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“Cultural Treatment” and “Most-Favoured-Culture” Principles to Promote Trade Related Cultural Diversity

Christophe Roy Germann
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I. Introduction

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on 20 October 2005 entered into force on 18 March 2007.¹ This paper focuses on the policy goal of “cultural diversity” for

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“international trade related cultural goods and services”, and on strategies and means to achieve this goal for countries that cannot afford substantial subsidies for these purposes. It proposes to explore and discuss an innovative legal approach beyond the new UNESCO Convention on cultural diversity in order to materialize cultural diversity based on a set of rules prohibiting “cultural discrimination”. This idea is inspired by the prohibition of economic discrimination that underlies WTO law and that is articulated in the basic principles of national treatment and most favoured nation. The contemplated new concept is intended to establish an institutional dialogue based on case law between the WTO and an international organization in charge of cultural matters, for example the UNESCO. The analysis in this paper refers to the film industry. However, most of the discussion and findings can also apply to literature and music as well as to other mass cultural goods and services.

II. New approaches

1. Subsidies as the cultural policy tool of the rich

Unfortunately, almost the whole debate on cultural diversity today is driven and squatted by the question of subsidies. The substantial private interests at stake explain this situation: If France could no longer subsidize its national film producers in the near future, the beneficiaries would soon be out of business, unless some alternative solution comes up to preserve their economic viability.

We challenge subsidies as a tool to implement cultural policies from the perspective of poorer countries that do not dispose of the corresponding public resources. We believe that it is unethical that a filmmaker from a rich country such as France can enjoy, at least in theory, substantive freedom of creation whereas her colleague from Poland or Burkina Faso must remain invisible and unheard because their States are not capable of intervening on a level playing field. As a complementary and, in the longer run, alternative solution to subsidies, we therefore suggest:

a) working towards a new deal in the area of intellectual property protection;


For a more extensive analysis of the issues at stake, see Christophe Germann, Diversité culturelle et libre-échange à la lumière du cinéma, a doctoral thesis to be published in autumn 2007.

For a definition of subsidies according to Community law, see Christoph Herrmann, Der gemeinschaftsrechtliche Begriff der Beihilfe, in : ZeuS, 3/2004, p. 415 ff.
b) instrumentalizing competition laws, in particular the doctrine of “essential facilities”, by using a market definition that takes into account the economic specificities of cultural industries; and

c) introducing and implementing new rules of law that are inspired by the principles of national treatment, most favoured nation and market access, and that shall prohibit “cultural discrimination” in international trade of cultural goods and services based on the novel principles of “cultural treatment” and “most favoured culture”.

2. Intellectual property, competition and the prohibition of cultural discrimination

The interface between intellectual property and competition laws and policies provides the starting point of this innovative approach that shall eventually confront the multilateral trading system with the principle of equal treatment of cultural contents, including, but not limited to, films, books and music, and of the suppliers of such contents from a variety of cultural origins. In the best case scenario, the principles of “cultural treatment” (“CT”) and “most favoured culture” (“MFC”), as we shall call them, will reinforce the peace promoting functionalism of economic integration on the global level, and make the trade of cultural goods and services economically even more profitable. Last but not least, this program, leading from cultural uniformity to diversity, would enrich the art and entertainment created, produced and distributed by cultural industries to the benefit of the society at large.

In this context, legislators should focus on the issue of intellectual property protection. High standards of intellectual property protection are incentives to proceed to excessive marketing expenditures for the majors’ films, and, therefore, detrimental to films that do not enjoy comparable investments to accede to the audience. In this sense, too much copyright, trade mark and trade name protection contributes to drive films from other cultural origins than the dominant one out of competition. On the other hand, certain standards of protection in the form of authors’ rights should remain in place as incentive for creativity and in order to guarantee to filmmakers more independence from subsidies granted by, and from corresponding control of, the State. Legislators who are eager to promote cultural diversity in cinema will therefore have the task of finding a new balance.

