

**Preliminary reflection on the implementation of the
Convention on the Protection and Promotion of the Diversity of Cultural Expressions
in the digital age**

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Executive summary

This report examines the impact of digital technologies on the way the diversity of cultural expressions is evolving and proposes a number of topics for discussion with a view to adapting the implementation of the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* to the particularities of the digital environment.

While digital technologies offer extraordinary possibilities for enriching the diversity of cultural expressions, they also increase the risk of certain cultures remaining on the sidelines. Without the space and time restrictions of the “material world,” these technologies allow a growing mass of “dematerialized” cultural expressions to circulate more freely and be more accessible to a broader public. The arrival of the digital age thus poses new challenges to States wishing to adopt and implement effective cultural policies and measures to protect and promote the diversity of cultural expressions in their territories and on the international scene.

The metamorphosis of the landscape in which cultural expressions now find themselves raises a number of questions concerning the adaptations required to effectively implement the 2005 Convention in this day and age. This study, however, rejects the idea of amending the instrument since such amendments to the text do not appear essential to the pursuit of the objectives of protecting and promoting cultural diversity in the digital world. While no provisions of the Convention explicitly mention digital technologies, the instrument implicitly conforms to the principle of technological neutrality. As such, the obligations of

the Parties can be implemented regardless of the environment—material or virtual—in which the cultural expressions are produced and disseminated. An examination of its scope of application and the relevant definitions led to the same conclusion: the 2005 Convention allows the Parties to take the particularities of the digital cultural ecosystem into account when they adopt policies and measures to protect and promote the diversity of cultural expressions.

While the text and the operational directives make no mention of issues specific to the digital world, a discussion on ways to adapt or guide the implementation of the relevant provisions of the Convention should nonetheless be encouraged in order to ensure that the objectives set by the Parties can also be attained in the digital environment. The study has assembled these provisions into four topics that merit in-depth discussion: (1) adapting national cultural policies to the particularities of the digital environment; (2) taking the reality of the digital world into account when deploying measures to educate and raise the awareness of the public, increase the participation of civil society and integrate culture into sustainable development; (3) cooperating to accelerate the digital shift in developing countries, especially by transferring digital technologies, strengthening the capacity to use these technologies and increasing the availability of digital cultural expressions from these countries; and (4) promoting the objectives of the 2005 Convention in other relevant negotiation forums, especially in negotiations of bilateral, regional and multilateral trade agreements whose scope of application extends to digital products.

This report calls on the Parties to react promptly to the new challenges posed by the reality of the digital world when implementing the 2005 Convention. It also invites the Parties to reject any form of compartmentalized discussions and to favour an open approach in order to take into account the way digital technologies are influencing the evolution of other legal instruments, notably trade agreements, whose e-commerce provisions may have an impact on the diversity of digital cultural expressions.

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Introduction

The goal of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*¹ is to preserve the capacity of States to define and implement cultural policies in order to protect and promote the diversity of cultural expressions, both nationally and internationally. It also aims to strengthen international cooperation with a view to enhancing the capacities of developing countries to protect and promote this diversity, foster the emergence of a dynamic cultural sector and increase the presence of their cultural expressions in international exchanges. However, the digital age has propelled the Parties to the 2005 Convention into a dematerialized world where the flow of information, images and sounds across long distances and borders challenges the power of States to effectively control cultural expressions produced or disseminated in their territories. Digital technologies accelerate and intensify these flows, which of course offers extraordinary possibilities for enriching the diversity of cultural expressions but which, in turn, increases competition among these expressions. As such, the power of States to intervene in order to rebalance cultural exchanges is also being put to the test. Digital technologies thus pose a challenge to all forms of State intervention aimed at protecting and promoting the diversity of cultural expressions, whatever the level, which raises questions about how the 2005 Convention preserves the powers of States to intervene in this area.

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¹ Hereinafter, the 2005 Convention.

At its sixth ordinary session, the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions proposed that “the inclusion of an item on the diversity of cultural expressions in the digital age be submitted to the Conference of Parties for consideration at the fourth ordinary session. It invited the Parties that so wished, as well as civil society, to report to the Committee at its seventh session on aspects of the development of digital technologies that impact the 2005 Convention and to submit proposals for future action”². The present document is a preliminary reflection on this theme. It explains certain notions and provides a synopsis of several main trends that characterize the evolution of cultural expressions in the digital environment (I). It also looks at the relevant provisions of the 2005 Convention and sets out a number of avenues to explore in order to delve further into this issue (II).

I. The evolution of the diversity of “cultural expressions” in a “digital” environment

1. Definition of concepts

- Digital

The term “digital” comes from the world of computers and electronics. Strictly speaking, digital corresponds to the representation of information using a binary coding system composed of a combination of two digits (0 and 1)³. This technology is the basis of all computers, and is the opposite of analog systems. Where digital systems tend to represent sounds or images as defined, limited values, analog systems are designed to represent the world as faithfully as possible in the form of continuous variations. By extension, “digital technologies” refers to all systems, devices or processes that require this type of representation to function, that is, whose signals are digitally coded. These devices are not just computers, but also increasingly digital music players, telephones, cameras, video cameras, and televisions as well as devices specially designed for digital data (tablets, for example).

² Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Sixth ordinary session, Paris, UNESCO Headquarters, December 10-14, 2012, CE/12/6.IGC/Dec., December 14, 2012, Decision 6.IGC 17, paragraph 5.

³ The terms “digital” and “numeric” are synonyms.

Digital technologies have many advantages. First, they increase the quality of information because, unlike analog technologies, converting, transmitting and duplicating data does not alter the content of the data. Second, they allow data to be compressed, which increases the volume of transferable information and the capacity to store and archive data. Lastly, digital coding is a universal language. Digitization⁴ and digital technologies therefore make it possible to combine all types of content on multiple platforms.

