

PROTECTION OF CULTURAL DIVERSITY FROM A EUROPEAN AND
INTERNATIONAL PERSPECTIVE

PROTECTION OF CULTURAL
DIVERSITY FROM A EUROPEAN AND
INTERNATIONAL PERSPECTIVE

Edited by

HILDEGARD SCHNEIDER
and
PETER VAN DEN BOSSCHE

 intersentia
Antwerpen – Oxford

Distribution for the UK:

Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Fax: +44 1865 51 07 10

*Distribution for Switzerland and
Germany:*

Schulthess Verlag
Zwingliplatz 2
CH-8022 Zürich
Switzerland
Tel.: +41 1 251 93 36
Fax: +41 1 261 63 94

*Distribution for the USA and
Canada:*

International Specialized Book
Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Fax: +1 503 280 8832
Email: info@isbs.com

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Fax: +32 3 658 71 21

Protection of Cultural Diversity from a European and International
Perspective
Hildegard Schneider and Peter Van den Bossche (eds.)

Cover photograph: © iStockphoto.com/Gautier Willaume - 'Arabic market'

© 2008 Intersentia
Antwerpen – Oxford – Portland
www.intersentia.com

Page layout and typography: Boekopmaak Nettie Litjens, Maastricht

ISBN 978-90-5095-864-6
D/2008/7849/107
NUR 828

No part of this book may be reproduced in any form, by print, photoprint, microfilm
or any other means, without written permission from the publisher.

PREFACE

The protection of cultural diversity has become an important issue on the agenda of many international organisations and fora. The G8, the Council of Europe and UNESCO, for example, have all expressed the need for the protection of cultural diversity. In October 2005, 148 countries signed the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter referred to as 'UNESCO Convention'). The UNESCO Convention entered into force on 18 March 2007. With the adoption of this Convention, the international community has created a framework for protective measures dedicated to the diversity of cultural expressions against the influences of globalisation and free trade. This progressive affirmation of the need for the protection of cultural diversity responds to growing concerns of governments and civil society regarding the preservation of cultural expressions. There is a mounting consensus in the international community that the preservation of cultural diversity is as important to humankind as the protection of biodiversity. The European Ministers of Culture declared in Thessaloniki in May 2003:

Europe as a continent of culture can neither accept the threat of cultural homogeneity, nor the threat of the clash of civilisations. The European answer to all this is to insist on safeguarding and promoting cultural diversity. This basic political pursuit needs the appropriate legal basis. On the international level, the latter may be expressed under the aegis of UNESCO in the form of a multi-lateral convention on the protection and promotion of cultural diversity, taking into account the preparation already done in the framework of the Council of Europe and the International Network of Cultural Policy. The basic international forum for cultural policies cannot be the WTO.

The Faculty of Law of Maastricht University, in cooperation with the Boekman Foundation, Amsterdam, organized on 18 and 19 March 2007 an international conference on *The Protection of Cultural Diversity from an International and European Perspective*. The aim of the conference was to discuss, on the very date of the entry into force of the UNESCO Convention, the policy space for national policies for the protection of cultural diversity. This book contains contributions reflecting the discussions and conclusions reached at this conference. The first part of the conference addressed the protection of cultural

diversity in the context of international law. The first session of this part focused on the relationship between the protection of cultural diversity and international trade law. The contribution on this topic by Peter Van den Bossche on *Free Trade and the Protection of Cultural Diversity: A WTO Perspective on National Policy Options* has earlier been published by Peter Van den Bossche as *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures* (Boekman Foundation, 2007) (with foreword by Cas Smithuijsen) and is therefore not included in this book. The second session of the first part of the conference focused on the UNESCO Convention and discussed the Convention from different perspectives. This book includes contributions on *The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, by Yvonne Donders, University of Amsterdam, on the *Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity*, by Christoph Beat Graber, University of Lucerne, on *Cultural Diversity and the WTO: David versus Goliath?*, by Jan Wouters and Bart De Meester, University of Leuven, and on *Trade Meets Cultural Diversity: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions*, Anke Dahrendorf, Maastricht University. The third and last session of the first part of the conference dealt with the protection of cultural diversity through the use of intellectual property rights. This book concludes contributions on this topic by Hannu Wager, WTO Secretariat, on *Copyright and the Promotion of Cultural Diversity* and by Fiona Macmillan, University of London, on *The UNESCO Convention as a New Incentive to Protect Cultural Diversity?*

The second part of the conference was devoted to the protection of cultural diversity and policy making in the European Union. The first session of this second part dealt with European Union law and policy on cultural diversity in general. This book includes contributions on *The Value of Cultural Diversity in European Union Law*, by Bruno de Witte, European University Institute, Florence, and on *The Implementation of the Droit de Suite – an Inventory and Reflection in the light of the Community’s Cultural Competence*, by Katja Lubina and Hildegard Schneider, Maastricht University. The second session of this part of the conference focused on European law and policy regarding mass media and the film industry. This book includes contributions by Madeleine de Cock Buning, Utrecht University, on *Cultural Diversity in Mass Media Regulation*, and by Sophie De Vinck and Caroline Pauwels, Free University Brussels, *Cultural Diversity as the Final Outcome of EU Policymaking in the Audiovisual Sector: a Critical Analysis*.

The editors wish to thank Nettie Litjens and Anja Wiesbrock for their invaluable assistance in preparing this book for publication.

Peter Van den Bossche and Hildegard Schneider
Maastricht, December 2007/October 2008

TABLE OF CONTENTS

Preface.....	v
List of Abbreviations	xi
The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions Yvonne DONDERS	1
Free Trade Meets Cultural Diversity: the Legal Relationship between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions Anke DAHRENDORF	31
Cultural Diversity and the WTO: David versus Goliath? Jan WOUTERS & Bart DE MEESTER	85
Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity Christoph Beat GRABER	141
The UNESCO Convention as a New Incentive to Protect Cultural Diversity Fiona MACMILLAN	163
Copyright and the Promotion of Cultural Diversity Hannu WAGER	193
The Value of Cultural Diversity in European Union Law Bruno DE WITTE	219
Cultural Diversity in Mass Media Regulation Madeleine DE COCK BUNING	249

Table of Contents

Cultural Diversity as the Final Outcome of EU Policymaking in the Audiovisual Sector: A Critical Analysis Sophie DE VINCK & Caroline PAUWELS.....	263
The Implementation of Droit de Suite – An Inventory and Reflection in the light of the Community’s Cultural Competence Katja LUBINA & Hildegard SCHNEIDER.....	317
Annex UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.....	357
Contributors.....	375

LIST OF ABBREVIATIONS

AVMD	Audiovisual Media Directive
AVMSD	Audiovisual Media Services Directive
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
BYIL	The British Yearbook of International Law
CCD	UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
CFI	Court of First Instance
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
EEA	European Economic Agreement
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
General Comment	General Comment No. 17 on 'The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Article 15, paragraph 1(c) of the Covenant)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
INCD	International Network for Cultural Diversity
INCP	International Network on Cultural Policy
IPRs	Intellectual property rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture

List of Abbreviations

IViR	Institute for Information Law
JIEL	Journal of International Economic Law
MEA	Multilateral Environmental Agreements
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
SCM	Agreement on Subsidies and Countervailing Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWF	Television Without Frontiers Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization