

**LOCAL CONTENT REQUIREMENTS FOR FILM, RADIO, AND TELEVISION
AS A MEANS OF PROTECTING CULTURAL DIVERSITY:
THEORY AND REALITY
(SECTION II)**

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Part II: Local content requirements as a means for preserving cultural diversity: justifications and future

In the first part of this chronicle, we have shown that there is an important discrepancy between economics' fundamentally negative view of quotas in general and the legal and practical tolerance that quotas appear to benefit from in their application to the film, radio, and television industries. However, this observation does not explain why such tolerance exists in these sectors. For further understanding of this subject, we shall look at the arguments that support the use of local content requirements in the sectors under discussion. Even when these arguments are accepted as valid, however, reservations are nonetheless expressed concerning local content requirements, either because they are not considered efficient economically speaking, or simply because new communication technologies are making them obsolete. We shall therefore complete our examination of the subject with a critical look at the future of local content requirements as defence mechanisms for cultural diversity.

A. JUSTIFICATIONS FOR EMPLOYING LOCAL REQUIREMENTS IN THE FILM, RADIO, AND TELEVISION SECTORS

Both economic and political arguments have been used to justify recourse to local content requirements in the sectors under discussion. These various arguments will now be examined with a view to evaluating their relevance.

- *Economic arguments*

These arguments are either linked to the characteristics of cultural goods, or to market deficiencies in the cultural sector. To the extent that they support State intervention in favour of cultural industries, they may be considered as justification for the use of local content quotas under the right circumstances.

The classic argument based on the characteristics of cultural products wants these products to be treated differently from other products because they are “public goods” rather than “private goods.” According to its most current definition, a “public good” is a good available to everyone without its use by any given agent affecting its availability to others, such as in the case of highways or defence. In addition, such a good when supplied to some ends up being offered to all, whether they want it or not. A “private” good, on the other hand, is a good whose consumption by an individual diminishes the quantity of this good available for other individuals and it is a good whose cost of production is directly linked to the number of its consumers. Applied to the cultural products sector, this distinction leads to considering film, television, and radio products as mixed products, but closer to public goods than to private goods because the addition of another viewer or listener raises production costs hardly at all.

Some recent studies have demonstrated that this last characteristic of film and audiovisual production facilitates the international sales of products, whose cost has already been largely covered domestically, by enabling sales prices to be adjusted to the buying power of consumers in various countries in such a way that even if the practice, properly speaking, cannot be qualified as dumping, the result is in fact often described as dumping.¹ In such a context, it is understandable that a good number of countries find themselves in a difficult situation when their producers, who are already confronted with a domestic market that is relatively limited, must also face low cost foreign film and audiovisual production. Depending on the circumstances, it is very possible that the only line of defence in such cases consists in recourse to local content requirements.

¹ See for example C. Edwin Baker, «*An Economic Critique of Free Trade in Media Products*», 78 *North Carolina Law Review* 1358 (2000) ; Peter Grant et Chris Wood, *Le marché des Étoiles – Culture populaire et mondialisation*, Montréal, Boréal, 2004, chapitre 3.

Various arguments linked to market deficiencies have also been used to justify the intervention of governments in favour of their cultural industries. Two of the most frequently mentioned of these arguments, existence of externalities and abuse of dominant position, will now be examined.

The economic argument founded on the existence of externalities justifies State intervention in favour of cultural industries on the ground that producers of cultural goods bring benefits to the community that surpass the remuneration they receive themselves. These non-monetary benefits or “externalities” are found on the one hand for example in the fact that dynamic cultural production raises national identity, pride, and prestige; influences investment decisions; and attracts consumers and tourists; and on the other hand in the fact that cultural products play an important role in the integration of individuals into a society and in defining cultural identity². Numerous authors who are critical of government intervention in the cultural sector recognize some validity in the argument regarding the existence of externalities³. However, they also raise the point that this argument rests on hypotheses that are difficult to verify and that it could easily be applied to numerous other products. These criticisms specifically underscore the difficulty of implementing responsible and effective policies on the sole basis of such imprecise ideas. This explains why the externalities argument is often cited along with arguments linked to product characteristics, to which it is closely related.

Abuse of dominant position is an argument that has often been mentioned, specifically in relation with the film industry, to justify local content quotas⁴. It is asserted then that such measures are necessary to counter the unfair practices of large producers who abuse their dominant position in the distribution sector to impose conditions that favour their products over those of foreign producers. In

² See David Cwi, "Public Support of the Arts. Three Arguments Examined", (1980) 4 *Journal of Cultural Economics*, p. 39 à 40-43. Externalities can be positive or negative. They are negative, contrary to the example given above, when a portion of the cost is not assumed by the producer or the buyer.

³ See Globerman, Steven, *Cultural regulation in Canada*, Montréal. Institute of Research on Public Policy, 1983, p. 60 ; Sapir, André, «Le commerce international des services audiovisuels. Une source de conflits entre la Communauté européenne et les États-Unis» in *L'espace audiovisuel européen*, Bruxelles, Éditions de l'Université de Bruxelles, 1991, p. 168 ; Ming Shao, W., "Is There No Business Like Show Business? Free Trade and Cultural Protectionism", (1995), 20 *Yale Journal of International Law*, p. 105 à 141

⁴ See among others on this subject, Farchy, Joëlle, *La fin de l'exception culturelle?* Paris, CNRS Editions, 1999, p. 200; Sapir, André, «Le commerce international des services audiovisuels. Une source de conflits entre la Communauté européenne et les États-Unis» in *L'espace audiovisuel européen*, Bruxelles, Éditions de l'Université de Bruxelles, 1991, p. 165 ; Shao, supra, note 3, p. 131

fact, it is difficult to deny that the control of distribution networks by major American players in some countries is such that it is a stretch to speak of real competition in this domain.

Abuse of dominant position is an argument that is not lacking in strength. Given the very integrated character of the American film industry, given the fact that at the end of the Second World War the U.S. courts themselves forced the Majors to abandon their interests in American film theatres in order to establish some sort of competition—which in turn led them to invest in foreign film theatres⁵—and given their present position of strength in distribution in several foreign countries, one is surprised by the small number of legal suits initiated regarding abuse of dominant position in recent times against major companies as much in the United States as abroad. Even if such conduct is explainable from an economic point of view as a way to spread out the risks associated with film production by appropriating as much as possible of distribution earnings, it does not lessen the fact that the practice remains dubious regarding competition.

Finally, when examining more closely the various economic arguments that can justify the use under some circumstances of local content requirements, it becomes apparent that no matter how well founded they may be, these quotas often end in implementation difficulties that discourage them from being considered. This is exactly what Shao invokes when he suggests that variables difficult to document should be largely ignored for the purposes of policy.⁶ Yet this position is vigorously contested by Baker who writes in answer to Shao: “*I find it is the height of irrationality to ignore variables that could be the most significant for human welfare merely because they are not scientifically quantifiable. Ignoring soft variables can simply lead to dramatically wrong results.*”⁷ Although entirely in agreement with Baker on this point, it seems that the preservation of a proper cultural space for each community on the basis of such arguments requires support from political arguments, because it is these in the end that will enable the real importance of these variables to be determined.

- Political arguments

⁵ See Fox, Craig G. “Paramount Revisited. The Resurgence of Vertical Integration in the Motion Picture Industry”, (1992) 21(2) *Hofstra Law Review* 505.

⁶ Shao, *supra*, note 4, p. 141, 146-147.

Until recently, the most commonly cited argument to justify the implementation of local content quotas in the film and audiovisual sectors was the preservation of national identity. This is the argument that was offered between 1920-1930 by various European countries to justify the establishment of screen quotas to counter the massive influx of American cinematographic products; it is also this argument that was a basis for the adoption of Article IV of the 1947 GATT, which, as has already been seen, legitimized screen quotas for cinema; and it was this argument that was again used to justify the preservation of film coproduction agreements at the time of the entry into force of the WTO in 1995 because these agreements were in principle incompatible with the most-favoured-nation treatment of Article II of the GATS.

The argument in question, however, is not safe from criticism. Three criticisms in particular deserve mention. The first is that the entry of foreign cultural products within a national territory has only a limited impact on the nation's culture because the consumers of these products distance themselves to an extent with respect to the content of these products. This is the conclusion that was reached in 1990 by Elihu Katz and Tamar Liebes in their study on the reaction of television viewers to imported television programs⁸. The second is to the effect that any State intervention in favour of its cultural industries for the specific purpose of protecting national identity supposes a relatively clear perception of what characterizes that identity, which generally fails or leads to generalities that are not really characteristic. This is exactly the point the United States raised in the debate on the "Television without Frontiers" Directive when they cast doubt on the existence of a real European cultural identity. The last is to the effect that even if there existed such a thing as national identity, there is no proof that State intervention in favour of cultural industries would be such as to reinforce this identity because the link between cultural production and national identity is not an obvious one.⁹ One response to these criticisms is that if national identity is difficult to describe, it is because it is influenced by a multitude of factors and because it is never really fixed since it must constantly adapt to both internal and external factors. This is why it is not necessary for the maintenance and development of an identity that cultural products reflect the identity as such, far from it in fact;

⁷ Baker, *supra*, note 1, in the note 87

⁸ Elihu Katz & Tamar Liebes, *The export of Meaning: Cross-Cultural Readings of Dallas*, New York, Oxford University Press, 1990.

⁹ See on this Richard Collins, «*National Culture: A Contradiction in Terms*», (1991) *Canadian Journal of Communication*, Volume 16 (2).

rather, an autonomous cultural production, understood as a form of discourse, is necessary for the preservation and development of an identity.

