International law of contemporary media session 10: media globalization and its discontents mira burri, dr.iur., PD fall term 2015, 2 december 2015

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nce in Research (MCCR) are presearch intrument al the Sola Alefend Science Reundation (3AD)

goals of the day

 flexibilities within the WTO law to reconcile
 trade and non-trade values

 2005 UNESCO Convention on Cultural
 Diversity

 media globalization: state of affairs and its
 implications

 the changing media landscape and some
 thoughts on the repercussions of digital
 media

 challenges vs. opportunities







trade and culture: an intriguing case

- a special pair in the 'trade and...' discussions
- over-politicized discourse; interestingly, the pressure does not come from developing countries or NGOs but from developed countries (France, Canada)
- a new instrument on 'culture' that was meant to counterbalance the WTO
- dynamic regulatory environment: fluidity of the media landscape; changes to the 'old' (analogue/offline) regulatory toolbox needed?

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flexibilities under the wto law

- general exceptions: art. XX GATT and art. XIV GATS
- otherwise inconsistent with GATT/GATS measures justified because they are necessary to serve certain public interests (e.g. public morals, public order); the chapeau test: application of the trade restrictive measure may not constitute an arbitrary or unjustifiable discrimination between countries, or a disguised restriction on int'l trade
- art. IV GATT: 'screen quotas'; states 'may require the exhibition of films of national origin during a specified minimum proportion of the total screen time' or 'reserve a minimum proportion of screen time for films of a specified origin other than that of the Member'.

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flexibilities under the wto law

- GATT vs. GATS; much greater flexibilities under the GATS: MFN exemptions and tailored commitments for NT and market access
- audiovisual services: the least covered services sector (only 26 members made specific commitments; only Central African Republic, Philippines and US in all 6 subsectors; EC and CH: no commitments)
- all-or-nothing approach; in contrast to telecommunication services: deep commitments, further-reaching rules
- negative spillovers to other domains (notably digital trade)

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Switz	zerland: art. II MFN ex		Intended	Conditions creating the need
Sub-Sector	Inconsistency with Article II	measure applies	duration	for the exemption
Audiovisual services	To confer national treatment to audiovisual works covered by bilateral or plurilateral agreements on coproduction in the field of audiovisual works, in particular in relation to access to funding and to distribution	All countries with whom cultural cooperation may be desirable (at present agreements exist with member countries of the Council of Europe and with Canada)	Indefinite	Promotion of common cultural objectives
	Measures granting the benefit of support programmes, such as MEDIA and EURIMAGES, and measures relating to the allocation of screen-sine which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment, to audiovisual verkies meeting specific European functional meating and audio relating and the second such and the second second second audio relating the second second European onging relating	European countries	Indefinite	Promotion of cultural objectives based on long- standing cultural links
The Politeiro	Concessions for the operation of radio or television broadcast stations may be granted, normally on the basis of bilateral agreements, to persons of countries other than Switzerland	All countries with whom cultural cooperation may be desirable	Indefinite	Promotion of common cultural objectives, and to regulate access to a market limited in scale (given the size of Switzerland) in order to preserve diversity of supply

Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
2. Communication Services				
D. Audiovisual Services				
a) Motion picture or video ape distribution services CPC 96113)	1)Unbound 2)Unbound 3)) Only trough representative offices which will be allowed to function with the second of the second recorporated outside India recorporated outside India to 100 per year	1) Unbound 2) Unbound 3) Subject to the prescribed authority having certified that the motion potune has: we are all any of the the intermational film feshals notified by the intermational film feshals notified by the intermational film feshals notified by the Ministry of Information & Broadcasting, Government of India, or b, participated in any of the official sections of the notified international film festivals; or c. received good reviews in prestigious film journals notified by the Ministry of Information & Broadcasting, Government of India.		
	4)Unbound except as indicated in the horizontal section	4)Unbound except as indicated in the horizontal section	Modes of supply: 1) Cross-border su 2) Consumption al 3) Commercial pre- 4) Presence of nail	broad isence



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flexibilities under the wto law

- · flexibilities not found sufficient
- forum-shopping: solutions outside the WTO
- preferential trade agreements: since 2002, US-PTAs with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, South Korea et al.: minimal restrictions for digital products (negative list approach)
- deference to the culturally inspired measures in audiovisual services, provided that these are 'frozen' and relate to conventional 'offline' technologies only
- EU: exclusion of cultural services from trade commitments, while promising cultural co-operation

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TPP and TTIP?

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UNESCO Convention on Cultural Diversity

- a remarkable success in int'l treaty-making: a legally binding instrument in the field of culture
- only 2 states voted against its adoption (US and Israel); 4 states abstained (Australia, Honduras, Liberia and Nicaragua)
- 2005 adopted; 18 March 2007 entry into force

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 presently, 140 parties; incl. Switzerland as of July 2008 http://portal.unesco.org/la/convention.asp? KO=31038&language=E

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UNESCO Convention: an appraisal

- no real obligations for the State Parties
 (best endeavour commitments)
- an extensive block of rights (art. 6)
- centrality of state sovereignty
- no distinction between licit and illicit measures; no proportionality test
- fuzzy concepts
- no working 'conflict of laws' provision
- substantive incompleteness
- no compulsory dispute settlement
- implementation: positive turn possible?

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rights rather than obligations

Articles 7-19 of the Convention

Article 5: General rule regarding rights and obligations

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- The Parties (...) reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.
- When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.