5 One of the rationales underlying the grant of exclusive rights consists in providing incentives for qualified creative achievements. Authors and investors therefore advocate high standards of copyright protection. On the other hand, too much protection is detrimental to the interest of the users and, in certain instances, the society at large as it increases the price of the protected goods and services. This is particularly true with respect to the huge accumulation of capital fueling the production and distribution of blockbusters. These investments, that are protected by intellectual property laws and are channeled to marketing rather than creative efforts, drive most of Hollywood Majors’ competitors out of the market. The following polemic formula can be used to express the basic threat at stake: TMC = SPA = TMC (where «Trade Mark and Copyright» equals «Stars, Print and Advertisement» equals «Total Mono Culture»).
with respect to the standards of intellectual property protection. The TRIPs Agreement should provide the necessary flexibility to achieve this goal (see preamble and art. 6 to 8 and 40 TRIPs). In this context, one may trigger inspiration from the debate on the standards of patent protection and their impact on public health in the light of South Africa’s struggle with the pharmaceutical majors to insure access to essential medicines.6 I therefore advocate that States shall implement the national treatment and most favoured nation principles in the context of intellectual property rights (art. 3 and 4 TRIPs Agreement) only in exchange of a contribution by the beneficiaries of this protection towards materializing the public policy goal of cultural diversity.

3. Cultural industries and the “essential facilities” doctrine

According to US law that inspired EU law, the “essential facilities” doctrine “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”7 Because it represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant its competitors access to an essential asset. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must meet five criteria:

(1) the control of the essential facility by a monopolist;

(2) the competitor’s inability, practically or reasonably to duplicate the essential facility;

(3) the denial of the use of the facility to a competitor according to reasonable conditions;

(4) the feasibility of providing the facility to competitors, and

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7 The Supreme Court first articulated this doctrine in United States v. Terminal Railroad Ass’n, 224 U.S. 383 (1912). In Terminal Railroad, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. This, the court held, constituted both an illegal restraint of trade and an attempt to monopolize.
Given the varied contexts in which the essential facilities doctrine has been applied, US courts have declined to impose any limit on the kinds of products, services, or other assets to which the doctrine may appropriately be applied: “The term ‘facility’ can apply to tangibles such as sports or entertainment venues, means of transportation, the transmission of energy or the transmission of information and to intangibles such as information itself”.

Arguably, one could consider the Majors’ marketing and distribution oligopoly, including the accounting structure allowing to set off the many "flops" against the rare "blockbusters", as an essential facility for content providers from other cultural origins to reach a broader audience on the world markets. The business practice known as «blockbuster strategy» in fact largely denies the access to the audience to independent film producers and distributors. It would therefore be interesting to test before courts whether the current system that enables the Majors to concentrate total investments of yearly over 10 billion USD in marketing (stars, print and advertisement) would qualify as an essential facility. An argument in support of this claim would be that the Majors’ oligopoly is able to attract these marketing funds because of its assets (catalogue of rights) as well as its corporate and contract based control of domestic and international film distribution.

This approach may inspire legislators in other jurisdictions to elaborate competition rules and develop an administrative and judicial case law based on the essential facilities doctrine that are specifically aimed at enhancing a level playing field for audio-visual content providers of diversified cultural origins. Furthermore, it may substantially contribute to make cultural diversity in cinema economically viable without unduly

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8 For an overview on the “essential facilities” doctrine with further references, see the opinion of the Advocate General Jacobs of 28 May 1998 in the case Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, Case C-7/97, ECR 1998 I-07791. The Court came to the conclusion that there was no essential facility in the case at stake.

9 Christophe Germann, Diversité culturelle et cinéma : une vision pour un pays en voie de développement, op. cit., with further references.

10 De Vany Arthur. 2004, Hollywood Economics. How extreme uncertainty shapes the film industry, London / New York 2004, p. 122 – 138: “The blockbuster strategy is based on the theory that motion picture audiences choose movies according to how heavily they are advertised, what stars are in them, and their revenues at the box office tournament. The blockbuster strategy is primarily a marketing strategy that suggests the movie-going audience can be ‘herded’ to the cinema. Where this theory is true, then the choices of just a few movie-goers early in a film’s run would determine the choices of those to follow. This suggests that the early choosers are leaders or people on whom later choosers base their choices. They choose to follow these ‘leaders’ because they believe they are more informed than they are or because they neglect their own preferences in order to mimic the leaders. Audiences who behave this way are said to be engaged in a non-informative information cascade. It is non-informative because their choices are not based on the opinions of the leaders, only their revealed actions, and the followers do not reveal their true preferences when they choose only what the leaders chose.”
relying on taxpayers’ monies. In the context of the EU, one must remember that Art. 151 of the EC Treaty requires to take into account cultural policies also in the context of competition law.

4. Marketing means as the main criterion for substitutability

Competition laws should also be applied with respect to the control of transactions that could lead to a concentration of market power harming cultural diversity, i.e. preventive control of mergers and acquisitions. However, competition authorities have so far faced the difficulty of defining and implementing cultural diversity in assessing merger and acquisitions. In our opinion, the main problem resides in predictable indicators or criteria of cultural diversity as well as in the traditional definition of relevant markets.