Since the beginning of the 1990's, various authors, influenced among others by UNESCO's work on cultural development¹⁰, have developed a conception of the place of cultural industries in society that sees them as an essential instrument to the democratic functioning of the State. An Australian researcher, John Sinclair, expressed himself thus on this subject in 1992:

The cultural industries then, are those which produce goods or services which are either somehow expressive of the ways of life of a society, such as film or television, or which occupy a special position within its system of social communication, such as advertising or the press. They are the industries which give form to social life on sound and image, words, and pictures. They offer the terms and symbols with which we think and communicate about patterns of social difference, the aspiration of groups for recognition and identity, the affirmation and challenging of social values and ideals, and the experience of social change.¹¹

This vision of the role of cultural industries in the democratic functioning of societies, which was echoed by other authors afterwards¹², is supported by Article 27 of the Universal Declaration of Human Rights that affirms that “Everyone has the right freely to participate in the cultural life of the community.” Cultural production thus appears, in the same way as education, capable of enabling the individual to become free, and the citizen that he is to adapt and participate in the life of the social groups and communities in which he operates. Thus envisaged, the argument that makes preservation of a proper cultural expression a democratic outcome appears to have something in common with the arguments of economists who consider cultural products as public goods.

This being said, it is not difficult to conceive that the right to cultural expression may be seriously compromised if quantities of foreign cultural products enter the national territory such that they overrun domestic cultural production, thus depriving the concerned cultural communities of a symbolic discourse essential to their own development. It is this danger that is cited now as

¹⁰ For UNESCO, in fact, “participation in cultural life is the translation, regarding values, of the participation of everyone in public life and the development of societies. This is why, without exercising cultural rights, there would not be a true cultural democracy and perhaps even, in the end, an authentic political democracy”: UNESCO, «*Qu'est-ce que la Décennie mondiale du développement culturel*», dans *Guide pratique de la Décennie mondiale du développement culturel*, Vendôme, Presses universitaires de France, 1987, p. 22

¹¹ J. Sinclair, «*Media and Cultural Industries: An Overview*», *CIRCIT Newsletter*, Vol.4, No 5, Août 1992, pp 3-4.

¹² See Marc Raboy, Ivan Bernier, Florian Sauvageau, Dave Atkinson, *Développement culturel et mondialisation de l'Économie: un enjeu démocratique*, Institut québécois de recherche sur la culture, Québec, 1994

justification by countries that maintain local content requirements for film, television, and radio. In fact, the use of this particular type of requirements may justifiably be viewed, under these conditions, as a cultural safeguard measure whose essential objective is to ensure citizens' right to cultural expression.

However, the exercise of this right is not without limitation and it has been argued in this regard that any form of restriction to the trade of content is contrary to another fundamental right: freedom of opinion and expression. It is specifically this argument that the United States advanced in the 1970s to condemn UNESCO's attempt to institute a New World Information and Communication Order (NWICO). This argument is based in particular on the First Amendment of the American Constitution ("*Congress shall make no law abridging the freedom of speech, or of the Press*") but also on Article 19 of the *Universal Declaration of Human Rights*, ("*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*"). Recently, within the framework of the procedures that led to the October 2003 UNESCO General Conference adoption of a resolution authorizing the opening of negotiations on a *Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, the United States returned to the argument when they demanded that the convention in question respect the freedom of opinion and expression recognized in Article 27 of the *Universal Declaration* and comply with Article 1 of the UNESCO Charter, which sets as one of its fundamental objectives "to promote the free flow of ideas by word and image."

However, when examining more closely the texts in question, it is noted that these texts make reference to rights that are not absolute, but that can in some circumstances be subject to limitations. In a remarkable study titled "*The First Amendment and the International 'Free Flow' of Information*," published in 1990, Fred H. Cate demonstrates that the refusal to accept any form of restrictions to the free flow of information does not comply with the interpretation of the First Amendment provided by the Supreme Court of the United States, just as it does not comply with the dispositions of the international instruments on this subject; Cate concludes in this vein:

The First Amendment, rather than bolstering economic arguments that restrictions on broadcasting and other news flows are not to be permitted, may weigh in favor of some restrictions. The justification for those restrictions may differ depending on the context.

Not all restrictions in service of any public interest are to be allowed, but the United States cannot hide behind the First Amendment, refusing to consider Third World and European interests in a free and balanced flow of communications.¹³

A decade later, the same point of view is expressed by C. Edwin Baker in an in-depth a study titled “*An Economic Critique of Free Trade in Media Products.*” Baker writes:

Thus, my suggestion is that human rights law, unlike trade law, provides a context likely to lead interpreters to be sensitive both to countries’ need to nourish their own media and to the human rights mandate that countries’ not isolate their citizen from diverse viewpoints and troublesome ideas. Reliance on human rights law might even have a nice side effect. Given the prospects of multi-national media corporations operating on the world stage, it would be desirable for the structure of the legal order to make corporate interests dependant on further development of international human rights law rather than on further invocations of trade law that simply enlarge the rule of multinational capital.¹⁴

A particularly interesting fact, emphasizes Cate¹⁵, is that when the United States attacked the European Community’s “Television without Frontiers” Directive en 1989, they did not do it on the basis of the right to free flow of information, but rather on the basis of GATT dispositions, and this notwithstanding the fact that the restriction to the free flow of information under the form of audiovisual quotas was particularly apparent.

