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The Television without Frontiers Directive: Preserving Cultural Integrity or Protectionism

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THE TELEVISION WITHOUT FRONTIERS DIRECTIVE: PRESERVING CULTURAL INTEGRITY OR PROTECTIONISM?

*Arthur Dimopoulos**

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I. INTRODUCTION

On October 3, 1991, the Council of the European Communities' controversial "Council Directive of 3 October 1989 On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities" ("Directive") went into full effect.¹ The Directive's popular moniker, "Television Without Frontiers," has evolved amidst a time of booming growth in the European television market.

The Directive is the result of painstaking studies, heated discussions, and collaboration among the European Commission, European Parliament, Council of the European Community, Member States and several other industry and non-industry interests. These parties viewed the Directive as a catalyst to promoting and reflecting European values and culture, and as

1. 1989 O.J. (L 298) 23 [hereinafter Directive]. The TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] defines "directive" as: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* at art. 189 of the Treaty of Rome [hereinafter TREATY].

an economic "gold mine" that others, namely the United States, have been taking advantage of for years.²

Despite some European Community Commissioners' statements regarding the Directive's non-binding legal effect on Member States,³ the Directive contains several goals that are in line with the European Community's general principles that are enunciated in Article 3 of the Treaty of Rome. The Treaty's main goal is the elimination of "obstacles to freedom of movement for persons, services and capital."⁴ To accomplish this end, the Directive mandates that all inter-Member State broadcasting barriers be totally eliminated.⁵ Yet, the Directive's expansive provisions address other issues as well: Chapter III addresses the European Community's concerns regarding the promotion, distribution and production of television programs;⁶ Chapter IV concerns the regulation of television advertising;⁷ and Chapter V concerns the protection of minors.⁸

Article 4 of the Directive contains quantitative restrictions on non-European works.⁹ Article 4 requires Member States to reserve at least fifty

2. Haydn Shaughnessy & Carmen Fuente Cobo, *The Cultural Obligations of Broadcasting, NATIONAL & TRANSNATIONAL LEGISLATION CONCERNING CULTURAL DUTIES OF TELEVISION BROADCASTERS IN EUROPE*, at v (1990).

3. For instance, Martin Bangemann, the European Community's Commissioner in charge of implementing a unified, barrier-free market for goods and services stated: "It's not a legal obligation It's a political commitment." Steve Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1; Jean Dondelinger, European Community's broadcasting Commissioner, felt that "each country has a duty of respecting the majority quota" and that the quotas are not legally binding on the Member States. Matthew Fraser, *Battle of TV Quotas Heats Up in Europe; EC Directive Leaves Few Satisfied*, INT'L HERALD TRIB., Oct. 7, 1991, Special Rep., at 1.

4. TREATY, *supra* note 1, art. 3(c). See also *id.* ch. 3, arts. 59-62 (provisions regarding services).

5. Directive, *supra* note 1, art. 2(1)-(2), at 26.

6. *Id.* at 26-28.

7. *Id.* at 28-29.

8. *Id.* at 29. For example, this chapter contains provisions regarding the advertising of cigarettes and alcohol.

9. *Id.* at 27. Article 6 of the Directive states:

1. Within the meaning of this chapter, 'European works' means the following: (a) works originating from Member States of the Community and, as regards television broadcasters falling within the jurisdiction of the Federal Republic of Germany, works from German territories where the Basic Law does not apply and fulfilling the conditions of paragraph 2; (b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2; (c) works originating from other European third countries and fulfilling the conditions of paragraph 2.

2. The works referred to in paragraph 1(a) and (b) are works mainly made with authors and workers residing in one or more States referred to in paragraph 1(a) and

percent or more of their broadcasting transmissions for European works.¹⁰ This has a direct impact on the United States entertainment industry which, in many cases, provides a large amount of European programming requirements.

This Article focuses on Article 4 of the Directive, assessing the implications and effects of the broadcast Directive in light of the growing European television market. The Article then analyzes the history of the Directive, the European Community's justifications, the counter-arguments for the Directive's provisions, and the legality of the Directive's terms. The Article concludes with a discussion of both the United States government's and private industry's responses.

II. THE EUROPEAN MARKET DEFINED

Europe is a growing continent, whether described in geographic, military or political terms. The evolving and dynamic geopolitical changes that have occurred so rapidly are the catalyst that fuels the dramatic growth of telecommunication. The European Community consists of twelve

(b) provided that they comply with one of the following three conditions: (a) they are made by one or more producers established in one or more of those States; or (b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or (c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

3. The works referred to in paragraph 1(c) are works made exclusively or in co-production with producers established in one or more Member State by producers established in one or more European third countries with which the Community will conclude agreements in accordance with the procedures of the Treaty, if those works are mainly made with authors and workers residing in one or more European States.

4. Works which are not European works within the meaning of paragraph 1, but made mainly with authors and workers residing in one or more Member States, shall be considered to be European works to an extent corresponding to the proportion of the contribution of Community co-producers to the total production costs.

Id. at 27.

10. Article 4(1) states:

Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Directive, *supra* note 1, art. 6(1)-(4), at 26.

Member States,¹¹ each with its own unique history, culture, and in many cases, language. Countries that have expressed a desire to become European Community members include Austria, Finland, Norway and Sweden.¹² Turkey, Eastern European countries, and Republics from the former Soviet Union have also expressed an intent to apply for membership.¹³

Even if Eastern Europe and other countries do not become European Community members, they will be bound by the Directive because its principles are embodied in the European Convention on Transfrontier Television¹⁴ ("Convention"). For all intents and purposes, signatories to the Convention are deemed to be "European" states. Thus, Convention provisions are applicable to the twenty-eight signatories of the Council of Europe and to the thirty-one members of the ever-growing European Cultural Convention.¹⁵ Similarly, Article 6 of the Directive incorporates by reference "European third States party to the European Convention."¹⁶ Further, signatories such as Czechoslovakia, Hungary, and Poland have a

11. The Treaty of Rome to date has twelve signatories: Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. See TREATY, *supra* note 1.

12. William Drozdiak, *EC Staggering Under Weight of Unity Bill*, WASH. POST, Feb. 17, 1992, at A31.

13. Stephen Nisbet, *EC Tries to Define Limits of New Europe*, REUTERS, BC CYCLE, Mar. 2, 1992, available in LEXIS, Nexis Library, Omni File.

14. *European Convention on Transfrontier Television*, EUR. CONSULT., Strasbourg, 1990, art. 10(1), at 64 [hereinafter *Convention*]. Article 10(1) provides that quotas be implemented for non-European works, and states in pertinent part:

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

Id.

15. *Council of Europe: Romania Signs Cultural Convention*, Eur. Rep. (Eur. Info. Serv.) No. 1731, at 2 (Dec. 21, 1991).

16. Directive, *supra* note 1, art. 6(1)(b), at 27. Compare this definition with Article 2(e) of the *Convention*, *supra* note 14, at 61, which states: "'European audiovisual works' means creative work [the] production or co-production of which is controlled by European natural or legal persons."

duty to apply the Article's precepts,¹⁷ and under the Directive are considered "European."¹⁸

The scope of military cooperation vis-a-vis such organizations such as the Conference on Security and Cooperation in Europe ("CSCE") is unprecedented.¹⁹ The CSCE has forty-eight states in its ranks, including all of Europe, the Baltic states, the Republics of the former Soviet Union, the United States and Canada.²⁰ Additionally, a subsidiary organization of the NATO alliance, the North Atlantic Cooperation Council ("NACC"), inducted ten former Soviet Republics. The NACC seeks to insure military cooperation, promote security, and expand peace-keeping initiatives in troublesome areas such as former Yugoslavia and the Caucasus region.²¹

The new cooperation between countries also allows for enhanced technological capabilities in telecommunication. For example, change has occurred rapidly in the former Soviet Republics. While it once took three days to place or receive an overseas phone call, today one can dial directly from anywhere in the United States to over 500 towns in the former Soviet Republics.²² Additionally, telephonic connections between the United States and the Ukraine, Poland, Hungary and Bulgaria have been established.²³

Several former Iron Curtain countries are also witnessing changes in television programming that have an impact on viewer behavior. For instance, television has the capacity to create new consumers by whetting their appetite for advertised products. Toothpaste advertisements, reminiscent of those seen in the United States in the 1940's, informing and instructing viewers of the virtues of brushing their teeth are aired regularly in Poland.²⁴ Feminine hygiene and other health care products are

17. Directive, *supra* note 1, art. 6(1)(b), at 27.

18. Stephen Nisbet, *EC Tries to Define Limits of New Europe*, REUTERS, BC CYCLE, Mar. 2, 1992, available in LEXIS, Nexis Library, Omni File. British Foreign Secretary Douglas Hurd referred to Russia's eligibility for EC membership as, "a door that we would not be justified in slamming." *Id.*

19. *Europeans Adopt Document On Peace From Atlantic To Urals*, REUTERS, AM CYCLE, Mar. 4, 1992, available in LEXIS, Nexis Library, Omni File.

20. *Id.*

21. William Drozdiak, *NATO States, Ex-East Bloc Meet for Talks Ambitious Plans Are Approved for Broad Military Cooperation*, WASH. POST, Mar. 11, 1992, at A11.

22. *Summary of World's Broadcasts, The USSR*, WKLY. ECON. REP., BBC, Feb. 7, 1992, at SU/W0216/B/1.

23. *Id.*

24. Stuart Elliott, *The Media Business: Advertising; Building a Consumer Economy Amid Communism's Ruins*, N.Y. TIMES, Jan. 10, 1992, at D5.

advertised in Hungary and Bulgaria.²⁵ Such instructive type of advertising creates new demands and new markets for Western products. Revenues for one advertising agency in the Central European area have climbed to \$10 million for 1991 compared to the \$1 to \$2 million for the previous year.²⁶

The Television Without Frontiers Directive should be viewed against this backdrop of change and growth. The European Community, by virtue of its political, industrial, and geographic make-up, is in a position to take advantage of its share of prospective markets, especially through television.

A. *The Television Market in the European Community*

1. Satellite and Cable Television Services

Within the last decade, the European Community has experienced skyrocketing growth in the area of technological advancements, particularly satellite services and cable. In 1981, public satellite television services in Western Europe were non-existent.²⁷ From 1982 to 1987, the number of television hours broadcast in Europe doubled.²⁸ By 1988, over thirty satellite television services were available from Intelsat, Eutelsat and Telecom.²⁹

The European Community has embraced new satellite television services and exhibited leadership in harmonizing standards for new technology, such as High Definition Television ("HDTV"). The Commission's proposed standards³⁰ were adopted by the Council on December 21, 1991.³¹ The Satellite Directive calls on Member States to promote, support, introduce and develop the new HDTV technology throughout the European Community.³² A frequency for Europe's HDTV was set aside

25. *Id.*

26. *Id.*

27. Shaughnessy & Cobo, *supra* note 2, at 17.

28. *Id.*

29. *Id.*

30. Commission Proposal for a Council Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals, 1991 O.J. (C 194) 20.

31. 1991 O.J. (332/06) 13 [hereinafter Satellite Directive].

32. *Id.* Article 4 of the Satellite Directive requires Member States to ensure all televisions and satellite receivers sold or rented after January 1994 have D2-MAC decoder capability, one of the two standards approved for emissions of frequency (the other being HD-MAC). *Id.*

during the World Administrative Radio Conference ("WARC") in March, 1992.³³

Europeans got their first glimpse of the new HDTV technology during the 1992 Winter Olympics.³⁴ Despite HDTV's high marks for reception, the switch to the new technology is estimated to cost up to \$258 million per year.³⁵ Besides these extraordinary costs, the European Community's switch to HDTV poses additional difficulties for broadcasters. For example, there is a potential problem with incompatible equipment. The United States intends to use a fully digital type of HDTV system,³⁶ whereas the European Community employs a combination analogue and digital system.³⁷ These technological advancements promise to be mirrored in Eastern Europe and the former Soviet Republics.