While each technology in the past used its own transmission channel (paper for photographs, cable for telephone, antenna for television, LPs, cassettes, music CDs, etc.), with digital technology it is possible to access, on the same platform and via a single network (the Internet), photographs, music, videos, films, books, and a wide range of other digital cultural content. It also offers the possibility of using the same platform to produce, transform and disseminate new content. This phenomenon of “digital convergence” thus allows a vast diversity of digital, and thus “dematerialized,” cultural expressions to circulate more quickly, in greater quantity, and to reach even the most widely dispersed and most remote populations.

The term “digital” is not defined in the 2005 Convention, which uses the more encompassing notions of “new technologies” and “information and communication technologies” (see below). Be that as it may, digital technologies influence the evolution of the diversity of cultural expressions in a unique way.

⁴ “Digitization” or “digital coding” refers to the operation of expressing information in a digital form. Among other things, it makes it possible to convert videos, images and sounds into a digital signal that can be processed by a computing device. As such, it is the technical foundation of the virtual world.

- *Cultural expressions*

Article 4.3 of the 2005 Convention defines “cultural expressions” as “those expressions that result from the creativity of individuals, groups and societies and that have cultural content.” In accordance with Article 4.2, “cultural content” refers to “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.” Article 4.4 specifies that cultural expressions are incarnated or transmitted by “cultural activities, goods and services,” without, however, defining the notions of “cultural activities,” “cultural goods” or “cultural services.” The definitions of “cultural expressions” and “cultural content” can be transposed to the digital environment. However, the definition of “cultural activities, goods and services” merits further comment.

While the use of the term “goods” or “services” is relevant to the application of national laws and international agreements (trade agreements usually differentiate between “goods” and “services”), the digital environment makes it difficult to differentiate between the two. Unless digital technologies are used to acquire “cultural goods” (such as ordering a paper book online) or “cultural services” (such as going online to purchase a ticket to a show), cultural expressions accessible in the digital world are “dematerialized.”⁵ The use of the term “cultural goods,” which traditionally refers to a material medium, thus appears inappropriate. On the other hand, the term “cultural services” seems better adapted to the virtual world, given that services are, by their very nature, “non-material.” However, this does not mean that all digitized cultural goods become, in the absence of other legal categories, “cultural services.” Such a qualification would have a major impact on the application of other rules of law, especially trade agreements that generally impose binding obligations on States with respect to the liberalization of cultural goods and more flexible obligations with respect to the liberalization of cultural services. The seemingly more neutral

⁵ New forms of cultural expressions (for example, hybrid products such as digital books that combine sounds, images and words, or products whose existence depends on digital technologies, notably cultural expressions that are only accessible via a tablet application) have been added to cultural expressions traditionally conveyed by cultural goods and services (books, music, films, etc.). We also talk about “digital arts,” which are composed of “a set of artistic explorations and practices whose processes of creation and dissemination as well as the works themselves would not exist without digital technologies.” See the Conseil des arts et des lettres, *Faire rayonner la culture québécoise dans l’univers numérique. Éléments pour une stratégie numérique de la culture*, Report by the Conseil des arts et des lettres du Québec submitted to the Québec Minister of Culture, Communications and the Status of Women, November 11, 2011, p. 13.

term “cultural products” may be preferable. For the purpose of the Convention, it does not however appear to be necessary to adopt a new vocabulary because the obligations of the Parties make no distinction between “cultural goods” and “cultural services”⁶. Nevertheless, it might be worthwhile to initiate a discussion on the definition of “cultural goods and services” as it applies to the digital environment given the impact that this definition may have on international law in a general sense.

2. A few observable trends

The Parties to the 2005 Convention recognize that “while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of the risks of imbalances between rich and poor countries”⁷. The evolution of digital technologies necessarily plays a role in this dynamic by providing extraordinary possibilities for the creation and dissemination of cultural expressions while, at the same time, increasing the risk of certain cultures remaining on the sidelines in these processes. In this respect, certain trends can be observed. They must not be considered as a complete picture of the changes that have occurred but rather as a snapshot of the multitude of shifts that are currently underway because digital technology is and will continue to be a shifting phenomenon. Sometimes even referred to as “alive,” a static representation cannot do it justice.

We are, in fact, in the midst, not at the end, of an evolution, some would say a revolution. This transition from a “material” to a “virtual” world seems to have gathered pace since the early 1990s, a decade during which societies began a gradual yet almost universal shift towards the dematerialization of works that result from creative genius. Since then, digital cultural content has been growing and circulating at an increasingly frenetic pace. While the speed and exact nature of these changes vary from one State to another and even within a given State, and while there are differences from one sector to another (changes having occurred more quickly in the music sector than in the book sector, for example), all the shifts

⁶ See articles 6.2 (b), 6.2 (c), 6.2 (e), 14 (a) (ii), 14 (a) (iv), 15 and 16 of the 2005 Convention.

⁷ Paragraph 20 of the Preamble of the 2005 Convention.

follow a similar trajectory. Far from being a comprehensive description of all the shifts underway, the five main trends briefly described below provide a glimpse of the dynamic created by the development of digital technologies.

A. An increase in and diversification of cultural offerings

It is generally acknowledged that the growth of digital technologies has enriched the cultural content on offer, referred to by one researcher as “hyper offre” in French [super offer]⁸. Since the space provided by the digital environment is unlimited, cultural expressions accumulate in a perpetually expanding world. The progressive disappearance of the limits inherent to the material world is not just about the capacity to “store” or “archive” these expressions, but also how to access them. All it takes is an Internet connection to make cultural expressions accessible anywhere and anytime, regardless of where they have been produced. Lastly, cultural content is enhanced by the phenomenon of the democratization of production and dissemination tools. Since digital technologies are generally affordable (not only in terms of acquiring digital tools, but also with regard to the cost of producing, distributing, disseminating and promoting digital cultural expressions), they open up new possibilities for creators. A broader diversity of cultural expressions has therefore emerged, generated not only by professionals but by amateurs⁹ and up-and-coming artists too.