Furthermore, it is important to emphasize that the Universal Declaration of Human Rights and UNESCO's Constitution speak of the right to free flow of information in a context where other rights are also affirmed. It is thus that Article 27 of the Universal Declaration affirms the right of everyone to freely participate in the cultural life of the community, which is in no way subordinate to the right to free flow of information of Article 19. On the contrary, these two rights, which play a capital role in the democratic functioning of States, are rather complementary. The wording itself of Article 19 confirms this close relationship when it speaks of the right “*to seek, receive and impart information and ideas through any media and regardless of frontiers.*” Concerning UNESCO's Constitution, Article 1 prompts UNESCO to collaborate in the work of promoting the mutual knowledge and understanding of peoples through all means of mass communication, and to conclude international agreements as may be necessary to promote the free flow of ideas by word and image, while the

¹³ Fred H. Cate, “The First Amendment and the International ‘Free Flow’ of Information”, 30 *Virginia Journal of International Law*, 371, 420 (1989-1990)

¹⁴ C.Edwin Baker, «An Economic Critique of Free Trade in Media Products», 78 *North Carolina Law Review* 1358 (2000)

¹⁵ Supra, note 13, p. 407.

same article has UNESCO preserve the independence, integrity and fruitful diversity of the cultures and educational systems of the Member States by prohibiting itself from intervening in matters which are essentially within their domestic jurisdiction. Again, it is clear that the right to free flow of information cannot be interpreted and applied without considering other rights, including cultural rights.

B. THE FUTURE OF LOCAL CONTENT REQUIREMENTS

Even if convincing arguments can be advanced to justify the use of local content requirements in film, television, and radio, whether from an economic or political standpoint, this still does not mean that such a method would be effective. Doubts as to the efficiency of such requirements have been expressed at two different levels. It is argued first that the efficiency of local content requirements is far from clear and, second, that in any case, new communication technologies make the controls necessary to ensure the effectiveness of similar measures difficult if not impossible. In both cases, however, it appears that theory does not entirely correspond to reality.

- *The effectiveness of local content requirements*

The effectiveness of local content requirements can be envisaged in light of their objectives or still, more generally, in terms of their contribution to the social well-being of the entire population. These two approaches will be discussed in turn based on the most recent studies on the subject.

In an article from 1997, François Grin and Catherine Hennis-Pierre suggest that the real effect of local content requirements on supply and consumption of European television programs remains ambiguous considering that some studies indicate the 60% proportion of European programs would be attainable by simple public demand, and also taking into account that stations often implement avoidance strategies such as the replacement of foreign programs submitted to the quota, as fiction programs for instance, with programs not submitted to the quota, such as sports, news, or game show programs.¹⁶ The analysis, however, is summary¹⁷ and its scope is limited by the fact that it

¹⁶ François Grin & Catherine Hennis-Pierre, «La diversité linguistique et culturelle face aux règles du commerce international: le cas du film et des émissions de télévision» in *Diversité linguistique et culturelle et enjeux du développement*, Éd. AUPELF-UREF, Saint-Joseph, Beyrouth, 1997, pp. 265 286

exclusively discusses broadcast quotas implemented within the framework of the “Television without Frontiers” Directive, leaving out the actions of other countries such as Canada, Australia, or South Africa, not only in the television sector, but also in the radio sector.

In another study published two years later in 1999, Stéphanie Peltier examines in depth the alleged ineffectiveness of quotas in the television sector.¹⁸ The data that Peltier uses are essentially related to France. She does refer at the beginning of her study to the quotas of the “Television Without Borders” Directive but only to specify that while the majority of European countries have respected the prescribed quota of 50% of broadcast time dedicated to European film and audiovisual works, France for its part has gone further with a quota of 60%.

After stating that the French broadcast quotas (60% of broadcast time dedicated to European film and audiovisual works, of which 40% must be original French language works) are on the whole respected by television broadcasting firms, the author goes on to examine whether such quotas are really as inefficient as the economic theory suggests on the following two grounds: first, as a policy instrument, quotas cannot be the objective fixed at the lowest possible cost, and second, they even have difficulty meeting the objective itself for which they were established. By the end of her study, Peltier concludes that “the observed effects often demonstrate the opposite of theoretical predictions because of the specific definition of television quotas and the specifics of the markets to which they apply.” However, Peltier does not go as far as to conclude that broadcasting quotas are efficient. She writes in that respect that “even if their existence has undoubtedly permitted to slow the decline in the production and distribution of European programs, the recourse to such a policy is open to question”.¹⁹ Thus, she points out, a policy of quotas does not necessarily go hand in hand with diversified creation. But the main problem in her eyes is that the use of broadcasting quotas is challenged more and more by the new communication technologies, which leads her to suggest that broadcasting quotas should be eliminated or at least diminished.

