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French Broadcasting Authority Proposes to Regulate Internet Content

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In its recent annual report,[1] France's broadcasting regulatory authority, the CSA, published the details of a legislative proposal that would allow the CSA to claim jurisdiction over a broad swath of internet content called "digital audiovisual services." This new category of services would be subject to several of the most fundamental principles of French audiovisual law, such as protection of children and the prohibition of content inciting racial hatred.

In addition to being subject to these obligatory principles, digital audiovisual services would have the option of agreeing to measures to promote other objectives of France's audiovisual law, including measures to promote diversity of opinion, the rights of women, or French and European motion picture production.

In exchange for these voluntary measures, the digital audiovisual service would benefit from the right to be featured prominently on digital distribution platforms. Qualifying digital audiovisual services would have a form of "must-carry" right in France with regard to digital distribution platforms, as well as improved access to film rights[2] and subsidies.

The CSA's proposals have not yet been adopted into French law. They may be included in an audiovisual reform bill to be presented by the government to parliament later this year.

If enacted, the proposal would mark a fundamental shift in how internet content is regulated, blurring the lines between broadcasting regulation and internet regulation.

The CSA's initiative follows a report issued in 2013 by Pierre Lescure, the former president and CEO of the Canal+ group,[3] which recommends the imposition of audiovisual-like regulation over certain internet content, as well as a 2013 government consultation[4] on the subject. If enacted into law, the CSA's proposal would mark a fundamental shift in how internet content is regulated, blurring the lines between broadcasting regulation and internet regulation.

Currently broadcasting regulation in Europe applies only to traditional television broadcasting, and to "on-demand audiovisual media services." On-demand audiovisual media services are video-on-demand services that are curated by a service provider with editorial responsibility, and that have a mass media character making them likely to act as a substitute for traditional television.[5] Video sharing platforms such as YouTube are excluded.

Internet services that are not "on-demand audiovisual media services" fall outside the broadcasting regulation. They are subject to the E-Commerce Directive and to existing laws on defamation and the press. Publishers of internet content are subject to little or no *ex ante* regulation, but can be sued or prosecuted afterwards (*ex post*) if the content violates the rights of others. To simplify, internet services are regulated like newspapers, not like television broadcasts. This tradition of light-handed regulation of internet content has its roots in freedom of expression.

In 1995, the United States attempted to impose measures to protect minors from pornographic content on the internet. When reviewing the constitutionality of the measure, the US Supreme Court had to determine whether internet content is like a broadcasting service, for which regulatory measures would be allowed; or a newspaper, for which regulatory measures would be unconstitutional.

The court concluded that internet content is more akin to a newspaper because users actively request information as opposed to having content "pushed" at them. Moreover, the internet does not use scarce broadcasting frequencies, which is one of the traditional justifications for government regulation of television. Consequently, the Supreme Court found that the US "Communications Decency Act" was unconstitutional because it attempted to extend broadcasting regulation to the internet.[6]

Courts in Europe also afford high protection to internet content. The European Court of Justice has stated that any *ex ante* measure that risks inadvertently blocking legitimate content would be an unacceptable restriction of freedom of expression.[7] This reasoning is similar to the US Supreme Court's in *Reno v. ACLU*: if there is even a small chance that a regulatory measure will block access to permitted content, the measure is an excessive restriction of freedom of expression. Like the US Supreme Court, the French Constitutional Council said that broadcasting regulation is justified under freedom of expression principles because broadcasters use scarce government spectrum, and because television has a high influence on viewers.[8] Any new broadcasting regulation over internet content would have to be tested under these constitutional principles.

The second potential hurdle for the CSA's proposal is compatibility with existing EU Directives. The E-Commerce Directive[9] imposes the "country of origin" rule for internet services, which means that France cannot discriminate against websites or platforms legally established in other EU Member States.

The CSA's proposal would give preference to digital audiovisual services that voluntarily agree to certain French content rules. A website established in the Netherlands, for example, would benefit from less favorable treatment than a website that voluntarily agrees to French rules. The Dutch website would suffer from a form of discrimination that might violate the E-Commerce Directive.

Digital distribution platforms, including those established outside of France, would be subject to a form of "must carry" obligation. This obligation might also raise issues under the country of origin rule. For an app store established in Luxembourg, the CSA's rule would constitute a new regulatory burden imposed by France. Finally, the Universal Service Directive[10] limits "must carry" obligations to certain television services of general interest. It is not clear that France can create a new must carry obligation for digital distribution platforms.

