

Local Content Rules in Broadcasting

**Drafted by Ken Bhattacharjee, Legal Officer, and revised by
Toby Mendel, Head of Law Programme**

ARTICLE 19

March 2001

Introduction

Many countries have local content rules in the broadcasting sector to protect and promote local programming. It is argued that these rules are necessary because international markets favour countries with large and well-developed broadcasting and production sectors, whose programmes can easily displace local programmes in countries with smaller, less developed sectors. However, at the same time, these rules are sometimes criticised for being a breach of the guarantee of freedom of expression, for restraining trade and for regulating the flow of foreign information into a country. The purpose of this paper is to examine international standards and comparative best practice for local content rules and their status in relation to guarantees of freedom of expression.

Under international law, it is well established that pluralism is an important aspect of freedom of expression. As such, local content rules which promote diversity of expression can be consistent with freedom of expression. In order to be legitimate, local content rules should:

- aim to promote pluralism;
- be implemented by appropriate legal means;
- be realistic and practicable, and based on suitable criteria, in the sense of being tailored to specific broadcasting sectors and their particular needs; and
- be implemented progressively.

The Need for Local Content Rules

Many countries have passed laws to protect and promote both the local broadcasting sector and local programming. In those countries, local control over and ownership of broadcasting as well as the production and broadcasting of local programming are seen as essential to promote pluralism, and to protect the identity, unity and sovereignty of the nation. In Canada, for example, the Broadcasting Act provides that the broadcasting system “shall be effectively owned and controlled by Canadians,” contribute to “the maintenance and enhancement of national identity and cultural sovereignty,” and should:

- (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
- (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
- (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society...¹

The regulatory means to further these goals generally take three forms:

- restrictions on foreign ownership and control of broadcasting services;
- the provision of tax incentives and government subsidies to local producers; and
- local content rules for television and radio broadcasters.

Local content rules are deemed necessary for two reasons. First, local expression as a “good” is much more intrinsically linked to the identity of the nation than other goods, such as cars or computers. In France, for example, French books, television programmes and films are seen as part of the national identity. In short, they express the unique “Frenchness” of France.²

Second, the economics of international markets, which hugely favour large countries with highly developed broadcasting and production sectors, pose a serious threat to the existence of local programming in countries with smaller, less developed sectors:

Film and television producers typically recoup most, if not all their production costs in their home market, with rich markets supporting high value productions. However, the costs of reproduction are marginal and there is a strong incentive for international trade as an export sale is worthwhile at any price that covers the cost of supplying a small print. This means that large wealthy producer countries like the USA with almost one hundred million television households, can sell high budget programs in other countries (or secondary markets) at a very low cost. With programs being sold at a fraction of the actual cost of producing them in their home market and well below the cost of locally made programs, it is very difficult for local programs to compete.³

¹ Section 3(1), *Broadcasting Act, 1991*.

² Gareth Grainger, *Protection of Cultural Sovereignty in a Free Trade Environment: An Australian Perspective on an International Dilemma* (Australian Broadcasting Corporation: 1997), p. 2.

³ Asia-Pacific Broadcasting Union, *Discussion Paper: Trade Liberalisation in the Audiovisual Services Sector and Safeguarding Cultural Diversity* (Sydney: 1999), p. 2.

In Malaysia, for example, a broadcaster can purchase a 30 minute American programme for about US\$1,500, while the average cost of producing a 30 minute local programme is approximately US\$20,000.⁴

As a result, in the absence of local content rules, countries with large and well-developed broadcasting and production sectors, most notably the United States, can easily displace local programming, and homogenise programming in countries with smaller, less developed sectors. This is a threat not only to developing countries and democracies in transition, such as South Africa or countries in Eastern Europe, but also to established democracies which have relatively developed broadcasting and production capacity, such as Canada, France and Australia.

The US, on the other hand, whose entertainment industry profits enormously from the export of American television programmes and films,⁵ views local content rules as restraints on trade, and is pushing in international negotiation fora, such as the World Trade Organization (WTO) and bilateral trade negotiations, to eliminate them.

International Standards

The relevant international standards on local content rules in broadcasting can be found in three places: provisions on freedom of expression in international instruments and case-law, provisions on cultural rights in international instruments, and specific European directives and instruments on regional content requirements. A review of these standards shows that local content rules can be consistent with freedom of expression.

Freedom of Expression

Freedom of expression is protected in several international instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the Inter-American Convention of Human Rights (IACHR), and the African Charter on Human and People's Rights (the Banjul Charter). For example, Article 10 of the ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of

⁴ *Ibid.*, p. 3.

⁵ In terms of generating trade surpluses, the entertainment industry is second only to aerospace. Note 2, p. 3.

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Pluralism, including the right of a person to access a diversity of information, is an important aspect of freedom of expression. In fact, it has been recognised that States have a positive obligation to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”⁶ The Inter-American Court has also held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”⁷

As noted above, international markets have a tendency to homogenise programming in the broadcasting sector. Pluralism, including the right of an individual to access information from a diversity of sources, is an important aspect of freedom of expression. Inasmuch as local content rules offset homogenisation and promote diversity of expression, they may actually promote freedom of expression and, as a result, they are not a restriction on freedom of expression.