B. A transfer of power from creators to the public

Digital technology has created a new ecosystem of cultural expressions, a unique meeting place for creators and the public. It dilutes and even transfers power from the creators of cultural content to the public. Once the public has the means to use the tools that enable them to access digital cultural content, they hold considerable power, much more than the “physical” world offers them. They can access cultural expressions of their choice, whenever and wherever it suits them using whatever medium available to them. They are no longer limited to information submitted and controlled by traditional creators; they have free

⁸ Pierre-Jean Benghozi, “L’économie de la culture à l’heure d’internet : le deuxième choc,” *Esprit*, July 2011, p. 3.

⁹ See Philippe Coulageon, *Sociologie des pratiques culturelles*, Collection Repères, Paris, La Découverte, 2010, pp. 84-88.

access to that information. Their power is amplified by the new interactivities provided by digital technologies and the social networks they generate: from passive recipient or consumer, the public has become a commentator, critic, promoter and even creator of cultural content. The public can also participate in the creation, production and dissemination process. Sometimes they even master these processes, as in the case of production and dissemination models that essentially rely on the participation of the public to create, disseminate and promote new cultural expressions. Lastly, the public can decide to interact with creators, or circumvent them by sharing or exchanging cultural expressions. Ultimately, it is the public that decides whether or not they will compensate the creator given that a “freebie culture” is already widespread on the Internet¹⁰.

C. *A dismantling of value chains*

Digital technologies provide opportunities for people to self-produce and self-distribute material, thereby changing the role of traditional developers of value chains in the culture sector¹¹. They alter and destabilize established structures by diluting the power of certain intermediaries (or simply causing them to disappear altogether) and by enabling the emergence of new actors (often from sectors other than culture, especially the IT sector, that are already very powerful in the cultural industry market): content aggregators (iTunes), search engines (Google), web browsers (Firefox) and operating systems (Windows, Mac OS, Linux), which offer new cultural services and have unequalled power to disseminate them. These actors have staked out a significant position in the digital world and exercise considerable influence over whether and how cultural expressions can be accessed, in turn controlling much of the cultural offerings and influencing the evolution of the diversity of cultural expressions. These actors, together with telecommunication providers, whose role and influence are constantly growing, dominate the ecosystem generated by digital technologies¹².

¹⁰ “Surveys report that most members of the public say that they would refuse to pay for arts online and suggest that persuading people to pay for arts online will require guarantees of exclusive content and consistent quality.” See David Poole, Sophie Le-Phat Ho, *Digital Transitions and the Impact of New Technology on the Arts*, Report prepared for the network of Canadian Public Art Funders (CPAF), June 2011, p. 5.

¹¹ See: Pierre-Jean Benghozi, *op. cit.* Note 8, p. 5 and following pages.

¹² See OECD, “The Development and Diffusion of Digital Content,” *OECD Digital Economy Papers*, No. 213, OECD Publishing, 2012, p. 7.

D. An ever-greater dominance of the “majors”

While digital technologies are redefining the roles of the actors, certain needs remain unmet, especially in terms of marketing and promoting cultural expressions. These operations are all the more important given that cultural offerings are constantly expanding. While this evolution can benefit diversity, certain cultures remain marginalized because a large segment of the public turns to cultural expressions that are often controlled by a handful of big players. Dominant market positions, which already exist in the material world, are being strengthened while others are emerging. While they have the potential to generate an unlimited quantity and variety of cultural expressions, digital technologies could, paradoxically, become the vehicle of a globalized mass culture controlled by large companies, leaving a very small place for the expression of other cultures. Creators, broadcasters and aggregators with more limited means or less expertise can have difficulty in reaching a broad public. On the other hand, when faced with an overabundance of cultural expressions, consumers may have trouble seeking a diversity of cultural expressions. The challenges facing the diversity of cultural expressions in the digital age must therefore not only be considered in terms of the quantity of available cultural content (deployment of measures to support the creation of digital cultural expressions), but also in terms of the accessibility and visibility of the content (formulation of measures to support the promotion and dissemination of digital cultural expressions and measures to educate and raise public awareness). While many actors may profit from digital technologies, from the giants of the cultural industry to artists working on their own¹³, access to digital technology alone does not seem to guarantee a reliable income stream for all creators¹⁴. Lastly, the challenge of adapting cultural content to multiple digital platforms that may be used (computer, tablet, telephone, etc.) requires investments that are beyond the reach of some actors, which could

¹³ A trend reflected by the theory of the long tail. See Chris Anderson, *The Long Tail: Why the Future of Business is Selling Less of More*, New York, Hyperion, 2006, 288 pages. Some people are predicting “an increase in ‘independent’ content with respect to the majors” and “a rebalancing of markets and practices in favour of ‘small works.’” Philippe Chantepie, Alain Le Diberder, *Révolution numérique et industries culturelles*, Collection Repères, Paris, La Découverte, 2010, pp. 50-51.

¹⁴ The long tail theory has been criticized: “The long tail may simply mean that an artist can get visibility for himself and their work, but it does not necessarily suggest a viable revenue source.” David Poole, Sophie Le-Phat Ho, *op. cit.* Note 10, p. 16.

also result in the cultural expressions generated by the most powerful groups being more readily accessible to the public.

E. A persistence and widening of digital divides and inequalities

The “digital divide” refers to several phenomena. Generally speaking, the expression refers to the disparity in the material needed to access digital technologies, that is, the infrastructure and equipment required for Internet access. Traditionally associated with the North-South gap, the “digital divide” may also refer to other realities, notably the disparity in access to materials between urban and rural populations or between the well-off and underprivileged communities within a State. These divides do not necessarily exist in every region of the world, but their existence is widely acknowledged and raises concerns because of the impact that access to digital technologies has on all aspects of life in a society, especially on economic development. Disparities in the progress of these technologies between countries, regions and populations are likely to maintain and even deepen the existing technological divide¹⁵. Specifically with regard to the challenges related to the diversity of cultural expressions, limited access to digital technologies reduces the possibility of entering into contact with the mass of digital cultural expressions and of using these technologies to create, disseminate and promote new cultural expressions. Cultural policies aimed at protecting and promoting the diversity of cultural expressions thus cannot be totally separated from infrastructure development policies aimed at making digital technologies accessible to all¹⁶.

