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"Television Without Frontiers": Possible U.S. Responses

Vincent Bela Feher

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“TELEVISION WITHOUT FRONTIERS”: POSSIBLE U.S. RESPONSES

VINCENT BELA FEHER*

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For their inspiration and guidance, Mr. Fehér wishes to dedicate this Article to Professor Detlev Vagts of the Harvard Law School, James Primm, Esq., and Katherine Goodman, Esq.

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I. INTRODUCTION

The Council of the European Communities passed the *Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*,¹ popularly known as *Television Without Frontiers*, on October 3, 1989. The Directive has become a center of controversy due to its impact upon the trade of television programs, especially American, in the European Television Market. The debate over the Directive has taken the form of both economic and political arguments, as well as basic statements of legal positions.² Commentators have summarized these positions and made comparisons to other international attempts at broadcast regulation.³ However, to date no in-depth legal analysis has evaluated the substance of the positions adopted by the parties directly affected by the Directive.

This Article assumes the perspective of legal counsel to the United States. It explores bodies of international law that are available as a basis for constructing a response to the Directive. Part II of this article briefly explores the European Community [hereinafter EC] goal of offering an integrated Europe as conceptualized in the Single European Act.⁴ Part III describes the Directive, paying particular attention to the quota provision for non-EC works contained in Article 4 of the Directive, and the definition of European Works. Part IV examines the context for the enactment of the Directive. It traces the roots of Article 4, the history of European broadcasting legislation, and the debate surrounding the Directive. Part V analyzes the international financial stakes in the regulation of television broadcasting. Part VI proposes the first of three possible United States responses to the Directive. Part VII examines the argument that the Directive is a violation of the OCED Code of Liberalization of Current Invisible Operations. Part VIII examines the argument that the Directive is a violation of the international doctrine of the free flow of information. Finally, Part IX describes the repercussions of allowing the Directive to violate

1. Council Directive No. 89/552, 1989 O.J. (L 298) 23 [hereinafter *Directive*].

2. Fred H. Cate, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 372 (1990).

3. *Id.*

4. Single European Act, BULL. EUR. COMM. Supp. No. 2/86.

principles of free trade and the doctrine of the free flow of information.

II. THE EC GOAL OF AN INTEGRATED EUROPE

The Directive, which regulates television broadcasting, is one of over twelve directives enacted by the European Commission⁵ designed to remove trade barriers and liberalize regulations between member states within the EC.

The EC enacted these directives as part of an overall plan to accelerate the formation of a barrier-free Europe. The Single European Act of 1986, gave the EC a self-imposed deadline of December 31, 1992, to create a single European Market which is free of all trade barriers between member countries.⁶ In an effort to achieve this goal, the Council of Ministers⁷ adopted the above mentioned directives, covering a wide variety of areas including banking, investments, securities, intellectual property, and television broadcasting.⁸

III. THE DIRECTIVE DESCRIBED

A. *The Broadcast Directive as a Whole: Salient Features*

The Directive regulates European Broadcasting through two methods. First, it introduces measures which increase the free flow of broadcast material within Europe and eliminates individual member state regulation that "impedes the free movement of broadcasts within the Community and may distort competition within the common market."⁹ Second, the Directive imposes limi-

5. The European Commission is the administrative body of the EC and is responsible for implementing the 1992 Program. It has seventeen members: two from France, Italy, Spain, the United Kingdom, and the Federal Republic of Germany; and one from each of the other member states. Fred H. Cate, *The European Broadcasting Directive*, Apr. 1990 A.B.A. SEC. INT'L. L. & PRAC., at 1, n.4.

6. The objective was to create a single market in which "the free movement of goods, persons, services, and capital is ensured." See 298 U.S.T. 11, 17, supplemented by the Single European Act 1986; the EC Commission White Paper of 1985, *Completing the European Market*.

7. The council is composed of the ministers from each Member State, with each Member State having between two and ten votes, depending upon the country's size. The council of Ministers may accept or reject, but not modify, measures proposed by the commission. Cate, *supra* note 5, at 1, n.5.