¹⁷ This point is essentially based on two previous studies, one from 1994, requested by Sony and conducted by London Economics (*The Impact of Television Quotas in the European Union*), and the other by Patrick Messerlin from 1995 (La politique française du cinéma: l’arbre, le maire et la médiathèque» in *Commentaire*, vol. 71, October 1995, 591-601.

¹⁸ Stéphanie Peltier, «La question de l’inefficacité des restrictions quantitatives: le cas des quotas télévisuels», *Communications & Stratégies*, Vol 35 (3), 1939, p.111-159

¹⁹ *Ibid.*, p. 153.

It is unfortunate that this study deals exclusively with the case of France. In fact, it would have been interesting to see how Peltier would have integrated data from other countries that also have recourse to local content requirements, such as Australia, South Africa, and Canada. Concerning more specifically the ability of broadcasting quotas to satisfy the objective for which they were established, it appears that the results in those countries are on the whole very acceptable. In the case of Australia, for example, the special report by the Productivity Commission Inquiry into Broadcasting, which covers 1996, 1997, and 1998, shows that the Australian content requirements according to hours of broadcasting and program category (dramas, documentaries, children's shows, etc.) have been, on the whole, met and often exceeded.²⁰ This is also the case with South Africa, where the *Independent Communications Authority of South Africa* reported in 2000 after inspection that all public and private stations were complying overall with the implemented broadcasting quotas.²¹ The situation was the same with Canada, where compliance with local content quotas was a condition for television stations to receive operating licenses. In all three cases, these requirements were not only respected, but wherever avoidance strategies were noticed, corrective measures were developed and implemented.

These findings, it seems, apply equally to radio. A study conducted by Paul Mason on behalf of the *Music Council of Australia* shows in this respect that since their introduction in 1942, radio quotas in Australia have been respected by radio broadcasters and that their introduction has given rise to a marked increase in local production.²² But Mason's study goes even further by showing that it is not sufficient to put broadcasting quotas in place, but it is also necessary to monitor their use in order to ensure that they attain the fixed objective. To this end, he cites a study by Ed Jonker²³ conducted in 1992, in which the latter shows that recent music recorded by independent local producers was regularly underrepresented on the airwaves even if this type of music was a significant part of local music production. An amendment imposing a quota was finally introduced in 2000 to correct this situation, the result of which was the stimulation of local production and sales of this type of music.

²⁰ Australia, *Report of the Productivity Commission of Inquiry into Broadcasting*, 2000, chapitre 11, p. 295 : [http://www.pc.gov.au/broadcast/final report/chapter11.pdf](http://www.pc.gov.au/broadcast/final%20report/chapter11.pdf)

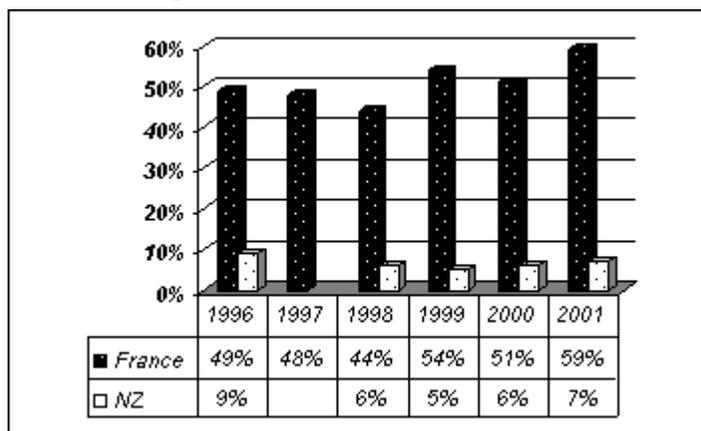
²¹ *Independent Communications Authority of South Africa*, Discussion Paper on Review of Local Content Quotas, 2000: <http://www.gov.za/report/2000/icasa.pdf>. In the case of private stations, however, the document in question states that part of the local content consists of rebroadcasts.

²² Paul Masson, *Assessing the Impact of Australian music requirements for radio*, research prepared for the Music Council of Australia, 2003. <http://www.mca.org./masonmusicimpact.htm>

²³ Ed Jonker, «Contemporary Music and Commercial Radio», Media Information Australia, Mai 1992.

Finally, referring to a study by Gmelin²⁴, Mason finishes his analysis of the effects of radio quotas by comparing results obtained in production in a country that has implemented radio quotas, France in this instance, with another country that has eliminated all quotas for local radio content, New Zealand. The very instructive results of that comparison are given in the following table:

Fig 4. Sales of national products – France and New Zealand 1996 - 2001



If one considers that the worldwide average for sales of music products of local origin was about 70% in 2000 (40% if one excludes the United States and Japan, two countries whose local music production figures between 80% and 90%, somewhat skewing the worldwide average), it must be recognized, as Mason concluded, that the deregulated environment of New Zealand does not seem very favourable to local music production.