However, “access” is not an end in itself because it does not guarantee “usage.” “Digital inequalities” are also part of the “digital divide”¹⁷. This is not simply a matter of having access to technologies but also involves mastering the skills required to benefit from them. This other divide can be geographic or economic, it can separate young people from their elders

¹⁵ Duncan Campbell, “La fracture numérique peut-elle être réduite ?,” *Revue Internationale du Travail*, Vol. 140, No. 2, 2001, p. 157.

¹⁶ “Network infrastructure considerations therefore must be viewed as important considerations in discussions about digital content policies.” OECD, *op. cit.* Note 12, p. 7.

¹⁷ Also a quality of the “second order digital divide.” Périne Brotcorne, Lotte Damhuis, Véronique Laurent, Gérard Valenduc, Patricia Vendramin, *Diversité et vulnérabilité dans les usages des TIC. La fracture numérique au second degré*, Gent, Academia Press, 2010, pp. 41-44.

and it can separate men from women. The existence of such inequalities confirms the fundamental role of educating and training the public in general and artists and cultural professionals in particular. In terms of culture, this reality also confirms the importance of investing in research and development with a view to ensuring the competitiveness of the sector.

II The protection and promotion of the diversity of cultural expressions in the digital environment

1. The place of digital technologies in the 2005 Convention

- *First observation: there is no explicit reference to digital technologies, only a few implicit references*

While the term “digital” does not appear in the text of the 2005 Convention, it is used in the *Universal Declaration on Cultural Diversity*, which was adopted in 2001, some two years before the official 2005 Convention negotiations began. The Universal Declaration mentions “equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination”¹⁸. In addition, the Action Plan appended to the Declaration encourages “digital literacy,” highlights the importance of “promoting linguistic diversity in cyberspace” and refers to the existence of a “digital divide”¹⁹. The Action Plan also calls for the adoption of measures to “foster access by developing countries to the new technologies, by helping them to master information technologies and by facilitating the digital dissemination of endogenous cultural products and access by those countries to digital resources”²⁰.

While it avoids using the term “digital,” the 2005 Convention takes up this idea. Other than a general reference in the preamble to the effect that “the processes of globalization, [are] facilitated by the rapid development of information and communication technologies,” the

¹⁸ Article 6 of the *Universal Declaration on Cultural Diversity*.

¹⁹ *Main lines of an action plan for the implementation of the UNESCO Universal Declaration on Cultural Diversity*, paragraphs 9, 10 and 11.

²⁰ *Ibid*, paragraph 11.

provisions devoted to international cooperation explicitly refer to the goal of “promoting the use of new technologies”²¹. The Parties also commit to support cooperation for sustainable development by “capacity-building through exchange of information, experience and expertise, as well as the training of human resources in developing countries, in the public and private sector relating to, *inter alia*, the use of technology and skills development and transfer,” as well as “the transfer of technology and know-how through the introduction of appropriate incentive measures, especially in the areas of cultural industries and enterprises”²². As for the operational guidelines of the 2005 Convention, the only explicit reference to “digital” can be found in the guidelines on education and public awareness (Article 10), where paragraph 4 stipulates that “the Parties shall consider [...] the identification of skills required and gaps in training, particularly related to digital expertise.” For their part, the guidelines related to articles 13, 14 and 16 refer to “the use of new technologies,” “information and communications technologies,” “technological needs,” “technological innovations” and “technology transfer”²³.

- *Second observation: the 2005 Convention makes no mention of the challenges specific to the reality of digital technologies*

The preceding observation gives rise to two comments. On the one hand, the scope of application of the provisions dealing with “technologies” necessarily includes digital technologies. There is nothing that precludes using the abovementioned more all-encompassing expressions to describe the unique ensemble of technologies that constitute digital technologies. On the other hand, there is no obligation by the Parties that specifically and exclusively refers to cultural expressions produced and/or exchanged in a digital format. The 2005 Convention makes no mention of the challenges specific to the reality of digital technologies. That said, the possibilities offered by digital technologies to expand the diversity of cultural expressions as well as the risks to which this diversity is exposed in

²¹ Article 12 (d) of the 2005 Convention.

²² Articles 14 (b) and 14 (c) of the 2005 Convention.

²³ See the operational guideline related to the Integration of culture in sustainable development (Article 13), paragraph 7.3.3; the operational guideline related to Cooperation for development (Article 14), paragraphs 1, 6.2, 6.3.1, 6.3.2, 6.3.3 and 6.4.3; and the operational guideline related to the Preferential treatment for developing countries (Article 16), paragraph 3.3.2 (b) (iii).

cyberspace can be different from the possibilities and risks seen in the material world. This is why, without calling into question the principle of technological neutrality (see below), it is advisable that certain policies and measures concerning the diversity of cultural expressions take into account the realities specific to each environment. In addition, policies and measures implemented by States, while facilitating the achievement of certain objectives in the material environment, could prove difficult to transpose to the digital environment (certain types of quotas, for example). Lastly, the protection and promotion of the diversity of cultural expressions in the digital environment may require specific policies and measures (policies to support digitization, for example). However, while the text of the 2005 Convention does not restrict the capacity of States to take such initiatives, it offers no particular guidance on formulating protection and promotion measures adapted to the digital environment. With the exception of Article 10 of the 2005 Convention, the operational guidelines also provide no specific guidance in this respect.