However, if in practice local content rules do not promote diversity, they are a restriction on freedom of expression. Where local content quotas are unreasonably high, where they do not distinguish between different types of broadcasters (e.g. national, local, radio, television), where they fail to take into account the type of programming a broadcaster airs, and where they do not include phasing in periods for quotas, they may not only restrict foreign programming but actually undermine the ability of local broadcasters to survive. In such cases, these rules do not contribute to diversity.

Cultural Rights

Local content rules can also be justified by reference to international standards on cultural rights. Article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise the right to cultural self-determination in the same words:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

⁶ *Informationsverein Lentia and others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

In addition, Article 15 of the ICESCR states:

1. The State Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life...
2. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for *the conservation, the development and the diffusion of... culture...* [Emphasis added]

Furthermore, the UNESCO-sponsored Action Plan on Cultural Policies for Development⁸ recognised the principle that “[t]he defence of local and regional cultures threatened by cultures with global reach must not transform the cultures thus affected into relics deprived of their own development dynamics,” and recommended that the Member States of UNESCO should:

Provide communications networks, including radio, television and information technologies which serve the cultural and educational need of the public; encourage the commitment of radio, television, the press and the other media to cultural development issues, such as the promotion of local, regional and national cultures and languages, exploration and preservation of the national heritage and promotion of the diversity of cultural traditions and indigenous and national cultural identities, while guaranteeing the editorial independence of the public service media.

Thus, it is well recognised at the international level that individuals have a right to take part in, peoples have a right to develop, and States have an obligation to protect and promote, local culture.

European Standards

In Europe, there are specific regional standards on European content in broadcasting set out in the 1989 Council of Europe European Convention on Transfrontier Television⁹ and the European Union Directive concerning the pursuit of television broadcasting activities of the same year.¹⁰ Both instruments, in nearly identical terms, require States which are members of the Council of Europe and European Union, respectively, to reserve a majority proportion of transmission time for European works. Article 10(1) of the Convention states:

Each transmitting Party shall ensure, where practicable and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and telephone shopping. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

⁸ Adopted by the Intergovernmental Conference on Cultural Policies for Development convened by UNESCO, Stockholm, 2 April 1998.

⁹ ETS 132, 5.V.1989, amended by Protocol, ETS 171, 1.X.1998.

¹⁰ Council Directive 89/552/EEC, 3 October 1989, amended by Directive 97/36/EC, 30 June 1997.

Thus, there is a requirement that more than 50% of broadcasting time is reserved for European works, which would include local production within the relevant State, but there is also a clear recognition that this standard should only be implemented “where practicable” and “by appropriate means”, and that it “should be achieved progressively on the basis of suitable criteria.”

Local Content Rules

Definition of Local Content

Local content is generally defined as programming which is produced under the creative control of nationals of the country. In Australia, for example, an Australian television program is defined as a program which “is produced under the creative control of Australians,” which means:

- (a) the producer of the program is, or the producers of the program are, Australian...; and
- (b) either:
 - (i) the director of the program is, or the directors of the program are, Australian; or
 - (ii) the writer of the program is or the writers of the program are, Australian; and
- (c) at least 50% of the leading actors, including voice actors, or on-screen presenters appearing in the program are Australian; and
- (d) in the case of a drama program – at least 75% of the major supporting cast appearing in the program are Australians; and
- (e) ... the program is produced and post-produced in Australia...; and
- (f) in the case of an animated program – the program satisfies at least 3 of the following requirements:
 - (i) the production designer is Australian;
 - (ii) the character designer is Australian;
 - (iii) the supervising layout artist is Australian;
 - (iv) the supervising storyboard artist is Australian;
 - (v) the key background artist is Australian.¹¹

Other countries, such as Canada¹² and South Africa,¹³ have even more detailed definitions of local content.

In addition, in some countries, as with the European Convention on Transfrontier Television, local content rules are imposed only on certain types of programming – such as fiction, series, serials, films, documentaries, arts and educational programmes – and not on other types of programming – such as news, sports events, games, advertising, tele-shopping or teletext services.

¹¹ S.7, *Broadcasting Services (Australian Content) Standard 1999*.

¹² Television Broadcasting Regulations, 1987, SOR/87-49; Radio Regulations, 1986, SOR/86-982; Public Notice CRTC, 17 March 2000, 2000-42.

¹³ The Independent Broadcasting Authority Local Television Content Regulations, 1997; The Independent Broadcasting Authority of South African Music Regulations, 1997.

