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FULL PAPER

THE AUDIOVISUAL POLICY OF THE
EUROPEAN UNION :

THE CHALLENGES OF THE FUTURE

Mass-media transmit from one country to another the cultural features of a society. This is particularly the case for television because of its transborder characteristic and its major impact on the public.

The set up of a European televisual space, without borders between States, would encourage exchanges of ideas and promote an actual European way of thinking, rich and complex. Difficulties arise from the very nature of this sector where cultural and economic problems are entangled. Because of this double characteristic, it seems natural that a European televisual law relies both on the European Convention of Human Rights and on the Treaty of Rome. The free circulation of TV programs is then established because of the two following features : the development of all artistic prestation of services, cultural ones included, and the protection of Human Rights, in particular, the right to freedom of expression.

The juridical structure concerning the audiovisual field has been set up by the Council of Europe and the Community. Actually, it only started in 1989. The objective was ambitious. The aim was to elaborate instruments so as to harmonize the national legislations. Their diversity is able to limit transborder diffusions. An adequate planning of regulations should then be started so as to ensure a free circulation of television programs. In a Europe, subject to technical mutations, a coherence was to be given to an audiovisual space both partitionned and committed to the different internal laws. This was the part of the "Transboarders TV Convention" of the Council of Europe of the 15th of March 1989 and of the "TV without borders Directive" issued on the 3rd of October of the same year. The adoption of these texts have confirmed the willingness of the European States to include the televisual sector within their action-field. Such dispositions take the credit to form the corner-stone of a global European coordination of the audiovisual rules.

Nevertheless, there still exists sectors needing an elaboration of coherent rules. The commercial, industrial, financial or fiscal policies of individualistic States slows down the construction of a free European televisual space. Two main problems need to be resolved :

- before a wider cultural Europe could rise, harmonization of copyrights should be obtained ;

- and a larger consensus on the quotas of diffusion seem essential to strengthen the credibility of the European audiovisual space.

The harmonization of copyrights and associated rights

The incentives for a protection of copyright and associated rights can be summarized as follows.

- First, to stimulate creativity by helping authors and professionals and to contribute to the social, economic and cultural development of Europe.

- Secondly, to protect the budgets, often quite considerable, which have been invested in the production of films and televisual programs.

- Thirdly, to encourage the broadcasting and the spreading of informations and the different outbreaks of cultural expressions.

If authors and other contributors to the creation of a program have certain rights on their production, they should then be more open to the diffusion of their work. These rights protect the intellectual creation and ensure a wide propagation of culture which cannot develop without an efficient legislation.

For these reasons, copyrights and associated rights cannot be ignored by the European institutions.

Both the "Transboarders TV Convention" and the "TV without boarders Directive" are silent on these rights. Such a fact has to be interpreted as the result of difficulties to be solved and not as a refusal to find a solution. The heterogeneity of national protection was, in fact, a problem not easy to solve.

In these matters, international law often refers to internal law. The right-holders are then protected by national dispositions which change from one country to another. Furthermore, laws are only valid on the territory of the State which has edicted them. Protective barriers preventing free flows of TV programs are then established. Such a situation slows down the development of the European cultural creation.

Because of the incoherency of the different national systems of protection, the European audiovisual space tends to be artificially organized. The stimulation of creation would obviously be weakened if it depended on the different opportunities offered by the incoherencies of internal regulations. Furthermore, it is of economic interest for all those who are involved (authors, artists, producers of phonograms, societies of radiodiffusion) to find a solution to the problems of intellectual property. The public as a whole can only benefit of a much larger choice of TV programs.

The new technologies related to programs distribution, satellites and cable, increase the complexity of the problems. Such transboarder means of diffusion of informations and ideas allow to spread programs over countries with widely different legislations. A right-holder will benefit from an unequal protection depending on the country of reception. The European Council and the Community have wanted to promote harmonization as large as possible of copyright and associated rights. These institutions have thus tried to set up juridical

instruments fit to the new systems of transmission. Such texts ensure a better coherency, between the different States, of the rights of all of those who contribute to audiovisual creation.

As far as radiodiffusion through satellites is concerned, the dispositions of the Council of Europe Convention ⁽¹⁾ and of the European Directive ⁽²⁾ are, as a whole, similar. The only matters which are really different concern the geographical fields of application of each instrument and their juridical strength. The Convention has a large field of application while the Directive is more compelling because it is imposed to the Fifteen.

The harmonization of the conditions of obtainment of authors rights is fully acceptable. But associated rights present a more complex problem to be solved. This is due to the three categories of beneficiaries and to the two groups of right-holders which are concerned by the diffusion of phonograms. The Convention and the Directive have no intention to harmonize the rights which are presently protected by national legislations, by virtue of the international Convention of Rome ⁽³⁾. If one compares a country to another, such lack leads to a very incoherent protection of each category of right-holder. The present conditions existing in the Community is a clear example. Belgium, Greece and the Netherlands for instance are totally deprived of any legislation on the protection of the associated rights, though some proposals are being prepared in Belgium and in the Netherlands.