2. Financial Size and Strength of the Market in Europe

The European Community comprises 320 million consumers and produces a combined gross national product of \$4 trillion.³⁸ In 1990, trade between the European Community and the United States amounted to over \$190 billion, making each the other's biggest trading partner.³⁹ In 1987, over 124 million European households had television sets,⁴⁰ in comparison to 92.1 million United States households.⁴¹ By 1995, it is estimated that over 31.5 million European homes will be linked to cable television, which represents 25.5% of all television households.⁴² The number of European households with video cassette recorders ("VCRs") has

33. COMM. DAILY, Mar. 6, 1992, at 5. Despite lacking worldwide compromise on HDTV standards, Europe allocated frequency at 21.4-22 GHz. *Id.*

34. Raymond Snoddy, *An Uphill Struggle*, FIN. TIMES, Feb. 28, 1992, at I13.

35. *High Definition Television; Industry Ministers Ok Plan to Develop Standard for HDTV, 1992 European Unification*, BURAFF PUB., Jan. 13, 1992, vol. 3, No. 19.

36. *Id.*

37. Snoddy, *supra* note 34, at I13. The European Community's HDTV system is manufactured by Thomson & BTS (Phillips-Bosch). *Id.*

38. COOPERS & LYBRAND, TRADE RELATIONS EC-USA & EC-CANADA § 1 (Feb. 27, 1992).

39. *Id.*

40. Matteo Maggiore, *Audiovisual Production In The Single Market*, STUDY FOR THE COMM'N OF THE EUR. COMMUNITIES 29 (1990).

41. A.C. Neilson Estimates, Neilson Media Research Inc. (Jan. 1990).

42. Maggiore, *supra* note 40, at 28-29. Satellite owner Societe Europeene des Satellites (ASTRA) estimates 21.8 million cable uplinks by 1995. *Id.* at 29. In fact, the German government plans to have 80% of all households in that country cabled by the year 2000. *Id.*

tripled within the past five years⁴³ to over forty percent of television owners in Europe.⁴⁴ In 1990, population and economic calculations from the European Free Trade Association ("EFTA") countries and Central and Eastern European nations indicate that the European population tally surpassed 500 million people, with an economic output of over \$7.5 trillion.⁴⁵ As more and more countries join the European Community, the increased population and television technology indicates a huge potential market.

3. Television Programming Requirements in the European Market

Article 4 regulates essentially everything the United States entertainment industry produces and exports, including fiction (series, serials, short or feature films, and cartoons) and non-fiction (documentaries, talk shows, variety shows, and special events). Article 4 of the Directive excludes "news, sports events, games, advertising and teletext services."⁴⁶ Fiction sales to the European Community provide United States entertainment producers with a major source of income.⁴⁷ In 1990, thirty-seven percent of all programming transmitted to Member States and other European countries consisted of fiction.⁴⁸ Of that percentage, twenty-seven percent originated from production houses in Europe and forty-four percent was imported from the United States.⁴⁹

In 1987, approximately 150,000 hours of programming aired in Europe⁵⁰ and conservative estimates indicate that the figure will double in

43. *Id.* at 68. Over 40 million VCRs are calculated to be in European homes, in comparison to Japan (30 million units), and United States (60 million units). *Id.*

44. *Id.* at 67.

45. Juan Thomassie & Victor Kotowitz, *The Three Europes*, L.A. TIMES, Feb. 4, 1992, at H4. This study compares the European figures to Japan, with a population of over 115 million people and an economic output over \$2.75 trillion, and the United States, with a population of 150 million people and an economic output of over \$5.5 trillion. The EFTA countries, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland along with the European Community constitute the world's largest economic area. EFTA has adopted 80% of European Community common market policies. *The G-3 Brief: The European Economic Area*, DEUTSCHE BANK ECON. DEPT., Nov. 1991, at 1.

46. Directive, *supra* note 1, art. 4, at 26.

47. Maggiore, *supra* note 40, at 45.

48. *Id.*

49. *Id.*

50. Steve R. Koltai, *Coming Attractions in European TV: Problems & Prospects For Cable & Satellite Television*, 22 COLUM. J. OF WORLD BUS. 57, 61 (Fall 1987).

the near future.⁵¹ Independent studies prepared for the European Community⁵² estimate that all European countries will be able to receive thirty cable channels, three more channels from Direct Broadcast Satellites ("DBS") and another three national channels, generating 1.5 million hours of total broadcast time per year.⁵³ Based on "present percentages, the proportion of fiction can be estimated at a third to half of the total programming . . . at 500,000 hours yearly."⁵⁴ As the community grows, expanded programming must also be supplied at commensurate levels.

B. United States Entertainment Industry Market Share

Europe's commercial deficit in the film and television industry has been estimated at over \$2 billion.⁵⁵ According to the Motion Picture Association of America⁵⁶ ("MPAA"), forty-seven percent of every box office dollar received from foreign exhibition of theatrical releases is derived from the European Community.⁵⁷ Film production in the European Community fell from 778 features produced in 1970 to a rate of approximately 500 per year in 1990.⁵⁸ During that same period in the United States, motion picture production rose from 443 to 578 films per year.⁵⁹ European productions account for roughly twenty percent of the total European box office "gate" compared to fifty percent for United States

51. *Europe's film industry; Sleeping with the enemy*, THE ECONOMIST, Oct. 26, 1991, at 91. Estimates indicate that Europe will require 300,000 hours of programming by 1995, while internal production capability is limited to 20,000 hours. Commission officials estimate the 205,000 hours of current satellite broadcasting air time which exists from 68 television stations estimate that the figure will rise to 400,000 hours. *EC Commission Proposes To Harmonize Protection For Satellite Broadcasts*, Pat. Trademark & Copyright Law Daily (BNA) (July 18, 1991). Some estimate that 400,000 hours of programming will be required by 1999. *Buddy, can you spare a reel?*, THE ECONOMIST, Aug. 19, 1989, at 56.

52. Maggiore, *supra* note 40, at 41.

53. *Id.* at 42.

54. *Id.*

55. Matthew Fraser, *Battle of TV Quotas Heats Up in Europe; EC Directive Leaves Few Satisfied*, INT'L HERALD TRIB., Oct. 7, 1991, Special Rep. at 1.

56. The MPAA & MPEAA (Motion Picture Export Association of America) represent the largest United States entertainment concerns: Columbia-Tristar, Disney, MCA/Universal, MGM/UA, Orion, Paramount, Time-Warner and 20th Century Fox.

57. STEPHEN E. SIWEK & HAROLD FURCHTGOTT-ROTH, AN ECONOMIC ANALYSIS OF THE EC BROADCAST QUOTAS ON AMERICAN TELEVISION PROGRAMS 9 (Jan. 1992).

58. Maggiore, *supra* note 40, at 42.

59. *Id.*

productions.⁶⁰ By comparison, European productions account for less than one percent of total box office receipts in the United States.⁶¹ Movie-going in Europe has consistently increased because of new theater construction, deregulation of television, and movies with an international appeal.⁶²

In 1990, United States producers received \$2.3 billion in revenue from television licensing rentals and \$1.9 billion from theatrical releases in Europe.⁶³ Of an estimated 125,000 hours of television time, European production accounted for approximately 20,000 hours, while the rest was imported.⁶⁴ In 1988, almost one half of all programming received in over 2.8 million European homes was United States product.⁶⁵ In 1989, European television stations paid more than \$1 billion to United States television companies for the right to transmit television programming.⁶⁶

1. Economic Rationale Underlying European Purchases

The motion picture industry is experiencing a decline in box office receipts while at the same time motion picture and television production costs in the United States are rising.⁶⁷ Nonetheless, the United States entertainment industry continues to be profitable. Despite the fact that European Community broadcasters paid an estimated \$2.6 billion for United

60. CARLO SARTORI & ANGELO Z. TEODOSI, REPORT ON THE SITUATION OF CINEMA AND AUDIOVISUAL MEDIA IN EUROPE 3 (Sept. 3, 1990) [hereinafter VENICE REPORT].

61. *Id.* at 10.

62. For example, France produced 146 motion pictures. Yet, United States films shown in France earned \$80 million more than the worldwide earnings of these 146 films outside of France. Matthew Fraser, *Battle of TV Quotas Heats Up in Europe; EC Directive Leaves Few Satisfied*, INT'L HERALD TRIB., Oct. 7, 1991, Special Rep. at 1. Jack Valenti, MPAA President, projected an "ascending spiral of theatrical admissions" due to dramatic new theater construction in Spain, Italy and Germany. Lewis Beale, *Ways and Means Lean Hollywood Fattens up in European Theaters*, CHI. TRIB., Nov. 10, 1991, at C22.

63. SIWEK & FURCHTGOTT-ROTH, *supra* note 57, at 9.

64. *Europe's film industry: Sleeping with the enemy*, THE ECONOMIST, Oct. 26, 1991, at 91.

65. Claus Hardt, introductory paper, in EUROPEAN COPRODUCTION IN FILM AND TELEVISION, SECOND MUNICH SYMPOSIUM ON FILM AND MEDIA LAW 1 (Jurgen Becker & Manfred Rehbinder eds., 1988) [hereinafter MUNICH SYMPOSIUM].

66. Dovie R. Wingard, *Law & Entertainment: Europe 1992: Mass Media Developments*, N.Y. L.J., Nov. 30, 1990, at 5. Sixty percent of all cartoons broadcast over European airwaves in 1989 were imported from Japan. *Broadcasting: Commission Endorses 1991 Program*, Eur. Rep. (Euro. Info. Serv.) No. 1655, at 2 (Feb. 23, 1991).

67. MPAA President, Jack Valenti, stated that a current motion picture's production cost averages about \$28 million. William Neikirk, *Hollywood Dances with Woes as Recession Invades Fantasy*, CHI. TRIB., Jan. 22, 1992, at 1.

States television programs in 1992,⁶⁸ it is more cost effective for European broadcasters to fulfill their programming requirements with United States made productions. For instance, a French television station can purchase the rights to broadcast a television movie from a United States producer for about \$70,000,⁶⁹ in comparison to the \$1 million it would cost to produce a television movie in Europe.⁷⁰ The sharp contrast in price stems from the fact that United States film and television production costs are recouped in the large United States market. Additionally, revenues for the United States television show are less speculative, because of a proven track record. There is more uncertainty with any new show.⁷¹ United States producers can compete in European markets with a finished product which has amortized its costs domestically, as opposed to European products which cannot compete due to their high production costs.

In the United States television market, advertising revenue largely defrays the cost of programs. By contrast, European advertising revenue defrays zero percent in Sweden and one hundred percent in Greece.⁷² Although European television advertising is expected to grow to \$20 billion by the year 2000,⁷³ this rise in revenue alone will not be enough to ameliorate the cost differential between European production and United States production. The Directive's advertising regulations⁷⁴ impose strict time and content restrictions on advertisements for some products, and ban advertisements for other products, decreasing total available advertising time and revenue. Additionally, Article 3(1) permits Member States to

68. Paul Prosbürger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 425, 495-502 (1990).

69. Blanca Riemer et al., *Europe May Slap a Quota on General Hospital*, BUS. WK., Mar. 27, 1989, at 46.

70. *Id.*

71. Pan-European production attempts include the five day a week series, *Riviera*, a \$45 million, 260-episodic soap opera about a French perfume dynasty. The show airs in France, Germany, Greece, Italy and Spain. The cast is French, speaking in "sometimes incomprehensible, French-accented English," and ironically, the show is later redubbed in French. The production company and director are American. Joe Joseph, *Sinking soap sets the scene for Euro-farce*, THE TIMES (London), Dec. 3, 1991, available in LEXIS, Nexis Library, Omni File.

