colombia Free Trade Agreement* signed on November 21, 2008, stipulates that “[n]othing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article 203 (National Treatment and Market Access for Goods – Tariff Elimination).” All the free trade agreements signed by Canada to date contain this type of exception. However, the *Comprehensive Economic and Trade Agreement* on which Canada and the European Union reached an agreement in principle on October 18, 2013, the text of which has not yet been made public, could break with this traditional approach.

services, should encourage the promoters of cultural exception to envisage a relatively broad definition of the goods and services targeted by a general cultural exception enshrined in a trade agreement. This is why the idea of drawing up of an exhaustive list of “cultural goods and services” or “cultural industries” covered by the cultural exception may have to be discarded in favour of a more flexible and more evolutive approach such as the adoption of a definition that encompasses all types of cultural content that can be disseminated by any means, including by digital technologies.<sup>185</sup>

In contrast, a second category is made up of agreements whose rules are formulated without regard for the specific nature of the cultural goods and services being traded between the Parties, subject occasionally to a few very limited exceptions or exclusions.<sup>186</sup> In the case of trade agreements containing such commitments, policies and measures aimed at protecting and promoting the diversity of cultural expressions are the same as any other policies and measures with an impact on the import and export of all types of goods and/or services. As such, they must comply with the national treatment rule (non-discrimination between national cultural products and imported cultural products) while the very purpose of these policies and measures is generally to promote the emergence of local cultural expressions by giving preferential treatment to national creators or national cultural goods and services. While Parties to the 2005 Convention have the option of adopting such agreements despite their accession to this binding legal instrument, it is clear that the effect of this approach considerably restricts, and even eliminates in some cases, the flexibility that these Parties expressly wanted to recognize in the 2005 Convention. Where this is the preferred option, many cultural policies and measures, including those mentioned in Article 6.2 of the 2005 Convention, are impossible to maintain. Lastly, if digital products are covered by this type of trade agreement, the flexibility of a Party to intervene to support the diversity of cultural expressions in the digital environment is greatly reduced.

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<sup>185</sup> On this point, free trade agreements signed by Canada could raise a number of interpretation problems. These agreements generally contain a cultural exception clause that refers to a definition of “cultural industries.” For example, Article 2208 of the Canada-Colombia Free Trade Agreement defines cultural industries as: (a.) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; (b.) The publication, distribution, sale or exhibition of film or video recordings; (c.) The production, distribution, sale or exhibition of audio or video music recordings; (d.) The publication, distribution or sale of music in print or machine readable form; or (e.) Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services; (f.) Production and presentation of performing arts; (g.) Production and exhibition of visual arts; or h. Design, production, distribution and sale of handicrafts.” Paragraph a. does not seem to cover the publication, distribution or sale of e-books, magazines, periodicals or newspapers. If such an interpretation were accepted, these cultural products would fall under the scope of the Agreement.

<sup>186</sup> This is the approach that the United States has generally used in its most recent bilateral agreements. See A. Vlassis and L. Richieri Hanania, *Effect of the CDCE on Trade Negotiations*, in L. Richieri Hanania (ed.), *op. cit.*, Note 6 (accepted for publication). See also I. Bernier, *The Recent Free Trade Agreements of the United States as Illustration of their New Strategy Regarding the Audiovisual Sector*, Ministère de la culture et des communications, Québec, 2004, 21 pp., [http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf\\_seoul\\_ang\\_2004.pdf](http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf_seoul_ang_2004.pdf) (last accessed in November 2013). These agreements differentiate between “traditional” goods and services and “digital products” and contain a chapter on e-commerce whose commitments are generally more restrictive than those provided for in the chapters on the liberalization of “traditional” trade of goods or services.



The vast majority of the regional and bilateral agreements reached over the past fifteen years belong to the two categories mentioned above. However, a middle-ground approach is possible. Such agreements could be based on *à la carte* liberalization of cultural goods and services, whether traditional or digital or both, or on a “partial” exclusion of certain cultural goods and services rather than on the complete exclusion of cultural goods and services and the total or near-total liberalization of such goods and services. The agreements could thus contain one or several cultural exceptions specific to one or more sectors (e.g. telecommunications or investment), or applicable to a specific rule (such as a cultural exception to the national treatment applicable to trade in goods and/or services, traditional and/or digital), or to a specific chapters of the agreement in question.<sup>187</sup> Such trade agreements could also include annexes or protocols that outline special treatment for cultural products.<sup>188</sup>

While agreements of this type can be fully consistent with the rules of the 2005 Convention, the Parties that take this path must carefully study the draft document to make sure that they retain the leeway they want to preserve in the development and implementation of cultural policies. More specifically, in terms of trade in digital cultural goods and services, special attention must be paid to the structure of the agreement since separate commitments may arise from the chapter or chapters on e-commerce. In this respect, and in order to preserve their flexibility in drafting and implementing their cultural policies, the Parties are advised to use the approach described below when negotiating such agreements.