Still in the music sector, it is useful to mention two other studies whose conclusions on the effectiveness of quotas for local radio content agree in some measure with that of Stéphanie Peltier. The first study is that of Richard Letts who examines the effect of globalization on music production in five countries: Australia, Germany, Nigeria, the Philippines, and Uruguay.²⁵ Of these five countries, only Germany does not use quotas for local radio content, although in 2001 the federal government considered the possibility of a quota (it must be mentioned that at the time of the study, the percentage of popular music in the German language was 1.2%). Quotas in the other countries

²⁴ Hannes Gmelin, «The National Product in Music and Film in Times of Globalization: A Comparative Study “, University of Hamburg, Paper prepared for the Global Alliance for Cultural Diversity, Division of Arts and Cultural Enterprise, UNESCO, Paris, 2003.

²⁵ Richard Letts, *The Effects of Globalization on Music in Five Contrasting Countries. Australia, Germany, Nigeria, The Philippines and Uruguay*, Music Council of Australia, Octobre 2003: <http://www.mca.org.au/pdf/mmresfinal.pdf>

vary between 25% and 30%, except for Nigeria whose level is about 80%. The effectiveness of the quotas in question, as Letts emphasizes, depends on their implementation. In Nigeria, monitoring of the implementation is really practiced only in the public sector. In the Philippines and in Uruguay, monitoring is practically nonexistent, with the result that the quotas are not really respected (it is not surprising to learn in this respect that the record industry in Uruguay for all intents and purposes is practically defunct). At the end of his comparative investigation, Letts arrives at the following conclusion concerning radio quotas:

The premise of local content quotas is based on the fact that governments are in charge of allocating a scarce resource, the broadcasting spectrum, and can set conditions for those who are assigned frequencies. One such condition can be that the broadcasters meet these quotas. However, scarcity of spectrum disappears when broadcasts or narrowcasts are made over the Internet. It is difficult to see how local content quotas can be imposed on Web or satellite radio emanating from another territory. For online music on demand (as opposed to streaming), perhaps a government can require that service providers domiciled in its territory should give a certain amount of “shelf-space” to local music productions, although of course this does nothing more than make them *available* to audiences.

The second study, from 2002, is that of Martin Richardson.²⁶ This study focuses not so much on the impact of radio quotas on local production, but on their impact on the radio stations themselves and on the share of local content that they integrate into their programming. Richardson also seeks to ascertain whether radio quotas allow for the attainment of the fixed objective at the lowest social cost. To this end, he uses a model wherein two radio stations choose to broadcast a combination of local and international content according to the preferences of their consumers. He concludes that even if a radio quota may increase the satisfaction of consumers and the profits of radios, it does not diminish any less, in the absence of externalities, the global social well-being when the diversity of content is reduced beyond the situation that would prevail in the absence of intervention. But, he adds, in the presence of externalities it is found that the interest in quotas increases according to the importance of these externalities. The author also examines two possible replacement policies, one consisting of a cap on radio advertising, the other in the creation of a non-profit public radio station. Richardson concludes in this respect that both solutions offer less diversity of content than would a laissez-faire policy, but that the cap on advertising is less effective than quotas in that the supply of

greater airtime for local content costs less while public radio could prove to be equally as effective as quotas considering the importance of the fixed costs associated with its operation.

This last study is particularly interesting in that it highlights an aspect essential to any discussion on the subject of the effectiveness of local content quotas. Insofar as cultural production, including musical production, plays an important role as a symbolic language of social communication in the functioning of a democratic State, it from this point of view engenders benefits for the community which must be taken into account when evaluating the effectiveness of quotas. Even though it is difficult to evaluate the importance of a given externality, it is permissible to believe that in a situation where a community's right to cultural expression would be compromised, this would be sufficient to justify resorting to local content quotas.

In fact, if there is one thing that clearly stands out from recent economic studies on the effectiveness of local content requirements, it is indeed that a condemnation *a priori* of resorting to such a mechanism is not justified. In some cases, depending on the particular circumstances and conditions of a State, it may be quite the contrary that resorting to such a mechanism is indeed justified. But several studies have also noted that the effectiveness of this mechanism may be seriously threatened by new information technologies. It now remains to be seen to whether this is really the case.

- ***The effectiveness of local content requirements with regard to new information technologies***

Two distinct types of arguments have been advanced by those who question the effectiveness of local content requirements in the context of new information technologies. The first type of argument is to the effect that the considerable number of new channels available (due to digitization and signal compression), as well as the tendency towards specialization of audiences make local content requirements less necessary. The second argument is that traditional approaches in regard to local content requirements no longer offer adequate response to the legal problems brought about by the cross border nature of new means of communication, in particular the Internet.