The CSA's proposal reflects two underlying policy concerns: the country of origin rule allowing online service providers to avoid French law and France's desire to shift some of the burdens of broadcasting regulation to new internet service providers.

Thus a number of legal uncertainties remain regarding the CSA's proposal, both under constitutional principles and under existing EU directives.

The CSA's proposal reflects two underlying policy concerns. The first is France's concern that the country of origin rule allows online service providers to avoid French law. The country of origin rule allows providers of on-demand audiovisual services to establish themselves in other EU Member States and ignore French broadcasting rules, even if their services target French viewers.

The CSA and the French Government would like to abolish the country of origin rule, and move to a country of destination rule during the next revision of the Audiovisual Media Services Directive. Under the country of destination rule, any service that targets French viewers would be subject to French broadcasting laws. The French point to the use of the country of destination rule for purposes of applying value added taxes for online services.

The second policy concern is France's desire to shift some of the burdens of broadcasting regulation — in particular the burdens associated with subsidizing

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French motion picture production — to new internet service providers. This policy concern is amplified by an institutional rivalry that exists between the CSA and other French regulatory authorities. The CSA wants to extend its institutional responsibilities beyond traditional broadcasting, and have a role in regulating internet services. The French Government already plans to give the CSA responsibility for fighting online copyright infringement, a task currently performed by the "HADOPI" agency. Hadopi is a French institution solely dedicated to the distribution of works and the protection of rights on the internet. Under the government's proposal, HADOPI would merge into the CSA.

The CSA's proposal is part of a broader rethink of audiovisual policy in the internet age. Today, French over-the-air channels suffer from diminishing advertising revenues, and perceive over-the-top services as a major threat.

On February 17, 2014, France's main commercial over-the-air broadcasters wrote to France's Minister of Culture to complain of stagnating advertising revenues, and complex regulatory burdens that date from the 1980s.[11] Many of these regulatory burdens are designed to support the French motion picture industry. Yet the support system for the French motion picture industry is also under attack.

The French Accounting Court recently issued a report revealing significant inefficiencies, and urging reform.[12] At some point, France may have to radically simplify its audiovisual regulations, and investigate alternative means, such as taxation and direct subsidies, to support its motion picture industry.

Whether European lawmakers will abandon the country of origin rule is uncertain. The country of origin rule is one of the pillars of European policy, contributing to the creation of a single European market. The country of destination rule would require service providers to comply with 28 different regulatory regimes — a step backwards in terms of the European single market.

Because the CSA's proposal is not limited to digital audiovisual services established in France, the proposal challenges the country of origin principle. The CSA's proposal takes a light-handed regulatory approach, applying only the most fundamental principles of French audiovisual law to digital audiovisual services.

Few in France would argue with the need to protect children and limit access to content inciting racial hatred. However, as we learned from the Communications Decency Act in the US, the devil is in the detail. Moreover, the idea of encouraging service providers to enter into voluntary agreements in exchange for obtaining additional rights is not as simple as it looks. Voluntary agreements with French regulatory authorities can still constitute a form of regulation — and discrimination — that could run afoul of the AVMS and E-Commerce Directive.

The CSA's Head Olivier Schrameck also chairs the newly-created group of European audiovisual regulators, the European Regulators Group for Audiovisual Media Services (ERGA).[13] The CSA's attempt to extend its regulatory reach into the internet space will be watched closely by other media regulators in Europe, and could prompt similar initiatives elsewhere.

Notes

1. CSA Annual Report for 2013, published April 14, 2014.

2. It is unclear how the French regulator could facilitate access to film rights, as those rights are controlled by private companies that license rights based on individual negotiation.

3. Report of Pierre Lescure "Act II of the Cultural Exception" dated May, 2013.

4. Consultation of the French Ministry of Culture and Communication: La communication audiovisuelle et les services culturels numériques, October 2013.

5. Audiovisual Media Services Directive 2010/13/EC, recital 21.

6. Reno v. ACLU, 521 U.S. 855 (1997).

7. Scarlet Extended v SABAM, Court of Justice of the European Union, Case 70/10, November 24, 2011.

8. French Constitutional Council, Decision n° 88-248 DC, January 17, 1989.

9. Directive 2000/31/EC.

10. Directive 2002/22/EC.

11. See: http://lci.tf1.fr/economie/netflix-google-apple-lettre-ouverte-de-tf1-canal-et-m6-a-aurelie-8366518.html.

12. French Accounting Court, Report on Support for Motion Picture and Audiovisual Productions, April 2014.

13. European Regulators Group for Audiovisual Media Services, Inaugural Meeting of the European Regulators Group for Audiovisual Media Services, March 4, 2014.