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international law of contemporary media

session 8: media globalisation and its discontents

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fall term 2009/2010, 3 november 2009

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the goals of the day

- flexibilities within the WTO law to reconcile trade and non-trade values
- striving for cultural diversity: **the UNESCO Convention**
- **media globalisation**: the state of affairs and its implications
- what is then cultural diversity? economics, politics, reality
- the changing media landscape and some thoughts on the repercussions of digital media
- challenges vs. opportunities; new regulatory designs.

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WORLD GOVERNMENT

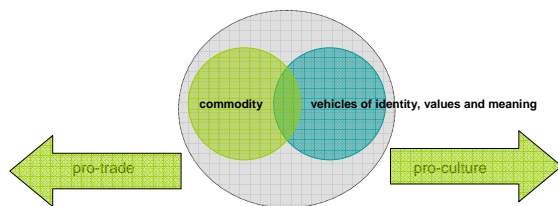
DEPARTMENT OF TRADE: 	JUSTICE DEPARTMENT: 
DEPARTMENT OF SOCIAL AFFAIRS: 	DEPARTMENT OF THE ENVIRONMENT: 

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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?

dual nature of cultural goods and services



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'**.

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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; 35 members - MFN exemptions)
- **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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Switzerland: art. II MFN exemptions

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-time which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment, to audiovisual works and/or to suppliers of audiovisual services meeting specific European origin criteria	European countries	Indefinite	Promotion of cultural objectives based on long-standing cultural links
	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

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India: List of specific commitments

Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
2. Communication Services				
D. Audiovisual Services				
e) Motion picture or video tape distribution services (CPC 98113)	1) Unbound 2) Unbound 3) i) Only through representative offices which will be allowed to function as branches of companies incorporated outside India ii) Import of titles restricted to 100 per year	1) Unbound 2) Unbound 3) Subject to the prescribed authority having certified that the motion picture has: a. won an award in any of the international film festivals 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 supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons	

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flexibilities under the wto law

- flexibilities however never found sufficient
- **forum-shopping: solutions outside the WTO**
- **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 9 October 2009, 103 states have ratified; incl. Switzerland as of July 2008.

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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

1. The Parties (...) reaffirm their **sovereign right** to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.
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.

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.**

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?

what is culture?



Mona Lisa
Leonardo da Vinci
(1503–1505)

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Marcel Duchamp
L.H.O.O.Q. (1919)

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Shrek 2 (2004)
No 15 All-time box
office \$880,871,036

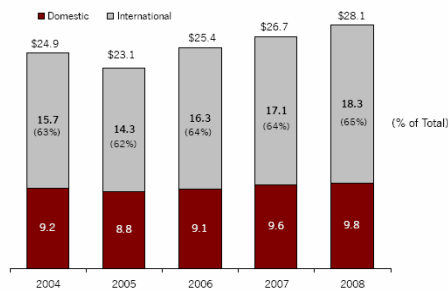
<http://www.imdb.com/boxoffice/alltimegross?region=world-wide>

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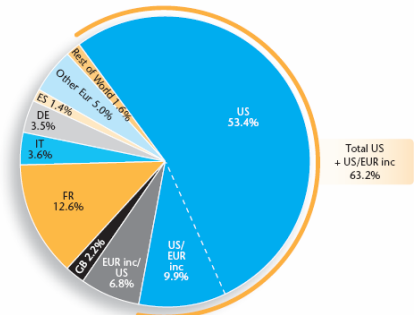
media markets: state of affairs

- US motion picture and television production industry remains highly competitive: in 2007, the enduring value and appeal of US entertainment around the world earned \$15 billion in audiovisual services exports, a 23% increase over 2006 and over 50% more than in 2003
- positive balance of trade: in 2007, surplus was \$13.6 billion, or 10% of the total US private-sector trade surplus in services. 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

Worldwide Box Office (US \$ Billions): MPA, Nielsen EDI, and Various Sources



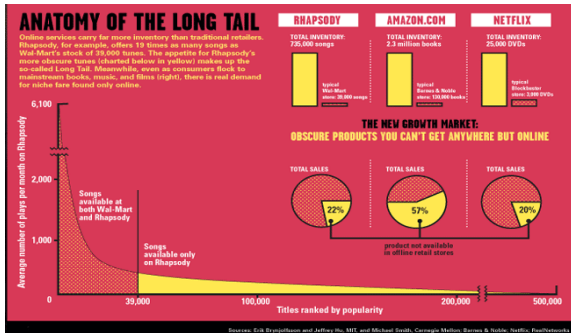
Breakdown of European Union admissions by the origin of films | 2008 prov.



selected features of the digital environment

- proliferation and diversity of content
- 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.

the long tail theory



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.

lower inventory storage costs



Amazon UK Warehouse

lower distribution / production costs



lower search costs



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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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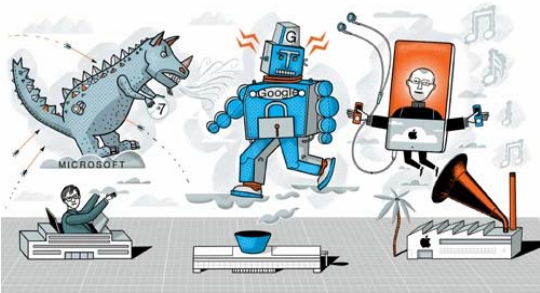
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selected effects of digital media

- as there is no scarcity, rationales for creating **reserved self-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
- empowerment of the consumer
- need to readjust the tools of media/cultural policies
- **new challenges.**

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