8. *Id.*

9. Directive, *supra* note 1, at pmbl. ¶ 13-1.

Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broad-

tations upon the type of material which may be broadcast in the community and how it may be presented.¹⁰ It regulates the content and quantity of advertising and the content of programming to protect minors and assure moral suitability.¹¹ Additionally, it guarantees a right of reply to persons injured by factually incorrect broadcasts.¹² It requires that a majority of the programming be devoted to "European Works," and that at least ten percent be reserved for European Works created by producers who are independent of broadcasters.¹³ It also regulates the means by which broadcast material may be presented,¹⁴ the placement of advertising within programs,¹⁵ and requires the clear identification of programming sponsors.¹⁶

For purposes of this discussion, Article 4 is the most significant Directive provision. It requires that:

1. 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.¹⁷

The basic point of Article 4 is to require that European Broadcasters devote a majority of their transmission time to "European Works" excluding time appointed to news, sports events, games, advertising, and teletext services.

casts within the Community and may distort competition within the common market;

Whereas all such restrictions on freedom to provide broadcast services within the Community must be abolished under the Treaty; . . .

Id.

In conjunction with this statement of purpose to abolish unnecessary restrictions on the movement of broadcast services, the Directive creates the principle that "[m]ember states shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive." *Id.* at art. 2(2).

10. *Id.* at ch. 2.

11. *Id.* at ch. 5.

12. *Id.* at ch. 6.

13. *Id.* at art. 5.

14. *Id.* at art. 4.

15. *Id.* at art. 11.

16. *Id.* at art. 17.

17. *Id.* at art. 4.

B. *The Definition of "European Works"*

A "European Work" is not defined by the content of the work, but rather by the identity of the producer, the talent involved in the production, and the location of the production.¹⁸ American programs such as *Charles in Charge*, *LA Law*, or *Dallas* could all have been "European Works" had they been made by European producers and talent in European Countries. The fact that they contain no European themes and reflect only American culture has no impact upon their qualification as "European Works" under the Directive.¹⁹

"European Works" are broken down into several categories.²⁰ The first category of programming may be referred to as Community Works. Community Works must meet three requirements.

18. *Id.* at art. 6

19. *Id.* at ch. 3.

20. Article 6 of the Directive defines "European Work" as follows:

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 3.

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 (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 [sic] 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 or 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.

First, they must originate from a member state of the EC.²¹ Second, they must be works "mainly made with authors and workers residing in" one or more Member State of the Community.²² Third, they must meet one of three requirements: (1) they must be made by one or more producers established in one or more EC states, or (2) their production must have been supervised and actually controlled by one or more producers established in one or more EC states, or (3) the contribution of co-producers of EC states to the total co-production costs must be preponderant and the co-production must not be controlled by one or more producers established outside EC states.²³

The second European Works category may be called "European Convention Party Works." Such works must meet requirements similar to those for Community Works. They must originate from European Third States party to the European Convention on Transfrontier Television of the Council of Europe.²⁴ They must have been created predominantly by authors and workers residing in at least one of those states.²⁵ In addition, they must meet one of the following three requirements: (1) they must be made "by one or more producers established in one or more of those States;"²⁶ or (2) their production must have been "supervised and actually controlled by one or more producers established in one or more those States;"²⁷ or (3) "the contribution of co-producers of those States to the total co-production costs must be preponderant and the co-production must not be controlled by one or more producers established outside those States."²⁸

Works referred to as European Third Country Works comprise the third category. These works must originate from European Third Countries which either were not EC members or a party to the European Convention on Transfrontier Television of the Council of Europe.²⁹ Additionally, they must be "made exclusively or in co-production with producers established in one or more [EC] State [sic] by producers established in one or more European third countries with which the Community will conclude

21. *Id.* at art. 6(1)(a).

22. *Id.* at art. 6(2).

23. *Id.* at art. 6(2)(a)-(c).

24. *Id.* at art. 6(1)(b).

25. *Id.* at art. 6(2).

26. *Id.*

27. *Id.*

28. *Id.* at art. 6(2)(a)-(c).