First, the relevant competitors must be defined. For the cinematographic sector, that drives large parts of the audiovisual one, there are several main markets in the exploitation cascade (theatrical market, various types of television and video markets). If a film is successful in the theatres, it will likely be broadcasted at prime time on television, and become a video bestseller. Theatrical exploitation, as the initial main market, includes three sub-markets, i.e. first the sub-market between film producers (supply) and distributors (demand), then the second sub-market between distributors investing in print and advertisement (supply) and exhibitors investing in the screening facilities and local advertisement (demand), and eventually the third and final sub-market between the exhibitors (supply) and the cinema audience (demand). The most significant sub-market is the one between the distributors (supply) and exhibitors (demand), since it conditions, to a large extent, what the public will be given to consume in the theatres, on television and in home cinemas (video), as well as on parallel markets such as books and music markets that recycle the success of films. The territorial market between distributors and exhibitors is international, since, in theory, a local exhibitor can rent a film for screening in his theatre from distributors around the world. We shall therefore take the second sub-market between distributors and exhibitors to explore the definition of the product or service relevant market.

According to our thesis, the definition of the product and service market needs to take into account the specific economics of cultural industries. The common approach under competition law is to assess the substitutable character between goods or services from the perspective of the demand in order to determine whether such goods or services are in a competitive relationship with each other. According to Community case law, the relevant product or service market encompasses all products or services that the consumer considers as substitutable or interchangeable with each other based on (1) their physical characteristics, (2) their price, and (3) the use they are dedicated to. These criteria make limited sense when they are applied to mass cultural goods and services. As a matter of fact, films, books and music often show little price differentiation, their physical characteristics are difficult or even practically impossible to define without an arbitrary recourse to aesthetic and content related considerations, and their intended use is...
commonly entertainment together with some form of personal enlightenment through the art. From the perspective of the exhibitors, the rental price of a film is generally based on a percentage of the box office results and aesthetic and content related aspects are largely irrelevant as long as the use of the film for screening purposes attracts as many moviegoers as possible into their theatres. In other words, exhibitors are interested in quantity (audience) rather than in quality (content). Therefore, the most relevant criterion for substitutability is the audience appeal of a given film. This appeal is largely unpredictable prior to the launching of the film on the market if one relies on a subjective criterion such as the characteristics of the film. We therefore suggest that competition authorities replace this criterion by the more objective one of the amount of investments in print and advertisement.

5. "Like" marketing and distribution power

A similar approach may be used in the context of international trade rules where a violation of the national treatment (NT) or the most favoured nation (MFN) principles requires, among other conditions, that the discriminatory treatment takes place between “like products” or “like services”. As a rule, the application of the principle of equal treatment in trade includes a “substitutability” or “interchangeability” test as one of its basic prerequisites. One shall compare products or services that are “similar” to each other in order to assess whether there is a level playing field for the purposes of competition and cross border trade. Based on the economic specificity of cultural industries, we argue that cultural goods and services that do not enjoy comparable marketing investments are not “like” goods or services.

In the area of human rights, equal treatment of men and women or black and white people relies on the assumption that men and women or black and white people are “like” human beings. From the perspective of the rule of law materializing the principle of equality, this analogy makes sense if one considers that gender, race and culture have in common the challenge of assimilating diversity without causing uniformity. The prohibition of discrimination therefore imposes a similar approach on the normative level between different individuals, communities and cultures to enable their factual diversity to flourish. This abstract rule of law is most often concretized in practice with respect to economic activities: For example, equal salary for equal work by men and women or equal job opportunities for black and white people. This long standing experience could inspire legislators who want to promote cultural diversity by enforceable rules of law. In this sense, economic activities related to culture should be the primary subject matter of the principle of equality of treatment or, at least, of the prohibition of discrimination.

