DOCTRINE AND OPINIONS

CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS AND THE PROTECTION OF AUTHORS' RIGHTS[*]

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At its 33rd session on 20 October 2005, the General Conference of UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

This text, which seeks to protect and promote culture through its diversity, lies in harmony, in principle, with the protection of literary and artistic property, itself an essential instrument for the existence and development of an abundant and diversified production of quality cultural goods.

In fact, the Convention's adoption was supported by creators, often united within coalitions for cultural diversity, amongst which the Canadian and French coalitions played a leading role. Moreover, the goals of protecting authors' rights and cultural diversity frequently go hand in hand in political discourse (see, for example, the statements by the French Minister of Culture, Mr Renaud Donnedieu de Vabres, on 20 December 2005 in the National Assembly during the debate on the implementation of the European Directive of 22 May 2001 on copyright and related rights in the information society).

Indeed, culture is sustained by creativity, which presupposes in turn that creators are protected and can receive adequate remuneration. In the same way, the desire of States to foster their national culture implies that they protect their creators. Thus authors' rights work in favour of cultural diversity and the fight for cultural diversity contributes to the defence of authors' rights.

However, this idyllic view needs to be nuanced.

Literary and artistic property is normally intended to protect creativity regardless of its origin. In concrete terms, this is reflected in particular by the fact that the principle of national treatment is one of the fundamental principles on which the international copyright conventions, including the Berne Convention, are based. And even when the principle of

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reciprocity operates, it is enough that the foreign State should grant protection to nationals of the State applying this principle for its own nationals to enjoy in that State the same protection as the latter's nationals.

Literary and artistic property is not intended as such to reduce one State's possible cultural hegemony over another. For example, it matters little from a copyright viewpoint that the author seeking protection is American or that the globally dominant culture is American.

It is true that the Berne Convention and the Universal Copyright Convention contain specific provisions for developing countries and that one of the purposes of these provisions is to stimulate these countries' cultural development. However, these provisions have limited scope and deal solely with the implementation of compulsory licensing systems for translation and reproduction. Furthermore, the fight for cultural diversity is not a necessity that is limited purely to developing countries but rather a value that deserves to be preserved in all States.

The fundamental neutrality of authors' rights in relation to cultural diversity is confirmed, moreover, by the fact that it was considered necessary to draw up the new Convention on cultural diversity and place it within a different framework from that of the copyright conventions.

In addition, during the process of drafting the Convention on cultural diversity, some rightholders expressed concern that certain States, pleading the need to protect their own cultures, might use it as a pretext to challenge the protection of authors' rights and their obligations under the international conventions governing copyright.

Indeed, we know that certain developing countries regard literary and artistic property as an impediment to the development of their cultural industries. The Convention too pays special attention to developing countries both in its objectives, which include (Article 1(i)) that of "enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions", and in its substantive provisions which not only place particular emphasis, in Article 14, on "cooperation for development", devoted notably to "strengthening the cultural industries in developing countries", but also provide, in Article 16, that developing countries are to be granted preferential treatment in cultural exchanges.

Thus, in connection this time with the rights of broadcasting organisations, Brazil relied on the adoption of the Convention on cultural diversity to table a proposal at the 13th session of the WIPO Standing Committee on copyright and related rights, held in November 2005, to the effect that no provision of the treaty being drafted on the protection of broadcasters "shall limit or constrain the freedom of a contracting party to protect and promote cultural diversity". Accordingly, if this clause were to be accepted, the protection granted by the new treaty could be challenged by a signatory State purely on the ground that the State considered it contrary to the protection of cultural diversity. This would create a very worrying precedent that could be transposed to the field of authors' rights.

The idea that the Convention on cultural diversity could be used as an argument to challenge the protection of authors' rights, or related rights, is, in our view, totally unjustified.

It is true that, on a first reading, Article 20 of the Convention, which deals with its relationship to other international instruments, may give rise to some concern.

Indeed, paragraph 1 of this Article states, firstly, that the Convention is not subordinated to other treaties and that the relationship between them must foster mutual supportiveness and, secondly, that "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".