29. *Id.* at art. 6(1)(c).

agreements in accordance with procedures of the Treaty [of Rome]."³⁰ Finally, the works must be made mainly by "authors and workers residing in one or more European States."³¹

A final category may be referred to as Partial European Works. This category applies to works "made mainly with authors and workers residing in one or more [EC] States," but which still fail to qualify as European Works under the previously mentioned categories.³² Such a work can be considered a Partial European work to the extent corresponding to the "proportion of the contribution of Community co-producers to the total production costs."³³

C. The Scope of Article 4: The Majority Requirement

Although Article 4 generally requires that member countries ensure broadcasters reserve a majority proportion of their broadcast time for "European Works," member states are exempted where attaining such a majority proportion is not practicable.³⁴ A member state must meet two conditions to be exempt. First, it must maintain an average proportion of European works not lower than the average for 1988 in the Member State concerned.³⁵ Second, every two years the state must provide the Commission of the European Communities with a report that includes a statistical statement on the achievement of the Article 4 proportion and an explanation for failure to attain that proportion.³⁶ The Commission must inform other Member States and the European Parliament of the reports and submit an accompanying opinion concerning the progress of Member States' compliance with the Directive. In making these progress reports the Commission can consider the progress achieved in relation to previous years, the particular circumstances of new television broadcasters, the specific situation of countries with a low audiovisual production capacity,³⁷ and the share of first broadcast works in the programming.³⁸

30. *Id.* at art. 6.

31. *Id.* at art. 6(3).

32. *Id.* at art. 6(4).

33. *Id.*

34. *Id.* at art. 4(1).

35. *Id.* at art. 4(2).

36. *Id.* at art. 4(3).

37. *Id.*

38. *Id.*

IV. THE CONTEXT FOR THE ENACTMENT OF "TELEVISION WITHOUT FRONTIERS"

A. *The Roots of Article 4*

Experts who work with producers attempting to qualify their entertainment products as "European Works" believe that the Directive's structure was taken from an older "grant system." In the "grant system," benefactor countries awarded grants to producers who created products which furthered cultural or economic goals of the awarding country.³⁹ Producers received funds based on how well their product met criteria established by benefactor countries.⁴⁰ "Grant system" countries used economic subsidies to bolster their film industry and encourage films of national cultural significance, whereas, the Directive uses a negative regulatory scheme to exclude material which does not further its analogous goals.

A present-day example of the grant system is the Canadian Feature Film Fund created in 1986, to promote the production and theatrical distribution of high quality Canadian dramatic films.⁴¹ The criteria which the Fund uses to award grant money is similar to the Directive's requirements for a product constituting a European Work.⁴² To be eligible for grants from the Fund "production, distribution, and sales companies must be under Canadian ownership and control."⁴³ This requirement resembles the Directives requirements which must be met to constitute European Works; that producers of either European Convention or EC states control and supervise the production of the audiovisual product.⁴⁴ The Fund also gives priority funding to productions which use Canadian "talent and technicians."⁴⁵ This also resembles the Directive's requirements for works to qualify as European Works: that the works be made mainly with authors and workers residing in either European Convention or EC states.⁴⁶ However, the Fund criteria differs from the Directive's requirements. The Fund gives priority,

39. Telephone Interview with Kathy Goodman & James Primm, Associates, Entertainment Department, White and Case, Los Angeles, California (Jan. 8, 1991).

40. *Id.*

41. See TELEFILM CANADA, *Feature Film Fund—Policies 1989-1990* (1989) [hereinafter *Fund*].

42. *Id.* at pt. 2(3).

43. *Id.*

44. See *supra* text accompanying notes 12-16.

45. *Fund, supra* note 41, at pt. 2(1).

46. See *supra* text accompanying notes 12-16.

to productions which have the highest proportion of Canadian creative elements, Canadian stories, themes, talent and technicians. The Corporation [The Fund] does not intend to restrict filmmakers in their choice of subjects but will favour [sic] projects that present a distinctly Canadian point of view or set in a clearly Canadian context.⁴⁷

Therefore, the Fund, unlike the Directive, seeks Canadian content or themes from the producers whom it supports. It is interesting to note that the Directive does not such have a content or "theme" requirement given that its supposed purpose is to ensure that European broadcasting become more culturally European.⁴⁸

B. *The History of European Broadcasting Legislation*

1. Conceptualizing "Television Without Frontiers"

The concept of "Television Without Frontiers" was formally introduced as an alternative to the old European regulatory scheme in a European Commission report entitled *The Green Paper on the Establishment Of the Common Market for Broadcasting, Especially by Satellite and Cable*.⁴⁹

The old European broadcast scheme consisted of a myriad of state centered regulations.⁵⁰ States had in place idiosyncratic rules requiring varying amounts of television of national or EC origin. Some states were quite severe in their television regulation. Britain, for example, required that its television stations cumulatively show "a reasonable proportion" of European programs.⁵¹ As of 1989, the government's interpretation of "reasonable" was eighty-six percent. This figure included news, sports, and quiz shows.⁵² As a result of negotiations with labor unions, Britain required that no more than fourteen percent of a broadcaster's programming could be produced outside England.⁵³ Television stations in France were

47. *Fund*, *supra* note 41, at pt. 2(1)(a).

48. Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L. & COMP. L. REV. 495, 504 (1990). Note that the directive's lack of a "content" requirement is an issue which will be discussed throughout this Article. It bears on whether the purpose of the Directive is cultural or economic. *Id.*

49. COM (84) 300 final (June 14, 1984) [hereinafter *Green Paper*].

50. Laurel Wentz, *EC Considers TV Restrictions*, ADVERTISING AGE, Nov. 3, 1986, at 69.

51. *Buddy, can you spare a reel?*, ECONOMIST, Aug. 19, 1989, at 56.

52. *Id.*

53. *Communications Policy Advisory Group Urges Single U.S. Representative to EC on 1992*, 6 INT'L. TRADE REP. 958 (July 19, 1989) [hereinafter *Advisory Group Urges*].

barred from broadcasting more than 192 movies per year; only forty percent of which could be produced in non-EC countries.⁵⁴ This resulted in a limitation per French television station of seventy-six U.S. films per year, irrespective of the size of the station.⁵⁵ France required that at least fifty percent of its entertainment programming be French produced.⁵⁶ News, sports, variety shows, game shows, and talk shows did not qualify for meeting the quota of French or EC-produced shows despite the fact that these "non-fiction" shows were mainly of French origin. Consequently, the portion of the total broadcasting time available for non-EC programming was closer to thirty percent.⁵⁷ France put teeth into its regulations by imposing a \$10,000 fine on its broadcasters for each hour they violated the quotas.⁵⁸ The threatened fines resulted in the cancellation of several multi-million dollar agreements which French television stations had with U.S. studios.⁵⁹

Other European countries have instituted their own broadcast regulations. Spain limited non-EC production of its three private stations to forty-five percent.⁶⁰ Holland restricted advertisements on foreign programs specifically aimed at the Dutch public.⁶¹ Italy limited non-EC programming to sixty percent of total programming, but essentially ignored the quota.⁶² In contrast, Denmark, Greece,⁶³ and Germany,⁶⁴ had little or no regulation.

The *Green Paper* recommended changing this patchwork of nationally based broadcast regulation. First, it provided an overview of the existing technical and legal framework of broadcasting regulation within the member states.⁶⁵ Then, it then argued that enhancing inter-European transmissions would be a "source of cul-

54. *Television Broadcasting and the European Community: Hearings Before the Subcomm. on Telecommunications & Finance of the House Comm. on Energy and Commerce*, 101st Cong. 2d Sess. 7 (1989) [hereinafter *House Hearings*] (statement of Richard Frank, President, Walt Disney Studios).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. These restrictions prevent foreign program distributors from carrying advertisements in Dutch, giving prices in Dutch currency, giving addresses of commercial outlets in Holland or featuring products only available in the Netherlands. Raymond Snoddy, *Television Without Frontiers Meets Dutch Resistance*, FIN. TIMES, Apr. 16, 1985, § I, at 5.

62. *Id.*

63. Paul Anastasi, *Greece Opens the Way to Private TV*, N.Y. TIMES, July 29, 1989, at D19.

64. *House Hearings*, *supra* note 54.

65. Presburger & Tyler, *supra* note 48, at 496.

tural enrichment."⁶⁶ It would create a momentum for technological innovation in the European media⁶⁷ and would halt American dominance of the media industry.⁶⁸

2. The Process of Legislating "Television Without Frontiers"

The birth of the Directive was a multi-stage process. In January of 1988 the European Parliament voted in favor of a European "Television without Frontiers" by a 328-11 margin.⁶⁹ However, the Parliament had no power to enforce its decision.⁷⁰ When the plan went to the Council it ran into trouble when six of the twelve member countries refused to accept it at a meeting in Luxembourg.⁷¹ France, Belgium, the Netherlands, Denmark, and the former West Germany objected to the insertion of the concept that only "where practicable" would the Directive require member states to have a majority proportion of European Works.⁷² France and Belgium wanted strict quotas imposed on U.S. made programs. The Commission, the executive body responsible for enforcing community law, felt that quotas of any kind violated the basic principle of the free movement of goods and services enunciated in the EC's founding treaty.⁷³ Britain and West Germany questioned the rules on the grounds that they encroached on their national responsibilities.⁷⁴ They and other EC countries objected because they did not believe that the EC's authority included the power to regulate cultural affairs.⁷⁵