- *Third observation: the technological neutrality of the instrument*

The rights and obligations of the Parties under the 2005 Convention apply without regard to the technologies that may be used to create, produce, distribute, disseminate or promote cultural expressions. In addition, no provision encourages the Parties to use one technology to the detriment of another or to adopt policies or measures that would favour certain technologies. The text can therefore be interpreted as conforming in an implicit manner to the principle of technological neutrality despite the fact that no provision explicitly enshrines this principle. As such, the content of the 2005 Convention does not currently call into question the freedom of the Parties to adopt or reject this principle when they formulate their policies. While the obligations of the Parties are “technologically neutral,” they do not prescribe or prohibit them from adhering to the principle of neutrality when implementing enforcement measures. Subject to their multilateral, regional and bilateral obligations, the Parties thus have considerable manoeuvring room to use the principle of technological neutrality to guide their interventions aimed, directly or indirectly, at protecting and promoting the diversity of cultural expressions.

- *Fourth observation: the imprint of a “material” world in certain provisions*

Technological neutrality and the fact that the text makes no mention of challenges specific to the digital environment in no way obscure the fact that certain provisions reflect practices in the area of the protection and promotion of the diversity of cultural expressions that developed in a traditionally material environment. Such provisions thus clearly reflect the fact that policies and measures have, until now, been essentially formulated on a geographical basis, either by taking into account the power of borders to limit the flow of cultural goods (import quotas, for example) or by simultaneously basing them on the territorial jurisdiction of the State and the existence of “physical” locations for the dissemination of cultural expressions to regulate the provision of certain cultural services (film projection quotas, for example). This is notably the case for Article 6.2 (b) of the 2005 Convention that allows the Parties to adopt “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.” However, protection measures formulated in this context may be difficult to transpose to the dematerialized flows generated by digital technologies. More generally, consideration must be given to whether the resources available to States to “protect” and “promote” the diversity of digital cultural expressions are adequate and whether the cultural policies currently in effect can be transposed to the digital environment.

2. Considering digital technologies when implementing the 2005 Convention

It is possible to examine in a transversal manner the way digital technologies are taken into consideration when implementing the 2005 Convention, using its scope of application as the starting point (A). In a complementary fashion, it can also be examined vertically based on each relevant provision in the text. For the purpose of this preliminary study, these provisions are grouped together in four topics for discussion (B).

A. *Transversal analysis: a few comments on the Convention's scope of application*

The 2005 Convention “applies to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions”²⁴. The text does not address the environment in which this diversity is likely to occur. As such, nothing appears to prevent the 2005 Convention from applying to policies and measures aimed at protecting and promoting the diversity of cultural expressions produced and disseminated by means of digital technologies. On the contrary, the objectives set by the Parties to the 2005 Convention encourage them to examine the impacts of digital technology on the evolution of this diversity and take the necessary measures to preserve it in the digital environment.

The definition of “cultural diversity” in the 2005 Convention reinforces this interpretation. According to this definition, “cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, *whatever the means and technologies used*” [my emphasis]. It thus seems obvious that cultural diversity and, even more so, the diversity of cultural expressions can be manifested, enriched and transmitted by digital technologies. In addition, while the text of the 2005 Convention contains no explicit reference to “digital technology” and does not specifically address the issues related to the diversity of cultural expressions in the digital environment (see above), the evolution of cultural industries resulting from the development of these technologies should naturally lead the Parties to explore the specific characteristics of this environment, observable trends

²⁴ Article 3 of the 2005 Convention.

and implications of such changes on the pursuit of the objectives set out in the 2005 Convention. And while the few references to “information and communication technologies” are only found in the provisions dealing with international cooperation, it is clear that the challenges of digital technology go beyond this framework. Although developing countries may have specific concerns in this regard that deserve to be fully considered, the challenges posed by the digital revolution with respect to the protection and promotion of the diversity of cultural expressions affect all the Parties.

The general rule regarding the rights and obligations of the Parties set out in Article 5, i.e., the reaffirmation of “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”²⁵, encompasses the cultural policies and measures applicable to digital cultural expressions and the digital cultural ecosystem. These policies and measures can be “focused on culture as such or can be designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services”²⁶. In this regard, the digital revolution²⁷ raises several questions about the way a Party may, and must, intervene to protect and promote the diversity of cultural expressions. Of course, all these questions do not have to be addressed in the framework of the implementation of the 2005 Convention (for example, intellectual property rights are excluded from the Convention’s scope of application, and issues regarding the freedom of communication and respect for individuals also go beyond the framework of the 2005 Convention²⁷). Other topics, however, that are closely tied to the challenges facing the diversity of cultural expressions and that are crucial for the preservation of this diversity in the digital age fall within the scope of the “cultural policies and measures” covered by the 2005 Convention. This does not simply involve discussions on how to adapt those policies and measures designed to support creation, distribution, dissemination and promotion to the digital environment. It also means looking at issues that go to the very heart of the digital cultural ecosystem such as “taking into account the growing interdependence of the

²⁵ Article 5.1 of the 2005 Convention.

²⁶ Article 4.6 of the 2005 Convention.

²⁷ Subject to Article 2.1 of the 2005 Convention that sets out the Principle of respect for human rights and fundamental freedoms.

various sectors or the capacity of competition legislation to bring the technical and content industries into sync²⁸. Digital technology is thus spurring the Parties to take a fresh look at the meaning of “cultural policies and measures” within the meaning of the 2005 Convention.

