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## **GOVERNMENT, CULTURE AND MOVIES: IN SEARCH OF A COMMON UNDERSTANDING FROM A EUROPEAN PERSPECTIVE**

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# Government, Culture and Movies: In Search of a Common Understanding from a European Perspective

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# I. Introduction

There is a growing feeling that the creation of a European culture must develop independently of the North American cultural model, perhaps even be prepared to defend itself against the latter, albeit this already has had a profound effect on the cultures of all the states of Europe. We must positively support the remarkable range of museums and art galleries and ancient buildings that we have, which in themselves perhaps indicate the way in which our future cultural development should go.<sup>1</sup>

Lord Slynn of Hadley, former judge of what is now the Court of Justice of the European Union (CJEU), puts forward in this wording a rarely heard statement, which is, however, implicit in many books, articles and conference proceedings and, most importantly, legal texts and case law. Culture could be considered, indeed, as many would argue, a European obsession.<sup>2</sup> European States, together with other countries, such as Canada, have fostered a protection system for culture in the international relations and, especially, in international trade.<sup>3</sup> This is not only a long standing tradition in the countries which are now members of the European Union (EU) but it has also been inherited by the European Union itself. The underlying reasons will be explored in this chapter, bearing in mind that culture has been a goal of the European Communities since

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<sup>1</sup> Lord Slynn of Hadley, 'Law and Culture – a European Setting', The Tanner Lectures on Human Values, delivered at Brasenose College, Oxford, October 28 and 29, 1993. See [https://tannerlectures.utah.edu/\\_documents/a-to-z/s/Slynn95.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/s/Slynn95.pdf), all links accessed 11 December 2019. Some authors have warned against the use of the notion 'American culture' in singular, since the United States is – as it happens with other countries – 'a land of many cultures'. See Rachael Craufurd Smith, 'Article 151 EC and European Identity' in Rachael Craufurd Smith (ed), *Culture and EU Law* (Oxford, Oxford University Press, 2004) 277.

<sup>2</sup> This is most notably perceived in the audiovisual field, where some have even spoken of a 'challenge to [the European] civilisation', due to the fact that American products are, allegedly, 'colonising' the European market. See, for instance, Jean-Claude Batz, *L'Audiovisuel Européen: Un Enjeu de Civilisation [The European Audiovisual: A Civilisation Challenge]* (Paris, Atlantica, 2005) 53.

<sup>3</sup> Some have argued that Canada's cultural policy in international trade responds to the need to defend itself from the erosion of its national culture by US dominance of the cultural market. See Joseph Devlin, 'Canada and International Trade in Culture: Beyond National Interests' (2004) 14 *Minnesota Journal of Global Trade* 177.

the very beginning of the European project in the 1950s, although it has acquired legal recognition only at a later stage.<sup>4</sup>

The main purpose of this chapter is to analyse the different legal approaches in Europe and the United States regarding culture and cultural policies. As I will develop further later, culture is understood here both in its broader and in its narrower meaning. The broader meaning links culture to concepts such as civilisation, traditions and customs, whereas the narrower meaning relates it to something more specific: the arts. Focus is put mainly on the European experience, since the research is carried out through the lens of a European lawyer. Yet the purpose is to try and identify certain parameters that enable the comparison of both approaches, the European and the American, and deduce elements for a common understanding in a framework of an ever closer legal globalisation. Culture is, by definition, something that should be excluded from the socio-economic phenomenon of globalisation, and therefore the law regulating culture should be the last, if at all, to be globalised. Anyway, there are already some international reference points, such as the negotiations on the cultural exception at the World Trade Organization, or the implementation of international treaties such as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>5</sup> Therefore, it is now a task for scholars to study this issue and propose ways of understanding, accordingly.

## II. The United States and the European Union in a Conundrum: What is Culture and What is a Film?

The differences in the approach to cultural policies in the United States and the European Union correspond to the existence of opposed or, at least, diverging, answers to the following questions: what is the relationship between the government and culture/the

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<sup>4</sup> As Paul Craig and Gráinne de Búrca have maintained, 'the connection between Community law and culture goes back considerably further, to the origins of the EEC Treaty'. See preface to the pioneering book Rachael Craufurd Smith (ed), *Culture and European Union Law* (Oxford, Oxford University Press, 2004) 277.

<sup>5</sup> Full text available at the following address: <https://en.unesco.org/creativity/convention>.

arts? Are there any constitutional constraints or obligations to establish a cultural agenda? Who is in charge of the political agenda in the government? Who defines the paths to follow? Who administers the money? Who decides where to allocate the funds? Are the agencies independent in this area? Is it possible to confer the implementation of this policy to private parties? What other types of constitutional problems arise in this field? What are the criteria that should guide the funding of the arts? What are the implications for fundamental rights, such as freedom of expression?<sup>6</sup> The debate on censorship is of course crucial here.<sup>7</sup>

The general framework on culture that has been exposed will be exemplified with one of the key policies that has given rise to controversy between the two sides of the Atlantic: the film industry and film policies, if we are indeed allowed to speak of policies in such an area. According to some recent developments, it seems that, in this respect, the European and the American perspectives are slowly converging. There is an increasing common trend to approach films from a manifold perspective, admitting that it does not belong to the world of culture/the arts exclusively or to the world of economics only. And this is an important step towards a mutual (legal) understanding.

In Europe, although the emphasis is always put on the cultural meaning of movies, public policies treat the film industry precisely as an industry. This has implications for the internal organisation of public bodies, and also for the relationship between those public bodies and others. Independence and autonomy from political choices are the key

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<sup>6</sup> In the United States, the debate on cultural public policies has been addressed from the perspective of the protection of fundamental rights, and mainly freedom of expression. See on this, among others, Symposium, 'Art, Distribution & The State: Perspectives on the National Endowment for the Arts' [Amy Schwartzman (Moderator); John Tuskey; Robert W. Peters; Hope O'Keeffe; Roberto Bedoya; David Cole; Marci Hamilton] (1999) 17 *Cardozo Arts & Entertainment Law Journal* 705.

<sup>7</sup> The following statement is highly illustrative in this regard: 'The requirement that the NEA, in making funding decisions take respect and decency into consideration, does not have anything to do with prohibiting art. Rather, it has to do with funding art. Simply because art is not funded does not necessarily mean that it is prohibited. Even if Karen Finley does not receive government money for smearing chocolate on herself, she is still perfectly free to do so. There is no censorship at all.' See Symposium, 'Art, Distribution and the State: Perspectives on the National Endowment for the Arts' (1999) 17 *Cardozo Arts & Entertainment Law Journal* 708 (John Tuskey). For a perspective of how private actors can interfere with freedom of expression (which, of course, puts forward a different set of problems than a case involving interference by a public body), see also Lawrence Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York, The Penguin Press, 2004).

elements here. The rationale behind new organisational models is the will to help this industry and use it as a means to promote economic growth and development, something which will be allegedly better achieved through independent bodies rather than through more traditional and hierarchical units. This perspective actually belongs to the United States and, as will be explored later, new agencies are being created in the Member States of the European Union to promote film production in accordance with this perspective.

In the United States, movies are approached from a very different perspective than in Europe. Movies are conceived of as part of the general entertainment business and are therefore subject, in general, to ordinary market rules. Nevertheless, some changes have occurred lately and new perspectives can be identified in film public policies. More and more public funding is increasingly being devoted to the film industry. On the one hand, direct public funding is being given to film production, usually to support creativity or access to films for certain communities. Thus, it is linked to policies of access to culture and education.<sup>8</sup> On the other hand, there is a system of tax credits, conferred (in principle) indistinctly of the artistic value of the movie. Therefore, its aim is not strictly speaking a cultural aim, but an economic one, since it pursues a positive impact in the development of certain areas and regions.

From a more general perspective, it is interesting to examine whether these cultural/film policies can be seen through the lens of constitutional welfarist theories.<sup>9</sup> Can new (substantive) rights and freedoms be deduced from the Constitution? Or, even, can these rights and freedoms be ‘found’ in documents such as the Declaration of Independence, the Ninth Amendment, and the ‘citizenship’ and ‘privileges and immunities’ clauses of Section 1 of the Fourteenth Amendment?<sup>10</sup> This theory, which is not widespread in the United States, is well understood by Europeans, since it is linked

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<sup>8</sup> It is important to note here that aids to film production refer to the whole ‘life’ of the film, ie pre-production, production, post-production, distribution, exhibition and promotion. This implies that the budget for this is fairly relevant.

<sup>9</sup> See, for instance, Sotirios A Barber, *Welfare & The constitution* (Princeton NJ, Princeton University Press, 2003). This topic, which is not as popular in the United States as it is in Europe, has been developed in the former at State level rather than at the federal level. See Helen Hershkoff, ‘Welfare Devolution and State Constitutions’ (1999) 67 *Fordham Law Review* 1403.