First, the Parties should insist on a general cultural exception or, at least, several specific cultural exceptions in the following fields: traditional commerce in goods; traditional commerce in services; e-commerce in goods and services; investments; telecommunications; and, as warranted, rules on subsidies (in the event a trade agreement includes a specific chapter on this issue).

Second, a reference to the entire 2005 Convention as well as one or more references to specific aspects of the Convention, especially the right of States to adopt cultural policies that they feel are necessary to protect the diversity of cultural expressions, the recognition of the dual nature of cultural goods and services, whatever the medium (traditional or digital) used to trade these goods and services, as well as the recognition of the fundamental link between culture and the sustainable development of societies, should be incorporated into the text of the trade agreement.

Third, a clause should be included in the chapter on dispute resolution to allow the Parties to the 2005 Convention to use the conciliation mechanism of the 2005 Convention to resolve disputes on the application of trade rules and the implementation of cultural policies in order that these disputes be examined by cultural experts in accordance with Article 25 of the 2005 Convention. If such a clause is not included, a provision could be inserted in the dispute

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<sup>187</sup> This approach could be the one used by Canada and the European Union under CETA, i.e., incorporating cultural exceptions into each chapter.

<sup>188</sup> This is the approach used by the European Union in its agreements with South Korea and the CARIFORUM countries. See Chapter 1 of the present report.

settlement mechanism of the trade agreement, providing for the examination of such disputes by cultural experts.<sup>189</sup>

## II.2. Other relevant agreements and negotiation forums

### A. Cultural rights instruments

The effect of digital technologies on the modes of production and dissemination of cultural content, the existence of digital divides and inequalities and the behaviour of economic actors in the digital environment raise questions about the respect for certain cultural rights, especially the right to enjoy arts and participate in the cultural life of one's community. The Human Rights Committee (HRC) recently explored themes related to these issues. However, the issues of the diversity of cultural content and access to a rich and broad array of such content have not yet been fully studied by the HRC.

The work of the HRC Independent Expert in the field of cultural rights could be an occasion to examine the diversity of cultural content on the Internet. In her first report, which was tabled in 2010, the Independent Expert mentions that one of the priority issues that she will address will be ways of "[e]nsuring cultural rights in globalization and development processes."<sup>190</sup> The report also refers to several issues that are closely linked to achieving the objectives of the 2005 Convention.<sup>191</sup> However, the 2011 and 2012 reports barely touch on the relationship between digital technologies and the respect for cultural rights. In addition, while it explicitly refers to the 2005 Convention, the most recent report by the Independent Expert on the freedom of artistic expression and creativity does not explore the diversity of cultural expressions in the digital age in any significant way<sup>192</sup>.

The HRC came closest to exploring this issue during its work on the freedom of expression. The *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* underscores, for example, the importance of ICT education<sup>193</sup> and access to the Internet, which is "not only essential to enjoy the right to freedom of expression, but also to other rights, such as [...] the right to full participation in social, cultural and political

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<sup>189</sup> The *Protocol on Cultural Cooperation* annexed to the *Free Trade Agreement between the European Union and South Korea* stipulates, for example, that "[f]or the purposes of Article 14.5 (Establishment of the Arbitration Panel), the Parties shall endeavour to agree on arbitrators having necessary knowledge and experience on the subject matters of this Protocol" (Art. 3*bis*).

<sup>190</sup> HRC, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36*, 22 March 2010, §§ 44-53.

<sup>191</sup> Notably "the protection of cultural freedoms (expression, information, creativity, scientific research, intercultural participation and exchange, regardless of frontiers); the creation and preservation of open space necessary for the exercise of those freedoms; measures to ensure the right to benefit from scientific progress and to access cultural heritage and knowledge; measures to enable individuals and groups to address and manage cultural changes in a participatory way." (*ibid.*, § 52). The report also mentions that the Independent Expert will address "[m]edia pluralisation, information technologies and cultural rights" and "[n]on-discrimination in the implementation of the right to take part in cultural life." (*ibid.*, §§ 53 and 54).

<sup>192</sup> HRC, *The right to freedom of artistic expression and creativity, report by Farida Shaheed, Special Rapporteur in the field of cultural rights, A/HRC/23/34*, 14 March 2013.