72. Maggiore, *supra* note 40, at 100.

73. Daniel Pederson, A 'Grenade' Aimed at Hollywood: Europe Votes to Slap a Quota on U.S. TV Imports, NEWSWEEK, Oct. 16, 1989, at 58. During 1988 to 1992, total advertising expenditures grew 46.2% in comparison to 25.1% in the United States. This amounted to \$51 billion in the European Community in comparison to \$68 billion in the United States. *Europe and America Prepare for 1992*, BROADCASTING, Apr. 17, 1989, at 35.

74. Directive, *supra* note 1, arts. 10-21, at 28-29.

impose more stringent standards on broadcasters if the Member States so desire.⁷⁵

2. Other Reasons European Broadcasters Choose United States Programs

Economics alone do not explain broadcasters' inordinate demand for United States programs. Program quality also plays a large role. As one commentator stated: "[I]t should not be forgotten that one reason why United States films and television programmes succeed is that they are very good"⁷⁶ European television audiences enjoy the plots, the culture and the "glamour and adventure in the U.S.-made shows."⁷⁷ MPAA President, Jack Valenti, summed up why there is such demand for United States audio-visual product:

What we do is we are a global industry. We don't make movies for people just in Wichita Falls, Texas and Claremont, California. We make them for Kuala Lumpur and Santiago and Paris and Toronto. We make them for the world. And I think that it is this global outlook on the part of the American Motion Picture Industry that gives it its sustenance and perhaps its enduring strength is that we are on a world market, we do not exist in a domestic market. And what sets us apart many times from the Europeans, whose talent is just as splendid as ours, whose craftsmen are just as technically innovative as ours, but they tend to make movies parochially; that is tell stories that might do well in Dijon, Lyon, but don't do that well in Shanghai. I think it's the global outlook of the Americans living in a hotly, deadly competitive world; and we think globally.⁷⁸

Mr. Valenti's observations regarding the limited success of parochial films are supported by empirical data.⁷⁹ Further, such observations would apply equally as well to those few parochial American films, such as *Steel*

75. *Id.* at 26. Art. 3(1) provides: "Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive." *Id.*

76. Hardt, *supra* note 65, at 22.

77. Riemer et al., *supra* note 69, at 46.

78. *Hearing of the International Trade Subcommittee of the Senate Finance Committee, "Intellectual Property Rights Protection and 'Special 301,'" Fed. News Serv., Mar. 6, 1992, at 2.*

79. Lewis Beale, *Ways and Means Lean Hollywood Fattens up in European Theaters*, CHI. TRIB., Nov. 10, 1991, at C22.

Magnolias or *Do the Right Thing*, which did not do well at the European box office because their themes are totally alien to most of the global market.⁸⁰

3. United States Programs' Effect on European Television

The Directive's and Convention's quantitative restrictions purportedly were enacted to protect cultural integrity. A thriving European audio-visual production industry was presumed to be the key means of accomplishing this objective. Despite the volume of United States programming, empirical studies indicate satellite and cable services offering programs from the United States and other countries do not displace the popularity of national programs.⁸¹ Michael Tracy, an expert in broadcasting research, comments, "[w]here they are used, U.S.-made programs will serve as a kind of televisual overhang, plugging the gaps in a schedule but lacking a seminal influence on audience preference, and, therefore, on the future economics of television."⁸² In light of the popularity of indigenous programs, the need for preservation of cultural integrity through the restrictions set forth in the Directive is questionable. Therefore, a brief review of the Directive's history is helpful.

III. TELEVISION WITHOUT FRONTIERS HISTORY

In 1984, the European Commission published a detailed study entitled, "Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially By Satellite and Cable" ("Green Paper").⁸³ The impetus behind the study was the need for a harmonized system regulated by the European Community to override Member States' complex, disparate and often protectionist national laws which impeded the European Community's agenda for 1992.⁸⁴ For instance, Belgium's broadcasting laws are divided according to the community they service, demarcated by the languages spoken: Flemish,

80. *Id.*

81. Michael Tracy, *European Viewers: What Will They Really Watch?*, 22 COLUM. J. OF WORLD BUS. 77, 83 (Fall 1987).

82. *Id.*

83. Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially By Satellite and Cable; COM(84)300 final [hereinafter Green Paper].

84. For a thorough discussion of the reasons for the study see Green Paper, *supra* note 83, at 63-104.

German and French.⁸⁵ Another example is the Federal Republic of Germany, whose German broadcasting laws are regulated by each of the eleven *länder* states,⁸⁶ (now sixteen because of East Germany's accession). A perusal of each *länder* state's laws regarding broadcasting reveals several inconsistencies that adversely affect European Community goals.⁸⁷

Pronounced disparities also exist in the area of advertising.⁸⁸ Member States' limits, regulations and prohibitions on air times, content, and other factors are at such variance that complying with each nation's laws is a formidable task for broadcasters and producers.⁸⁹

A. The Quota Articles Compared

The most disliked national restrictions or "obstacles to freedom of movement for services"⁹⁰ are quotas.⁹¹ Historically, quotas were imposed by countries because television broadcasting services, like utilities, were mostly state controlled monopolies where protectionist measures furthered state interests. The European Commission derived many of its proposals for the Green Paper from some common ideas shared by the Member States.⁹² Many nations desire to maintain their diversity but still do not want to forsake their own cultural, traditional and linguistic identities. However, it is difficult to maintain and promote, let alone define, something as complex as a "culture." The Preamble of the Directive specifically refers to each Member States' national cultural concerns and expresses the desire and need for each Member State to protect these same concerns.⁹³ Ignoring the Member States' national cultural concerns in the Directive would have lead to the Directive's

85. Green Paper, *supra* note 83, at 33-34.

86. Shaughnessy & Cobo, *supra* note 2, at 43.

87. *Id.*

88. Denmark, compared with other European nations, limits advertising to ten minutes per day without interruptions between programs. *Id.* at 60.

89. Green Paper, *supra* note 83, at 238-43.

90. Directive, *supra* note 1, at 23.

91. Shaughnessy & Cobo, *supra* note 2, at 197. The following figures reflect Member States' disparate quotas: Belgium, up to 50% of airtime reserved for Flemish works, *id.* at 34; Denmark, no quotas, *id.* at 60; France, 60% EC origin, 50% of airtime reserved for works of French origin, *id.* at 74; United Kingdom, 14% of air time is reserved for foreign works. *Id.* at 93-94.

92. *Id.* at 97.

93. Directive, *supra* note 1, at 25. For example: "Whereas in order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria . . ." *Id.*

demise.⁹⁴ If the Directive truly seeks to eliminate barriers through uniform regulation, the issue becomes whether a collective European culture exists.⁹⁵ One answer came from Jaques Delors, President of the Commission. At the European Audiovisual Conference in Paris on the eve of the Directive's passing, Delors made the often cited comment that "culture is not another piece of merchandise . . . and should not be treated as such . . . [C]ulture can be spread only if we have mastery of the technological tools . . . [W]e cannot treat culture as we should treat refrigerators or even motor cars. 'Laissez-faire,' market forces alone cannot suffice."⁹⁶ Another answer is from the Explanatory Report on the European Convention on Transfrontier Television, which states:

[the] general philosophy underlying this Article . . . [is] the development of European audiovisual production . . . [as] a means of achieving the cultural objectives⁹⁷ [which is] to ensure the development . . . of creative national productions and European co-productions (fiction, series, serials, films, documentaries, arts and educational programmes, etc.) in order to uphold European cultural identity as regards both its specific national features and common values, and to guarantee pluralistic means of expression.⁹⁸

Article 4 of the Directive⁹⁹ and Article 10 of the Convention¹⁰⁰ are the European Community's attempts to placate the conflicts inherent in creating a pan-European culture. The terms at the center of Article 4's provisions and Article 10's provisions are virtually identical.¹⁰¹ The

94. In a similar situation but in a different context, at the Economic Monetary Union (EMU) summit held in December, 1991, the collapse of the European Community nearly came about because some Member States were reluctant to delegate further sovereign authority and powers. David Marsh, *Europe's Honeymoon Starts to Sour*, FIN. TIMES, Dec. 21, 1991, § 1, at 7.

95. Article 10(2) of the Treaty of Rome reads as follows:

The members of the Commission shall, in the general interest of the Communities, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks . . .

TREATY, *supra* note 1, at 209.

96. Maggiore, *supra* note 40, at 197.

97. *Convention*, *supra* note 14, at 31.

98. *Id.*

99. *See supra* note 9 and accompanying text.

100. *See infra* note 101.

101. Compare the language of Article 4(1) of the Directive with the language of Article 10(1) of the Convention, which states:

Directive's watered down quotas came about only after long and hard debate from many internal and external factions. Proponents, mainly France, wanted more severe restrictions. For example, they advocated that sixty percent of their air time be dedicated to "European works."¹⁰² Belgium and Denmark, on the other hand, were opposed to all quota restrictions regardless of whether or not the work was European.¹⁰³ The Directive and the Convention place quotas on non-European works, meaning that the final product need not originate from the European continent.¹⁰⁴ The audio-visual product can be from anywhere and still qualify as a "European work" as long as certain economic requirements are met.

1. "European Works"

The term "European works" is defined by the Convention in Article 2(e)¹⁰⁵ and by the Directive in Article 6.¹⁰⁶ The Convention definition is a terse one: "European audiovisual works' mean creative works, the production or co-production of which is controlled by European natural or legal persons."¹⁰⁷ This definition is qualified by linking it to actual European Community membership or by an economic analysis relating to

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

See Directive, *supra* note 1, at 26; Convention, *supra* note 14, at 64.

102. Article 4 of the Directive initially required a 30% quota for European works, with progressively increasing percentages required within three years of the Directive's passage, up to 60%. Directive, *supra* note 1, at 26. See also Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action, in Member States Concerning the Pursuit of Broadcasting, COM(86)146 final at 4, 7 [hereinafter Commission Proposal] (contains discussion of initial proposals of the quotas).

103. Steve Greenhouse, *Europe Reaches TV Compromise, U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1.

104. See *supra* note 9 and accompanying text.

105. Convention, *supra* note 14, at 61.

106. Directive, *supra* note 1, at 27.

107. Convention, *supra* note 14, at 61.

the proportion of shared production costs with a non-member participant.¹⁰⁸ For example, if a Portuguese producer invested at least fifty-one percent of the costs in a television series produced in the United States, like *Cheers* or *Rosanne*, it would be a European work. The economic test holds true under the broad language of Article 2(e) of the Convention which qualifies a work as European if it is "controlled by European natural or legal persons."¹⁰⁹ Thus, control is related to amount of ownership.

The Directive's definition of "European works" in Article 6 has significantly evolved from the definition of "Community works."¹¹⁰ The mechanics of the definition can best be demonstrated by an example. Poland is both a member of the Council of Europe¹¹¹ and a ratifier of the European Convention on Transfrontier Television.¹¹² Therefore, through incorporation, Poland clearly falls within the language of Article 6(1)(b).¹¹³ If a Polish writer and producer were to finance fifty-two percent of a film in Borneo, using a Sumatran cast, a Mongolian crew, with the film's dialogue in Farsi, legally this qualifies the production as a "European work."

2. European Council and European Parliament Input

The common language found in the Directive and Convention is a result of carefully orchestrated efforts. On May 28, 1986, the Council consulted the opinion of the Economic and Social Committee on the Commissions' Broadcast Directive proposal.¹¹⁴ The Committee noted that

108. *Id.* Article 4 of the Commission Proposal states:

Community works within the meaning of this Chapter are: (a) works made by producers from a Member State; (b) works made by producers from several Member States; (c) works made by producers from one or several Member States and non-member States where the Community proportion of total production costs is at least 70%.