This lack of harmonization has even more influence on countries with protective legislations. It is the case for :

- artists who have accepted a radiodiffusion. National legislation may step in to fix the conditions leading to a second broadcast, a fixation or the reproduction of a fixation in case of a second broadcast.

- broadcasting societies. The conditions of use of a communication to the public if money is involved also depends on internal laws.

It is highly desirable that the European institutions work toward a coordination of the rules which concern the rights of artists, phonograms producers, radiodiffusion societies.

The reenforcement of the juridical protection of those who contribute to a transborder audiovisual creation in Europe would incite them to authorize the diffusion of their work without reluctance. As a consequence, the European cultural space would appear strengthened.

As far as cable distribution is concerned, the rules the European Council has in mind are different from those which have been adopted by the EC. Problems of compatibility will have to be solved when the question of the ratification of the European Convention by the Fifteen arises. If not, the circulation through out Europe of TV works would then be slowed

1. Convention adopted on the 3rd of March, 1994, opened to signature on the 11th of May of the same year.

2. Directive adopted on the 27th of September 1993, JOCE n° L 248, October 6th, 1993.

3. Convention adopted by the United-Nations on the 26th of October 1961.

down, and a shadow would be cast over the magnificence of European culture. A clause, which foresees connections between those two texts, has to be worked out, similar to the one appearing in the "Transborder TV Convention" of March 1989. It would say that the countries of the EC, part to the Convention of the European Council, would in their mutual relationship apply the EC rules. Member States of the EC would then, with such a disposition, explicitly give priority to the Directive.

The reinforcement of the proportion of broadcasted European programs

It is essential to warrant the public a minimum number of productions from European origin. This is the condition for our screens not to be invaded with already redeemed American programs. The promotion of European programs would be made easier. Furthermore, the limitation of the diffusion of foreign programs would then enhance the value of our own way of thinking.

The quota of European works

According to the article 4 of the "TV without borders Directive" and to the article 10 of the "Transborder TV Convention", *"member States take care, whenever it is feasible, through appropriate means, that broadcasting stations give a majority of their broadcasting time to European works. Such a proportion will be obtained progressively, on the basis of appropriate criteria"*.

The notion of "work" must be interpreted in a restrictive way. Information, sport reports, games, publicities and teletext services have to be excluded. The purpose of these exclusions is to ensure the development of the European culture and thus the diffusion of actual works of creation.

France has been one of the first countries to underline the importance of a large diffusion of European works during the prime time. In fact, the French law of 1986 is more precise and more rigid than the European one. It had already introduced a quota of at least 50% of EC programs during such schedules. Anyhow, the text n°92-61 adopted on the 18th of January 1992 has changed this notion. The new wording, as far as private channels are concerned, is now *"hours with a significant audience"*. This slight difference of meaning is of importance because the French authority "Conseil d'État" has condemned TF1 in 1989 because this channel was counting the nightly hours so as to reach the requested quota (4). The French private channels are unanimous to proclaim such broadcasting schedules as unjust. The more so since no equivalent could be found in the Directive or the Convention. Compared with their European rivals, the French broadcasters have less possibilities to reach the quotas with the time schedule of their choice.

4. Conseil d'État, Section, 20th of January 1989, Commission nationale de la communication et des libertés c/ SA Télévision française TF1, Recueil du Conseil d'État, p. 13 conclusions Mme Moreau.

The French law of the 18th of January 1992 adds two other major changes. First, the quota is set at 60% which is a more ambitious objective. Second, according to the text written by the EC, the notion of "*European works*" has been substituted to the notion of "*communautary works*". This new wording encourages the promotion of creations from a larger number of European countries. It also favours the interpenetration of different cultures. It clearly appears then that the position of France stands more rigid than what is written in the EC Directive or in the European Convention. It also prefigures the French attitude adopted during the GATT discussions related to audiovisual.

If national laws should promote the teledistribution of European televisual works, they should not aim a blow at the film industry. Movies are representative, in the noble sense, of audiovisual creation which has to be protected. This is the reason why the French law adds that broadcasting societies are not allowed to present more than 192 full-length films a year. Furthermore, the number of diffusions of such movies is limited to 104 between 8:30 PM and 10:30 PM. One must add that it is forbidden to broadcast full-length films on Wednesday and Friday nights. An exception stands for ancient or classical movies after 10:30 PM, Saturday all day long and Sunday before 8:30 PM. Canal Plus (a crypted channel) benefits from a special regime : the maximum number of long movies is set at 364 a year, between noon and 1:00 AM. The time schedules forbidden to long movies has also been changed.

Lastly, channels must respect a certain delay between the first show of a picture in a movie theater and its broadcasting on the TV screens. The "TV without boarders Directive" and the "Transboarders TV Convention" ask for a two year delay. One year is sufficient if the movie has been coproduced by the broadcasting company. In France, the delay is longer, respectively three years, but exceptionnally two if the broadcasting company is the producer. The national law is more rigid because it is essential to protect the French movie industry. The possibility of an agreement between the right-holders and the TV broadcasting compagny is foreseen in the European texts. For Canal Plus, the delay running from the first show of a movie in a theater has thus been reduced to one year only. Such a gradual protection for audiovisual creations is not the consequence of a better quality of cinematographic works. It is only due to the importance of the investments which have been brought in.

The high quota of European programs prescribed in France clearly shows the determined policy of this country. It also underlines its willingness to protect European culture from the invasion of the audiovisual space by the US programs. This is not the case in the UK for instance, where Turner Channel is allowed to broadcast 100% American programs. A coherent defensive attitude of the European culture would ask that everyone apply the so-called majoritary proportion rule without any delay.

The linguistic quota

Another way to widen the notion of European culture would be to promote the use of local languages and dialects.

"When they assume it is necessary for the fulfillment of their linguistic policy, member States may foresee, as far as a certain number, or the totality of the programs of the broadcasting companies under their authority are concerned, more detailed or stricter rules, taking specially into account linguistic criteria".

According to the article 8 of the EC Directive and to the article 10.3 of the European Convention, the existence of a linguistic quota is allowed so as to protect minorities and make the most of national cultural specificities.

Such a quota may be justified in Belgium or in the Netherlands, but it has no real meaning in France where only one official language exists. In fact, works of French expression are defined as *"those which are totaly or chiefly in French or in a French local language"*. There exists no specific percentage for broadcasting in a local dialect.

However, the French text adopted on the 26th of January 1987 ⁽⁵⁾ added a restraint which had been written neither in the EC Directive nor in the European Convention. It was specified that at least 50% of the programs would have to be broadcasted in the French original language. The text adopted on the 27th of March 1992 ⁽⁶⁾ lowered the quota to 40% and thus allowed to broadcast a more significant proportion of extra-national European works.

Actually, complaints against this quota had been lodged by TF1 and M6 and the Commission informed the French gouvernement that the text of 1987 did not seem consistent with the EC Directive. The new text is the result of a compromise between Bruxelles and Paris.

The system in position ends to a broadcast of European works only if the quota of original French expression programs is covered. Though there appears no formal contradiction between the national right and the EC Directive or the European Convention, it follows that the French text seem to counter the European ones. It slows down the building of a televisual space and casts a shadow on a common cultural heritage. The obligation to produce in the French language is a step towards the isolation of the French market ; it weakens the concept of a European space.

Furthermore, one has to underline that a change happened on the 1rst of Febuary 1994 in the modified law of the 30th of September 1986 concerning the freedom of communication. A minimum of 40% of songs of French expression, the half of which from new artists, will hace to be broadcasted during hours with a significant audience, that is between 6:00 AM and midnight. This rule which should start on the 1rst of January 1996 was meant to react against the overwhelming number of American songs on the radios.

5. "Décret" n° 87-36.

6. "Décret" n° 92-279.

On the other hand, even radios such as Nostalgie or RFM which broadcast a majority of French titles are opposed to these quotas. First, a kind of uniformization will certainly result from this new rule, ending into a smaller audience for the specialized radios. The text does not take into account the actual conditions of the radio-compagnies. Can it be seriously said that radios specifically devoted to Latin-american or Oriental songs will broadcast such a percentage of French works ? Secondly, record compagnies are reluctant to conclude an agreement with unknown singers. Broadcasting societies would then have to freely promote young artists for the part of the phonogram producers.

In fact, France was not trying as much to promote European culture but, for economic reasons, was acting alone, defending its own culture in the name of an obsolete nationalism.

This is clearly showed by Jacques Toubon's proposal, adopted on the 23rd of March 1994 by the French Cabinet, was reenforcing the privileged position of the French language. This text was trying to eliminate any use of neologisms or foreign expressions having an equivalent in the French language.

According to the foreword of the text, "*vigilance towards the French language does not cause any prejudice to the use of local languages*". This rule can not pretend to protect local dialects because no regulation existed yet as far as they were concerned. The European Bureau for restricted languages could then rightly declare the project inconsistent with the article 128 of the Maastricht Treaty on the European Union : "*the Community must contribute to the beaning of cultures of the member States, respecting their national and local diversities and enharcing their common cultural heritage*". The Bureau was wondering on the willingness of France to get a modern legislation and to join this EC principle.

Anyway, it has to be stressed that some leftists member of the French Parliament have appealed for violation of the article 11 of the Declaration on Human Rights of 1789. On July 1994, The French constitutionnal Court has then declared the project contradictory with the general constitutionnal texts.

If quotas of European works seem a necessity to protect European culture, linguistic quotas should not be understood in a biased way the way France has.

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Audiovisual is a privileged instrument to enhance the development of the European Community and of it's cultural unity. The more so, since economic and cultural interests are closely mixed to each other.

The difficulties of the GATT discussions have underlined the osmosis between the economic and cultural points of view. Europe has presently the advantage of a recess. But not much time is left to polish the coherence of it's televisual space and to try to impose it to others.