<sup>193</sup> HRC, A/66/290, 10 August 2011, §§ 46-48.

life.”<sup>194</sup> While it gives a prominent place to the freedom of expression, the Report only refers in passing to the themes of intercultural dialogue and cultural diversity.<sup>195</sup> The Report does state that the Internet allows minorities “to express and reproduce their cultures, languages and traditions, preserving their heritage and making a valuable contribution to others in a truly multicultural way.”<sup>196</sup> The Report in particular insists on access to the Internet for all people.<sup>197</sup> However, the issue of the diversity of content is not addressed head-on.

Neither does the HRC’s General comment No. 34 on Article 19 of the *International Covenant on Civil and Political Rights* address this issue. However, the General comment does mention that the right to the freedom of expression includes cultural and artistic expression,<sup>198</sup> and that spoken and written expression, images, objects of art, as well as “all forms of audiovisual as well as electronic and internet-based modes of expression” are protected.<sup>199</sup> However, the need to protect all aspects of cultural diversity is not dealt with and only a few references to the independence and diversity of media appear in the document.<sup>200</sup>

Lastly, a resolution adopted by the HRC in 2012 that specifically deals with *The promotion, protection and enjoyment of human rights on the Internet*<sup>201</sup> “[a]ffirms that the same rights that people have offline must also be protected online.”<sup>202</sup> While the resolution covers all human rights and gives a preponderant place to the freedom of expression,<sup>203</sup> there is no explicit reference to cultural rights. Since human rights are “universal, indivisible, interrelated and interdependent”<sup>204</sup> all the rights embodied in the fundamental human rights instruments should also be covered by HRC initiatives to promote their respect on the Internet. A balance between the promotion of the freedom of expression and respect for cultural rights could be explored in the work conducted by the HRC on this issue.

The search for such a balance in the digital environment reminds us certain discussions held during the first meeting of government experts organized during the 2005 Convention

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<sup>194</sup> *Ibid.*, § 61.

<sup>195</sup> *Ibid.*, §§ 41 and 57.

<sup>196</sup> *Ibid.*, § 48.

<sup>197</sup> See notably § 63.

<sup>198</sup> HRC, General comment No. 34, CCPR/C/GC/34, 12 September 2011, § 11.

<sup>199</sup> *Ibid.*, § 12.

<sup>200</sup> See, *ibid.*, § 14, which states that “[a]s a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media,” and § 15, which states that “[s]tates parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic dissemination systems, have substantially changed communication practices around the world [...]; [they] should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.” See also § 16.

<sup>201</sup> HRC, Resolution 20/8, 31st sess., 5 July 2012. The Preamble notes “that the exercise of human rights, in particular the right to the freedom of expression, on the Internet is an issue of increasing interest and importance as the rapid pace of technological development enables individuals all over the world to use new information and communications technologies.”

<sup>202</sup> *Ibid.*, § 1.

<sup>203</sup> The resolution affirms that all people have the right to the freedom of expression, “which is applicable regardless of frontiers and through any media of one’s choice.” (*ibid.*, § 1). Other references to the freedom of expression can be found in subparagraphs 4, 5 and 5 of the Preamble as well as in § 5.

<sup>204</sup> HRC, *Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity*, A/HRC/RES/23/10, 20 June 2013, § 1.

negotiations. In his opening address, Kader Asmal, the Chairman of the Conference, took care to stress that while “[f]reedom of expression and the free flow of ideas and knowledge are the foundations of any effort in promoting and protecting the diversity of cultural expressions, without multiple, distinct cultural expressions, there would be no true intercultural dialogue.”<sup>205</sup> The discussions currently underway at the HRC on the respect for human rights in the digital environment do not yet appear to have taken into consideration this potential conflict between the freedom of expression and respect for cultural rights. However, respect for cultural rights is required if the diversity of cultural expressions is to flourish. It would thus be worth making the issue of respect for cultural rights in the digital environment a topic of a study in its own right.

## **B. Cultural heritage instruments**

Interactions between the 2005 Convention and international rules on cultural heritage are limited to a few instruments, including the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* (ICH), which is certainly the instrument that presents the greatest potential for interference and overlap. The evolution of digital technologies and the role they can play in safeguarding this type of heritage is such that one can imagine a variety of situations in which “the practices, representations, expressions, knowledge and skills that communities, groups and, in some cases, individuals,”—all various forms of ICH under Article 2 of the 2003 Convention—could be assimilated to “cultural expressions” within the meaning of Article 4 of the 2005 Convention. As such, the digitalization, reproduction and commercialization of certain elements of the intangible cultural heritage of communities could raise some questions related to the simultaneous application of the two instruments.