6. Prohibition of "cultural discrimination"

In order to encourage cultural diversity one should focus on cultural goods and services,

and apply the principles of equal treatment to their economic aspects by promoting a competitive level playing field. Correlatively, normative action should be content neutral in order to avoid State or private filtering or censorship. In other words, neither private nor public powers shall distort competition between cultural content providers in a way that discriminates on the basis of the cultural origins of the authors and their works. If a merger between two music corporations leads to the result that less artists from a variety of cultural origins are produced and distributed on a competitive level, one may argue a violation of the prohibition to culturally discriminate. If authors are refused the access to competitive marketing means for their work because these works do not reflect the economically dominant culture without legitimate business reasons, trade and competition are distorted in an abusive way. If no facility that allows managing the high entrepreneurial risks at stake by forms of private cross-subsidization is granted to such works, these cultural goods and services will miss economic viability on a sustainable basis. If local and export markets are out of reach for certain categories of cultural goods and services for other reasons than their intrinsic artistic and entertainment values and mass appeal, there is ground to suspect cultural discrimination. Furthermore, achieving a level playing field based on equal opportunities for artists from all cultural origins could positively widen the scope of the diversity of cultural expressions that are not directly trade relevant (“spill over” effect).

7. The “distribution bottleneck” in the light of a concrete example

In order to structure our new approaches, we propose to distinguish between

- the factors of creation and production (artists, creative technicians and producers),
- the factors of commercialization (distributors and content disseminators such as theatrical exhibitors, broadcasters, video and “new media” outlets), and
- the factors of consumption (audience and other media adapting and multiplying the original contents in other formats).

The first and last categories of actors in the cinema market are affected by the distribution “bottleneck” where the factor of commercialization “filters” mass cultural goods and services. Let us take as a concrete example the distribution of films in a small country like Switzerland. It is typical of an American comedy, that is distributed by a local subsidiary of a major, to be widely released with over 50 copies and investments in advertisement of over 300’000 Euro. In addition, such a film normally enjoys global advertisement goodwill, thanks to the investments performed on a worldwide basis in the stars acting in it, and functioning like trade marks. In comparison, a film that is not distributed by a Hollywood major will be released with not more than 10 copies and less than 50’000 Euro for advertisement purposes. In addition, such a film does not enjoy any additional goodwill induced by advertisement abroad (e.g. star brand value) to appeal the audience. If we take the second sub-market between the distributors (i.e. supply and main
investors in marketing) and exhibitors (i.e. demand), it is obvious that the exhibitors will tend to rent the comedy that enjoys the more competitive marketing investments since they are more likely to attract a greater audience (i.e. demand of the third sub-market) into the theatres. In turn, the better box office results achieved in the theatrical release will generate a higher visibility for the film and cause a programming on more popular schedules on television (“prime time”), boost video sales, and the demand on subsequent or parallel markets (merchandising, books, music, etc.). The visibility that a film can acquire on the theatrical market translates in terms of public appeal. This visibility implies corresponding marketing efforts that, in turn, triggers media coverage multiplying this visibility. According to our thesis, this marketing induced visibility is the most objective indicator to assess substitutability or a “like” character between cultural goods and services. It allows to define whether two cultural goods or services are in competition with each other or not (substitutability test).

8. The principles of “Cultural Treatment” and “Most Favoured Culture”

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, that the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) approved on 20 October 2005, arguably is, in fact, no real convention at all. In my opinion, this instrument is rather a mere declaration that has almost no legal effect beyond what the UNESCO Declaration on cultural diversity already achieved in 2001. Among other weaknesses, this instrument does not provide a system of dispute settlement and sanctions that are equivalent to the means at the disposal of the WTO to enforce its trade agreements, such a convention will have little or no effect. In order to address this issue, we recommend to adopt an approach limiting the power of the factors of commercialization (distributors) over the factors of creation (creators and producers) and the factors of consumption (audience). In other words, we argue that a new balance should be implemented between these three factors based on principles of law prohibiting “cultural discrimination”. These “meta-rules” would mirror the prohibition of economic discrimination as set forth in the principles of “national treatment” and “most favoured nation” building the basis of GATT law, and subsequently WTO law for more than half a century. With a view to illustrate our proposal and to cause a discussion on it, we have adapted art. II and XVII GATS as follows:

Article I
Most Favored Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of cultural commercialization of one cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and

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production of another cultural origin treatment no less favorable than that it accords to like cultural goods
and services and their suppliers of any other cultural origin.

Article II
Cultural Treatment

Each public, private or mixed-economy factor of cultural commercialization of one cultural origin having a
dominant market position shall accord to cultural goods and services and to factors of cultural creation and
production of any other cultural origin, in respect of all measures affecting the commercialization of
cultural goods and services, treatment no less favorable than that it accords to its own like cultural goods
and services and like factors of cultural creation and production.

Article III
Maintenance of a culturally discriminatory measure

The factors of cultural commercialization having a dominant market position may maintain a measure
inconsistent with articles 1 and 2 provided that such a measure is effectively demanded by the factors of
consumption.