<sup>10</sup> See Charles L Black, Jr, *A New Birth of Freedom* (New Haven CT, Yale University Press, 1997) *xix*.

to the system of fundamental rights in countries such as Germany, Italy and Spain. Others, such as the United Kingdom are reluctant, just as the United States are, insofar as a theory of duties addressed to public powers and based on fundamental rights is not as common as in the aforementioned European countries.<sup>11</sup>

Yet the idea that underlies the whole debate could be, whether culture/the arts are public goods that justify an obligation for public powers to act. For precisely

as societies become more complex and differentiated, there may be disagreement about what constitutes social and political ‘health’ and how it may best be ensured. ... With increasing sophistication, people can eventually come to believe that the best way to ensure the vitality of society is by ensuring the well-being of the constituent members in the *widest* possible sense, and that may mean leaving it up to them to determine themselves in what their human flourishing consists.<sup>12</sup>

In this chapter some legal norms and public policies will be tackled, where culture and the arts are indeed considered public goods and therefore it is possible to identify public duties which should pursue this goal.

The questions that have been posed in the preceding lines will be given an answer, at least a tentative one. One of the main features of the new scenario of cultural and film policies is that both perspectives, the American and the European, are converging. In both cases, the constitutional and economic implications of film production should be analysed through an array of different legal instruments, ie films are not homogeneous from a legal perspective. Their nature is rather multifold and therefore various film legal policies and not just one should be developed. Thus, to begin with, the relationship between government and culture in the European Union and the United States will be discussed, in order to canvass at a later stage the relationship of the government and films.

### III. Culture and the Arts in Today’s Global Law

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<sup>11</sup> In the British bibliography, see Andrew J Harding, *Public Duties and Public Law* (Oxford, Clarendon Press, 1989). See also, related to this issue, Ross Cranston, *The Legal Foundations of the Welfare State* (London, W & N, 1985); Harry Street, *Justice in the Welfare State* 2nd edn (London, Stevens, 1975).

<sup>12</sup> Raymond Geuss, *Public Goods, Private Goods* (Princeton NJ, Princeton University Press, 2001) 37–38.

Global law is increasingly becoming a reality, even though its features are still far from clear. Both the supporters and opponents of this phenomenon alike are aware of the fact that globalisation is a process which cannot be stopped. Differences lie rather in the way both groups approach this process: some would like to reduce its scope as much as possible, whereas others consider that people should benefit from its positive aspects. Among such positive aspects, in the first instance, it is the economic development in those areas of the world which require so. And, in later instances, the respect for human rights, including social and cultural rights, are found on the agenda.

Culture is, by definition, opposed to the idea of globalisation. Culture is what characterises a specific society and is therefore peculiar to that society. No global society strictly speaking exists so far and, indeed, it could be argued that globalisation has provoked nationalist and regionalist movements which foster their own identity and fear the homogenisation effect that could be purported by it. Notwithstanding this, there is a *global trend* to try and establish a common protection system for culture, or, better expressed, for *cultures*. Diversity – *cultural diversity* – is here the key concept, and it derives from an understanding of culture which will be now explored.

There are many theories on the concept of culture. Yet a major tentative division is the one which distinguishes between a broad and a narrow concept of culture. The broad concept understands culture as civilisation, ie as the group of customs, beliefs and institutions that form a society. Anthropologists following Edward B Tylor's theories would argue that culture is an accumulative process, and therefore there are different degrees in the evolution towards the ideal of culture or civilisation.<sup>13</sup> On the other hand, theories following Franz Boas' approach would focus on the fact that there are not different degrees towards a common idea of culture, but there are different cultures, all of them equally valuable.<sup>14</sup> This second approach is the one underlying modern international legal scholarship interested in the concept of cultural diversity.

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<sup>13</sup> Edward B Tylor, *Primitive Culture* 7th edn (New York, Brentano's, 1924) 1871. Tylor was the father of cultural evolutionism and gave this most famous definition of culture: 'That complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society'.

<sup>14</sup> Franz Boas wrote also against theories generally accepted in that time, according to which some races are superior to others. See, mainly, Franz Boas, *The Mind of Primitive Man* (Whitefish MT, Kessinger, 2007) 1911.

On 18 March 2007, an international treaty entered into force: The Convention on the Protection and Promotion of the Diversity of Cultural Expressions,<sup>15</sup> a Convention that was framed by the UNESCO, the agency of the United Nations for Science, Education and Culture. Only two States voted against it: the United States and Israel, and there were four abstentions: Australia, Honduras, Liberia and Nicaragua. There is a general trend whereby culture is regarded, in general, as a minor political issue. Yet the (hard) negotiations proved that the topic was indeed highly political. There was fear that the Treaty might lead to an increase in the so-called ‘cultural exception’ in areas where the World Trade Organization (hereinafter, WTO) did not really want it to happen. In the framework of the WTO it is well known that the principle of free trade might be subject to some exceptions, one of them being the abovementioned ‘cultural exception’.<sup>16</sup> Movies are the classical example of this cultural exception, an exception which goes back to the post-Second World War period, when France used it to stop the increasing presence of American movies in its theatres. However, this was not a unilateral decision, since it responded to agreements signed between France and the United States.<sup>17</sup> The US accepted it. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is, indeed, intended to be applied in any negotiation on trade regulation products or goods with some kind of cultural or artistic value.<sup>18</sup> Even if it is not its main intention, it is at least one of its major consequences. Thus its political and economic importance is apparent.

Cultural diversity is also a key legal concept in European Union law. The Treaty on the Functioning of the European Union (TFUE) grants powers to the European Union to preserve its cultural diversity. European culture in the broad sense, as mentioned

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<sup>15</sup> <https://en.unesco.org/creativity/convention>.

<sup>16</sup> See Serge Regourd, *L'Exception Culturelle [The Cultural Exception]* 2nd edn (Paris, Presses Universitaires de France, 2004); Bruno de Witte, ‘Trade in Culture: International legal regimes and EU constitutional values’ in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO* (Oxford, Hart Publishing, 2001) 238; Anna Herold, ‘European Public Film Support within the WTO Framework’, *IRISplus, Legal Observations of the European Audiovisual Observatory* (2003-6) 2ff; Anna Herold, *European film policies in the context of EU and international law: a misalliance of culture and free market* (PhD thesis written at the European University Institute, Florence and published in Europa Law Publishing, 2009).

<sup>17</sup> On the Blum-Byrnes Agreements see Association française de recherche sur l’histoire du cinéma, Blum-Byrnes. L’arrangement 1945-1948 (1895, 1993, n° 13).

<sup>18</sup> See Art 20 of the Convention.

before, is thus a complex phenomenon, since it purports a somewhat delicate equilibrium between the cultures of the Member States and an ideal of European culture in the strict sense, which is still developing.

So far, I have referred to the broad concept of culture. As for the narrow concept, it implies that culture is only related to the fine arts, or simply the arts, admitting here that some entertainment activities – such are movies – can also be considered to be culture in this sense.

The question of culture is indeed relevant in the international sphere. This is so not only due to the existence of international treaties on the protection of culture, but also due to ‘cultural clauses’ or ‘exceptions’ in other types of treaties. In the international arena, such as in the framework of the negotiations of the WTO, one can perceive a major fracture between the United States and the European States. And the fracture is fostered even more since the European States take common positions under the umbrella of the European Union and develop therefore a common cultural policy. The relevance of this issue was put forward by some scholars back in the 1990’s and, as Schlesinger framed it at that time, ‘culture is going to be one of the main political battle camps in the future’.<sup>19</sup> It should be assessed whether this has actually proved to be so.

‘Culture’ is understood here as equivalent to ‘the arts’.<sup>20</sup> However, its broader meaning will also be considered, since public policies on the arts, and more specifically film policies, usually lay on a preconception of what a certain culture is or should be and how it can be preserved.<sup>21</sup>

#### IV. The European Perspective: Changing Patterns in EU Law

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<sup>19</sup> See Philip Schlesinger, ‘Europeanness: A New Cultural Battlefield’ in John Hutchinson and Anthony Smith (eds), *Nationalism* (Oxford, Oxford University Press, 1994).

<sup>20</sup> See here, in the British literature, P Kearns, *The Legal Concept of Art* (Oxford, Hart Publishing, 1999).

<sup>21</sup> On this see Batz (n 2). This reference is particularly interesting, because it focuses the analysis on audiovisual policies in Europe.

## A. Cultural Policies in the Member States of the European Union

For many years, some Member States of what is now the European Union, developed strong cultural policies, where films played a very important if not decisive role. France, of course, is the leading example of this, since it expeditiously created a specific public body to deal with these policies: the Department of Culture (*Ministère de la Culture*).<sup>22</sup> But also other countries, such as Germany, Italy,<sup>23</sup> and Spain, among others,<sup>24</sup> have traditionally devoted an important part of their public budget to subsidise culture/films in various forms: grants to fund the artistic creation, protection of cultural/artistic heritage, funds to support the film industry in all its phases – pre-production, production, post-production, distribution, exhibition, promotion, etc. However, other European countries, such as the United Kingdom, have a different tradition in this regard. Although they are in favour of aiding and supporting artistic activities, yet it is for very different motives. For instance, aids are granted in the United Kingdom to promote culture as an educational goal and not *usually* just for the art's sake.<sup>25</sup> This echoes the widespread notion of culture, one that links culture with education, and has given rise to the birth of a constitutional theory on the so-called 'Culture State; in Europe.<sup>26</sup>

Present-day public powers *in Europe* have 'discovered' the economic potential of culture and of cultural industries.<sup>27</sup> And here lies a new basis for public intervention

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<sup>22</sup> For a classical critique on the French interventionism in the field of culture, see Marc Fumaroli, *L'état culturel. Essai sur une religion moderne [The Culture State. Essay on a Modern Religion]* (Paris, Fallois, 1991).