In response to this apparent deadlock, the European Commission initiated legal action against France, Belgium, and the Netherlands "over restrictions protecting their national television channels from cross-border broadcast[ing]," European Commission officials said.⁷⁶ However, officials of the European Commission ac-

66. *Green Paper*, *supra* note 49, at 30; see also Presburger & Tyler, *supra* note 48, at 496-97.

67. *Green Paper*, *supra* note 49, at 53; see also Presburger & Tyler, *supra* note 48.

68. *Green Paper*, *supra* note 49, at 33; see also Presburger & Tyler, *supra* note 48, at 497.

69. *European Parliament Votes for Europe-Wide Television*, REUTERS, Jan. 20, 1988 (AM cycle).

70. *Id.*

71. *European T.V. Plan Rejected*, N.Y. TIMES, June 15, 1989, at D2.

72. *EC Attacks French, Dutch, and Belgian TV Restrictions*, REUTERS, July 19, 1989 (AM cycle) [hereinafter *EC Attacks*].

73. *Id.*

74. *Buddy, can you spare a reel?*, *supra* note 51.

75. *Id.*

76. *EC Attacks*, *supra* note 72.

knowledge that the underlying purpose of the lawsuit was to make a political statement and illustrate how badly uniform EC broadcast regulation was needed.⁷⁷

The Directive was enacted with the "where practicable" wording in place. France succumbed to pressure from West Germany, Britain, the Netherlands, and Denmark to moderate its proposal.⁷⁸ Even with the moderation, the final vote was not unanimous, with two of the twelve nations voting against it.⁷⁹ It is hypothesized that some smaller countries did not support the quotas because it was cheaper for broadcasters in those nations to buy American shows than to produce them themselves.

C. *The U.S. Response*

The U.S. government, U.S. industry, and European television entrepreneurs strongly opposed the Directive as passed by the European Parliament.⁸⁰ Initially, U.S. industry conducted strong public and private anti-Directive lobbying at the highest levels of European Government.⁸¹ However such efforts failed to produce results.⁸² The U.S. government and industry argued that the failure was due to the lack of access to the EC's legislative process.⁸³

The United States House of Representatives, denounced the Directive, calling it a trade restriction and declaring it to be in violation of the General Agreement on Tariffs and Trade.⁸⁴ The House Resolution requested that the United States take retaliatory action.⁸⁵ In Congress, Representative Bill Richardson (D-N.M.)

77. *Id.*

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

79. *Id.*

80. Fred Hift, *TV Trade War Heats Up*, CHRISTIAN SCIENCE MONITOR, Nov. 2, 1989, at 10.

81. David Webster, *The Phony War: European TV Quotas & American Excitement*, (Remarks by David Webster to the Mid-Atlantic Club at the Carnegie Endowment for Int'l Peace) (D.C. Nov. 9, 1989).

82. *Europe Adopts TV Plan Opposed by US*, CHRISTIAN SCIENCE MONITOR, Oct. 6, 1989, at 3.

83. *U.S. Disappointed By TV Directive, USTR Task Force Report on EC 1992 Says*, 7 INT'L. TRADE REP. 809, June 6, 1990.

84. 135 CONG. REC. H7, 326-27 (daily ed. Oct. 23, 1989) (referencing General Agreement on Tariffs & Trade, Jan. 1, 1948, 61 Stat. (5), (6), T.I.A.S. No. 1700, 55-61 U.N.T.S.) [hereinafter GATT].

