



thoughts on the repercussions of digital media

challenges vs. opportunities; new regulatory desings.





trade and culture: an intriguing case

- a special pair in the 'trade and...' discussions
 over-politicised (even emotionally laden) 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: the 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'.

flexibilities under the wto law

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- 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; 35 members - MFN exemptions)
 all-or-nothing approach; in contrast to teleoammunication convinces.
- telecommunication services: deep commitments, further-reaching rules
- negative spillovers to other domains (notably digital trade).

Sector or Sub-Sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need 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-inse which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment, to audiovisual vorks and/or to supplies of audiovisual services meeting specific European origin criteria	European countries	Indefinite	Promotion of cultural objectives based on long- standing cultural links
Tar Balance	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 tape distribution services (CPC 96113)	1)Unbound 2)Unbound 3)) Only through representative offices which representative offices which incorporated outside India incorporated outside India incorporated outside India 1) Import of this restricted to 100 per year	1) Unbound 2) Unbound 2) Unbound 3) Subject to the prescribed authority having certified that the motion psi-won an award in any of the international film festivals notified by the international film festivals notified available constraints and finderational film described participated in any of the official sections of the notified international film journals out even in prestigious film journals notified by the Ministry of Internation & Broadcasting, Government of India, or c-received good reviews in prestigious Information & Broadcasting, Government of India.		
the balance of the star of the starburnes is these	4)Unbound except as indicated in the horizontal section	 Unbound except as indicated in the horizontal section 	Modes of supply: 1) Cross-border s 2) Consumption a 3) Commercial pr 4) Presence of na persons	broad esence



flexibilities under the wto law

flexibilities however never found sufficient

forum-shopping: solutions outside the WTO

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- preferential trade agreements: since 2002, US-PTAs with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore and the Central American countries: 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
 EC: exclusion of cultural services from trade commitments, while promising cultural co-operation.

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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

 as of 15 march 2011, 116 states have ratified; 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?

rights rather than obligations

Articles 7-19 of the Convention Article 5: General rule regarding rights and obligations

- 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.
- 2. 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.

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why regulate media?

• economic rationale (market failure)

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











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trade in cultural products		
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.	Ganada	1,577
10.	Austria	1,561
11.	The Netherlands	1,546
12.	Spain	1,532
13.	Switzerland	1,384
14.	Italy	1,381
15.	Mexico	1.244
16.	Belgium	1,130
17.	Sweden	875
18.	Hungary	720
19.	Hong Kong	578
20.	Denmark	499



TABLE 2. Percentage Share of Total Exports of Core Cultural Products by Region, 1994–2002			
	1994	2002	
TOTAL EXPORTS	\$36.2 billion	\$54.7 billio	
European Union (EU 15)	54.3	51.8	
Other Europe	6.1	6.2	
North America	25	16.9	
Asia	11.8	21.2	
East Asia	7.6	15.6	
Latin America & Caribbean	1.9	3.0	
Africa	0.2	0.4	
Oceania	0.6	0.6	



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).

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 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 Magazine, 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
- changing business models: it becomes economically viable to sell niche products.



















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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Time Magazine persons of the year 2003 – The American Soldier 2004 – George Bush 2005 – The Good Samaritans (Bono, Bill and Melinda Gates) 2006 – You 2007 – Putin 2008 – Obama

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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
- new challenges.