<sup>23</sup> See Lucia Bellucci, *Cinema e Aiuti di Stato Nell'Integrazione Europea. Un Diritto Promozionale in Italia e in Francia [Film and State Aid in European Integration. A Supporting Law in Italy and France]* (Milan, Giuffrè, 2006).

<sup>24</sup> See an early publication on this in Council for Cultural Co-operation of the Council of Europe, *Art of the cinema in ten European countries* (1967).

<sup>25</sup> It should be mentioned here that the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions defines cultural activities, goods and services 'irrespective of the commercial value they may have. Cultural activities may be and end in themselves, or they may contribute to the production of cultural goods and services' (art 4.4).

<sup>26</sup> This theory will be further developed later, but it should be noted already that it was first treated thoroughly in Enrico Spagna Musso, *Lo Stato di Cultura nella Costituzione italiana [The Culture State in the Italian Constitution]* (Naples, Morano, 1961).

<sup>27</sup> Speaking of cultural 'industries' might sound oxymoronic to some, especially in Europe, but the truth is that such industries exist and some laws have been passed to establish their legal framework, and their importance for the general

which has developed recently and with a certain amount of success.<sup>28</sup> Governments, and more importantly, local authorities foster culture and film production, in order to increase the economic growth of the areas subject to their jurisdiction. This is generating a delocalisation of film production from the United States to Europe, since American producers can benefit – under certain circumstances – from European public funds, and they can also benefit from the indirect support to the film industry which is provided by facilitating access to locations, technical personnel, etc.<sup>29</sup>

The tradition in the EU Member States of placing culture in the political agenda and giving it support has been inherited by the European Union itself. The three founding Treaties of the European Communities, drafted back in the 1950s, are said to be just of economic nature and their purpose being to reach a European economic integration. Yet some early political documents indicate that the goals of the European project were already ambitious at that time.<sup>30</sup> This is the case, for instance, of the Schuman Declaration, presented by the French foreign minister, Robert Schuman, on 9 May 1950, where it was stated that ‘[the] proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace’. In fact, it is not even necessary to remember here that the idea of placing the coal and steel industry under one and the same authority (which was the aim of the European Coal and

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economy is continuously growing. See Rostam Neuwirth, *The Cultural Industries and the Legacy of Article IV GATT* (Conference on Cultural Traffic: Policy, Culture and the New Technologies in the European Union and Canada of 22–23 November 2002, Carleton University).

<sup>28</sup> On this see *The economy of culture in Europe*, EU Publications [https://ec.europa.eu/assets/eac/culture/library/studies/cultural-economy\\_en.pdf](https://ec.europa.eu/assets/eac/culture/library/studies/cultural-economy_en.pdf). See also *Eurobarometer qualitative study on the Europeans, culture and cultural values* at [https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs\\_278\\_en.pdf](https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_278_en.pdf). On the issue of economic value of culture for the United States, see Devlin (n 3). In the first paragraph of this article it is argued: ‘The United States and Canada trade with each other more than any two other countries on earth. Part of this trade involves cultural products, an important export industry for the United States. Unlike the United States, Canada is primarily an importer of cultural products. Seventy-five percent of Canadian cultural products are imported, and the vast majority comes from the United States’.

<sup>29</sup> See, among others, Toby Miller and others, *Global Hollywood* (London, British Film Institute, 2005) 2: and in particular ch 2: ‘The New International Division of Cultural Labour’.

<sup>30</sup> *ibid*, 8, for instance.

Steal Community in 1951), co-ordinated by two countries which had been enemies for centuries – France and Germany – was to help to maintain peace in the old continent.

A specific legal basis for cultural policies was not included in the European Community Treaty until the Treaty of Maastricht modified the former in 1992 and introduced Article 128 EC Treaty (now Article 167 TFEU).<sup>31</sup> Culture was initially not a goal of the European Communities. However, it was present in some policies or regulations. For instance, culture could be invoked to limit the four fundamental freedoms of the internal market: free movement of goods, persons, services and capitals. This can be illustrated with the landmark ruling of the European Court of Justice (ECJ) in *Cinéthèque SA v Fédération Nationale des Cinémas Français* (1985).<sup>32</sup> Here, the French government established a minimum period of time that had to elapse between the time when a movie was first shown in theatres and the time when the same movie could be sold or rented through other means, such as video tapes. The Tribunal de Grande Instance of Paris asked for a preliminary ruling to the ECJ, in order for it to determine whether this regulation was at all compatible with the European fundamental freedoms and, if it was not compatible, whether it could be considered as an exception to the general regime. The ECJ argued that such a system was common to many Member States of the European Union, and that its goal was to promote film production. It was indeed a restriction of the freedom of movement of goods (video tapes), but it was justified in order to pursue a legitimate goal in Community law. Culture was thus considered a legitimate objective in Community law which could affect its core, ie the fundamental freedoms.

Culture, therefore, was present in Community law before the Treaty of Maastricht, first, due to the fact that it could constitute an exception to fundamental freedoms. Second, it should also be borne in mind that policies which might very well be regarded from a cultural point of view can also be tackled from other perspectives. Film policies, for instance, have been adopted by the European Community even before the Treaty of Maastricht incorporated a legal basis for it. The MEDIA Programmes, which have been in motion since 1991, were carried out then under the legal basis of Article 130 EC Treaty,

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<sup>31</sup> This might well be regarded as a symptom of the new drift the European Community received at that time, a question which was tackled in Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

<sup>32</sup> Cases 60 & 61/84 [1985] ECR 2605.

now Article 173 TFEU, which gives competence to the European Community to act in the field of industry. After a specific legal basis for culture was included in the Treaty, the MEDIA programmes have *still* been linked to industry, but it is important to note that the cultural dimension has always been put forward.<sup>33</sup> So culture was implicit even when it wasn't formally present.

Third, culture was also present before 1992, not only to justify restrictions to the fundamental freedoms, but also to admit exceptions to another core principle of European Community law, being the prohibition of State aids.<sup>34</sup> There are several exceptions to this principle, which are included in various provisions. Culture is one of these examples. Article 107 TFEU, paragraph 3 indicates which aids may be considered compatible with the common market. The Commission should indicate case by case (here including case categories) which aids affect trade in a manner that they are not compatible with the common market. Amongst these types of aids, the Treaty specifically defines aids related to culture in the following terms: '[A]id[s] [devoted] to promote culture and heritage conservation where such aid[s] [do] not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'. The aforesaid Article also mentions other categories of aids that can constitute an exception and that are related to economic development: this is important to note, since some measures adopted in Member States to promote film production could easily be included here. As already stated, public policies on the film industry are increasingly focusing now on using film production as a means to promote economic development in certain areas.

## B. The European Identity. Towards a Legal Basis for Cultural Policies

The legal basis for European institutions to pursue cultural policies was introduced in 1992. Notwithstanding the foregoing, there is a long history of political attempts to take consideration of culture in the European integration process. This will be briefly

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<sup>33</sup> See Herold (n 20) (both references).

<sup>34</sup> TFEU art 107 establishes that '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

summarised in the following lines, with a view to show the path the EC and the EU have followed until now. It might seem difficult to find just one purpose behind this new policy and the political documents that preceded its incorporation to the EC Treaty. Various goals lie behind national cultural policies and therefore various goals also lie behind cultural policies in the framework of the EC. Education can be one of them and today the programmes developed under both policies are conferred to one executive agency: the Executive Agency for Education, Audiovisual and Culture.<sup>35</sup> Economic development can also be a goal of cultural policies, as already indicated. However, to end with, one of the most important goals of cultural policies is to defend, to protect, to construct or to foster a specific identity. This can be traced in the opening statement to this article, put forward by Lord Slynn, and it is also one of the concepts that have guided the attempts to make the EC act in the cultural field.<sup>36</sup>

The Schuman Declaration showed the aim of the framers of the European project to reach an ever-growing union which at the end would not only be economic. Later documents show this ambition even better. As early as 1961, the so-called Fouchet Plan,<sup>37</sup> fostered by General De Gaulle, mentioned the need to foster cultural cooperation, with the view to protect the common heritage and also the values precious to the European civilisation. This document intended to promote a Union between European people, a Union based upon an intergovernmental model rather than upon an integrative one.<sup>38</sup> Yet the basic principle of its organisation was the one that has inspired the whole project since the very beginning: unity and common *spiritual* heritage, on the one side, and diversity and respect of the various cultures, on the other side.

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<sup>35</sup> See <http://eacea.ec.europa.eu/index.htm>.

<sup>36</sup> This attempt, however, might bring negative consequences with it, such as the increase of 'the sense of alienation felt by certain sectors of Europe's population'. See Craufurd Smith (n 1) 277, 294.