85. House Resolution 257 urged that "the President and the United States Trade Representative take all appropriate and feasible action under its authority, including possible action under Section 301 of the Trade Act of 1974, to protect and maintain United State's access to the EC broadcasting market." CONG. REC., *supra* note 83, at 327.

threatened to introduce legislation banning the Corporation for Public Broadcasting from buying BBC and other European programming.⁸⁶

In the international arena the United States formally challenged Article 4 of the Directive in the presence of the ruling council of GATT.⁸⁷ The EC responded by saying that it did not believe that GATT was the correct forum for the dispute.⁸⁸ However, non-EC countries agreed to discuss the subject.⁸⁹

After the initial flurry of opposition to the Directive, U.S. government and industry took a more "low-key" approach. They "put[] mild, but constant pressure on the EC in GATT, and push[ed] for the subject of services to be negotiated at the Uruguay rounds, but [did] not provok[e] any major confrontations with the EC."⁹⁰ However, the U.S. government is presently considering taking France to GATT over the "French Decree,"⁹¹ which requires French broadcasters to devote at least sixty percent of their programming time to European Works and fifty percent to French material.⁹²

V. INTERNATIONAL FINANCIAL STAKES IN THE REGULATION OF ENTERTAINMENT BROADCASTING

The ramifications of non-EC broadcasting quotas can be understood by analyzing the European market for television.

A. *The Magnitude of the U.S. Industry Stake*

American entertainment products are the second biggest U.S. export.⁹³ As of 1989, over \$1 billion worth of American films and television programs were shown on European television stations.⁹⁴ Statistics show that U.S. exports of films for European television are rapidly increasing. The total U.S. film industry sales in Europe, including receipts from box office, television, and video sales were

86. Cate, *supra* note 2, at 411; see also *Hubbub Intensifies; Congress Lashes Out at European TV Content Restrictions*, 9 COMM. DAILY 1, Oct. 13, 1989.

87. Presburger & Tyler, *supra* note 48, at 506.

88. Laura Raun, *A Dramatic Change on the Media Landscape*, FIN. TIMES, Oct. 19, 1989, at 6.

89. *Id.*

90. Interview with U.S. government officials who wish to remain anonymous.

91. *Journal Officiel De La Republique Francaise*, 18 JANVIER 1990, at 757.

92. *Id.*

93. *Id.* Defense material is the biggest U.S. export. *Id.*

94. *Buddy, can you spare a reel?*, *supra* note 51.

\$2.5 billion in 1987, and approximately \$3 billion in 1988.⁹⁵ By 1989 they were five times what they were in 1983.⁹⁶

Additionally, the European market is also the largest source of television sales outside the United States. As of 1989, two-thirds of major studio television sales outside the United States were in EC countries,⁹⁷ amounting to approximately \$630 million. In contrast, 1980 sales amounted to only \$100 million.⁹⁸ Further, anecdotal evidence⁹⁹ presents Eastern Europe as a potentially lucrative market for American film and television.

Japan and Australia also have an interest in the European television market. After American imports, Japanese cartoons are one of the largest imports for European television stations.¹⁰⁰

B. Defining U.S. and Other Non-E.C. Market Share of European Broadcasting and Determining the Likely Impact of the Directive

Financial sources conflict as to the exact percentage of the European television market that the American industry now holds. However, most sources agree that seventy percent of fiction programs shown in the Community are foreign created.¹⁰¹ The estimations of what quantity of the non-EC material is of U.S. origin varies between fifty percent and forty percent. The fifty percent figure indicates a thirty-five percent U.S. share of the total European Market [hereinafter T.E.M.] for fiction,¹⁰² with the forty percent

95. *Advisory Group Urges*, *supra* note 53.

96. *Buddy, can you spare a reel?*, *supra* note 51.

97. Clyde H. Farnsworth, *U.S. Fights Europe TV-Show Quota*, N.Y. TIMES, June 9, 1989, at D1.

98. *Id.*

99. See Colin McIntyre, *East Bloc Rush for "Television Without Frontiers,"* REUTERS, May 12, 1989 (BC cycle).

100. *General Developments: GATT*, 6 INT'L TRADE REP. NO. 41, 1346, Oct. 18, 1989.

101. Yves Clarisse, *EC Puts Finishing Touches to Television Without Frontiers*, REUTERS, Mar. 12, 1989 (BC cycle); Leyla Ertugrul, *EC Agrees Rules For "TV Without Frontiers,"* REUTERS, Mar. 14, 1989 (PM cycle). However, there are other sources which seem to disagree with this number. France, for instance, commissioned a survey which it submitted to the EC in 1988. The survey indicated that based on the criteria set out in the Television Without Frontiers draft directive European content in the broadcasts of all television channels available in the Community averaged 68%. Jane K. Albrecht, Director, European Home Video and Pay Television, *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 [hereinafter *Request of the MPEAA*], at 20 (citing Summary of "European Programme Content in the Broadcasts of European Television Channels in 1988", BIPE, Sept. 1989)).