Id.

109. *Id.* at 102.

110. *See supra* note 9 and accompanying text.

111. George D. Moffett III, *European Body's Role Expands*, CHRISTIAN SCI. MONITOR, Feb. 12, 1992, at 9.

112. COOPERS & LYBRAND, EUROSCOPE, AUDIOVISUAL COMMUNICATIONS § 4 (Jan. 23, 1992). Countries that ratified the Convention include St. Marin, Cyprus, Switzerland and the United Kingdom. *Id.*

113. *See supra* note 9 and accompanying text.

114. Opinion of the Economic and Social Committee on the Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, 1987 O.J. (C 232)

"the need to encourage the promotion of European television programmes by a Community Directive, while maintaining the cultural identification and national structure of the media"¹¹⁵ was of paramount concern. The Committee approved of the Commissions' proposed quota provisions as a means of "encouraging the production of Community works, especially in order to increase employment opportunities and promote European creativity."¹¹⁶ The Committee further stated, "a quota system should be viewed not so much in terms of the national identity of the programmes . . . as in terms of promoting the production of television programmes in the Community."¹¹⁷

The European Parliament proffered their suggestions for amending the text of the proposed Directive.¹¹⁸ The Parliament's reasoning underlying the quota provisions was best exemplified by a recital in the Preamble: "[w]hereas additional Community measures to promote the international competitiveness of European cinema are needed, in view of the strength of the non-European media industry, not only in order to achieve the economic objectives of the Community but also to counteract any loss of linguistic and cultural identity."¹¹⁹ Parliament agreed with the original proposal for sixty percent quota restrictions in order to counterbalance the disparity between European and United States audio-visual production.¹²⁰

B. Analysis of the Surviving Language

The quotas in Article 4 are left to the Member States to implement "where practicable and by appropriate means."¹²¹ The wording has been referred to by European Community officials as "an escape clause," indicating Article 4's non-binding nature.¹²² However, the legislative history suggests otherwise. The Directive originally laid out extensive time

29 [hereinafter Committee Opinion].

115. *Id.*

116. *Id.* at 30.

117. *Id.* at 29. The Committee adopted their opinion on July 1, 1987. *Id.*

118. Commission Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, 1988 O.J. (C 49) 53.

119. *Id.* at 54. Although this language has been added in the Preamble, it has been largely ignored in practice.

120. *Id.* at 56.

121. Directive, *supra* note 1, art. 4(1), at 26.

122. *Europe and America Prepare for 1992*, BROADCASTING, Apr. 17, 1989, at 38.

guidelines for Member States to follow in implementing the provisions.¹²³ Additional support for the binding effect on Member States comes from Article 4(3),¹²⁴ which requires Member States to submit detailed statistical reports indicating whether the goals of Articles 4 and 5 have been attained, and if not, to provide justification for why they were not.¹²⁵ Further, the express delegation of authority from the Council of the European Communities to the Commission to "ensure the application" of Article 4 and Article 5, coupled with the Commission's inherent powers pursuant to Article 169 of the Treaty of Rome,¹²⁶ also indicate the binding nature of Article 4.¹²⁷ Under the interaction of Articles 4 and 5, coupled with the Commission's power of enforcement, the Directive has a legally binding effect. Although untested as of yet, deviation from Article 4, whether egregious or not, could result in a Member State being brought before the European Court of Justice.

IV. JUSTIFICATION OR PRETEXT?

Proponents of the Directive have defended the propriety of Article 4 on the grounds that a continued deluge of "cheap" programming under-

123. See *supra* note 91 and accompanying text.

124. Directive, *supra* note 1, art. 4(3), at 27.

125. Article 4(3) provides:

The Commission shall ensure the application of this Article and Article 5 in accordance with the provisions of the Treaty. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a audiovisual production capacity or restricted language area.

Id. at 27.

126. This article provides:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

TREATY, *supra* note 1, art. 169. See *The Effects of Greater Economic Integration Within the European Community on the United States: Third Follow-up Report*, U.S. Int'l Trade Comm'n, No. 2368 (Mar. 1991), available in LEXIS, Nexis Library, Omni File (for an excellent review of the European Community legislative process, and account of national implementing legislation for each Member State).

127. The binding nature of Article 4 of the Directive may be compared with Chapter IX, article 25, of the Convention, which calls for conciliation measures upon dispute, and article 26, which mandates arbitration as a final remedy. *Convention*, *supra* note 14, at 72-73.

mines the European Community's aims of promoting culture, leading to what European Community Culture Commissioner Jean Dondelinger describes as "cultural suicide."¹²⁸ Others have justified the quotas as reciprocal treatment for the informal quotas the United States places on European films and television.¹²⁹ The European Community quota restrictions, according to the British Labour Party's Art and Media spokesman, are meant to instill "a balance between international product and our own national culture and identity" and protect against the "unregulated flood" of United States programming that supposedly devastates local production.¹³⁰ France's European Affairs Minister justifies the quotas for cultural reasons by stating: "what will remain of our cultural identity . . . if audiovisual Europe consists of European consumers sitting in front of Japanese TV sets showing American programs?"¹³¹

Commercial and economic reasons have also been used to justify the quotas.¹³² Chapter III of the Directive concerning the promotion, distribution, and production of television programs demonstrates the commercial basis of the Directive. These commercial and economic concerns have been mirrored in other European Community-backed initiatives.¹³³ The

128. *No Gilligan Is An Island*, NEW REPUBLIC, Apr. 17, 1989, at 10.

129. It is alleged that these "100% quotas" against European audio-visual products are in effect because of a lack of demand by Americans. Fred Hift, *TV Trade War Heats Up*, CHRISTIAN SCI. MONITOR, Nov. 2, 1989, at 10. French culture minister, Jack Lang, stated that: "it is we who should complain to GATT. . . . [T]he Americans don't have a 70% quota, or an 80% quota. They have a 100% quota against us." *Id.*

130. *Europe and America Prepare for 1992*, BROADCASTING, Apr. 17, 1989, at 38.

131. Daniel Pederson, *A 'Grenade' Aimed at Hollywood: Europe Votes to Slap a Quota on U.S. TV Imports*, NEWSWEEK, Oct. 16, 1989, at 58.

132. *French Parliament Set to Debate New Quota Laws*, SCREEN FIN., Oct. 16, 1991, available in LEXIS, Nexis Library, Omni File.

133. One such program, the Measures to Encourage the Development of Industry of Audiovisual Production (MEDIA), is a five year program aimed at assisting the European audiovisual industry in competing internationally. Council Directive 1990 O.J. (L 380) 37.

MEDIA's goals are mirrored in the EUREKA program which was launched in October, 1989. EUREKA's objectives include the encouragement of exchange and widened European work distribution; the creation of necessary financing of production; fostering contact between professionals; training of professionals; increasing competitiveness; bolstering production in countries with low capacity and limited linguistic coverage; and promotion of new technologies. *Id.*

Other programs have also been launched to stimulate European audio-visual production. The program established the European Film Distribution Office (EFDO), which loans up to 50% of distribution costs for low-budget films distributed in a minimum of three EC countries; Broadcasting Across the Barrier of European Languages (BABEL), which provides financial support for subtitles and dubbing; Euro-AIM, which gives independent producers assistance in marketing and production promotion; Media Investment Club for Advanced Technologies, a

underlying purposes and desired results of these programs are economic in nature. Promotion of culture is an outgrowth of a prospering industry. The quota provisions of the Directive and Convention insure market access to European market productions. Broadcasters will need some product to fill their air time, and with quotas restricting their choice, they will turn to European audio-visual productions.

A. *Inherent Logical Gaps in the Cultural Justification*

What is European culture? Culture involves vagaries that are intangible, complex, and difficult to typecast. Differences in culture occur from country to country, even where similarities such as language are shared. For example, South Africans, New Zealanders, and New Yorkers all speak English, however, their respective traditions, customs, and lives clearly vary. If these concerns, characterized as culture, are to be promoted, each respective country should be empowered to protect their own culture. The Commission reflected the Members States' cultural concerns in the Directive by granting the Member States license to "lay down more detailed or stricter rules in the areas covered by th[e] Directive."¹³⁴ Thus, nations such as France can promote and bolster their national language by imposing language restrictions on audio-visual products. Currently, France requires that a certain percentage of its product be in French.¹³⁵ This language restriction is a way to promote a true

networking and financial support group that promotes advanced technology in production; the European Script Fund, which provides financial support for screenplay and pre-production costs; the European Association of Animation Film (CARTOON), which promotes financial and structural European cartoon production; European Audiovisual Entrepreneurs (EAVE), an association of training institutions, production companies, television organizations and public authorities, which organizes training and management sessions for independent producers with an emphasis on multinational and European co-production; MEDIA Business School of Madrid, which coordinates and co-finances programs which improve economic and commercial European audiovisual environment; Space Video European (EVE), which gives financial and loan support to defray costs in helping promote European film to video distribution costs; Memories-Archives-Programmes (MAP-TV), a networking archive which clarifies copyright laws for producers and establishes development grants for archive-based productions; Groupement European pour la Circulation des Oeuvres (GRECO), which assists independent fiction producers compete in world market distribution; and Independent European Documentaries (INDEED), which promotes the production of quality documentaries. *See also* COOPERS & LYBRAND, EUROSPE, AUDIOVISUAL COMMUNICATIONS § 6 (Jan. 23, 1992) (contains a thorough summary and description of these programs).

134. Directive, *supra* note 1, art. 3(1), at 26.

135. *See supra* note 91 and accompanying text.

component of culture. If these more restrictive rules seek to preserve the culture of an individual Member State, arguably the Directive's more general quotas seek to preserve a more "European culture."

United States government officials have lambasted the Europeans for implying that a "European culture" exists and have characterized the Directive as mere protectionism.¹³⁶ United States Trade Representative ("USTR") Carla Hills stated:

We do not understand why the Spanish culture is more protected by a film produced in Germany by 'Europeans' than by a Spanish film of Mexican origin, or why the English culture is promoted more by a film produced in France by 'Europeans' than by a film of New Zealand origin. We do not understand why a film about French cultural history, in the French language, promotes French culture any less simply because it is 'not of European origin.' The definition of 'European works' is economic, not cultural.¹³⁷

If broadcasting quotas ignore the content of audio-visual product, and instead look to where control of production originates as criteria for whether a work is "European," then it seems rational to assume that economic protection determines the aims of the Directive.¹³⁸

Hypothetically, the Directive would not meet the United States' constitutional "rational basis" test which allows legislation to stand if the means are

136. *U.S. Officials, Industry Takes Hard Line on EC Television Broadcasting Directive*, 6 Int'l Trade Rep. (BNA) 1020, 1020 (Aug. 2, 1989). J. Michael Farren, Department of Commerce Undersecretary, testified before House Energy and Commerce Subcommittee on Telecommunications and Finance: "It is nothing more than an infant industry protection for the European entertainment industry" *Id.* United States Trade Representative Carla Hills portrayed the Directive as "blatantly protectionist and unjustifiable discriminat[ion] against U.S. and other non-EC film goods." Paul Prosburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 425, 501 (1990).