<sup>37</sup> It should be remembered that neither the United Kingdom nor Ireland were members of the European Communities at that time. This is the reason why English was not an official language, so usually references to the *Plan Fouchet* are made in French, even when addressed to English speakers. The text can be found, in French, at [www.leforum.de/artman/publish/printer\\_520.shtml](http://www.leforum.de/artman/publish/printer_520.shtml).

<sup>38</sup> It was promoted by General De Gaulle, but some representatives of other Member States were firmly against it. The Fouchet Plan was reviewed on several occasions but finally did not lead to the project it was supposed to foster.

Later, in 1969, at the Summit of The Hague, in The Netherlands, the – then – six Member States drafted a final Communiqué which contained the details of a real *momentum* in the history of the European Union.<sup>39</sup> Here, it was decided that the European Economic Community should be transformed into an economic and monetary union, that it should be enlarged and that goals other than economic should be pursued. Therefore, they stated that ‘[they had] a common conviction that a Europe composed of States ... is indispensable for preserving an exceptional seat of development, of progress and culture, for world equilibrium and for peace’.<sup>40</sup>

The Paris Summit in 1972 introduced a ‘qualitative development’<sup>41</sup> in the European Economic Community. The Member States decided to go further with new objectives and policies. Economic expansion, again, was considered not to be an end in itself, but a means towards something more ambitious. This was the year in which new Accession Treaties for Denmark, Ireland and the United Kingdom were signed, thus meaning that the Communities would be nine Member States Communities from 1973 onwards. It can be inferred from the Statement of the Paris Summit an express awareness of the destiny and role of Europe:

[N]ow that the tasks of the Community are growing, and fresh responsibilities are being laid upon it, the time has come for Europe to recognize clearly the unity of its interests, the extent of its capacities and the magnitude of its duties; Europe must be able to make its voice heard in world affairs, and to make an original contribution commensurate with its human, intellectual and material resources. It must affirm its own views in international relations, as befits its mission to be open to the world and for progress, peace and co-operation.

A special mention to the ‘genius of Europe’ is to be found in the text, as well as the need to take into consideration European ‘intangible values’. This is (clearly?) linked to a concept of identity that the European Communities might be willing to build or identify.<sup>42</sup> The idea of a common identity is found further in the section related to external

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<sup>39</sup> This document can be found at [http://aei.pitt.edu/1451/01/hague\\_1969.pdf](http://aei.pitt.edu/1451/01/hague_1969.pdf).

<sup>40</sup> In point 11 of the Communiqué the States even mention the desire to create a European University. This is a reality now, after the creation in 1972 of the European University Institute in Florence, Italy.

<sup>41</sup> So it has been qualified in Marcos Vaquer, *Estado y Cultura* (Madrid, CEURA, 1998) 153.

<sup>42</sup> This will be a recurrent argument: every time an enlargement takes place, the question of identity is tackled.

relations, where a distinct approach, common to all Member States, but recognisable as pertaining to a different subject, is to be fostered.<sup>43</sup> The idea of an identity based on diversity might seem apparent.

The European identity will be a key concept at a later stage, the European Summit in Copenhagen, in 1973. The Europe of Nine drafted a new document, precisely about identity, which starts with the following statement:

The Nine Member Countries of the European Communities have decided that the time has come to draw up a document on the European Identity. This will enable them to achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs. They have decided to define the European Identity with the dynamic nature of the Community in mind. They have the intention of carrying the work further in the future in the light of the progress made in the construction of a United Europe.

Identity is constructed upon an idea of opposition to others, as it was already visible in the Statement at the Paris Summit, and responsibilities are thus to be defined. One of the key words in the document is ‘dynamism’, and it indicates the need to redefine the identity as new Member States are included in the European project. The European identity is considered in this document from a twofold perspective, which has been a constant *leit motiv* since the early beginning of the European Communities and explains European cultural policies now. On the one hand, there is a need to concentrate on the common values. On the other hand, cultural diversity (and diversity in general) is to be respected.<sup>44</sup> This formula is now in Article 167 TFEU, ie in the legal basis for cultural policies.

The European identity, according to the Declaration adopted in 1973 at the Summit in Copenhagen, is based on four main elements: representative democracy, rule of law, social justice (which is, according to the document, the ultimate goal of economic progress) and respect of human rights. And the premises for those elements to exist at the supranational level are the common European civilisation, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of

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<sup>43</sup> ‘The construction of Europe will allow it, in conformity with its ultimate political objectives, to affirm its personality while remaining faithful to its traditional friendships and to the alliances of the Member States, and to establish its position in world affairs as a distinct entity’. See in the document ‘To this end’, number 7.

<sup>44</sup> ‘The Nine wish to ensure that the cherished values of their legal, political and moral order are respected and to preserve the rich variety of their national cultures’.

having specific interests in common and the determination to take part in the construction of a United Europe. It is clear that these ambitious goals go way beyond the economic nature of the European Union, but it is also clear that they are not easy to achieve, not the least because Member States might not be really willing to reach that end.

The Copenhagen Declaration can be considered a milestone on the path towards a political union, at least *on paper*, and some years later it leads, implicitly or explicitly, to the idea of a people's Europe. This starts to take shape at the European Council in Fontainebleau, in 1984, and the Conclusions to this Council revisit the notion of identity and common image. Identity and people's Europe might well be considered as two elements of one and the same reality. Yet this chapter does not endeavour the (fascinating) task of building a theory on identity in Europe,<sup>45</sup> but to simply try and explain why cultural policies developed in the European Communities at a certain point in time.

Finally, mention should be made of a political document which was drafted precisely back in 2007, in order to set a new conceptual framework in the EU. Another enlargement of the EU and the need to define the European project for the future brought European political leaders, under the German Presidency, to sign the Berlin Declaration on 25 March 2007.<sup>46</sup> The type of Declaration under discussion here very much reminds us of Constitution Preambles. Of course, I do not mean here that the Berlin Declaration should be considered a Constitution Preamble (since this would imply many assumptions that are not the object of this chapter), but the constitutional moment and the political process in which the EU was then embedded may magnify the importance of this document.

It is perhaps not surprising that no reference to a European identity is to be found in this text. Experiences that were still perceived as very recent, such as the negative results in the French and Dutch referenda about the European Constitution, may lie

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<sup>45</sup> Joseph Weiler is critical of the institutional attempts to foster a European identity. See Joseph Weiler, *The Constitution for Europe, 'Do the New Clothes have an Emperor'* (Cambridge, Cambridge University Press, 1999) 344. See also, among others, R Comella, *New Governance Fatigue? Administration and Democracy in the European Union* (Jean Monnet Working Paper No 06, 2006), <https://jeanmonnetprogram.org/paper/new-governance-fatigue-administration-and-democracy-in-the-european-union/>.

<sup>46</sup> The text can be found at [http://europa.eu/50/docs/berlin\\_declaration\\_en.pdf](http://europa.eu/50/docs/berlin_declaration_en.pdf).

beneath this choice. From a political point of view it might not have been an appropriate moment to foster the idea of a European identity when the popularity of the European project may not have been as high as it used to be.<sup>47</sup> Thus, the Berlin Declaration does not refer to the European identity, contrary to previous documents of the same kind, but it does include references to unity and to the citizens of the Union in a way very reminiscent of earlier utterances to the European identity:

For centuries Europe has been an idea, holding out hope of peace and understanding. That hope has been fulfilled. European unification has made peace and prosperity possible. It has brought about a sense of community and overcome differences. Each Member State has helped to unite Europe and to strengthen democracy and the rule of law. Thanks to the yearning for freedom of the peoples of Central and Eastern Europe the unnatural division of Europe is now consigned to the past. European integration shows that we have learnt the painful lessons of a history marked by bloody conflict. Today we live together as was never possible before.

We, the citizens of the European Union, have united for the better.

...

We have a unique way of living and working together in the European Union.

...

We preserve in the European Union the identities and diverse traditions of its Member States. We are enriched by open borders and a lively variety of languages, cultures and regions. There are many goals which we cannot achieve on our own, but only in concert.

The many references in various parts of this document to *aspects* or *perspectives* of the notion of identity are apparent; as is also apparent the emphasis put on the existence

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<sup>47</sup> After the negative results of the referenda in France and The Netherlands, the European Commission launched a campaign focused on culture in order to involve the citizens in the European project. Thus, the Commission stated the following: 'Opinion polls confirm that Europeans are generally concerned about the speed of economic and technological change, as well as the phenomenon of globalization. They feel a loss of identity and often have a sense of disconnection from the European Union. Against this backdrop, there is a growing recognition that the EU must bring itself closer to the citizen and that art and culture can make an important contribution. Indeed, art and culture offer an inspiring way of looking at reality. They can provide a more human dimension to the integration project, a so-called "Soul for Europe". In this context, the perception and role of culture in the EU is gradually changing. Whereas, in the past, the question was what Europe could do for culture, there is a growing recognition that culture lies at the heart of the European project and has a unique and indispensable role to play. It is therefore increasingly necessary to also ask what culture can do for Europe. The Directorate General for Education and Culture (DG EAC) is preparing a Communication on culture which seeks to address these issues. Please visit our website ... Participate in the consultation.' E-mail from Edith Guetta (27 September 2006) (on file with author). See *Eurobarometer qualitative study on the Europeans, culture and cultural values* (n 32). Maybe in order to fight the euro-scepticism, the Berlin Declaration concludes, '[F]or we know, Europe is our common future'.

of *various* identities under one common umbrella, which is the European Union. The consolidation of a ‘European society’ and of a ‘European model’ – which are mentioned by the Declaration – should/could be achieved, precisely, through cultural policies, that preserve the identities, the traditions, and the variety of languages, cultures and regions. Again, unity in the diversity.