The Design of Local Content Quotas

Local content rules need to be implemented in such a way as to promote local expression and pluralism as effectively as possible. Many countries (e.g. Australia, Canada and South Africa) use a layered and progressive approach with at least some of the following features:

- 1) Measured on an hourly, daily, weekly, and/or annual basis
- 2) Variable quotas for different types of broadcasting and programming:
 - television and radio
 - terrestrial, cable and satellite
 - free and pay-tv
 - public and private
 - drama, films, children's programming, news, talk shows, music videos, different kinds of music
 - in-house and independent (contracted) productions
 - exemptions for broadcasters who target special programming at a particular community of interest, where there little or no local cultural production (e.g. Italian opera)
- 3) Progressive implementation of quotas to give broadcasters an opportunity to increase their local content production over time
- 4) Periodic review and amendment of quotas to take into account the effect they are having on broadcasters, as well as any relevant changes, for example in local production capacity

Examples of Local Content Quotas

Local content quotas vary from country to country. The following list provides a number of examples of quotas in different countries around the world. It is not comprehensive but has been included to give a general idea of established standards and practices.

Australia. Television: 55% from 6:00 am to midnight.

Bulgaria. Television and radio: at least 50% European and Bulgarian productions.

Canada. Radio: 35%, except for stations whose playlists are at least 35% instrumental. Such stations have to meet lower local content quotas because of the limited amount of Canadian instrumental music that is available. Public service television: 60% overall annually, 60% from 6:00 pm to midnight. Private television broadcasters: 60% overall annually, 50% from 6:00 pm to midnight. Pay and specialty television services: 16 to 100% depending on the service, but

most are required to meet at least 30%. Pay-per-services: 1 Canadian : 20 non-Canadian films, 1 Canadian : 7 non-Canadian events.

France. Television: 40% French productions, 60% European productions.

Hungary. Television: 15% in 1996, 20% from 1 January 1999. Music on radio: 15%. Public sector radio: 30%.

Latvia. Terrestrial television: 80% European of which 40% must be Latvian.

Macedonia. Broadcasters: 20% own programmes in the first year, 30% in the second year, 40% in the third year.

Malaysia. Television: 60% of programming in national language, increasing to 80% by 2000, for free-to-air television and certain cable and satellite channels. Radio: 60% local origin, increasing to 80% by 2000.

Netherlands. Commercial broadcasting: 50% European productions.

Poland. All broadcasters: minimum 30% Polish productions. The minimum can be raised for some broadcasters (e.g. public service television).

Portugal. Private television: 30% Portuguese productions.

Romania. Television and radio: more than 50% European productions by 1 January 2003, of which 40% must be Romanian productions.

Slovenia. 55% European productions.

South Korea. Terrestrial television: imported programmes limited to 20%. Cable television: foreign sports, science, and documentary programmes limited to 50%. All other kinds of foreign programming, including films, limited to 30%.

South Africa. Public television: at least 50% South African productions (within 5 years for existing license holders and within 18 months for new license holders). Private television: at least 20% (within 2 years of regulations coming into effect). Subscription television: at least 5%. Radio: at least 20% South African productions.

Spain. Private television: 40% own productions, 50% of film broadcasts must be Spanish and European.

Sweden. Public service television: 55% in-house production and an increasing proportion (not specified) from independent Swedish producers. Commercial radio: 33% of airtime must be dedicated to local programmes.

Recommendations

Local content rules vary from country to country, but in general, along with standards on European content set out above, the best practices are as follows:

Local content rules must promote pluralism

Local content rules can only be justified as a restriction on freedom of expression and broadcasting freedom if they both aim to promote pluralism and are effective in achieving this result.

Local content rules which operate as a vehicle of government control or which undermine diversity are not legitimate, particularly if they are designed to favour State-owned or private media which are partial to the government, to keep out foreign programming which is critical of the government or ruling elites, or to disproportionately favour one or more racial, ethnic, religious, or language group(s) in the country.

Local content rules should be implemented by appropriate legal means

Local content rules should be implemented by appropriate legal means. First, they should be established either in legislation or regulations or as part of the licensing of broadcasters. Second, a broadcast regulator, which is independent of government and fair and impartial, should monitor and enforce compliance with local content rules.

Local content rules should be realistic and practicable

The level set for local content rules should take into account the strength of local production in the country and its potential for development. Excessively high local content requirements, which are unrealistic and unachievable, can undermine the viability of broadcasters and pluralism.

As an aspect of this, local content rules should be based on suitable criteria, which reflect the complexity and diversity of the existing broadcasting sector and local production. Suitable criteria may include variable local content levels for different types of broadcasters – such as television and radio – different types of programmes – such as drama, films, documentaries, educational programming, children's programming, music – and types of production – in-house and independent. There should also be exemptions for broadcasters who target special programming, with little or no local cultural production (e.g. Italian opera), at a particular community of interest.

Local content rules should be achieved progressively

Local content rules should be implemented progressively so as to give broadcasters time to bring themselves into compliance with the rules. They should also be subject to periodic reviews, where there is flexibility to make amendments. Local content requirements which are immediate and fixed, particularly if the quotas are high, can undermine the rules themselves (if many broadcasters are simply unable to comply with them), the viability of the broadcasting sector, and pluralism.