137. Prosburger & Tyler, *supra* note 136, at 505.

138. Jane K. Albrecht, Request of the Motion Picture Export Association of America, Inc. for Designation of the European Community as a "Priority Country" under section 182 of the Omnibus Trade and Competitiveness Act of 1988 (Feb. 15, 1991) at 7 [hereinafter MPEAA's First Petition]. The MPEAA argued: "The underlying principle of the definition of a European work is that production must be controlled by Europeans. Regardless of how much European input there is, to be considered a European work, production must be controlled by Europeans. Accordingly, a movie based on a European script, made with European actors and technicians in Europe, would not be considered a European work if it was financed and production controlled by a non-European company. In contrast, an episode of *Dallas* filmed on a set outside Paris, with a US script, U.S. actors, and other U.S. talent, would be considered an EC production under the EC's Directive, if production was controlled by an EC company." *Id.*

rationally related to legitimate government ends.¹³⁹ Employing the Directive's quotas, which are means unrelated to the ambiguous end of the promotion of "European culture" is absurd. In this light, the quotas are a pretext for economic protectionism.

Empirical data indicates that individual Member States are not threatened by United States audio-visual products.¹⁴⁰ The citizens of all five Directive signatories were unconcerned with threats from American culture.¹⁴¹ The results of surveys conducted by the United States Information Agency of five countries indicate general agreement that some national cultural protectionism is needed.¹⁴² Ironically, forty-three percent of those surveyed in the United Kingdom and twenty-six percent in France agreed that *European integration* also threatened their own respective cultures.

Ultimately, the viewer is the arbiter of what they choose to watch. With the growing number of television channels available, a viewer who wishes to watch United States programming is almost certainly going to be able to do so, because of the high probability that a United States program will be on television at any given time. The quotas disregard the viewer's own free will and choice. As one author commented, "no matter what quotas are set, people will always vote with their remote controls."¹⁴³

United States cultural exports, whether food, fashion, or lifestyle, are emulated worldwide, and are transmitted through television. For example, United States culture is broadcast all over Europe on CNN and MTV.¹⁴⁴ Paradoxically though, both networks are not regulated by Article 4 because

139. *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988). Application of the means/ends test to the quota provisions requires several assumptions. First, that a "pan-European culture" from Moldova to Ireland exists. Second, that culture is a legitimate European Community or Convention objective. Third, that a non-content based quota provides a reasonable nexus between establishing quotas and bolstering that purported culture.

140. *Despite EC Directive, Public Unconcerned With U.S. Media Threat*, U.S. INFO. AGENCY, Aug. 14, 1991, at 3.

141. *Id.*

142. *Id.* Of the countries surveyed, the following percentages of the population did not regard American culture as a threat to their own culture: France, 61%; Western Germany, 83%, Eastern Germany, 77%; Italy, 72%; Spain, 63%; United Kingdom, 60%. *Id.* at 8-10.

143. Timothy Harper, *Europe May Unite, But Will Still Turn to U.S. TV*, ELEC. MEDIA, Oct. 21, 1991, at 10.

144. *Id.* CNN is Cable News Network, broadcast in English with European headquarters in London. It is operated by Turner Broadcasting Service International. Shaughnessy & Cobo, *supra* note 2, at 174-75.

MTV is a "pan-European" music channel broadcast from London. It is labeled as European because European cultures are represented by "video-jockeys" that come from various countries. *Id.* at 169-70.

it only regulates fiction, yet their programming mirrors more of United States culture via news and music than do fictional exports. The success of CNN and its format has spurred similar programming in Europe.¹⁴⁵ Other United States cultural exports include sports such as basketball and football. The World League of American Football, which included European teams, broadcasted many of their games live throughout Western Europe, Scandinavia and even Czechoslovakia.¹⁴⁶

Culture is not threatened by United States or other programming, so long as unfettered viewer choice exists. Of the top twenty programs of April, 1987 in Germany, France, and the United Kingdom, the overwhelming majority were nationally produced programs.¹⁴⁷ Studies indicate "one obvious feature of [the statistics] is just how little imported television, including United States programming, there is."¹⁴⁸ Thus, elimination of viewer choice by using quotas does not support or promote an emerging or existing culture; rather, quotas seek to protect a struggling industry trying to compete in a huge market. A study conducted for The European Institute for the Media concluded:

What we believe emerges from this study is that there is a strong case for leaving the industry to regulate itself. Our review of cross-frontier services shows that there is now a diversity of services available reflecting many aspects of European culture—even if no single service is satisfactory in traditional terms

Quotas are intended to ensure that the European industry generates a sufficiently healthy production capability to compete with overseas producers. But there is a serious problem with this. Can legislators be sure, in the absence of an efficient, dynamic European drama-production industry, that such a quota will not undermine the viability of new services?

Not stopping the flow of imported programmes now will irreparably damage the European audiovisual industry in the long run.¹⁴⁹

145. "Euronews," a planned all-news channel, will attempt to reach some of the estimated 23 million viewers currently tuned to CNN. Alan Riding, *European Channel Takes a Stab at CNN*, N.Y. TIMES, Feb. 24, 1992, at D8. Euronews is a collaboration of twelve nationally backed television stations with a \$50 million annual budget. *Id.*

146. *The WLAF on TV*, INT'L HERALD TRIB., Mar. 19, 1992, available in LEXIS, Nexis Library, Omni File.

147. Michael Tracy, *European Viewers: What Will They Really Watch?*, 22 COLUM. J. OF WORLD BUS. 77, 83 (Fall 1987).

148. *Id.* at 83-84.

149. Shaughnessy & Cobo, *supra* note 2, at 194-98.

Further, the reasons against quotas can be found in the Treaty of Rome itself. The rationale behind the formation of the European Community was the goal of complete integration of its countries by December, 1992 through the elimination of physical, fiscal, and technical barriers to trade.¹⁵⁰ There is an inconsistency in tearing down one wall within Europe while building another around it. The Directive acts as an impediment to free world trade in Europe as well as American interests.

V. THE DIRECTIVE'S ECONOMIC EFFECTS

Economic effects of the quotas have broad macroeconomic ramifications. Broadcasters and audiences will feel the effect of the quotas worldwide.¹⁵¹ One of the few United States industries experiencing a trade surplus is the United States film and television industry.¹⁵² The concerns about this "sector-specific" area of trade were so serious that former President George Bush specifically addressed these concerns in the 1992 Trade Policy Agenda¹⁵³ as an area of negotiation to be pursued in bilateral and multilateral talks during the General Agreement on Tariffs and Trade ("GATT") Uruguay Round discussions.¹⁵⁴

150. TREATY, *supra* note 1, at Preamble.

151. The United States House of Representatives condemned the quotas as "trade restrictive" and in violation of the GATT in a House resolution after a 342-0 vote. *House Approves Resolution Urging U.S. Action To Protest European Programming Directive*, 6 Int'l Trade Rep. (BNA) 1384, 1384 (Oct. 25, 1989).

152. *Hearing of the International Trade Subcommittee of the Senate Finance Committee*, "Intellectual Property Rights Protection and 'Special 301,'" Fed. News Serv., Mar. 6, 1992, at 2. MPAA President Jack Valenti stated: "What American product other than Boeing aircraft captures 40% of the Japanese marketplace? And what American product is usually number one wherever it is available, not only in Western Europe but in Asia and in Latin America? And the answer, of course, is the American movie and television program, which returns to this country about \$3.5 billion in surplus balance of trade, when the word 'surplus' balance of trade is seldom heard in the corridors of this building." *Id.*

153. Former United States President George Bush stated: "[T]here are a number of sector-specific trade concerns that are urgent to address in Europe. [O]ur concerns include . . . EC quotas restricting U.S. films on European television . . ." *The President's 1992 Trade Policy Agenda*, 9 Int'l Trade Rep. (BNA) 422, 422 (Mar. 4, 1992).

154. GATT WHAT IT IS, WHAT IT DOES 30-34 (GATT Pub., 1991). The GATT is a binding contract between 103 governments which account for 90% of world merchandise trade. GATT's aims are to ensure a multilateral trading system that contributes to economic growth and world development. The "Uruguay Round" is the eighth multilateral trade negotiation held under the GATT. *Id.*

A. *Effects on United States Interests*

Television and motion picture producers in the United States increasingly finance their products, at least in part, by selling rights to investors. Included in the rights sold are foreign broadcast rights. Foreign broadcasters pay a licensing fee for the right to air the product in their respective markets. Broadcasters in turn recoup their investment from advertising revenue. Quotas will result in a decline of quantity, as well as price, attained by United States programming sold to the European Community.¹⁵⁵ A decrease in revenue and profits creates a less attractive investment for producers.¹⁵⁶ Because there is less money to be made, this ultimately results in an undervalued product.

Even without quotas, most United States productions lose money.¹⁵⁷ Statistics indicate that big budget productions replete with top quality talent, production values, and technical and managerial professionals, appeal more to viewers than do smaller budget productions.¹⁵⁸ Investors will continue to take large risks in big budget productions because the ultimate payoff can be extremely lucrative.¹⁵⁹ However, under the Directive's new quotas, it appears financiers will invest even less money in large budget productions because of the high probability of lesser return. The quality and appeal of the programs will, in turn, be adversely affected because less money is available from investors.¹⁶⁰ Less money invested in audiovisual productions translates to lower quality productions, which affects all viewers.

United States programming may also be injured because in Europe, national programs appeal primarily to national audiences. In light of

155. SIWEK & FURCHTGOTT-ROTH, *supra* note 57, at 21.

156. *Id.*

157. *Id.* at 16 n.32.

158. *Id.* at 12.

159. Lewis Beale, *Ways and Means Lean Hollywood Fattens up in European Theaters*, CHI. TRIB., Nov. 10, 1991, at C22. The epic big budget film, *Robin Hood: Prince of Thieves*, doubled its \$160 million North American box office receipts in Europe. *Id.* *JFK* earned more than \$75 million overseas, and *Terminator II* earned \$285 million abroad. Even *Wild Orchid*, a flop which earned only \$11 million domestically, earned \$60 million internationally. Alan Citron, *Hollywood Goes Boffo Overseas: The Increasingly Multinational Movie Industry is Raking in Profits Around the Globe. New Theaters and TV Channels Will Fuel Demand for American Films*, L.A. TIMES, Mar. 30, 1992, at A1.

160. "[T]he quotas reduce risk by transforming risky investments into nearly certain losses . . . investors have less incentive to invest in works that appear to have a high likelihood of success. The net result is that investment in motion picture productions may decline disproportionately to the lost broadcast revenue." SIWEK & FURCHTGOTT-ROTH, *supra* note 57, at 18.

increased "quasi-subsidized" production, prime-time slots will ultimately be reserved for "European works."¹⁶¹ Non-peak advertising revenue for aired programs diminishes the licensing fee of the product. Distributors of programming are forced to charge less than what they could have without quotas. In the long run, the quotas will cause permanent injury to the United States entertainment industry.

A contrary study conducted by the National Association of Broadcasters ("NAB"),¹⁶² detailing United States broadcasting opportunities abroad, found little detrimental effect of European Community quotas on United States broadcasters in light of overall growth prospects.¹⁶³ The NAB study indicates that the number of television channels in Europe is projected to quadruple in the 1990's; therefore, it will be easy for United States producers to stay under the fifty percent quota restriction and still post economic gains. Because of the construction and growth of new television and radio outlets, the NAB concluded that European broadcasters could "dry up for lack of programming . . ."¹⁶⁴ The study indicated that United States broadcasters are not presently being overburdened by European quotas.¹⁶⁵ However, the study ignored the recently received figures for 1991 program sales by United States producers in Europe which decreased by over \$100 million.¹⁶⁶ Although the NAB study did not address the effect of quotas on prime time television slots, MPAA President Jack Valenti cites this as the area "where we are getting killed."¹⁶⁷ The quotas also harm the United States by allowing the European Community to maintain an edge on the world market. Quotas preserve the European Community's internal market. They also provide increased internal

161. *Id.* at 31 n.41. One example indicates that French television broadcasters including TF1, France's largest broadcaster, renegotiated contracts with United States studios and distributors because of an oversupply of United States programs resulting in a juxtaposition of United States programs from prime time to non-prime. MPEAA Memorandum from Jane Albrecht to Harlan Moen and Fritz Attaway, Sept. 18, 1991, at 2-3.