On the face of it, there does not appear to be any conflict between the two texts, and it is difficult to envisage a case where compliance with a provision of the first text would violate a commitment under the second. However, as soon as “safeguarding,” as defined in the 2003 Convention, is understood to mean any measure “aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement [and] transmission” of ICH, and when digital technology is used to carry out one of these ICH actions, initiatives aimed at safeguarding this heritage can be similar to those aimed at assisting the creation, production, dissemination and promotion of cultural expressions in the digital environment. This especially applies to recordings of certain “oral expressions,” various forms of “performing arts” and “festive events” that are considered manifestations of ICH. The safeguarding of this type of heritage using digital technologies is thus very similar to the protection and promotion of the diversity of cultural expressions in digital form.

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<sup>205</sup> I. Bernier, *The First Intergovernmental Meeting of Experts on UNESCO’s Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Implications for the Following Meeting*, Ministère de la culture et des communications, Québec, November-December 2004, p. 2, <http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/update0412.pdf> (last accessed in November 2013), refer to the Opening Address of Kader Asmal, the Chairman of the Conference.

The objectives of the two texts are, of course, different, but the two conventions are both intended to preserve cultural diversity, including in the digital environment. In fact, one of the key attributes of digital technologies is to make various types of cultural forms and expressions available on a single medium. The Parties to the two conventions might thus be convinced, in certain special cases, to implement the two texts in a cumulative manner. This proposal would especially affect the commitments of the Parties to the 2005 Convention to draw up measures to promote the diversity of cultural expressions that must take into account “the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples”<sup>206</sup> as well as measures intended to protect cultural expressions “at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.”<sup>207</sup> In terms of these cultural expressions, some of which could be considered as types of ICH, the Parties could use a cross-fertilization approach to implement initiatives under the two conventions to make these various forms of cultural diversity accessible to more people through the use of digital technologies.

Lastly, using digital technologies to create, produce and disseminate cultural expressions raises the issue of the archiving, preservation and continued accessibility of these expressions, issues that are notably covered by the UNESCO *Charter on the Preservation of the Digital Heritage*.<sup>208</sup> This Charter reflects the awareness by States of the efforts that must now be made to safeguard this “new” type of heritage. Given the interdependence of and interrelationships between past and present cultural expressions, the Parties to the 2005 Convention should study the content and implementation of this Charter. The technological neutrality of the 2005 Convention cannot mask the importance of examining the “technological continuity” of the expressions that fall under its scope given that the principle of neutrality that is part of the Convention’s fabric is not a reflection of any indifference of the Parties to the technological challenges that interact with the Convention’s objectives. On the contrary, it should be seen as the expression of a desire that technology in no way act as a brake or obstacle to the preservation of the diversity of cultural expressions, but rather as an instrument to further such preservation.

### C. Intellectual property agreements<sup>209</sup>

The use of digital technologies by artists, cultural professionals and consumers as well as the appearance of new types of cultural services in the digital environment, whether legal (certain types of streaming, for example) or illegal (all forms of pirating), points to a need to review the modes of administration and management of intellectual property rights. While the challenges involved in adapting the protection of property rights to the reality of the digital environment are beyond the scope of the 2005 Convention, proposals for revising the current rules with a view to guaranteeing their applicability to digital works or formulating new rules adapted to the

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<sup>206</sup> Article 7.1 of the 2005 Convention.

<sup>207</sup> *Ibid.*, Article 8.1.

<sup>208</sup> UNESCO *Charter on the Preservation of Digital Heritage*, 17 October 2003, Doc. UNESCO 32 C/Res. 42, in *Records of the General Conference, 32nd sess. Paris, 29 September-17 October, 2003*, Vol. 1, *Resolutions*, UNESCO, Paris, 2004, p. 83.

<sup>209</sup> It should be noted that other chapters of the present report also deal with the issue of intellectual property, especially Chapter 1, sub-section II.1.8, Chapter 2, sub-section II.3, and Chapter 3, sub-section II.3 C.

particularities of this environment could have contradictory effects on the diversity of cultural expressions. Discussions have already begun on how the current intellectual property protection regime bolsters or—to the contrary—undermines the diversity of cultural expressions on the Internet. In addition, while the issue of intellectual property was explicitly excluded from the scope of the 2005 Convention, the Parties must address it by implementing Article 21 in order to promote the objectives and principles of the Convention in other relevant international forums.<sup>210</sup>

WIPO has been studying the evolution of digital technologies and their impact on intellectual property for several years.<sup>211</sup> It would be difficult to provide a full account of all the relevant initiatives in the limited framework of the present study. A few examples will nonetheless suffice to illustrate the value of the work by WIPO in protecting and promoting the diversity of cultural expressions in the digital environment.