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art. 20: conflict of laws

- 1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, they:
- (a) shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
- (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention
- 2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Core Diversion Childrament

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why regulate media?

• economic rationale (market failure)

- cultural products as public goods
- economies of scale
- externalities (positive and negative)

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- collective action problems
- societal rationale (media as critical for the functioning of the democratic state and as cultural products and services)
- cultural diversity: politically laden concept; actual contents unclear; concept problematic from the viewpoint of the nation state?













entertainment earned \$15.8 billion in audiovisual services exports consistently generates a positive balance of trade: in 2013, that services trade surplus was \$13.4 billion, or 6% of the total U.S. private-sector trade surplus in services; the industry exported six times what it imported in 2013 the motion picture and television surplus was larger than

 the motion picture and television surplus was larger than the combined surplus of the telecommunications, management and consulting, legal, and medical services sectors, and larger than sectors like computer and information services and insurance services

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ndia	1,041	India	1,091	Nigeria	1,559	India	1,325	India	1,28
ligeria	872	Nigeria	1,000	India	1,146	Nigeria	956	Nigeria	987
nited States	699	United States	673	United States	656	United States	759*	United States	734
apan	356	Japan	417	China	411	China	422	China	475
hina	260	China	330	Japan	407	Japan	418	Japan	448
d States 1	699 356	United States Japan	673 417	United States China	656 411	United States China	759* 422	United States China	





14 Top	20 Internation	nal Box Offic Source: IHS,		e ts – All Films (s	US\$ Billio
1.	China	\$4.8	11.	Brazil	\$0.8
2.	Japan	\$2.0	12.	Italy	\$0.8
з.	France	\$1.8	13.	Spain	\$0.7
4.	U.K.	\$1.7	14.	Netherlands	\$0.3
5.	India	\$1.7	15.	Turkey	\$0.3
6.	South Korea	\$1.6	16.	Venezuela	\$0.3
7.	Germany	\$1.3	17.	Argentina	\$0.2
8.	Russia	\$1.2	18.	Sweden	\$0.2
9.	Australia	\$1.0	19.	Taiwan	\$0.2
10.	Mexico	\$0.9	20.	Indonesia	\$0.2







Rank	Company	Country	Film subsidiary	Turnover
1.	Sony	Japan	Sony Pictures	30.245
2.	Walt Disney	USA	Walt Disney Studios	25.482
3.	Time Warner	USA	Warner Bros.	22.769
.	News Corp.	USA	20 th Century Fox	22.699
5.	Direct TV Group	USA		21.565
6.	Vivendi	France	Canal+ Group (StudioCanal + 20% stake in NBC)	17.133
7.	Nintendo	Japan	-	15.474
в.	NBC Universal	USA	Universal Studios	15.436
9.	Viacom	USA	Paramount Pictures	13.619
10.	CBS Corp.	USA	-	10.684



	TABLE 1. Top 20 Exporters of Core	Cultural Goods (\$Million)
	Country	Total Exports of Core Cultural Good
1	United Kingdom	8,549
2.	United States	7.648
3.	Germany	5,789
4.	China	5,275
5.	France	2,521
6.	Ireland	2,277
7.	Singapore	2,001
8.	Japan	1,805
9.	Canada	1,577
0.	Austria	1,561
1.	The Netherlands	1,546
2.	Spain	1,532
3.	Switzerland	1,384
4.	Italy	1,381
5.	Mexico	1,244
6.	Belgium	1,130
7.	Sweden	875
8.	Hungary	720
9.	Hong Kong	578
20.	Denmark	499



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digital media: characteristics

- · freed from the need of a tangible medium
- dense: very large amounts of digital information can be stored in small physical spaces
- · easy to manipulate
- · perfect copies of the original
- digital information can be shared between large numbers of users simultaneously
- new modes of organising and accessing information (e.g. Dewey vs. Google)

selected features of the digital environment

- proliferation and diversity of content

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- changing business and consumer behaviour patterns (reduced storage and distribution costs; no scarcity)
- empowerment of the user to choose and pull the desired content
- new modes of content production, where the user is not merely a consumer but an active creator, individually or as part of the community





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the long tail theory

- the 80/20 rule (Pareto distribution)
- Chris Anderson, Wired, 2004:
- the tail of available variety is far longer than we realise (almost no end)
- it is now within reach economically
- all those niches, when aggregated can make up a significant market

ENSTINE Trent Mellone, 1

changing business models: it becomes economically viable
 to sell niche products



















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user participation

The Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships (sometimes referred to as the 'rise - or return - of the amateurs'). Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially gives rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless.

OECD, Participative Web, 2007

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selected effects of digital media

- as there is no scarcity, rationales for creating reserved shelf-spaces for domestic content and barriers to entry to foreign cultural content become redundant; if such measures maintained, they do not work(!)
- esp. as we move from **push** to **pull** mode of cultural content consumption
- empowerement of the consumer
- need to readjust the tools of media/cultural policies

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new challenges



DRMs and licensing as overriding user's rights / statutory exceptions and limitations DRMs and licensing as overriding user's rights / statutory exceptions and limitations copyright impacts on the selection of materials for digitization; libraries and archives avoid the complexities of copyright law by digitizing materials that have passed into the public domain and are no longer covered by copyright restrictions (e.g. Europeana only 2% audiovisual works) a bubble of limited (digitally available) information?

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 thank you. 	
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