162. The NAB is a non-profit, free trade association representing networks, television and radio stations. It is sponsored by its membership. Telephone interview with the NAB, April, 1992.

163. *Valenti Seeks Sanctions; NAB Says EC Quotas Still Give U.S. Programmers Lot of Leeway*, COMM. DAILY, Mar. 9, 1992, at 6.

164. *Id.*

165. *Id.*

166. *Id.* In 1990, before the quota became effective, MPEAA member company EC television sales exceeded \$1.3 billion. In 1991, the year the quota went into effect, the first nine-month TV sales decreased 16% over the same time period for the year 1990. "This represents a revenue decrease of over \$100 million!" SIWEK & FURCHTGOFF-ROTH, *supra* note 57, at 14 (emphasis added).

167. *Id.*

production, creating a profusion of programs which will qualify as European works. "European producers have a solid and relatively low risk base from which they may engage in riskier investments in other markets, including the United States."¹⁶⁸ United States producers, distributors, consumers, advertisers, and workers all directly suffer negative effects from the European Community and Convention quotas.¹⁶⁹

Member States, broadcasters, advertisers and manufacturers realize there are huge untapped markets before them. Central European countries and the former Soviet Republics will attempt to harmonize laws in conformity with European Community laws in order to gain eventual Member States or Most-Favored-Nation status.¹⁷⁰ Additionally, with the advent of HDTV spreading throughout the continent, European producers conceivably could create a monopoly by making broadcasters dependent on internal technologies and programming products.

Direct exclusion of some foreign television programming, coupled with select technological standards, works to indirectly exclude other sectors of United States industry from the European Community. Dissemination of United States goods, services and culture is accomplished through television. Clothing, durable goods, automobiles, foods, health and beauty care products and a panoply of other United States products and services are seen in United States television productions. Thus, demand for the same is created. "In every nation of the world can be found jerseys, T-shirts, and hats emblazoned with images of American culture made popular by television."¹⁷¹ United States trade is harmed by extinguishing free trade in television, relegating United States programming to non-peak hours, and supplanting the gaps with European Community programming and advertising. Even though United States producers can sidestep the quotas through co-productions, partnerships and joint ventures, an enormous competitive edge inures to the European Community and the Member States.

168. John W. Kitzmiller, *Satellite Television: Satellite TV Network Formed*, U.S. INT'L TRADE COMM'N MONTHLY IMPORT, Mar. 1991, at 38.

169. *Id.* at 35-41.

170. Turkey, Hungary, Czechoslovakia and Poland desire European Community status. MPEAA's First Petition, *supra* note 138, at 3.

171. SIWEK & FURCHTGOTT-ROTH, *supra* note 57, at 13.

B. Effects on European Interests

Spanish draft legislation implementing the Directive has caused clamor among Spanish broadcasters who import the bulk of their programming from United States sources.¹⁷² Privately owned broadcasters Telecino and Antena-3 stated the Directives' program and advertising quotas could mean their extinction.¹⁷³ Any change due to the quotas jeopardizes the broadcasters' earnings.¹⁷⁴ In France, the French television station La Cinq is estimated to have accumulated losses of over \$321 million resulting from losses and operating costs.¹⁷⁵ Government regulation was a contributing factor that led to the station's demise. One source stated that, "despite the much-vaunted deregulation of television in 1986 . . . the Government continued to restrict advertising and impose programming requirements."¹⁷⁶ Also, France's state-owned channel, Channel M6, lost \$40 million in 1990.¹⁷⁷ Further, the only way other state-owned channels such as Antenne2 and FR3 will stay on the air is due to "large Government subsidies."¹⁷⁸ Future prospects do not bode well for these stations.

In the Federal Republic of Germany, the managing director of the most successful private channel, RTL Plus, called the quotas "makeshift regulation [that] will be ineffective in the end."¹⁷⁹ In the United Kingdom, British channel Sky One will bear the full brunt of the Directive

172. Linda Moore, *Spanish Webs Quake Over Proposed Quotas*, VARIETY, Feb. 3, 1992, at 1.

173. Current advertising policies allow up to fifteen minutes per hour of commercial spots during prime-time. *Id.* Compare this to the Directive's rigid advertising requirements which preclude advertising inserts during programs in a one-hour series, or film broadcasts. Directive, *supra* note 1, art. 11, at 28. Additionally, Article 17 bans "indirect" advertising, such as that in gameshows. The Directive would also affect advertising during game shows, from which Spanish broadcasters receive significant revenue.

174. Moore, *supra* note 172, at 1.

175. Roger Cohen, *The Media Business; Losses in TV Hurt Hachette Shares*, N.Y. TIMES, Mar. 31, 1991, at D7. Total accumulated losses were estimated at more than \$550 million. Alan Riding, *The Shakeout Begins In French TV Stations*, N.Y. TIMES, Jan. 13, 1992, at D8.

176. Riding, *supra* note 175, at D8.

177. *Id.*

178. *Id.*

179. *To Quota Or Not To Quota*, BROADCASTING, Oct. 16, 1989, at 57. Helmut Thoma, RTL Plus' managing director, indicated that funding for productions should come from advertising and that the EC Directive's advertising rules create a "tremendous disadvantage" in facilitating market realities. *Id.*

because all their programming is affected by the Directive.¹⁸⁰ In Italy, private channels will also be affected. Of the 5,000 films broadcast in Italy in 1985 on private channels, sixty-five percent were United States imports.¹⁸¹

The Directive will also affect smaller Member States.¹⁸² For example, the Netherlands' channel NOS imports fifty-six percent of its programming from the United States as opposed to thirty percent from European sources.¹⁸³ Works from smaller countries cannot compete within the European Community let alone internationally. Currently, France, Germany, Italy and the United Kingdom dominate European production.¹⁸⁴ The European Institute for the Media study indicates:

The world market for television programmes favors English-language producers, who have access to the large American market and to many other countries which built a broad base of acceptance of the English language. No other European language enjoys this privileged position. In fact the smaller language groups cannot even find a market in Europe because of the difficulties of language transfer. These same countries have too small a home market to sustain a cost-efficient audiovisual industry.¹⁸⁵

Thus, the bulk of European production will be adversely affected by these higher costs.¹⁸⁶

Broadcasters in countries such as Denmark, Ireland, Greece, Portugal, and Luxembourg depend on imports and their lower free market price tags, in order to survive. These higher costs will siphon away capital reserved for production budgets in order to offset cost differentials. Only a few

180. Julian Clover, *A Problem of Implementation*, CABLE AND SATELLITE EUR., Feb. 1992, at 26. In fact, the only two categories that remain unaffected by the Directive, news and sports, have been removed from the channel's format. *Id.*

181. *Id.* at 47.

182. The smaller Member States have neither the experience nor the capital to enter and compete successfully in international markets disproportionately controlled by the four larger Member States. Shaughnessy & Cobo, *supra* note 2, at 195.

183. Maggiore, *supra* note 40, at 50.

184. Shaughnessy & Cobo, *supra* note 2, at 195.

185. *Id.* at 200 (emphasis added).

186. Maggiore, *supra* note 40, at 80. French media groups involved in European commercial TV include Bouyues, Chargeurs, Editions Mondiale, Generale Des Eaux, Hachette, Hava, Hersant, Lyonnaise des Eaux. German media groups include Axel Springer, Bertelsmann, Beta-Taurus. British media groups include Carlton Communications, Central TV, DC Thompson, Granada Group, ITN, Ladbroke, London Weekend TV, Maxwell Group, Parallel Media, Pearson, Rank, Thames TV, TVS, Virgin, Visnews (Reuters), Yorkshire TV, W.H. Smith Television. *Id.*

states can survive the restrictions—those who can limit internal competition by centralizing production in order to withstand the initial cost-prohibitive phases of operation. Therefore, current and prospective smaller Member States have a great deal to lose.

VI. LEGALITY OF THE DIRECTIVE UNDER GATT

The goal underlying the GATT is to foster free and fair international trade of goods without undue sovereign state intervention. The GATT effectuates this goal in four ways:

- 1) By creating an elaborate machinery for obtaining tariff concessions via multilateral trade negotiations and a system of registration of the concessions thus achieved ('tariff bindings');
- 2) by eliminating quantitative restrictions and a number of other important non-tariff barriers;
- 3) by instilling the Most-Favored-Nations treatment obligation for all GATT parties; and
- 4) by creating a presumption of fair trade underpinned by procedures for the imposition of anti-dumping or countervailing duties.¹⁸⁷

Signatories to the agreement, or "Contracting Parties," carry out the terms of the GATT through official government representatives,¹⁸⁸ who participate in a series of multilateral trade negotiations known as "rounds."¹⁸⁹ Though the EEC is not an official member in GATT, its legal status comes very close to actual membership.¹⁹⁰ The twelve EEC Member States were all GATT members prior to accession to the Treaties establishing the EEC¹⁹¹ which occurred ten years later.¹⁹² Accordingly, the European Community's "powers are limited by international law binding on the EEC and must be exercised in conformity with international

187. E.L.M. VOLKER ET AL., PROTECTIONISM AND THE EUROPEAN COMMUNITY 18-19 (1987).

188. Most members have a diplomatic mission at GATT headquarters in Geneva, often represented by a special ambassador. GATT WHAT IT IS, WHAT IT DOES, *supra* note 154, at 1-38.

189. Since 1947 there have been eight rounds including the unconcluded "Uruguay Round" which was launched in Punta del Este, Uruguay, in September, 1986. *Id.*

190. MEINHARD HILF ET AL., THE EUROPEAN COMMUNITY AND GATT 32 (Kluwer-Deventer ed. 1986). The EEC is an international organization with legal persona established by international law. *Id.*

191. *Id.*

192. GATT WHAT IT IS, WHAT IT DOES, *supra* note 154, at 18.

law."¹⁹³ Thus, EEC institutions and Member States under both GATT and European Community laws have a general duty to observe GATT rules.¹⁹⁴

The European Court of Justice ("ECJ") held that rules of international law including treaty law are subordinate to the EEC's founding Treaties.¹⁹⁵ Moreover, the ECJ held that "in so far as under the EEC Treaty, the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement."¹⁹⁶ Therefore, the European Community can step into the shoes of a Member State, where a delegation of authority is found pursuant to the Treaties' binding nature.

A. Characterizing Films and Television Programs

The subject matter of the GATT dispute must relate to "goods" for GATT to apply.¹⁹⁷ During the initial round of consultations with the United States in Geneva,¹⁹⁸ the European Community argued that the GATT agreement was not applicable because Article IV of the Directive

193. HILF, *supra* note 190, at 55. Many European Community trade laws mirror GATT rules in the areas of dumping, subsidies, standards, procurement and other "illicit commercial practices," including quotas. *Id.* at 56. Council Regulation 2641/84, 1984 O.J. (L 252) 1, prescribes that the European Community must act in compliance with its international obligations and may take only "commercial policy measures . . . which are compatible with existing international obligations and procedures." *Id.* at 57-58.

194. *Id.* at 56.

195. Joined Cases 21 & 24/72, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.

196. *Id.* at 1227. See Case 38/75, *Douaneagent der N.V. Nederlandse Spoorwegen v. de Inspecteur der Invoerrecht en Accijnzen*, 1975 E.C.R. 1439 (ECJ adopted full European Community substitution for Member States); see also Joined Cases 267 & 269/81, *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana Spa and Michelin Italiana*, 1983 E.C.R. 801.