In his opening address to the WIPO Assemblies in September 2013, the Director General of WIPO referred to “the tendency of intellectual property to move from the periphery to the centre of the economy,” a tendency that is accentuated by the “ubiquity of the Internet, devices for accessing it and, in consequence, of entertainment and creative works.”<sup>212</sup> Insisting on the effects of a “transition from analogue to digital,” the Director General pointed to “the seemingly avoidable and inappropriate loss of value for creators, performers and the creative sector.”<sup>213</sup> This is why WIPO intends to contribute to efforts to create “a legal seamless global digital marketplace,” notably via two projects that “will help the process of connecting creators and performing artists in the developing world with the nascent global digital marketplace.” The Parties to the 2005 Convention could examine how these projects influence the evolution of the diversity of cultural expressions at the local, national and international levels.

Several WIPO initiatives in recent years have been closely linked to the challenges of implementing the 2005 Convention in the digital age. For example, WIPO has studied the digital divide and its impact on development and intellectual property. Based on certain recommendations in its *Development Agenda*,<sup>214</sup> which was adopted in 2007, WIPO launched a

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<sup>210</sup> It is worth recalling that the UNESCO General Secretariat has always been aware of the ties between the protection of intellectual property and the objective of protecting and promoting the diversity of cultural expressions. It is, moreover, for this reason the World Intellectual Property Organization (WIPO) was one of three international organizations invited to serve as observers during the 2005 Convention negotiations, the other two being the WTO and the UNCTAD.

<sup>211</sup> WIPO adopted two new treaties in 1996, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). “The purpose of the two Treaties is to update and supplement the major existing WIPO Treaties on copyright and related rights,” namely the Berne and Rome conventions, primarily to respond to developments in technology and in the marketplace [...]. Both the WCT and the WPPT address the challenges posed by today’s digital technologies, in particular the dissemination of protected material over digital networks such as the Internet.” The WIPO Digital Agenda was adopted by the Member States in 1999. *The Digital Agenda: Implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, Permanent Committee on Cooperation for Development Related to Intellectual Property, 3rd sess., Geneva, 28 October-1 November 2002, PCIPD/3/9, July 2002, p. 2, [http://www.wipo.int/about-ip/en/studies/publications/ip\\_ecommerce.htm](http://www.wipo.int/about-ip/en/studies/publications/ip_ecommerce.htm) (last accessed in November 2013).

<sup>212</sup> WIPO, Address by the Director General – *Assembles of the Member States of WIPO*, 23 September 2013, [http://www.wipo.int/about-wipo/en/dgo/speeches/a\\_51\\_dg\\_speech.html](http://www.wipo.int/about-wipo/en/dgo/speeches/a_51_dg_speech.html) (last accessed in November 2013).

<sup>213</sup> *Ibid.*

<sup>214</sup> *Development Agenda for WIPO*, [www.wipo.int/export/sites/www/freepublications/fr/general/1015/wipo\\_pub\\_l1015.pdf](http://www.wipo.int/export/sites/www/freepublications/fr/general/1015/wipo_pub_l1015.pdf) (last accessed in November 2013). Of the 45 recommendations in the Development Agenda, two deal specifically with bridging

*Project on Intellectual Property, Information and Communication Technologies (ICTS), the Digital Divide and Access to Knowledge.*<sup>215</sup> Within the framework of this project, the *Feasibility Assessment on Possible New WIPO Activities Related to Using Copyright to Promote Access to Information and Creative Content* presented in May 2013 proposed a number of activities that could help promote the diversity of cultural expressions.<sup>216</sup>

The *Creative Heritage Project*, which consists of “developing best practices and guidelines for managing IP issues when recording, digitizing and disseminating intangible cultural heritage,”<sup>217</sup> is another WIPO initiative that is relevant to the objectives pursued by the Parties to the 2005 Convention. The notion of “creative heritage” is certainly linked to the “intangible cultural heritage” protected by the 2003 Convention, but “cultural expressions” within the meaning of the 2005 Convention are also addressed in this project. WIPO emphasizes that “[d]igitized traditional music, designs and art can reach new audiences in niche markets for distinctive, diverse and local cultural goods and services, and, in so doing, promote community and rural economic and cultural development.” This is why it recommends practices and guidelines aimed at protecting traditional cultural expressions through intellectual property rights. According to WIPO, “by creating and exercising IP rights in new digital recordings, protection of the cultural expression can be enhanced.”<sup>218</sup> There is no doubt that such an initiative has a strong connection to the 2005 Convention, and the Parties should look at how these types of project can help in the implementation of the Convention.