To conclude with, it should be noted that documents other than the ones signed at the highest political level of the European Communities and the European Union were also drafted in order to promote specific actions in the area of culture. The first one of this sort was the Commission’s Communication *Community Action in the Cultural Sector*, issued in 1977, on the basis of former resolutions of the European Parliament.<sup>48</sup> Here, the Commission recalls that at the Copenhagen Summit, culture was recognised at the highest political level as one of the fundamental elements of European identity. It is one of the elements that contribute to the feelings of being part of a whole and to solidarity. The Commission provides a definition for the cultural sector, which is considered as ‘the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services’. It is interesting to note that this definition includes both an economic and a social view of culture. Community action in this area should focus in two main types of activities: solution of specific problems (taxes, preservation of common heritage) and support of culture, which might be considered the very European approach. This actually allows the existence of different European cultural policies, and not just one cultural policy. Finally, there is an insistence upon cooperation, with other international organisations, such as UNESCO and the Council of Europe, and also cooperation with Member States. Later documents only emphasise on this specific line, such as the Communication of Commission and Parliament on *Stronger Action in the Cultural Sector* (1982) and *Cultural Action in the European Community. New Orientations Envisaged*, Commission Staff Working Paper (1991).

### C. The Legal Basis for Culture: ‘Culture Constitution’ and ‘Culture State’

All the aforementioned political precedents should not overshadow the main legal achievement of the Treaty of Maastricht in 1992: the inclusion of a legal basis for the

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<sup>48</sup> 13 May 1974 and 8 March 1976.

European Community to pursue cultural policies. What is now Article 167 TFEU reads as follows:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples,
  - conservation and safeguarding of cultural heritage of European significance,
  - non-commercial cultural exchanges,
  - artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article:
  - the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
  - the Council, on a proposal from the Commission, shall adopt recommendations.

A modification to the initial version of 1992 was introduced in 1998, and what is now paragraph 4, was inserted to incorporate a transversal provision, implying that all measures adopted under any other provision of the Treaty (such as trade or industry, for instance) should take consideration of the ‘cultural aspect’ of the measure. These types of transversal provisions, which also exist in other areas, such as environmental law, imply here that all policies can be indirectly addressed to support culture, something which is especially applicable to film policies, because they can pursue different goals. It should also be noted that the regulation of Article 167 TFEU is coherent with the classical twofold perspective which appeared in previous political documents: although a common culture is to be fostered, support of diversity is at the core of Community cultural policies.

In Article 167 TFEU, some authors see an embryo of the so-called ‘Culture Constitution’. The theory of the ‘Culture Constitution’ (*Kulturverfassung*, *Costituzione culturale*, *Constitución cultural*) has been developed by scholars in some European States, departing from the fact that some European Constitutions include specific

provisions on culture and the arts.<sup>49</sup> These *constitutional* provisions are designed, among other aims, to preserve cultural heritage, to provide access to culture for citizens, to protect artistic freedom or to include cultural transversal clauses such as the one now existing at the European Union level. Culture, both in the broad as in the narrow sense are considered here, and therefore public duties towards culture are, in principle, wide in scope (of course, as in other cases of public duties, there are always difficulties in enforcing them). It should be noted that the notion of ‘Culture Constitution’ does not refer to a type of Constitution based on customs or traditions. It has a very precise meaning, which is the set of constitutional provisions dealing with public action in the field of culture and the arts, the whole of principles and choices of the supreme norm in relation to culture. The theory should not be confused with other anthropological notions which might share some common elements with it, but which do not have the legal dimension that is being referred to here.

The theory of the ‘Culture Constitution’ argues that, along history, different norms have regulated various aspects of culture (museums, theatre, education...) but only recently – mostly after Second World War – have Constitutions incorporated these types of provisions.<sup>50</sup> This could be applied to the EU. As to the European Union, some authors maintain that some articles of the TFEU build what is usually considered as the Culture Constitution. Article 167 TFEU is one clear example, but mention should also be made of Article 3.3 of the Treaty on European Union (TEU), insofar as it includes culture as one of the competencies, goals and policies of the EU. The fact that these Articles exist implies specific obligations for public powers, like the one included in paragraph 4 of Article 167 TFEU, the transversal provision that was referred to previously: Thus, ‘[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures’. So, an action related to trade, to industry, to economy in general, to environmental protection... any action should take into consideration possible cultural implications and

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<sup>49</sup> Apart from the references that are provided in other notes, see also Peter Häberle, *Kulturstaatlichkeit und Kulturverfassungsrecht* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1982); Jesús Prieto de Pedro, *Cultura, Culturas y Constitución* (Madrid, Centro de Estudios Políticos y Constitucionales, 1992).

<sup>50</sup> This is a similar phenomenon to the one that occurred between World War I and World War II with the concept of ‘Economic Constitution’.

take them into account in the final decision. From a wider perspective, the existence of a ‘Culture Constitution’ is linked to a specific State type or model, which has been characterised by some authors as the ‘Culture State’.<sup>51</sup> The ‘Culture State’ is, of course, linked to the Welfare State, but the emphasis is put on one specific public policy, which is considered to be the key element to build up the public space and to allow citizens to take part fully in that public space. Supporters of this theory thus argue – in coherence with the theory of the ‘Culture Constitution’ – that there are constitutional provisions that compel public powers to adopt cultural measures, usually intended to facilitate access to culture for all citizens, to fight against social exclusion, and to support artistic creativity and free expression through the arts. Film policies are clearly included here. There might be some problems on applying a broad concept of culture here as there won’t be a clear priority in terms of cultural goals, and the judges will be unable to decide on clear constitutional patterns in case of conflict. But a wide concept of culture is also useful, as it allows consideration of wide-ranging policies and can confer, if needed, higher protection.

The original concept of the ‘Culture State’ links culture to education, which should be understood in the most far-reaching way, ie as a means to educate future citizens who will fully participate in the democratic process. Only thus would theoretical democracy be transformed into real democracy. I do not pretend here to deal, even tentatively, with theories of democracy. The research question is much more specific, but the overall picture should not be forgotten. Culture and democracy go hand-in-hand according to this theory, and it could be asked whether cultural policies at the EU level might be directed explicitly or implicitly towards the building up of a concept of democracy at the supranational level.

## V. The US Perspective: Changing Patterns in US Law

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<sup>51</sup> See the early works of Otmar Jung, *Zum Kulturstaatsbegriff* (Meisenheim, Anton Hain, 1976) and Spagna Musso (n 30).

It is frequently argued that culture has not played a political, legal or public role in the United States as it has in Europe. This might be true if the figures of public budgets are compared,<sup>52</sup> but American public policies in the cultural field should not be underestimated. In the following section, the various stages in the history of cultural policies of the United States will be briefly summarised. Interestingly, the attempt to create a public body somehow comparable to a Department or a Ministry for Culture (the National Endowment for the Arts, hereinafter NEA) was pursued approximately at the same time as some European countries, such as France, decided to establish similar type of bodies. The creation of the NEA led ultimately to important controversies in Congress, but also throughout the country, as public funding was given to certain artistic projects that some found ‘indecent’.<sup>53</sup> This debate is clearly applicable to the funding of the film industry and is therefore the context in which the latter should be considered. Indeed, attention will be devoted, first, to the general question of presence of public policies and public bodies in the cultural field, bearing in mind the previous considerations in the European experience, which should serve to draw conclusions from a comparative law perspective. Second, film policies will be specifically discussed and some final remarks, again from a comparative law perspective, will be made.

## A. A Brief Introduction to the History of Cultural Policies in the United States

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<sup>52</sup> Figures for the NEA, 2018, can be found in the following link: <https://www.arts.gov/sites/default/files/2018%20Annual%20Report.pdf>. As for the European Union, see references in note 32.

<sup>53</sup> See, eg, Symposium, ‘Art, Distribution & the State: Perspectives on the National Endowment for the Arts’ (1999) 17 *Cardozo Arts & Entertainment Law Journal* 705. See further GE Devlin, ‘NEA v Finley: Explicating the Rocky Relationship between the Government and the Arts’ (2000) 27 *Pepperdine Law Review* 345; M Mustokoff, ‘National Endowment for the Arts v Finley: Striking the Balance between Art and the State or Sealing the Fate of Viewpoint Neutrality?’ (1998) 9 *Temple Political & Civil Rights Law Review* 135; Th Scelza and KT Murray, ‘The Big Chill: Is the Exotic Cow, Tutto Nudo, an NEA Endorsement?’ (‘002) 164 *Education Law Reporter* 2; Cara Putman, ‘National Endowment for the Arts v. Finley: The Supreme court Missed an Opportunity to Clarify the Role of the NEA in Funding the Arts: Are the Grants a Property Right or an Award?’ (1999) 9 *George Mason University Civil Rights Law Journal* 237, 248; Lackland Bloom, Jr, ‘NEA v. Finley: A Decision in Search of a Rationale’ (1999) 77 *Washington University Law Quarterly* 1, 25–26.