However, by declaring that "nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties", Article 20.2 categorically precludes any reference to the Convention as a means of challenging the protection granted to authors' rights under existing treaties.

What is more, and this also holds for the negotiation and conclusion of future treaties, the very purpose of the Convention prevents it from being invoked in order to weaken the protection of authors' rights.

In the first place, as we stressed earlier, there is no justification for claiming that respect for authors' rights is a barrier to the pursuit of cultural diversity when it is obvious that there can be no cultural development without protecting creators. This is all the more true as far as the Convention is concerned because its framers made a point of emphasising, in paragraph 17 of the preamble, "the importance of intellectual property rights in sustaining those involved in cultural creativity". To seek to use the Convention to reduce the protection of authors' rights would thus go directly against the values that its framers took care to proclaim.

In the second place, authors' rights lie outside the scope of the Convention. Indeed, the Convention was adopted to protect cultural diversity from the growing influence of economic liberalism in the organisation of world trade, notably in negotiations on services conducted within the World Trade Organization – liberalism that would open the floodgates to the ever greater cultural hegemony of the most powerful nations, particularly the USA.

Therefore, the statement in Article 1(g) on the need to "give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning" and the right of the signatory States in Article 2 "to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory", entitle States to lay down specific rules to protect their national or regional cultures without falling foul of the existing or impending rules designed to liberalise world trade. Examples might include financial aid of a public or private nature notably in the form of subsidies or low interest loans, various support schemes for national creation, production and distribution systems, broadcasting quotas, public sector support, stronger partnerships between the public and private sectors, promotion of the use of new technology, incentives to conclude co-production and co-distribution agreements, linguistic support measures, education and consciousness-raising programmes to increase public awareness of the importance of protecting and promoting the diversity of cultural expressions, education, training and exchange programmes in the cultural industry sector, cooperation agreements between States, the creation in Article 18 of the Convention of an International Fund for Cultural Diversity, etc…

It should also be stressed that intellectual property was not absent from the process of drafting the Convention. Indeed, the preliminary draft text of the Convention drawn up in July 2004 by a group of non-governmental experts specifically mentioned intellectual

property and the intellectual property treaties in article 4-4 (definition of cultural goods and services), article 7 (obligation to promote the diversity of cultural expressions) and article 19, option A (relationship to other instruments). However, at the first two intergovernmental meetings of experts in September 2004 and February 2005, it became apparent that these references raised difficulties and that to address intellectual property issues in the convention entailed a risk of weakening the existing international standards on the subject. So, at the third and final negotiating meeting, in June 2005, the choice was made to remove all references to intellectual property in the articles of the future convention and just to stress the importance of intellectual property rights for cultural diversity in paragraph 17 of the preamble. This choice was not challenged at the general conference held in October 2005.

In sum, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions has neither the intention nor the effect of changing the rules of literary and artistic property protection set out in the international conventions governing the subject, notably those adopted within the framework of the World Intellectual Property Organization or under the TRIPs Agreement of the World Trade Organization.

Therefore, it cannot be invoked by signatory States to challenge obligations incumbent on them under those international conventions.

In addition, it is not an instrument to raise the international standard of literary and artistic property protection. However, it is a fact that this protection is strengthened as a result of the Convention's adoption. As already emphasised, the protection and promotion of cultural diversity go hand in hand with the protection of literary and artistic property and the need to guarantee cultural diversity is often – rightly – put forward as one of the reasons justifying the protection of creativity. Their complementary nature is expressed, moreover, in paragraph 17 of the preamble. Lastly, paragraph 18 of the preamble proclaims that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value". This fact is often underscored by the defenders of authors' rights, notably in the face of attacks based on competition law or in order to request an exemption for literary and artistic property from the application of the rules of a purely economic nature designed to govern all goods and services. It is clearly very positive in this regard that the Convention expresses it forcefully, even in a framework that is not intended to govern the protection of literary and artistic property.

(English translation by
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