²⁶ Martin Richarson, «*Cultural quotas in broadcasting: local content requirements, advertising limits and public radio*», (2002) University of Otago, Dunedin, New Zealand: <http://www.nzae.org.nz/files/%2310-RICHARSON.pdf>

The basic reasoning that underlies the first argument stands out no more clearly than in the following presentation made to the American Congress by the *Motion Picture Association of America* (MPAA) in May of 2001:

Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programs that reflect their history, their cultures, and their languages. In the past, when their towns might have had only one local cinema and received only one or two TV broadcast signals, the motivation for foreign governments to set aside some time for local entertainment products was understandable. In today's world, with multiplex cinemas and multi-channel television, the justification for local content quotas is much diminished. And, in the e-commerce world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no "shelf-space" problem on the net.²⁷

The MPAA subsequently concluded with the request that the freest possible circulation of digital products be guaranteed.

What is striking in this argument is the distinction that is made between the situation that prevailed in the still recent past and the situation that prevails now. Local content quotas were justified and tolerated in the past, but this is no longer the case with the advent of new technologies; thus, the existing quotas ought to be gradually eliminated in the course of negotiations or, in the new world of the Internet and e-commerce, purely and simply forbidden.

Before accepting this last conclusion however, there is reason to wonder about the assertion that the motives which justified local content quotas in the past no longer exist. This assertion seems to go against data that shows that the dissemination of foreign audiovisual products remains very high in a number of countries. Thus, regarding cinema, nearly a third of countries in the world do not have actual film production that reflects their particular culture and a good number of those that do produce more than 20 films per year on a regular basis are able to do so solely because of direct financial intervention from the State coupled in some cases with film quotas²⁸ In the case of television, the data concerning local content may be slightly more favourable in terms of

²⁷ "*IMPEDIMENTS TO DIGITAL TRADE*": Testimony of Bonnie J.K. Richardson, Vice President, Trade & Federal Affairs, Motion Picture Association of America, before the House Commerce Committee Subcommittee on Commerce, Trade & Consumer Protection, May 22, 2001: <http://www.mpa.org/legislation/>.

²⁸ See LLUIS Artigas de Quadras, "*Cultural diversity in national cinema*", UNESCO, *World culture report 2000*, p.89.

percentages, but it remains no less problematic for many countries considering the importance of television as a means of social communication.

Even among countries that have an acceptable level of their own film and television program production, it does not appear that the assertion that local content quotas no longer have a place in the communications environment has resulted in a change of attitude concerning the use of quotas. A typical example is that of Canada with its developed subsidies program for film and television producers and its local content requirements for television and radio.

Far from considering the new environment in the communications sector as sufficient reason to eliminate its local content requirements, Canada has sought to respond in a constructive and open manner to the development of new communication technologies while at the same time looking to preserve a place for Canadian content in the overall radiobroadcast system.²⁹ Similarly, the European Commission, while recognizing in its 1999 paper entitled “Principles and Guidelines for Audiovisual Policy for the Community in the Digital Age” that the digital environment calls for a more global approach on the national as well as Community levels, has clearly reasserted that the cultural and linguistic diversity of Europe must be guaranteed, and as such, forms a basis for development of the information society.³⁰ A notorious exception is that of New Zealand which had committed itself throughout the Uruguay Round negotiations to not using quantitative restrictions in the audiovisual sector only to regret it afterwards. A study conducted a few years later demonstrated that the proportion of local content in relation to total New Zealand broadcasting time had decreased to such a point that in comparison with ten other countries, New Zealand was at the bottom of the scale with 24% percent of content being local³¹ All this seems to indicate that the problem of developing and preserving a shelf-space for the expression of national and regional cultures threatens to remain a major concern in the future for several countries, including developed countries.

This brings us to the second argument put forward to justify the elimination of local content quotas. The arrival of direct satellite television has already given an idea of the difficulties in exerting

²⁹ See B Goldsmith, J. Thomas, T O’Regan & S Cunningham in “*Cultural and Social Policy Objectives for Broadcasting in Converging Media Systems*”, Australian Broadcasting Authority et Australian Key Center for Cultural and Media Policy, mai 2001, p. 73 :
http://www.aba.gov.au/tv/research/pprojects/pdf/rf/CMP_report.rtf

³⁰ Commission des communautés européennes, Bruxelles, 14.12.99, doc. COM (1999) 657final, p. 19

³¹ New Zealand on Air, «Broadcasting and Cultural Issues at the Start of the New Millennium».

control in a situation where the service supplier is outside of the country and has direct access to the consumer. With the Internet, it is even more difficult. As a representative from the *Australian Broadcasting Authority* explained during a conference in Sydney in 1997:

We recognised that the Internet cannot be regulated in the same manner as traditional media as there is no central control and content can be provided from anywhere in the world. And, unlike traditional mass media, such as broadcasting, the operators of the infrastructure, such as on-line service providers, are usually not aware of, and are not in a position to be aware of, much of the content which is being accessed or provided by users of their service, unless it is specifically brought to their attention.³²

However, it must be understood that several technologies exist, each having their advantages and limitations. In a study entitled “*The Effects of New Technologies on Cultural Protectionism*” published in 2002, Harvey B. Feigenbaum reviews various technologies in order to see how they affect traditional tools of cultural protection such as quotas.³³ These technologies go from direct satellite television to distribution via Internet streaming, to digital video on demand and various other distribution techniques relying on digital data compression. As Feigenbaum emphasizes, they have the use of digital language in common, which considerably expands the number of choices for consumers and allows them to watch what interests them without regard for local content quotas.