The history of the relationship between government and culture in the United States is clearly different from the one in Europe and is determined by the very origins of the country. According to historical studies, colonial America was unsupportive of the arts and people were prosecuted for producing or rehearsing plays.<sup>54</sup> This might have been a reaction against European countries, mainly England, since plays reflected precisely a specific culture which might have been perceived as alien and hostile. Apart from this, another fact that should be taken into consideration is that theatre was also controversial at that time in Europe, and that theatre censorship and prohibitions were developed during that period, due to various reasons, such as political or those related to alleged decency issues.<sup>55</sup>

Cultural policies in the United States go back to the period of the Depression, when two projects were created: the Federal Arts Project and the Federal Theatre Project. Yet these projects did not pursue strict cultural or artistic aims, but were rather conceived to foster employment.<sup>56</sup> Although there are, of course, some precedents, it was not until the 1950s that the American Federal Government clearly developed the idea of creating an agency for the arts and the education, which would lead some years later, in 1965, to the establishment of the NEA.<sup>57</sup> Since then, some have seen a (constant) increase in the role of the government through various bodies and techniques.<sup>58</sup>

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<sup>54</sup> See, among others, Enrique R Carrasco, 'The National Endowment for the Arts: A Search for an Equitable Grant Making Process' (1986) 74 *Georgetown Law Journal* 1521, 1534. See further George B Bryan, *American Theatrical Regulation* (Metuchen NJ, The Scarecrow Press, Inc, 1993) 1607–900.

<sup>55</sup> See, in Spanish, *Ingenio fecundo y juicio profundo. Estudios de Historia del Teatro en la Edad Moderna* (Carmen Sanz Ayan, ed, Universidad Complutense de Madrid 1999), and also edited by Carmen Sanz Ayan (a Member of the Spanish Royal Academy of History) see *Teatro y Fiesta del Siglo de Oro en Tierras Europeas de los Austrias* (Madrid, SEACEX 2003).

<sup>56</sup> See Carrasco (n 65).

<sup>57</sup> For a thorough description and analysis of the development of cultural policies in the US see Frédéric Martel, *De la Culture en Amérique* (Paris, Gallimard, 2006). The author of this 'tocquevillian' approach to cultural policies in the US worked at the department of cultural affairs at the French Embassy in Washington for some years.

<sup>58</sup> This is one of the major arguments of Frédéric Martel (n 68). I am translating here the French word 'État' for 'Government'. Yet it should be noted that the way Martel uses the word 'État' might be more far-reaching, as it is related to any public intervention by any type of public body.

In his thorough and well-documented study,<sup>59</sup> Martel submits that there is indeed public intervention in the field of culture and the arts, but this is ‘invisible’. There is usually, contrary to what happens in Europe, no public funding for individuals, as is usually the case in Europe. Yet tax deductions to foundations or private institutions are fairly common in the system.<sup>60</sup> This is an important example of the presence of private funding,<sup>61</sup> which leads the author to describe this ‘decentralised system’ in its singular details. All together it might be qualified as a “mess” or a “disorder”, which nonetheless builds a system.<sup>62</sup> This is, definitely, the case for films, since film production depends on private business, public policies and private initiative based on cultural, artistic or other non-profit interests.<sup>63</sup>

So there is in fact a history of cultural policies in the United States. But does it have the same implications for the question of identity as it might have in Europe/the EU? The arts and culture do play an important role in the United States law, and in reality it could be considered that they contribute to the concept of cultural identity or identification, as much as they do in Europe. Indeed, as some authors have argued:

[w]e depend upon our arts community for cultural identification. Moreover, tolerance and understanding are often drawn from the arts. ... Indeed, it is said that philosophers

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<sup>59</sup> *ibid.*

<sup>60</sup> I would like to refer again here to the discussion on indirect public aids. See on this Vanessa Hernández Guerrero, ‘Defining the Balance between Free Competition and Tax Sovereignty in EC and WTO Law: the “Due Respect” to the General Tax System’ (2004) 5 *German Law Journal* 1.

<sup>61</sup> This is one of the *leit motifs* of the book (cited in n 67). *Ad ex* see p 289: ‘De sorte que si le ministère de la Culture n’est nulle part, la vie culturelle est partout’ [Thus if the Department for Culture is nowhere, cultural life is everywhere].

<sup>62</sup> See also on this general idea E Abrahamson and D Freedman, *A Perfect Mess: The Hidden Benefits of Disorder* (2007).

<sup>63</sup> Something more specific – and leaving the film industry for later comment – is the public policy on museums. As Congress declared at the time of the framing of the Museums Act, ‘an advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view to the future’, reported in Marilyn E Phelan, *Museum Law* 4th edn (Kalos Knapp Press, 2014). The author argues that museums in the US should ‘foster and support a form of education, and access to the arts and the humanities’ that will ‘provide models of excellence to the American people’ [at 1]. See also Stephen E Weil, *Beauty and the Beasts. On Museums, Art, the Law and the Market* (Washington DC, Smithsonian Institution Press, 1983).

are half a generation ahead of cultural trends and that artists are half a generation ahead of philosophers.<sup>64</sup>

Others have scrutinised the impact of the film industry on American cultural identity, since film exportation implies the exportation of a cultural image to the world.<sup>65</sup> This is not the place to propose a tentative definition of what cultural identity is, or what identity in general is. But it is interesting to note how it is possible to locate an approach here rather similar to the one existing in Europe, an approach which might have legal implications.

Films are not *necessarily* regarded as culture in the United States, but some novelties – which will be developed later – are worth mentioning. First, subsidies for film production are increasing, be it through direct aids or through tax benefits. Second, state and local bodies are developing film policies in order to foster economic development. And, third, there are some concerns in the film industry regarding audiences in Europe. This is due to the fact that many American films are more successful in Europe than in America, something that implies that a part of the market is oriented towards Europe and not towards America.

It could be concluded from the previous lines that in the US there is indeed a public system of regulating and funding the arts, a system completely different from the European system, but which pursues similar aims. From a legal perspective, it is interesting to see how the system works, what kind of public bodies pursue these policies, what kind of limits and conditions constrain their activity and how it can be controlled. Some of these questions will be considered in the following section, which will link the general question with the more specific one of film policies.

## B. Culture and Agencies: the NEA

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<sup>64</sup> See Kristine M Cunnane, 'Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v Finley' (1999) 31 *Connecticut Law Review* 1445, 1482.

<sup>65</sup> See Paul C Weiler, *Entertainment, Media and the Law*, *Entertainment, Media and the Law* 997 (St Paul MN, West Group, 1997).

The NEA is an independent agency of the federal government which was established in 1965<sup>66</sup> with the following goals: to support the excellence in the arts, to bring the arts to Americans and to provide leadership in arts education.<sup>67</sup> The key words here are creativity, access to culture and education, ie just the same ones that guide cultural public policies in Europe.<sup>68</sup>

Attention should be paid to the fact that this agency does not simply support culture or the arts for themselves, in the belief that they might be considered public goods worth protecting and promoting.<sup>69</sup> The NEA does so, but it also does something else. It links the arts to other public policies, such as education and the fight against social exclusion (through access to culture).<sup>70</sup> This is something common to other countries and to the European Union, as has already been mentioned. Thus, another element for a common understanding can be found here.

One of the major problems with public bodies dealing with cultural and artistic issues in the US is the fact that it is not easy to convince tax-payers that their money is

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<sup>66</sup> The agency was created under the presidency of Lyndon Johnson, following the path of President John F Kennedy. Its greatest development arrived only later, under President Nixon, paradoxically enough, since Republicans had been contrary to the creation (and preservation) of such an agency.

<sup>67</sup> The National Foundation on the Arts and Humanities Act of 1965. The NEA is not a regulatory agency, but an adjudicatory one. On rulemaking, from an American-European comparative perspective, particularly interesting for this article, see Peter L Strauss, 'Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa' (2006) 12 *Columbia Journal of European Law* 645.

<sup>68</sup> Some have identified less pious aims in the creation of this (type of) agency, which would have been proposed by some intellectuals, at the time of the Cold War, in order to show the excellence of American culture to the world. On American cultural policy at the time of the Cold War, see eg Martel (n 68) 27–28.

<sup>69</sup> On culture as a public good in the US see Weiler (n 75): 'The further question, though, is whether the cultural environment (like the physical environment) has the qualities of a public good that are not sufficiently served by individual choices in the consumer market, such that there is a need for collective citizen action through the political process'.