In any event, these cultural policies and measures must remain consistent with the provisions of the 2005 Convention²⁹. In this regard, we should remember that the concept of “protection” caused quite a stir during the negotiations of this legal instrument, pushing the negotiators to clarify it in order that the meaning be understood as “the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions”³⁰. The principles set out in Article 2 of the 2005 Convention also serve as a guide for the interpretation of “protection,” especially the principles of equitable access³¹ and openness and balance³². This definition and these principles can be transposed to protection policies and measures aimed at digital cultural expressions. However, in practice, certain approaches that have been proposed to date to “protect” cultural expressions are difficult to transpose to the digital environment. While the State keeps its rights and obligations with respect to the diversity of cultural expressions, its borders are no longer sufficient to control dematerialized flows. In addition, the notions of “openness” and “balance” must be adapted to the digital environment since in a virtual world where borders are being overwhelmed by a globalized space, State control over such considerations tends to be much more limited than in the environment in which the cultural industries first appeared and evolved.

Lastly, one may ask whether the definitions set out in Article 4 of the 2005 Convention, which define the scope of application of the instrument, are sufficient to allow the effective implementation of the 2005 Convention in the digital age. The issue as to whether it is advisable to define the term “digital” is also worth raising. It should be noted that, until now, there has been no generally accepted legal definition of the term “digital” in international law. There are some national laws and European legislation and directives that govern

²⁸ Philippe Chantepie, Alain Le Diberder, *op. cit.* Note 13, p. 73.

²⁹ Article 5.2 of the 2005 Convention.

³⁰ Article 4.7 of the 2005 Convention.

³¹ Article 2.7 of the 2005 Convention.

³² Article 2.8 of the 2005 Convention.

specific activities in the digital environment. In some cases, the digital products or elements in question can be defined³³. In other cases, the general formulation of the legal statement may be sufficient to render the legal text applicable to this environment. It seems that this is the case for the provisions of the 2005 Convention, which do not require any amendments for issues relating to digital technology to be fully taken into account by the Parties when implementing their obligations.

B. Vertical analysis: four topics for discussion

- First topic: national cultural policies

Articles 6, 7 and 8 of the 2005 Convention set out the rights of the Parties at the national level and their obligations with respect to the protection and promotion of the diversity of cultural expressions. The implementation of these provisions in the digital age could, in certain cases, force changes in the approaches used to date. It seems difficult, at first glance, to envisage policies and measures that would apply to all sectors given the heterogeneous way in which the digital environment has evolved from sector to sector. Further reflection in this regard might thus require a sectoral approach, while also taking into consideration the new interactions and interdependencies between various cultural sectors that are being created by digital technologies. A few remarks can, however, be formulated with respect to the rights and obligations set out in these three articles.

In terms of rights, Article 6 lists a series of measures that each Party can adopt based on their specific circumstances and needs. The content of this article was strongly influenced by geographically based legislative and regulatory frameworks that, for a long time, enabled States to control the entry of cultural expressions from other territories into their national

³³ This is the case, for example, for the definition of “digital book” used in French legislation governing the price of digital books (see *Act No. 2011-590 of 26 May 2011, with respect to the price of digital books*, JORF No. 0124 of 28 May 2011, p. 9234, which “applies to the digital book when it is an intellectual work created by one or more authors and when it is commercialized in a digital format and published in a print format or when it may, because of its content and composition, be printed” or the definition of “digital content” proposed by a European Directive on consumer rights (see Article 2 of Directive 2011/83/UE of the European Parliament and of the Council of 25 October 2011, and OJ L 304 of 22 November 2011, p. 64, which defines digital content as “data which are produced and supplied in digital form.”

territories. However, in the digital environment, it is easy to “bypass existing cultural protections”³⁴, which would seem to justify the development of approaches better adapted to the specificities of the digital environment.

The difficulty in transposing the quotas referred to in Article 6.2 (b) to the digital environment has already been mentioned. The increase in and diversification of the offerings resulting from the use of digital technologies may, however, “drown” national cultural content in a growing mass of cultural expressions, forcing the Parties to seek new ways to promote their national expressions. However, with the absence of border controls, any attempt to restrict the flow of foreign cultural expressions in order to secure a space for the dissemination of national productions is illusory. In addition, in a virtual world where it is the public that decides where and when to access content and from which service provider (a phenomenon called “delinearization”), the wisdom of using this type of measure must be reconsidered. New forms of quotas could, however, be envisaged, including quotas on the showcasing of national cultural expressions or expressions in a given language³⁵.

Measures aimed at granting public funding³⁶ may also need to be reconsidered. First, it is widely acknowledged that the development of the digital environment as a meeting place between creators and the public, combined with the methods for marketing cultural expressions that coincide with this evolution, are changing the traditional forms of cultural funding. New sources of funding will have to be found. Second, while the goal of supporting creation remains, the beneficiaries may need to be redefined. On the one hand, the growing interdependence of the various sectors is encouraging governments to move beyond a purely sectoral vision of funding. On the other hand, the emergence of new actors that are reconfiguring the value chains may lead to the identification of new categories of beneficiaries. For example, content aggregators play a crucial role in guiding demand (support could thus be provided for the positioning of national products, and even the emergence of national content aggregators). Given that cultural expressions produced by

³⁴ Société de développement des entreprises culturelles, *Porte grande ouverte sur le numérique*, Consultation report, Option culture, virage numérique, Montréal, 2011, p. 6.

³⁵ Pierre Lescure, *Mission Act II de l'exception culturelle. Contribution aux politiques culturelles à l'ère numérique*, Volume 1, May 2013, p. 152. The report also raises the idea of quotas for independent productions and up-and-coming talent.

³⁶ Article 6.2 (d) of the 2005 Convention.

cultural professionals are increasingly finding themselves alongside amateur creations, support for these new forms of cultural expressions could also be considered³⁷.

The implementation of Article 7 of the 2005 Convention in the digital age brings the question of access to digital technologies into sharp focus (the access creators enjoy to the various digital means of production, dissemination and promotion, and the access to cultural expressions such technologies provide to the public). These issues are closely linked to the eradication of digital divides and the alleviation of digital inequalities mentioned previously. Within the globalized environment generated by the digital cultural ecosystem, it is no longer, as such, the location of the creator or the public that determines access to a diversity of cultural expressions, but rather the availability and mastery of digital technologies in order to benefit from them that is important. In this context, the obligations arising from Article 7 appear to be closely linked to articles 10, 11 and 13 of the 2005 Convention regarding education, the participation of civil society and sustainable development (see below).