While initiatives such as these can contribute to achieving the objectives set by the Parties under the Convention, the fact remains that numerous studies have also raised doubts about the actual contribution of regimes to protect intellectual property and preserve the diversity of cultural expressions.<sup>219</sup> That said, it is possible that promoting the objectives and principles of the Convention in relevant international forums on intellectual property will also lead States to question the appropriateness and effectiveness of some rules in this area, whether in force or in the process of being negotiated.

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the digital divide: “9. Request WIPO to create, in coordination with Member States, a database to match specific intellectual property-related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide; 24. To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).”

<sup>215</sup> The project was approved in November 2009 at the fourth session of the Committee on Development and Intellectual Property (CDIP). Its implementation began in January 2010 and ended in December 2011. See *Evaluation Report of the Project on Intellectual Property, Information and Communication Technologies (ICTS), the Digital Divide and Access to Knowledge*, Committee on Development and Intellectual Property, 10th sess., Geneva, November 12-16, 2012, CDIP/10/5, October 1, 2012.

<sup>216</sup> WIPO/CDIP, 11th sess., Geneva, May 13-17, 2013, CDIP/11/6, 2 April 2013. Certain activities will deal with “software development practices, including freeware and open source software,” which could be of interest to artists and cultural professionals in developing countries (a point raised by H. Ramduth, *op. cit.*, Note 15). Other activities could be proposed at future CDIP meetings, especially in the field of access to knowledge.

<sup>217</sup> WIPO, *Creative Heritage Project – IP Guidelines for Digitizing Intangible Cultural Heritage*, WIPO Publication No. L934E/TCH, [http://www.wipo.int/export/sites/www/freepublications/en/tk/934/wipo\\_pub\\_l934tch.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/934/wipo_pub_l934tch.pdf) (last accessed in November 2013).

<sup>218</sup> *Ibid.*

<sup>219</sup> On this point, see L. Richieri Hanania, *op. cit.*, Note 5, pp. 386-432.

#### D. The International Telecommunication Union

The International Telecommunication Union (ITU) is the United Nations specialized agency for information and communication technologies (ICTs).<sup>220</sup> Its main mission is to enable the growth and sustained development of telecommunication and information networks. It also allocates limited global resources such as radio spectra and satellite orbits. Given the phenomenon of convergence mentioned earlier, ITU activities can thus have a major impact on access to content and the evolution of the diversity of cultural expressions.

Fostering and respecting cultural diversity were identified as fundamental principles at the World Summit on the Information Society (WSIS),<sup>221</sup> which was an initiative of the ITU Plenipotentiary Conference. UNESCO subsequently played a major role in implementing the results of this first Summit. Lastly, during the first phase of WSIS+10, which was held at UNESCO headquarters in February 2013, and jointly organized by ITU, UNDP and UNCTAD,<sup>222</sup> the issue of cultural diversity was examined from several angles (media pluralism, multilingualism, Internet access [especially for indigenous peoples], digital divide, etc.).<sup>223</sup>

WSIS also led to the creation of the Internet Governance Forum (IGF), in which UNESCO is a participant. Organized for the first time in 2006, this forum brings together States, non-governmental organizations and representatives of the private sector to discuss the development of the Internet. While the Forum does not adopt any decisions, the issues that it explores and its discussions influence the behaviour of decision-makers and other actors involved in Internet governance and regulation.

It goes without saying that the discussions held and the policy orientations formulated at WSIS as well as the discussions at IGT can have a major impact on the evolution of the diversity of cultural expressions in the digital environment.<sup>224</sup> As such, the Parties to the 2005 Convention may want to pay close attention to this work, notably by contributing to the formulation of the positions advocated by UNESCO in these forums.

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<sup>220</sup> Its members are not only States, but over 700 other entities (companies and universities) active in the ICT sector. This organization is based on public-private partnerships and international cooperation.