<sup>70</sup> This might be clear when referring to action in small communities. See J Weatherup, 'Agencies and the Arts: The Dilemma of Subsidizing Expression' (2004) 24 *Journal of the National Association of Administrative Law Judges* 271, 307: 'While private parties may provide support for the arts in a major metropolis, programs bringing art and culture to local communities would be unlikely to survive without the aid of the NEA'. The NEA programmes to bring the arts to Americans including specific actions on reaching every community.

devoted to cultural enterprises,<sup>71</sup> especially when those cultural enterprises are capable of offending some of them. In this regard, significant controversies have arisen in the judicial arena, as some funds allocated by the NEA to cultural projects were considered indecent by some.<sup>72</sup> Thereafter, many voices asked Congress to cut or even eliminate funds to the NEA, and this turned into one of the ongoing discussions between Democrats and Republicans. The latter proposed the NEA had to disappear, whereas the former put forward its value and its need for the development of a society of free people. Finally, there was an agreement that the NEA was indeed necessary, but there was still discrepancy in the way it should work. Republicans would rather fund the preservation of cultural heritage, where Democrats would see the value in supporting artists even if their projects may in some cases raise doubts as to the respect of the limits of the First Amendment.

The NEA takes decisions on what is art and what is not art when giving funds to the various projects, and is setting the framework of artistic freedom as a manifestation of freedom of expression.<sup>73</sup> But this should be and is controlled by judges. The Supreme Court did not find that the ‘aggressive’ projects that were funded by the NEA and which gave rise to various cases had gone beyond the First Amendment limits. It actually advised political parties to reach some balanced agreement amongst them. New trends at the NEA show a move towards educational policies, something which might imply that

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<sup>71</sup> *ibid*: ‘Rather than being conclusive, Finley leaves many questions unanswered, and its broad grant of discretion to the NEA obscures the extent to which the agency may have duties to protect the First Amendment rights of grantees while maintaining taxpayers’ confidence in the institution’, at 307. See also Neil P Patten, ‘The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in *National Endowment for the Arts v Finley*’ (2000) 37 *Houston Law Review* 559.

<sup>72</sup> Among the most relevant cases, see: *Nat’l Endowment for the Arts v Finley*, 524 US 569, 602 (1998) (Souter, J dissenting); *Advocates for the Arts v Thomson*, 532 F. 2d 792 (1st Cir. 1976) cert. denied, 429 US 894 (1976); *Southeastern Promotions, Ltd v Conrad*, 420 US 546 (1975); *Brooklyn Inst Of Arts & Scis v New York*, 64 F. Supp. 2d 184 (EDNY); *People for the Ethical Treatment of Animals v Giuliani*, 105 F. Supp. 2d 294 (SDNY); *Rosenberger v Rector & Visitors of Univ of Va*, 515 US 819 (1995); *Bella Lewitzky Dance Foundation v Frohanmayer*, 754 F. Supp. 774, 776 (CD Cal 1991); *Miller v California*, 413 US 15 (1973).

<sup>73</sup> See, eg, J. Weatherup (n 81) 309–10.

this balanced (de minimis) agreement has been reached. From a practical point of view, this has had positive consequences, such as a funding increase in the last few years.<sup>74</sup>

From the preceding lines it can be deduced that although culture has allegedly not played a major role in public policies in the United States, there is an interesting bibliography on the NEA and on the limits and justification for this kind of public policy. Also, other public and private initiatives illustrate this statement. American for the Arts was created in 1996 as a result of the merger between the National Assembly of Local Arts Agencies (NALAA) and the American Council for the Arts (ACA). Even though it is a non-profit organisation, its links with public organisations are strong. They present themselves in the following way:

Americans for the Arts is the nation's leading non-profit organization for advancing the arts in America. With 45 years of service, we are dedicated to representing and serving local communities and creating opportunities for every American to participate in and appreciate all forms of the arts.<sup>75</sup>

This far-reaching objective seems fairly similar to European proposals, and its main purpose is carried out through local arts agencies, something which is again coherent with similar initiatives in Europe. The development of cultural public policies through local agencies is especially relevant in the area of film law, as has already been indicated and as will be developed later.

According to one of the organisations devoted to cultural policies, the Center for the Arts and Culture,<sup>76</sup> three major issues are:

pre-eminent legal concerns for the next decade [writing in 2005], as regards the laws affecting culture and creativity:<sup>77</sup>

- copyright and intellectual property
- free expression and content control
- consolidation and consumer choice

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<sup>74</sup> See Weatherup (n 81) 309.

<sup>75</sup> Americans for the Arts: [www.americansforthearts.org/](http://www.americansforthearts.org/).

<sup>76</sup> It existed until 2005. See [www.culturalpolicy.org](http://www.culturalpolicy.org).

<sup>77</sup> *ibid.*

Legal challenges, court decisions, and a changing regulatory framework will make a tremendous impact upon our cultural life.<sup>78</sup>

This type of prediction reminds of the statement made by Schlesinger some years ago.<sup>79</sup> Culture and the arts are and will be, for various different reasons, a major political issue. The challenge is to identify exactly the public good we are talking about, to discuss if it is a public good at all, and to decide what type of legal framework we are going to provide for it. Indeed, the Center for the Arts and Culture developed an Art, Cultural & the National Agenda Project, intended to promote the regulation of the arts. In the framework of this project, it identified seven areas where policy and culture intersect: law, globalisation, access, preservation, community, investment and education. It should be noted that the major topics that are addressed in this chapter can be subsumed within these seven major areas.

### C. Constitutional Framework for Cultural Policies

In 1989, the Congress reacted to the controversies in the cultural and arts field regarding public funding of works with an ‘indecent’ content, and amended the NEA’s statute, so as to avoid NEA funding being allocated to works that the agency considered obscene. The District Court in the *Bella Lewitzky* case held the amendment to be unconstitutional and the Congress reformed its grants procedures.<sup>80</sup> For this, the Congress was helped by a commission of constitutional law scholars. In the commission’s report it can be read that

*there is no constitutional obligation to provide arts funding*, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us [emphasis added].

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<sup>78</sup> See [www.culturalpolicy.org/issuepages/issuetemplate.cfm?issue=Law](http://www.culturalpolicy.org/issuepages/issuetemplate.cfm?issue=Law).

<sup>79</sup> See Schlesinger (n 23). Schlesinger foresaw the impact of culture and the arts in the legal and political sphere. Here, emphasis is put on the other side of the story: the law will have an impact on cultural life.

<sup>80</sup> The *Bella Lewitzky* case (n 83).

Although minor, there exists a line of thought among constitutional lawyers in the United States that considers constitutional rights to have always been narrowly interpreted. Charles L Black, Jr suggested that more efforts to develop substantive rights in American law are required, something that would help a real citizenship to be built up.<sup>81</sup> The starting point of Black's argument is the Preamble of the Constitution, which states that a purpose of the Constitution is to 'promote the general Welfare', and from there on he disseminates the concept of 'general welfare', as the key concept which could justify the existence of affirmative constitutional duties.<sup>82</sup> In a similar way as Black's, Barber asks himself what constitutes well-being and concludes that '[f]aring well in this society might best be viewed not as actually possessing good things ... but as developing or possessing the capacity to get them by one's lawful efforts to the extent that one reasonably wants'.<sup>83</sup> So welfare is not getting things, but developing the capacity to get them. Access to culture could play here an important role.

According to this theoretical framework, it could be considered that educational policies (to which, as it has been already indicated, cultural policies are linked) are at the core of this welfarist interpretation. Indeed, as Black later argues, '[b]ecause government must maintain the conditions for developing and exercising the capacities in whose possession well-being consists, well-being in America would also include the education, economic independence, and self-respect sufficient for the electoral choices that the Constitution envisions'.<sup>84</sup>

This line of thought could well be linked to the European efforts to give content to the concept of 'Culture State'. But there are also other constitutional implications regarding culture.<sup>85</sup> An apparent example of this would be the First Amendment, which

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<sup>81</sup> See Black, Jr (n 12).

<sup>82</sup> *ibid*, at 133.

<sup>83</sup> See, in a similar way, Barber (n 11) 107. Barber bases his theories on Martin Diamond, 'Ethics and Politics: The American Way' in Robert H Horwitz (ed), *The Moral Foundations of the American Republic* (Charlottesville VA, University Press of Virginia, 1986).

<sup>84</sup> See Black, Jr (n 12) at 113–14.

<sup>85</sup> On the implications of welfarist theories for Administrative Law, which is the legal academic background of the author, see Matthew Diller, 'The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government' (2000) 75 *New York University Law Review* 1121.

as has been already mentioned, gave rise to a series of court decisions dealing with controversial arts funding.<sup>86</sup>

#### D. Subsidising Films. Executive Agencies and Films: A New Model of Public Administration

It is frequently heard that the film industry in the United States is not subsidised. However, there has always been some kind of public funding, a tendency that has been increasing in the last few years.<sup>87</sup> Federal, State and local agencies give aids to film production for different reasons. Also, an amendment to the Internal Revenue Code incorporated tax credits for film production, after the Department of Commerce ‘estimated that run-away production drains as much as \$ 10 billion per year from the US economy’.<sup>88</sup>

At the Federal Level, besides tax breaks under Section 168 of the “Tax Cuts and Jobs Act” of 2017, the National Endowment for the Arts gives grants to the media arts (film, radio and television) with the intention to encourage

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<sup>86</sup> On this issue, see the Supreme Court’s decision in *Finley* (n 83), where the Court indicates that ‘the First Amendment certainly has application in the subsidy context’ [at 587]. See further Frederick Schauer, ‘Principles, Institutions, and the First Amendment’ (1998) 112 *Harvard Law Review* 84, 98–99. More specific are the following studies: Celia A Cohen, ‘An Endangered Species? Artistic Grants as a Vehicle for the Evolution of Entitlements Law’ (1999) 49 *Syracuse Law Review* 1277, 1284; Craig J Flores, ‘Indecent Exposure: An Analysis of the NEA’s “Decency and Respect” Provision’ (1998) 5 *UCLA Entertainment Law Review* 251, 257; Robert Vosburgh, ‘Government Subsidies of Controversial Art: Dung, the Virgin Mary, and Rudy Giuliani’ (2001) 11 *Temple Political & Civil Rights Law Review* 221, 234.