But they also have their limitations and are less protected from control than may have been believed. The first limitation is that, contrary to conventional radio and television, content is rarely available for free. This barrier is perhaps not significant financially speaking, but it is of utmost importance to the most vulnerable part of the population that can not avail themselves of its services. The total disappearance of conventional radio and television is therefore not imminent. Furthermore, insofar as access to paid services must be controlled, the door is open to indirect control of content. In the case of direct satellite television, there is nothing to stop the control of content by controlling the sale of the decoders necessary to obtain access to the service. Even in the case of the Internet, the possibility of exercising content controls through servers, whether to prevent illegal copying, or the circulation

³² <http://www.nzonair.govt.nz/media/policyandresearch/otherpublications/issues.pdf>
Kaaren Koomen, «*Emerging Trends: Content Regulation in Australia and Some International Developments*», p. 4 : http://www.aba.gov.au/abanews/speeches/online_serv/pdf/f/f/kkaic_97.pdf

³³ Harry B. Feigenbaum, «*The Effects of New technologies on Cultural Protectionism*» Occasional Paper Series , October 7, 2002, George Washington Center for the Study of Globalization.

of illegal sexual, hateful, or other types of content, is no longer excluded.³⁴ Another type of limitation mentioned by Feigenbaum concerns the technologies themselves. The hopes based upon *streaming* technology have not yet been realized: not only does the cost of providing the service increase with the number of users, but the data transfer over the Internet still suffers from the occasional problems caused by congestion on the network. Finally, the author points out one final problem, perhaps the most important in his eyes, which is effective access to bandwidth; this problem, also known as the digital divide, is particularly worrisome for developing countries.

The threat posed by new technology on local content quotas is therefore not as immediate nor as pressing as we have been led to believe. This conclusion is reinforced by an excellent Australian study entitled “*The Future of Local Content? Options for Emerging Technologies,*” made public in 2001, which asserts the following in its conclusions:

As long as analog simulcasting remains the predominant element of Australian television broadcasting, the quota system will continue to be a viable regulatory device. However, any easing of restrictions on datacasting will raise questions about the application of the quotas. If and when interactive services are permitted to develop, and as the storage capacities of set-top boxes and disk-based video recorders increase, time-based quotas will begin to be compromised.

We identified a number of possible evolutionary responses to such developments, including modifying the existing quota system, replacing or augmenting quotas with subsidies, redefining the role of the national broadcasters, and regulating distribution through must carry and other policy measures.

Continuing research and public consultation on the practicalities and implications of these options will be critically important over the next several years, accompanied by careful study of the development of digital television and other new audiovisual media. Market cycles and the immediate problems of the production industry do need to be addressed, but in our view longer term policy development is equally if not more important.³⁵

The only comment to add is that these conclusions, which are valid for a developed country such as Australia, will not find application in the case of developing countries until they have real access to the bandwidth. In the meantime, for a good number of these countries, local content quotas may well

³⁴ The legal battle between France and the United States in the case of *Association «Union des Étudiants Juifs de France», la «Ligue contre le Racisme et l'Antisémitisme», le «MRAP»* (intervenant volontaire) c. *Yahoo! Inc. et Yahoo France*, is particularly interesting in this regard. It is interesting to note also that in 1999 Australia adopted a law entitled *Broadcasting Services Amendment (Online Services) Act 1999* which allows the government to restrict Internet servers from accessing sexually explicit or violent content.

³⁵ *Supra*, note 29, p. 73

prove to be their only concrete means to acquire and preserve their own space for discussion in the audiovisual domain.

Conclusion

In the first part of this study, we have noted that the fundamentally negative perception of quotas by the science of economics has, in general, not led to their systematic ban in the audiovisual sector and that local content requirements still remain in current practical use in this sector. In the second part, we have turned our attention to the arguments that could explain such a state of affairs, and we have attempted to see if this type of intervention is condemned to disappear as certain theorists have argued. At the end of our study, it has become clear to us that the observed effects were often contrary to the theorists' negative predictions and that a sweeping condemnation of local content requirements was not in order. This does not signify that the quotas in question are a panacea, but it does mean that under the appropriate conditions and subject to monitoring of their actual effectiveness, they may play a deciding role in the preservation and promotion of threatened cultural expression. Regarding the impact of new technology on quotas, there again, it appears that the heralding of their disappearance was exaggerated to say the least and that, if and when they disappear, local content requirements will necessarily be replaced by new approaches capable of offering similar guarantees. Because in the end, if there is one thing that is certain, it is that the concern for the preservation of the diversity of cultural expression is not soon to disappear.