Article 8, which deals with measures to protect cultural expressions that are “at the risk of extinction, under serious threat or otherwise in need of urgent safeguarding,” raises the question of how such situations can be identified in the digital environment³⁸. In addition, given the importance of digital technologies for the diversity of cultural expressions, is the absence or limited nature of certain cultural expressions from this environment sufficient to consider them at risk of extinction or under serious threat? If so, what safeguarding measures would be appropriate for this environment? In this regard, it might be useful to examine the link between the threats in the “physical” environment and those that characterize the digital environment.

³⁷ This type of measure might, moreover, fall within the scope of application of articles 6.2 (e) and 6.2 (g) of the 2005 Convention.

³⁸ It should be noted that, with the exception of Article 8, three other articles of the 2005 Convention make explicit reference to threatened cultural expressions, namely articles 12, 17 and 23 (d). For a general analysis of the terms “risk of extinction,” “serious threat” and “urgent safeguarding” in Article 8, see Ivan Bernier, *Les expressions culturelles menacées dans la Convention sur la diversité des expressions culturelles de l’UNESCO*, Québec, 2009, pp. 10 and following. Online: http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/Expressions_culturelles_menacees.pdf (May 30, 2013).

- *Second topic: education, participation of civil society and sustainable development*

While the issues of education, the participation of civil society and sustainable development are covered by three separate provisions—articles 10, 11 and 13 of the 2005 Convention, respectively—they are closely interrelated. First, sustainable development is based, among other things, on the principles of intergenerational and intragenerational equity. The transmission of a diversity of cultural expressions to future generations requires raising the awareness of present generations to the importance of preserving this diversity, which is where education plays a fundamental role. However, in the digital age, education and raising awareness of the diversity of cultural expressions³⁹ requires material access to digital technologies and the acquisition of the knowledge needed to use them. The notion of maintaining the social cohesion of communities, which is fundamental to sustainable development, is also prompting societies to consider deploying educational and awareness-raising measures for all social groups and all generations, including the elderly, who often possess limited understanding of how to access these technologies. Moreover, measures “to encourage creativity and strengthen production capacities”⁴⁰ must, among other things, target the integration of digital tools into the teaching of techniques for the creation, production, dissemination and promotion of cultural expressions, as well as the promotion of innovation, by investing in research and development for cultural industries in the digital age. Sustainable development also hinges on the active participation of civil society, and Article 11 clearly recognizes this fundamental role in achieving the goals of the 2005 Convention. Digital technologies provide new opportunities for interaction between governments and representatives of civil society, and could be used to revitalize the participation of civil society in initiatives aimed at protecting and promoting the diversity of cultural expressions.

Lastly, Article 13 deals specifically with the integration of culture into sustainable development. The implementation of this provision in the digital age requires a debate on how culture should be taken into consideration in the digital shift of societies. Since the

³⁹ Article 10 (a) of the 2005 Convention.

⁴⁰ Article 10 (c) of the 2005 Convention.

*Seoul Declaration for the Internet Economy*⁴¹, a number of States have adopted a digital strategy while others are in the process of doing so. However, this shift must take into consideration the impacts that digital technologies have on culture in general and the diversity of cultural expressions in particular. Sustainable development also provides an impetus to look at how cultural industries that are active in the digital environment behave in terms of mastering the cultural content that they make available to the public. The quality of this content and their interoperability (i.e., the ability to access it on different types of digital devices) and life cycle (i.e., its continued accessibility when devices are upgraded or when technologies evolve) must be taken into consideration⁴². Lastly, the digital shift also has certain impacts on the preservation of natural resources and the quality of the environment, notably in terms of energy costs related to the manufacturing and operation of equipment and costs related to the recycling of digital devices that generally have a very short life cycle⁴³.

- *Third topic: cooperation for development*

While the avenues for reflection raised previously are of interest to all States, rich, emerging or poor, the implementation of articles 12 and 14 through 18 of the 2005 Convention should allow the Parties to focus on specific initiatives to accelerate the digital shift in developing countries. Priority could be given to three approaches: transferring digital technologies; mastering these technologies, not just by creators of cultural content but also by the public in general in order to facilitate their access to digital cultural expressions; and providing a broader array of cultural expressions from developing countries in the digital environment. The upheavals caused by digital technologies in the cultural industry sector are providing new opportunities for developing countries⁴⁴. On the one hand, these technologies

⁴¹ *Seoul Declaration for the Future of the Internet Economy, adopted on 18 June 2008.*

⁴² See Mira Burri, "Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship," *International Journal of Cultural Property*, Vol. 17, 2010, p. 47. See also Marie-Aude Roux, "Le numérique, passeport vers l'oubli," *Le Monde*, 30 May 2013, Cahier Ircam Manifeste 2013, p. III, where the author mentions "[t]he rapid obsolescence of physical storage media, software and recording formats supports" and raises the question of "the survival of contemporary memory."

⁴³ David Poole, Sophie Le-Phat Ho, *op. cit.* note 10, p. 49.

⁴⁴ See Alain Kiyindou, "De la diversité à la fracture créative : une autre approche de la fracture numérique," *Revue Française des Sciences de l'Information et de la Communication*, No. 2, 2013, pp. 1-8 ; Hortense Volle, *La promotion de l'art africain contemporain et les N.T.I.C.*, Paris, L'Harmattan, 2004, 164 pages.

considerably reduce the cost of producing, disseminating and promoting cultural expressions and, on the other, they facilitate the circulation of works, making it possible to reach a large audience. Access to digital technology and tools can compensate for a lack of movie theatres, libraries, televisions, CD players and even sound recording and film studios. These technologies must, however, be available, which means making the development of the required infrastructures a priority, notably by developing new forms of partnerships⁴⁵. Developing skills essential for mastering digital technologies, providing digital production training to artists and cultural professionals and educating the public in the use of these technologies must also be prioritized. The *International Fund for Cultural Diversity* could be used to fund this type of project⁴⁶. The disappearance of State borders in the digital environment combined with the explosion of on-demand services has considerably reduced the powers of the Parties with respect to providing preferential treatment for developing countries⁴⁷. The possibility of providing incentives to encourage the dissemination of cultural expressions from developing countries could, nevertheless, be explored. In addition, in the context of trade negotiations, greater flexibility could be accorded to developing countries in the implementation of obligations respecting trade in digital cultural products.