<sup>87</sup> On film law in the United States see, eg Donald Biederman and others, *Law and Business of the Entertainment Industries* 5th edn (Westport CT, Greenwood, 2006); Sherri Burr, *Entertainment Law in a Nutshell* (Eagan MN, Thomson/West, 2004); Robert Fremlin and Michel Landau, *Entertainment Law* (Eagan MN, Thomson/West, 2006); Schuyler M Moore, ‘The Film Industry’ in Howard Siegel (ed) *Entertainment Law* 3rd edn (New York, New York State Bar Association, 2004); Philip Miller, *Media Law for Producers* 3rd edn (Waltham MA, Focal Press, 1998) (with some interesting insights for public lawyers); Peter Muller, *Show Business Law* (Westport CT, Quorum Books, 1991); Thomas Selz and others, *Entertainment Law: Legal Concepts and Business Practices* 3rd edn (Eagan MN, Thomson/West, 2006).

<sup>88</sup> See Senate Committee Report (S REP N° 108-192). On the position of American movies in international trade, see W Wayne Fu, ‘Concentration and Homogenization of International Movie Sources: Examining Foreign Film Import Profiles’ (2006) 56 *Journal of Communication* 813.

the artists and organizations that participate in advancing and preserving the media arts, and to supporting the production of media art works that celebrate the arts – visual arts, music, dance, literature, design, theater, musical theater, opera, folk & traditional arts, etc. – in an engaging and creative manner.<sup>89</sup>

Agencies other than federal also help the film industry financially. In the State of New York, for instance, different bodies share competences on the same areas: the New York State Council on the Arts,<sup>90</sup> the New York State Governor’s Office for Motion Picture and Television Development<sup>91</sup> and the Mayor’s Office of Media and Entertainment.<sup>92</sup>

At the State level, the New York State Council in the Arts and the New York State Governor’s Office operate from different perspectives. The Office for Motion Picture, or New York Film Commission, is one of the many bodies existing in the United States to promote film production in their territories. They do this by means of tax credits, which vary from State to State, and also by other means. These include, for instance, help provided for obtaining licences and permits, help to find locations, contacts to local personnel who provide stages and equipment, etc.

The so-called ‘Film Commissions’ (although the actual name may vary from case to case) are reunited in the Association of Film Commissioners International.<sup>93</sup> The history of this Association, which is based in the United States (in Helena, Montana) goes back to 1975 and it defines itself as a non-profit *educational* organisation.<sup>94</sup> Yet, its origins are more remote. As early as in the decade of the 1940s, these commissions were timidly created, at the time when film producers decided to shoot outside studios as practical needs for film production started to increase. Permits requirements, police supervision, even coordination with fire departments, as well as the fact that film production usually has a positive economic impact on the area where films are produced, led these commissions to provide the services desired by film producers and, at the same

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<sup>89</sup> See [www.arts.gov/grants/apply-for-a-grant](http://www.arts.gov/grants/apply-for-a-grant).

<sup>90</sup> See [www.nysca.org/public/home.cfm](http://www.nysca.org/public/home.cfm).

<sup>91</sup> See [www.nylovesfilm.com/index.asp](http://www.nylovesfilm.com/index.asp).

<sup>92</sup> See [www.nyc.gov/html/film/html/index/index.shtml](http://www.nyc.gov/html/film/html/index/index.shtml).

<sup>93</sup> See <https://afci.org/>.

<sup>94</sup> See <https://afci.org/about-afci/#afci-history>.

time, they would promote the economic development of their own areas. This is still their main focus.

Film Commissions have a public nature, in the sense that they must be created by a public body and are usually operated and funded by government agencies. As stated by the Association of Film Commissioners International,

[t]heir primary responsibility is to attract film and video production to their area in order to accrue locally-realized benefits from hiring local crews and talent, renting local equipment, using hotel rooms, rental cars, catering services, or any number of goods and services supplied on location. While attracting business to their area, they also attract visitors. Film scenes at a particular location are in themselves ‘soft-sell’ vehicles that also promote that location as a desirable site for future tourism and industry.

From a general more theoretical perspective, this is very interesting, because this shows a type of public body very different from classical public bodies which would limit themselves to funding. Here, it is actually possible to distinguish one good example of what some scholars have called ‘entrepreneurial government’.<sup>95</sup>

So the New York State Governor’s Office for Motion Picture and Television Development is one of these bodies and is therefore more focused in the economic aspect of films than in the cultural one. Its main aim is to promote economic development in the State of New York through film production.

On the other hand, the New York State Council is, as the National Endowment for the Arts at the Federal level, more focused on the artistic aspect of film production. And on this basis, it gives grants with ‘the goal to bring high-quality artistic programs to the citizens of the state through supporting the activities of nonprofit arts and cultural organizations’.<sup>96</sup> This is another typical aim of cultural policies in the strict sense, ie to provide access to culture to all citizens, thus contributing to full participation of citizens in society.

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<sup>95</sup> See Diller (n 96), particularly at 1172ff. See also, as the major piece proposing a reconception of public administrations, Michael C Dorf and Charles F Sabel, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia Law Review* 267, where the authors argue in favour of a decentralisation of government power and the distribution to citizens. See also Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing in Government* (Berkeley CA, University of California Press, 1992); David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York, Perseus, 1992).

<sup>96</sup> See [www.nysca.org/public/home.cfm](http://www.nysca.org/public/home.cfm).

## VI. Conclusions

The U.S. and the E.U. have, logically, different histories regarding cultural policies, where ‘cultural policies’ mean the intervention of public bodies in the cultural and artistic field. The tradition of (some) European States to treat culture as a public good, pursuing therefore cultural policies, has been inherited in the European Union. The political documents that led to the introduction of a legal basis for cultural policies in the EC Treaty, the aims of these policies and the problems they pose have been discussed in this article. And, as it has been developed here, culture and cultural policies are narrowly linked to the concept of identity. From a legal perspective, it is interesting to focus on the theories of ‘Culture Constitution’ and of ‘Culture State’, which were proposed in some Member States of the EU and have now been inherited in some literature dealing with the European Union itself. According to this theory, culture is related to the very concept of democracy, as it implies public duties addressed to public powers in order to facilitate access to culture and education for citizens. Cultural policies in Europe are manifold, but one of the key areas of them all, including E.U. cultural policies, is films. Films are particularly linked to the idea of identity, since they reflect and idiosyncrasy and they help to understand other customs, traditions, and ways of living. In Europe there is a long tradition of subsidising films, as they are conceived as cultural products. Yet new trends in film law show that public bodies, especially at the local level, are developing different policies. Considering films from an economic or industrial perspective, new mechanisms are being established, so as to take advantage of the positive effects on the economy.

In the U.S., the principle of freedom that justified the new political system after independence and the ‘rebellion’ against certain traditions and customs of the European States might be the reason why from the very beginning the decision of not subsidising the arts was consciously taken. Yet in the twentieth century, this changed slightly and the new situation gave rise in the 1960s to the creation of the National Endowment for the Arts, which is not equivalent to a Department or Ministry for Culture in the European way, but which developed some cultural policies and provoked some case law and bibliography on the relationship between the government and the arts. In some circles and in some legal writing, culture has been considered a public good, though the concrete consequences of this statement are still to be developed. There is no theory of a ‘Culture Constitution’ in the U.S. or of a ‘Culture State’ as it exists in Europe, but some scholarly efforts to provide a more ‘generous’ interpretation of the American Constitution are

interesting for comparison. Cultural policies in the U.S. are being conducted at the State and the local level, rather than at the federal level. Here it is to be noted that films are, as it happens in Europe, at the core of those policies. Local and State authorities have for a long time favoured the production of films in their territories through various means. Also, different systems of tax benefits have been implemented in the last years, not least due to the fact that film production, as any other activity, is increasingly being delocalised.

In Europe, public bodies are approaching films and film production from an economic perspective as they usually did not do in the past. In the US more attention is being paid now to the film industry, from a public law perspective in comparison to the situation in the past. The reasons for the same have been discussed in this article, and the future of these converging perspectives is still to be awaited. One final conclusion could be that films are complex in their nature. They might not be regarded just as cultural products or as economic products. They can be both and they can be objects of different public policies which pursue different objectives. This complexity should be borne in mind in the relationship between the U.S. and the E.U., be it bilateral, be it multilateral in more general frameworks. Complex situations require complex solutions. Many problems are still to be solved, but this is the story so far. To be continued.