This tentative formulation of the principles of “cultural treatment” and “most favoured
culture” will require a more comprehensive elaboration. In our opinion, this approach is
compatible with the provisions on cultural diversity, competition and intellectual property
protection of the EC Treaty and with the TRIPs Agreement, in particular its preamble,
art. 7, 8 and 40.

9. Banana, films and trade sanctions based on intellectual property protection

The States are the gate keepers in the context of international trade rules. These rules
impose legal obligations on the States to remove obstacles to trade by applying the
principles of “national treatment” and “most favoured nation”. With respect to the
economic specificity of cultural industries, one can argue that not only States, but also
private actors having a dominant position on national and cross-border markets condition
the free movement of mass cultural goods and services. In other words, the majors as
multinational corporations acting within an oligopoly are in the position to control cross-
border trade of films. For the time being, these factors of commercialization keep the gate
open for works from one single, largely homogeneous cultural origin, and keep the gate
closed for movies from all other cultural origins. It therefore makes sense to focus
normative action on these private market actors by way of a combination of competition,
intellectual property and “free culture” rules. As a matter of fact, intellectual property
protection is the “nerf de la guerre” of cultural industries. This protection relies on State
action, i.e. on the elaboration and implementation of national and regional legislation in
the areas of copyright, neighboring rights, trade marks, trade names, etc. If a State is
eager to promote cultural diversity on its territory, it should be legitimated to put its
public resources dedicated to intellectual property protection at the disposal of private
actors in exchange for these beneficiaries’ contribution to the State’s cultural policy
goals. Concretely, the State should only protect a major’s intellectual property if this
 corporation participates as a factor of commercialization in preserving and promoting
cultural diversity on the State’s territory. On the other hand, if such a dominant position
systematically discriminates on the basis of the cultural origin of films, i.e. violates the
principles of “cultural treatment” or “most favoured culture” as phrased above, the State should be entitled to refuse to grant intellectual property protection with respect to the works owned by that corporation. In the arbitration procedure European Community EC – Regime for the Importation, Sale and Distribution of Bananas, Ecuador was granted the authorization to suspend intellectual property protection for right holders from the EC as compensation for the EC’s violation of the “most favoured nation” clause and further specific provisions that applied to the export of Ecuadorian bananas into the EC. Why should this form of incisive sanction be available against infringement of international trade rules, and not against violation of the prohibition of cultural discrimination?

11. Feasibility of a new legal framework

The feasibility of the change of paradigm that is proposed in this paper will be conditional to the resistance of those individuals, companies and State entities who are satisfied with the status quo, and of the strength and perseverance of those people who are genuinely engaged in promoting cultural diversity. For example, subsidized film producers, who receive a substantial rent from the State each year, because they control the peer review procedures, based on which public aid is granted to local film industries, by clientelism and other forms of dysfunctioning, will strongly lobby against a radical change of the system. Similarly, the majors will strongly hinder any attempt to link the promotion of cultural diversity to the protection of their intellectual property. If these conservative forces should prevail, the creative people and their public from all cultural origins, especially from transitional, developing and least developed countries, would eventually be the big losers, and with them society at large.

III. Conclusions

Today there is a need to coordinate laws and policies on the national, regional and global level in order to encourage and materialize cultural diversity. In the field of cinema, that exemplified the issues and solutions at stake for the purposes of this paper, market mechanisms have so far failed to preserve and promote cultural diversity. Cultural diversity can be considered as both a public good and a prerequisite of the freedom of expression and opinion. As consequence, many States and supranational bodies such as the European Union and the Council of Europe intervene today in the audiovisual sector by way of subsidies and other forms of public support. At the same time, the United States, driven by the oligopoly of the Hollywood Majors, seek to remove, or at least to reduce to a minimum, such intervention within the WTO, arguing that public aid distorts competition. In reality, however, one can argue that there is no level playing field in the audiovisual sector between the Majors’ motion pictures and the ones from other cultural

origins. Overwhelming distribution and marketing power by these corporations drives most competitors out of business. Since consequent subsidies for cultural industries are out of reach for the majority of the country, legislators should focus their attention on complementary or alternative means to pursue public policies aimed at preserving and promoting cultural diversity. To achieve this goal, we recommend considering competition and intellectual property laws and policies as well as the implementation of a legal system inspired by the international trading system that would promote cultural diversity by prohibiting cultural discrimination.