- *Fourth topic: trade negotiations and other relevant discussion forums*

The acknowledgement of the dual economic and cultural nature of cultural goods and services is enshrined in the 2005 Convention. It is precisely this dual nature that has encouraged many States to invest in drawing up this legal instrument, especially with a view to preserving “their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions”⁴⁸. This sovereign right may, however, be limited by multilateral, regional or bilateral agreements reached by each Party in other forums. As such, trade negotiations are the main source of concern. In the framework of a reflection on the implementation of the 2005 Convention, the evolution of bilateral trade agreement models must be examined given that new approaches to e-commerce may call into question the power of intervention that the Parties

⁴⁵ In accordance with Article 15 of the 2005 Convention.

⁴⁶ In accordance with Article 18 of the 2005 Convention.

⁴⁷ In accordance with Article 16 of the 2005 Convention.

⁴⁸ Article 5.1 of the 2005 Convention.

wished to preserve. For some ten years now, free trade agreements have included a chapter on e-commerce and differentiate between “traditional” goods and services and a new category of goods and services grouped together under the term “digital products”⁴⁹. The obligations set out in this chapter are generally more restrictive than those in the chapters devoted to the liberalization of trade in goods or services. Given the fact that cultural expressions produced and/or disseminated by digital technologies fall into this new category of digital products, the obligations of the Parties under such agreements considerably reduce the scope of the rights that are recognized in the 2005 Convention. Articles 20 and 21 thus remain important tools for the development of mutual support approaches between the various legal instruments to which they are Parties⁵⁰, especially to promote the objectives and principles of the 2005 Convention in the framework of such trade negotiations in order to preserve their right to intervene in the culture sector. In this regard, a debate could be initiated on clauses that refer back to the 2005 Convention and that could be included in these types of agreements. Standard examples of obligations with respect to the electronic trade of digital cultural products could also be proposed to assist the Parties in their negotiations. Lastly, the phenomenon of convergence resulting from digital technologies could encourage the Parties to consider other international negotiation forums whose work could have an impact on the evolution of the digital environment, notably those forums that deal with issues related to telecommunications, investments and competition.

⁴⁹ Ivan Bernier, *Les accords de libre-échange conclus récemment par les Etats-Unis en tant qu'exemple de leur nouvelle stratégie relativement au secteur audiovisuel*, Québec, 2004, 16 pages. Online: http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf_seoul_fra_2004.pdf (May 30, 2013).

⁵⁰ In accordance with Article 20.1 (a) of the 2005 Convention.

Conclusion

In 2003, the member States of UNESCO decided to task the Director-General with drawing up a legal instrument to protect and promote the diversity of cultural expressions. Two years later, they adopted a new Convention, one of whose main objectives was to reaffirm the sovereign right of States to formulate and implement cultural policies and measures with a view to preserving this diversity. In 2013, there is no doubt that one of the most important challenges of implementing this Convention is to adapt the forms of intervention in the culture sector at both the national and international levels to the particularities of digital technologies and to their impacts on the diversity of cultural expressions. The goal is ambitious, but the rapid evolution of the digital culture ecosystem calls for quick action.

Reacting to the impacts of digital technologies on the diversity of cultural expressions and thinking about the various ways in which cultural policies and measures can be adapted to the particularities of the digital environment does not however obviate the Parties from pursuing, in parallel, the objectives they set out in the 2005 Convention in the “material” world. Because, while it cannot be denied that a digital shift is currently underway and will eventually be felt worldwide, the fact remains that all cultural sectors are not being impacted at the same pace or in the same way by digital technologies. Therefore, “traditional” cultural policies and measures remain relevant, and it is essential that States remain vigilant in order to preserve the essential nature of their ability to intervene.

Moreover, reflections on the protection and promotion of the diversity of cultural expressions in the digital age by the bodies of the 2005 Convention should ideally be conducted in parallel with international monitoring of work and negotiations in other forums. The evolution of digital technology and its impacts on the diversity of cultural expressions make it even more vital to promote the objectives and principles of the 2005 Convention in forums outside UNESCO. Just as the trade negotiations during the Uruguay Round revealed the need to develop a binding legal instrument to preserve the ability of

States to intervene to protect and promote the diversity of cultural expressions, trade negotiations currently underway require that special precautions be taken by the Parties to ensure that this ability to intervene, which is altered by the reality of digital technology but still essential, is preserved. The reflection on the implementation of the 2005 Convention in the digital age must thus take into consideration the interactions between this legal instrument and numerous other international agreements and interdependencies that link culture to other areas of national and international activity. This reflection must not be compartmentalized under any circumstances.

Lastly, while the present study proposes a comprehensive overview of the challenges posed by digital technologies in implementing the 2005 Convention, it is not an exhaustive study of this theme. It merely strives to give a snapshot of the complexity of the topic and, perhaps, to structure any reflection that might be undertaken should the Conference of the Parties decide, at the fourth ordinary session in June 2013, to so mandate the Intergovernmental Committee. If such a situation comes to pass, it would certainly be desirable that the required resources be deployed to ensure that the reflection continues, not just among the Parties, but also in collaboration with the artists and cultural professionals whose experience and expertise are essential to a thorough discussion of the review topics outlined herein.