197. The current Uruguay Round multilateral trade negotiations have resulted in a draft negotiating text, *Draft Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations*, GATT Secretariat document, UR-91-0185 (Dec. 20, 1991). Articles I-XXXV embody the proposed General Agreement on Trade in Services. Assuming the contracting parties sign and ratify this agreement, application of its provisions would apply to the Directive's quota requirements and would directly impact: Article II(1) (the Most-Favoured-Nation Treatment clause); Article XVI (provision for Market Access with no less favorable treatment); Article XVII (recognizing National Treatment for service producers); and Articles XIV and XV (which list exceptions to the requirements). *Id.*

198. Articles XXII and XXIII provide the framework for consultation, conciliation and dispute resolution as the first step in exhausting remedies prior to GATT panel action. Bilateral consultation is the preferred method of conflict resolution. GATT WHAT IT IS, WHAT IT DOES, *supra* note 154, at 15.

affects a "service," rather than a "good."¹⁹⁹ The issue is one of semantics. The European Community argued that film and television programs were "services"²⁰⁰ while the United States argued that the film and television programs were "products." The MPAA reasoned that Directive language and goals related to "European works," and that usage of the noun "work" inherently defines a product.²⁰¹ The MPAA also deduced that intellectual property by definition is a property right, reasoning that "one can not own a service. One subscribes to or uses a service."²⁰²

In order to resolve this dispute, the actual broadcasting of the work and the work itself must be distinguished. Only tangible works or products qualify for copyright protection under international or United States laws; services, such as broadcasting, do not. In the international arena, the Berne Convention for the Protection of Literary and Artistic Works defined the expression "literary and artistic works" in the international context.²⁰³ Article 2 and Article 11 of the Berne Convention grant protection to works, and, although services may have been utilized to create the work, the services alone are not capable of being protected without the work. Title 17 of the United States Code states that "'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."²⁰⁴

199. U.S. Int'l Trade Comm'n Exec. Summary, No. 2368 (Mar. 1990) available in LEXIS, Itrade Library, Alltic File.

200. Dovie R. Wingard, *Law & Entertainment: Europe 1992: Mass Media Developments*, N.Y. L.J., Nov. 30, 1990, at 5.

201. MPEAA's First Petition, *supra* note 138, at 5. "The Directive regulates the product directly (by defining what constitutes a European work) as well as indirectly (by regulating the use of the product by the service providers, the broadcasters)." *Id.*

202. *Id.* at 6.

203. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, Hein's No. KAV 2245, at 1-2 (art. 2(1)). This definition states: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as . . . cinematographic works to which are assimilated works expressed by a process analogous to cinematography . . ." *Id.* Under Article 11, "Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one . . ." *Id.*

204. 17 U.S.C.S. §§ 101-102 (1992).

Section 102 of Title 17 specifically addresses copyright protection.²⁰⁵ The property right attaches to the work and belongs to the copyright owner. An audio-visual work itself is comprised of many different parts, including individuals' services, machinery, instruments, equipment and the good itself. This collaboration culminates in the creation of what is called the "master." Prints for distribution or broadcast are then made from this master. Both the master and the prints are protected, as goods, whereas the modes of transmission or duplication of these goods are not protected. The Directive does not regulate the actual frequency used to broadcast the works or the television equipment which actually receives, descrambles and airs the works. The Directive's focus is the regulation, promotion, and restriction of the works themselves, and indirectly, their creation.²⁰⁶ Because the quotas are not specifically exempted by GATT, their legality is suspect.

The Directive quota provisions in Article IV conflict with four Articles of the GATT:²⁰⁷ 1) Articles XI and XIII, the prohibitions against quantitative restrictions,²⁰⁸ 2) Article III(4), which proscribes national

205. This section states in pertinent part: "Copyright protection subsists, in accordance with this title in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories . . . (6) motion pictures and other audiovisual works . . ." *Id.* § 102.

206. In Case 155/73, *Giusseppe Saachi v. Italy*, 1974 E.C.R. 409, the European Court of Justice discussed that broadcasting a television signal is the provision of a service, while trade articles such as films, sound recordings and other products used for the diffusion of television signals is subject to the rules relating to the free movement of goods. *Id.*

207. These contentions were made by the MPEAA in their First Petition, *supra* note 138, at 6-8. This sentiment was also echoed by the USTR's office: "First . . . [Article 4] is a local-content requirement that effectively constitutes a quota, thereby violating GATT Article XI's prohibition on nontariff trade restrictions. Second, the United States asserts that the directive, if implemented as written, would grant preferential treatment to works produced by non-EC members of the Council of Europe and deny the United States equally favorable treatment. Such a situation would run counter to the GATT's most-favored-nation principle . . . Third, the United States alleges that the treatment to be accorded EC works under the directive is clearly preferential and therefore represents a blatant violation of the national-treatment principle, which prohibits discrimination between foreign and domestic goods." U.S. Int'l Trade Comm'n Exec. Summary, No. 2368 (Mar. 1990) available in LEXIS, Itrade Library, Allitc File.

208. Article XI(1) provides: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." HLF, *supra* note 190, at 267.

Article XIII(1) states: "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the

treatment;²⁰⁹ and 3) Article I(1), the general Most-Favored-Nation treatment provision.²¹⁰

1. The Directive and GATT Articles XI and XIII²¹¹

The MPEAA alleges that the Directive's implementation of quantitative restrictions against non-European Community and "non-European" works is a de facto violation of Article XI.²¹² Recent decreases in United States sales of audiovisual products to the European Community indicate that implementation of the quotas is adversely affecting sales.²¹³ Additionally, the quotas in both Article 6(1), excepting Convention signatories' works,²¹⁴ and in Article 6(2), excepting works co-produced by Member States' producers,²¹⁵ appear to violate Article XIII(1) of the GATT.²¹⁶ The control of production criteria is facially discriminatory and produces

exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted." *Id.* at 268.

209. Article III(4) states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." *Id.* at 256.

210. Article I(1) states: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.* at 252.

211. *Id.* at 267-73. The GATT Panel Report concerning Japanese import restrictions against United States leather products found quotas as violative of Article XI. MPEAA's First Petition, *supra* note 138, at 9. Additionally, the GATT Panel Report by Canada against the United States found import restrictions violative of Article XI. GATT Panel Report, L/4931, at C/M/138, 139, 141, 144, 154, 155, 156, 157, 159 (Feb. 22, 1982).

212. MPEAA's First Petition, *supra* note 138, at 6.

213. *See supra* notes 155-61 and accompanying text.

214. *See supra* note 9 and accompanying text.

215. *Id.*

216. MPEAA's First Petition, *supra* note 138, at 4-6. Yet another GATT Panel Report found EEC measures against Chilean apples not in conformity with Article XIII. GATT Panel Report, L/4805, 4807, 4816, at C/M/134, 135, 138, 144 (Nov. 18, 1980).

inconsistent results.²¹⁷ For example, a majority contribution by a European entity into a United States movie studio's production could be dubbed a European work. If that investment is less than a majority it will not be considered a European work. This type of discriminatory treatment is a GATT breach.²¹⁸

2. The Directive and GATT Article III(4)²¹⁹

It is anticipated that the number of United States and other non-European audio-visual products aired in Member States will decline because of artificially decreased demand. The discriminatory effects, according to the MPAA's Petition to the United States Trade Representative, are as follows:

The discrimination has a direct impact on . . . [non-European] sales within the [European Community] E.C., their distribution and their use. In restricting the amount of U.S. programming that can be aired in the Member States of the E.C., it directly affects their use and distribution. It also affects their internal sale, offering for sale and purchase, by affecting the volume of U.S. audiovisual works that will be purchased by broadcasters. Purchasers are already arguing for lower prices, because of their limited ability to use these programs in the future.²²⁰

In contrast to this impediment, audio-visual product bearing a "European label" is afforded unrestricted access to the airwaves.

3. The Directive and GATT Article I(1)²²¹

Member States' producers can control what will be interpreted as "European works" by merely increasing or decreasing their level of investment. The definition of the work is not a substantive determination, but is qualified in economic terms. Inconsistent results may arise because identically produced works could feasibly be defined as "European works" in some cases while "non-European" in other cases. For example, if a European Community producer invests in six of thirteen episodes of a

217. See *infra* note 219 and accompanying text.

218. MPEAA's First Petition, *supra* note 138, at 4-6.

219. See *supra* note 209 and accompanying text.

220. MPEAA's First Petition, *supra* note 138, at 7.

221. See *supra* note 210 and accompanying text.

television series, those six episodes in which he invested would be considered "European works" while the other seven episodes produced solely by finances of a United States producers would not be considered "European works." These arbitrary results constitute a breach of GATT obligations.

4. GATT Article XX Exceptions

Article XX lists certain exceptions to the GATT. However, "cultural exceptions" have never been recognized.²²² Denial of such "cultural exceptions" makes sense because all contracting parties could justify invoking cultural exceptions with plausible arguments indicating a nexus between imports and injury to their respective cultures. Article XX(f) provides for "the protection of national treasures of artistic, historic or archaeological value."²²³ A broad reading of this clause could encompass "cultural exceptions," which would be tantamount to the exception swallowing the rule. The GATT seeks to avoid such capricious "disguised restriction[s] on international trade." It is difficult to ascertain when a culture would be legitimately injured because of imported works. An argument can be made that these goods bring about positive social and cultural change. Curtailing such a beneficial change is directly antithetical to the aims of GATT.²²⁴ Even if a cultural exception was recognized, the use of non-content based quotas, with their incongruous results, is not justified under the Directive.

The European Community has justified the cultural exception by analogizing to the United States-Canada Free-Trade Agreement²²⁵ and asserting an estoppel like defense. In the Agreement, the United States and

222. The GATT panel specifically denied cultural exceptions in one instance in which the GATT Panel held that "the special historical, cultural and socioeconomic circumstances referred to by Japan could not be taken into account . . . in light of GATT provisions . . . those provisions did not provide such a justification for import restrictions" GATT Panel Report, L/5440, 5462 C/M/166 (May 15-16, 1984).

223. Article XX provides: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (f) imposed for the protection of national treasures of artistic, historic or archaeological value." HILF, *supra* note 190, at 287-88.

224. *Id.* at 251.

225. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

Canada agreed to afford different treatment for "cultural industries." The European Community alleged that since the United States afforded Canadian cultural industries different treatment, the United States could not object when the European Community chose to regulate culture distinctively.²²⁶ However, it is Canadian, and not United States "cultural industries" which are afforded protection because the "cultural industries" exception in the Canada-United States Free-Trade Agreement came about at *Canada's* insistence. Further, the agreement between the nations was executed in order to protect Canadian "cultural industries," and not merely Canadian culture. During negotiations, it was the United States' position that there should not be any cultural exceptions.²²⁷ Moreover, the contractual terms of the agreement between Canada and the United States are not in contravention of the contracting parties' GATT obligations. Thus, the European Community's contention that the Directive quotas are GATT-compatible under a cultural exception because the United States and Canada agreed to treat their "cultural industries" differently is non-supportable.

VII. LEGALITY UNDER EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, ARTICLE 10

A contradiction exists between Article 10 of the Convention for the Protection of Human Rights, which allows for the free flow of information regardless of borders,²²⁸ and the Directive/Convention quotas which

226. *The Effects of Greater Economic Integration Within the European Community on the United States: Third Follow-up Report*, U.S. Int'l Trade Comm'n, No. 2368 (Mar. 1991), available in LEXIS, Itrade Library, Allitc File.