<sup>221</sup> *Building the Information Society: a global challenge in the new Millennium*, Doc. WSIS-03/GENEVA/DOC/4-E, 12 December 2003, § 19. Paragraph 52 adds that “[c]ultural diversity is the common heritage of humankind. The Information Society should be founded on and stimulate respect for cultural identity, cultural and linguistic diversity, traditions and religions, and foster dialogue among cultures and civilizations. The promotion, affirmation and preservation of diverse cultural identities and languages as reflected in relevant agreed United Nations documents including UNESCO’s *Universal Declaration on Cultural Diversity*, will further enrich the Information Society.” See also line C8 – “Cultural diversity and identity, linguistic diversity and local content” of the Plan of Action appended to this Declaration, WSIS-03/GENEVA/DOC/5-E, 12 December 2003.

<sup>222</sup> The second phase took place at ITU in May 2013.

<sup>223</sup> UNESCO, *Towards Knowledge Societies for Peace and Sustainable Development: First WSIS+10 review meeting. Results*, 25-27 February 2013, UNESCO, Paris, 24 pp.

<sup>224</sup> For example, at the last forum which was held from October 22 to 25, 2013, in Bali, a session was devoted to the theme of *Access and Diversity – Internet as an Engine for Growth and Sustainable Development* (IGF, *Chair’s Summary, 8th Meeting of the Internet Governance Forum (IGF)*, Bali, Indonesia, October 22-25, 2013).



### **III. RECOMMENDATIONS TO THE INTERGOVERNMENTAL COMMITTEE AND THE CONVENTION SECRETARIAT**

Given the relationship between the treaties, and given that digital technologies can have an impact on the scope of the legal instruments that interact with the 2005 Convention, it is important that the Parties create the tools required to promote, in accordance with Article 21, the objectives and principles of the Convention in forums where these instruments are negotiated, and to preserve their right to intervene to promote and protect the diversity of cultural expressions. Consequently, the Intergovernmental Committee and the Convention Secretariat could:

- In the wake of the 2011 and 2012 consultations to draw up an inventory of experiences and practices related to the promotion of the objectives and principles of the Convention in other international forums, request that the Parties make a specific presentation in the next consultation of their interventions targeting digital technologies and how they are taken into consideration when formulating their cultural policies.
- In order to benefit from the many bilateral and regional cultural agreements in force between the Parties themselves and with other States, request that the Parties revisit their cultural agreements in order to update them with a view to further incorporating the potential of digital technologies for the creation, production, dissemination and trade of cultural expressions and to report back to the Intergovernmental Committee on their efforts in their quadrennial reports.
- In order to further explore the relationship between cultural and commercial concerns, mandate a group of experts to compile a compendium of clauses used in trade agreements that refer to other international agreements as well as of standard clauses specifically adapted to the cultural sector that could be incorporated into bilateral and regional trade agreements (cultural exception clauses, references to the 2005 Convention, referral of disputes to the Convention's conciliation mechanism). This compendium could be made available in electronic form to the Parties for use as they see fit in their trade negotiations.

## OVERVIEW OF THE RECOMMENDATIONS

**In matters of cooperation for development in the digital age**, the Intergovernmental Committee and the 2005 Convention Secretariat could, in a general way, encourage cooperation between the Parties (North-South cooperation, triangular Nord-South-South cooperation and/or South-South cooperation) on each of the areas of action described in Chapter 1. In the short/medium terms the Intergovernmental Committee and the 2005 Convention Secretariat could more specifically:

1. Give preference, in the next project funding cycle by the International Fund for Cultural Diversity, to projects related to the implementation of the Convention in the digital environment. Priority should be given not only to applications for funding to develop cultural measures and policies and/or projects likely to have a direct impact on the creation, production, dissemination and distribution of digital cultural activities, goods and services, but also to research projects aimed at exploring the contributions of digital technologies and identifying practical ways to better use them in order to foster the diversity of cultural expressions in specific developing countries.
2. In tandem with the initiatives of the Global Alliance for Cultural Diversity, establish an online database and knowledge-sharing platform that centralizes information on partnerships and policies that promote the diversity of cultural expressions in developing countries. This platform could contain sections specifically devoted to partnerships set up to protect and promote the diversity of cultural expressions in the digital age. It should also offer and promote the use of online technical tools that would allow representatives of parliaments, governments, civil society (including digital technology experts) and international institutions to discuss the drafting of policies adapted to digital technologies in developing countries. International organizations active in sustainable development and the fight against poverty should be key players in such a platform.
3. In conjunction with international organizations active in the field of digital technologies, such as the ITU and the World Bank, draft an action plan that explicitly integrates the objective of protecting and promoting the diversity of cultural expressions into international ICT technical assistance projects such as those aimed at developing infrastructures, transferring technologies and building capacity.

**In matters of adapting cultural policies to the particularities of the digital environment,** the Intergovernmental Committee and the 2005 Convention Secretariat could more specifically:

4. Draw up an inventory of new cultural trades and services linked to the development of digital technologies as well as of new modes of production and creation based on these technologies using a questionnaire sent to all Parties. Drawing up an inventory is essential for developing truly coherent, forward-looking cultural policies. It could also provide a better understanding of how non-commercial sectors are created in this environment and of the impact of digital technologies on the dematerialization of media in the various sectors (the music and book industries, for example). It could also include an inventory of new cultural consumption practices, notably in terms of accessing, sharing and creating cultural content, which will most certainly require the development of policies governing educational institutions.
5. Seek the collaboration of civil society to document and report on the difficulties encountered by artists and cultural professionals in obtaining financial assistance and grants in the new context brought about by the proliferation of digital technologies in the cultural industry sector. A request to this effect could first be sent to the International Federation of Coalitions for Cultural Diversity (IFCCD). Based on the information obtained, new approaches to regulatory and financial assistance systems that take the changes in question into account could then be developed. We believe that artists and cultural professionals are the first to be impacted by these mechanisms and that they must therefore be able to provide input on their needs in this respect.
6. Launch a call for input from the universities of the Parties with a view to organizing an international conference attracting culture policy specialists from State governments and civil society to discuss strategies, best practices and new regulatory models adapted to the evolution of digital technologies in the cultural sector, notably based on the information in the quadrennial reports and the responses to the questionnaire regarding Article 21. The conference could give prominence to identifying the digital sector cultural policies that are best adapted to the reality of developing countries.

**In matters of education, participation of civil society and integration of culture into sustainable development,** the Intergovernmental Committee and the 2005 Convention Secretariat could more specifically:

7. Encourage “digital literacy,” which is understood as “ensuring greater mastery of the new information and communication technologies, which should be seen both as educational discipline and as pedagogical tools capable of enhancing the effectiveness of educational services” (paragraph 9 of the Action Plan appended to the 2001 Universal Declaration on Cultural Diversity). This initiative must not lead merely to a one-time project, but rather to a flexible and more evolutive approach by educational institutions and similar organizations. As such, careful consideration must be given to determining the tools best suited to enable individuals and groups to participate actively in the creation, distribution and use of cultural content. Statistically documenting the impact of the digital divide on the mastery of new technologies would be a good first step. This task could be entrusted to the UNESCO Institute for Statistics (UIS).
8. Formulate a strategy to use social media to stimulate a more active involvement of civil society in the implementation of the 2005 Convention. Given that civil society representatives are often in closer touch with local communities and better connected at the international level, they can represent the concerns of artists and cultural professionals more efficiently and more faithfully and, at the same time, respond to their needs.
9. Prepare an action plan to encourage the Parties to implement Paragraph 7.3 of the Operational Guidelines for Article 13, which specifies that “[t]he integration of culture into sustainable development policies entails acknowledgement, in particular of [...] the use of new technologies and the expansion of networked communication systems.” As a first step, the Parties could be asked to inform the Intergovernmental Committee of measures they have already adopted in this respect. After studying the responses, and if few measures have been implemented, such an action plan could be drawn up.

**In matters of the relation between treaties**, and considering that digital technologies may have an impact on the scope of legal instruments that may interact with the 2005 Convention, the Parties should acquire the appropriate tools to uphold their commitment to promote, in accordance with Article 21, the objectives and principles of the Convention in the forums where these instruments are negotiated and to preserve their right to intervene to promote the diversity of cultural expressions. Consequently, the Intergovernmental Committee and the Convention Secretariat could:

10. In the wake of the 2011 and 2012 consultations to draw up an inventory of experiences and practices related to the promotion of the objectives and principles of the Convention in other international forums, request that the Parties make a specific presentation in the next consultation of their interventions targeting digital technologies and how they are taken into consideration when formulating their cultural policies.
11. In order to benefit from the many bilateral and regional cultural agreements in force between the Parties themselves and with other States, request that the Parties revisit their cultural agreements in order to update them with a view to further incorporating the potential of digital technologies for the creation, production, dissemination and trade of cultural expressions and to report back to the Intergovernmental Committee on their efforts in their quadrennial reports.
12. In order to further explore the relationship between cultural and commercial concerns, mandate a group of experts to compile a compendium of clauses used in trade agreements that refer to other international agreements as well as of standard clauses specifically adapted to the cultural sector that could be incorporated into bilateral and regional trade agreements (cultural exception clauses, references to the 2005 Convention, referral of disputes to the Convention's conciliation mechanism). This compendium could be made available in electronic form to the Parties for use as they see fit in their trade negotiations.

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