227. United States Trade Representative Carla Hills stated, "[W]e just agreed to disagree, and we still disagree . . . if we can make improvements and enhance the competitiveness of this region then of course we will do so. We are not walking away from the Canada Free Trade Agreement." *Hills Doubts Trade Pact Threatens Canada's Culture*, 1 AMERICAN BANKER-BOND BUYER 27 (Aug. 19, 1991). The Canada-United States Free-Trade Agreement was submitted to the GATT for approval and passed. The question of whether contracting parties can bilaterally agree amongst themselves to contract away rights assured under the GATT was raised, caused tension and was never resolved. It can be deduced that an expansive trade agreement, such as the instant one, would not have been denied over this relative minor point and in light of the still looming Uruguay Round. *Id.*

228. TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (Antonio Cassese & Andrew Clapham eds. 1990). Article 10(1) provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

obstruct that free flow.²²⁹ Three justifications attempt to reconcile this contradiction. First, some of the Directive's architects have argued that the quotas address the "origin of the programme and not . . . its content."²³⁰ This "control of production" rationale still does not explain away the fact that the free flow of programming is curtailed. Second, the contradiction is a result of "a very difficult political and legal negotiation . . . advanced in relation [of] the means to be used to sustain and support audio-visual production."²³¹ This "lesser of two evils" approach neither addresses the inconsistent effects nor rationally justifies the anomaly. Third, some have argued that the quotas actually serve as a positive means of promoting the free exchange of information.²³² This can be supported by the fact that a broad interpretation of Article 10 authorizes the imposition of quotas as part of the licensing scheme. Such power presumably is intended to allow for an increase of protection of the stations which would be able to broadcast a diversity of views. However, a broad interpretation which allows quotas while limiting the flow of information as a means of bolstering the free flow of information is an absurdity which allows the exception to swallow the rule. Despite the three justifications advanced by various groups, Article 10 appears to be incompatible with the Directive quota provisions. Under the Directive, the "right" to receive information freely operates only with regard to European information, within European borders. Outside these parameters, the right to receive non-European productions is limited.

This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." *Id.* at Annex 1.

229. Shaugnessy & Cobo, *supra* note 2, at 193-94. Article 4 of the Convention, which provides for the free flow of information, states: "The Parties shall ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention." *Convention, supra* note 14, at 61.

230. TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION, *supra* note 228, at 209.

231. *Id.* at 195.

232. *Id.* at 204-09. Pursuant to Article 10(1), clause 3, authorization to regulate by imposing quotas can be part of the licensing scheme. *Id.* at 206.

VIII. UNITED STATES' RESPONSE TO THE DIRECTIVE

Under the Omnibus Trade and Competitiveness Act of 1988,²³³ provisions for the protection of and market access for intellectual property rights come under the sphere of "Special § 301."²³⁴ Under "Special § 301," authority is transferred from the President to the USTR to determine whether unfair trade practices are actionable and whether retaliation is appropriate under the circumstances.²³⁵ The USTR is required to identify foreign countries that deny adequate and effective intellectual property protection or deny fair and equitable market access for United States concerns. Suspect countries are labeled "Priority Foreign Countries."²³⁶ Once a country is so labelled, the USTR must then adhere to stringent timing and investigatory procedures to determine if any response is warranted.²³⁷ Countries whose acts, practices, and policies do not rise to the level of a "Priority Foreign Country," yet affect United States intellectual property owners' interests in negative ways may be placed on a "Priority Watch List."²³⁸ The USTR closely monitors "Priority Watch List" countries and undertakes informal conciliatory steps toward resolution of problems with such countries. Countries whose acts, practices, or policies regarding intellectual property protection or market access that cause particular concern, but with no ascertainable negative effect, are placed on a "Watch List."²³⁹ The USTR then undertakes informal efforts in the hopes of resolving tensions with these countries.²⁴⁰

On April 26, 1991, the USTR placed the European Community on its "Priority Watch List" because of its restrictive quota on U.S. television broadcast material.²⁴¹ Immediately, the USTR began addressing market access issues with the European Community.²⁴² On February 21, 1992, the Motion Picture Export Association of America, along with the International Intellectual Property Alliance, urged the USTR "to retain the

233. 19 U.S.C. §§ 2411-2420 (1988).

234. 19 U.S.C. § 2411(a)-(b) (1988).

235. *Id.*

236. 19 U.S.C. § 2242(a)(2), (b), (c) (1988).

237. *Id.* § 2242 (b), (c).

238. *Hearing of the International Trade Subcommittee of the Senate Finance Committee, "Intellectual Property Rights Protection and 'Special 301,'" Fed. News Serv., Mar. 6, 1992, at 2.*

239. *Id.*

240. *Id.*

241. *Hills Announces Implementation of Special 301 and Title VII, USTR Press Release, Apr. 26, 1991.*

242. *Id.*

European Community on its 'Priority Watch List' while considering designation of the [Community] as a 'Priority Foreign Country' if no progress is made toward a resolution of its restrictive quotas on U.S. film and television product."²⁴³ Bilateral discussions have been unproductive thus far and the stalemate will likely continue given the European Community's uncompromising position.²⁴⁴ The European Community's adamant insistence upon an annex to the GATT that would place television outside the domain of the GATT treaties further underscores the European Community's strong commitment to the Directive.²⁴⁵

The chance of the European Community being questioned as a result of its elevation to "Priority Foreign Country" status is unlikely in light of ongoing developments. To call the European Community's support of the Directive into question would cause the USTR to make determinations which are fraught with a host of other political repercussions. The USTR must consider that the European Community is our largest trading partner.²⁴⁶ Even if the USTR determines that relief under "Special § 301" was warranted, enforcing that relief could result in recriminations. The current embroglio will only become further entangled. By maintaining the European Community on the "Priority Watch List," the United States government takes the middle ground; the government's concern is symbolized, and the entertainment industry is mollified for the short term.²⁴⁷

If the status quo continues, United States television earnings in Europe will continue to decrease, European broadcasters who depend on American

243. MPEAA News Release at 11 (Feb. 21, 1992).

244. *U.S., EC Unlikely to Compromise on GATT Trade Talk*, Japan Econ. Newswire, Apr. 18, 1992, available in LEXIS, Nexis Library, Omni File. Japanese government officials stated: The United States and the European Community are unlikely to reach a compromise on farm subsidies in the Uruguay Round multilateral trade talks. . . . [R]easons for the pessimistic views are speculations that [the EC Commission President] cannot negotiate effectively because there was no . . . earlier. . . coordination within the EC and the timing and environment in the U.S. and the EC are not [enough] ahead of the U.S. presidential election in November and the EC's market integration

Id.

245. *Television: Worrisome US Domination?*, Tech Europe, Apr. 2, 1992, available in LEXIS, Nexis Library, Omni File. Dominique Wallon, head of Centre National du Cinema stated "the imperialist monopolistic policy" undertaken by the United States at GATT jeopardizes the "very survival" of European audiovisual production." *Id.*

246. See *supra* note 39 and accompanying text.

247. *Hills Announces Implementation of Special 301 and Title VII*, *supra* note 241. Ambassador Hills announced that the European Community would continue to remain on the "Priority Watch List" for restricting access to United States audiovisual imports due to the Broadcast Directive. *Id.*

product will find it harder to stay on the air and, most importantly, the viewing public will be deprived of their right of free choice. For the United States' entertainment industry, the solution to these problems must come from the private sector, not governmental intervention. Indeed, private enterprise is already availing itself of Directive loopholes.

IX. UNITED STATES AND EUROPEAN ENTERTAINMENT INDUSTRY RESPONSES

In response to the Directive and its quotas, United States entertainment companies have explored ways to use the "control of production" requirements to their own advantage. Paramount Communications purchased forty-nine percent of Europe's leading independent television producer, Carlton Communications Plc.'s Zenith Productions.²⁴⁸ Capital Cities/ABC Video Enterprises purchased fifty percent of a German production house, Telemunchen, and became involved in Spanish co-production.²⁴⁹ NBC aligned itself with Britain's Yorkshire Television.²⁵⁰ The owners of *The Wheel of Fortune*, the world's most popular game show, have "format-licensed" the show into Europe. Format licensing is when the concept for the show is licensed but the show is produced in the country where the license was granted. Such a production is usually staged in the native language and utilizes local personalities and contestants.²⁵¹ This list hardly begins to illustrate the many ways the industry has endeavored to escape the Directive's mandate.²⁵² Likewise, broadcasters in Europe have invested in United States companies in an effort to gain access to valuable libraries or to take advantage of the "control of the production" exceptions. British broadcaster Television South bought United States producer MTM for \$320 million. Investors such as West Germany's Bertelsmann and Leo Kirch Group, Fininvest of Italy, France's Canal Plus, Bouygues, Compagnie General des Eaux and Holland's Philips each have substantial investments

248. *Tuning in To Europe*, TIME MAG., Nov. 27, 1989, at 77.

249. *Europe and America Prepare for 1992*, BROADCASTING, Apr. 17, 1989, at 40.

250. Matthew Fraser, *Battle of TV Quotas Heats Up in Europe; EC Directive Leaves Few Satisfied*, INT'L HERALD TRIB., Oct 7, 1991, Special Rep., at 1.

251. Wingard, *supra* note 200, at 5.

252. Maggiore, *supra* note 40, at 79-85. The following were considered as having European presence in 1987: Cablevision, Cannon, CBS, CNN (TBS), ESPN, Hughes Communications, Lorimar Telepictures, MTV, Murdoch, NBC, Samuel Broadcast, Time-Warner, UIP, Viacom and Worldvision. *Id.*

in United States production companies.²⁵³ In sum, quota loopholes will be plentiful for United States producers and European broadcasters with the financial ability to structure their businesses in a way to take advantage of these opportunities.

X. CONCLUSION

The growth of television services will continue to expand. As political change swiftly transforms both European and Asian continents, some harmonization of certain standards is beneficial to free world markets. For markets to operate optimally, whether for cars and kitchen appliances or for reruns of *Gilligan's Island*, they must be free from unnecessary and burdensome government regulation and restrictions. However, the European Community has instituted the Directive with its additional restrictions and regulations. Television occupies a special place in commerce because it has the power to influence opinion and demand. Restrictions in this area are extremely dangerous because of their potential impact.

The Directive's quota provisions negatively affect the United States and to a certain degree, the European entertainment industry; they hamper the viewing public's free discretion, and they undermine present and future bilateral and multilateral treaties such as the GATT.

Promoting culture, although a legitimate concern, is only an incidental and ill-defined aim of the Directive. The actual aim is cornering the television market. The Directive's quotas create an internal "protected" market. The Directive's provisions serve no purpose other than to guarantee an industry access to a vast and ever-growing market.

The European Community may be headed toward a confrontation with the United States. Initial comments from the Clinton administration indicate that existing statutory authority to counter against EEC protectionism, such as the kind posed by the quotas, may be invoked and applied. The visible nature of the controversy and the likelihood of support from the public makes the Directive a prime target for retaliatory action.

With the Directive in place, it is virtually assured that demand for television programming will out-pace supply. Instead of restricting supply,

253. *Going Hollywood: Foreign companies look for part in U.S. Studios*, BROADCASTING, Apr. 17, 1989, at 40. See William Fisher & Mark Schapiro, *Four Titans Carve Up European TV*, THE NATION, Jan. 9-16, 1989, at 1 (analysis of the influence of Robert Maxwell, Rupert Murdoch, Leo Kirch and Silvio Berlusconi in the European television market).

Europe should strive to better address demand. One of the most redeeming qualities of the United States entertainment industry is its freedom of production, which is attuned to the dictates of consumer demand. As long as demand exists, programs will continue to be produced. The industry as a business does not concern itself with the metaphysics of art; that is left to the artisans, the technicians and the talent. In this way, masterpieces will continue to surface amidst the mire of audiovisual trash. The United States entertainment industry obviously is doing something right, otherwise there would be no need for Europe's imposition of quotas. The European entertainment industry should do likewise and allow the consumers, not the Eurocrats, to decide what to watch on the "telly."