102. See Clarisse, *supra* note 101; Ertugrul, *supra* note 101; L.A. TIMES, Mar. 15, 1989, pt. 6, at 2.

figure indicating a twenty eight percent U.S. share of T.E.M.¹⁰³ In contrast, the Europeans have a less than two percent share of the U.S. market.¹⁰⁴

The Europeans claim that the figures indicate that the American entertainment industry will not be negatively affected by the Directive. The rationale is that the United States has, at most, only thirty-five percent of the EC television market. Since the Directive only requires that fifty-one percent of the market be European, the remaining forty-nine percent is still open to American media.¹⁰⁵

This analysis suffers from several deficiencies. First, the Directive's quota of forty-nine percent applies to all non-EC television. Therefore, U.S. programming must share the forty-nine percent of T.E.M. with all other non-E.C. programming. At present the United States and other non-EC countries combined make up seventy percent of T.E.M.¹⁰⁶ The United States holds roughly fifty percent of that seventy percent of T.E.M.¹⁰⁷ The Directive's reduction of allowable non-EC programming from the preexisting seventy percent of T.E.M. to forty-nine percent of T.E.M. logically requires the U.S. and other non-EC programming to decrease proportionately.¹⁰⁸ It may be argued that the U.S. market share would not dramatically drop because U.S. programming is more popular than other non-EC nation programming and, consequently, that other non-EC nation programming would suffer disproportionately. This assertion is not empirically supported given the different market segments served by the United States and other non-EC programming. As mentioned above, the European's enjoy Japanese cartoons which is predominantly a children's market.¹⁰⁹ If European broadcasters want to preserve their present programming structure, such as morning television for children and prime time for adults, each source of programming would have to be propor-

103. *Hollywood Chief Attacks EC Plans as Protagonist*, REUTERS, Oct. 31, 1989 (BC cycle).

104. *Id.*

105. Presburger & Tyler, *supra* note 48, at 503.

106. See Clarisse, *supra* note 101; Ertugrul, *supra* note 101.

107. *Id.*

108. The U.S. proportion of T.E.M. will have to shrink from 50% of 70% of T.E.M., or 35% of T.E.M., to 50% of 49% of T.E.M. or 24.5%. This means that U.S. industry will suffer an approximate 28% decline in its market share. *Id.* If U.S. market share started at 35% of T.E.M. before the Directive and ended up with 24.5% of T.E.M. after the Directive, this would constitute a loss of 10% from an original 35% market share or 28% net loss of the U.S. market share of T.E.M.

109. See *supra* text accompanying note 83.

tionately cut.

Second, the assertion that U.S. programming dominates thirty-five percent of the EC market only describes the U.S. market share in the EC as a whole. The percentage does not reflect U.S. programming on a state by state basis. The percentage of U.S. programming shown on European TV varies widely between countries.¹¹⁰

Third, although the Directive applies to individual broadcasters, the above figures do not differentiate on a broadcaster by broadcaster basis.¹¹¹ The European assertion that few networks broadcast more than forty-two percent U.S. programming¹¹² is disputed by the U.S. entertainment industry.¹¹³ Assuming that the European figures are accurate, U.S. programming for individual network television market will drop from forty-two percent to twenty-nine percent;¹¹⁴ a thirty percent drop from its present market share in a very lucrative market.

Finally, evidence indicates that U.S. sales are already depressed because of the implementation of the Directive. In 1989, U.S. television sales in the EC declined by 7.2%.¹¹⁵ Some of this evidence is anecdotal. It is based on U.S. government and entertainment industry observations indicating that the price paid for U.S. programming abroad is declining.¹¹⁶ Three of the top five overseas television markets—the United Kingdom, Italy, and France—led the decline.¹¹⁷ France, which has enacted the most severe form of the quota, experienced the most severe decline in U.S. sales, 51.8% compared to 1988 figures.¹¹⁸ It should be noted that during this decline in U.S. television sales, the annual growth rate

110. Ertugul, *supra* note 101.

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

112. Hift, *supra* note 80.

113. Interview with members of the U.S. entertainment industry (Mar. 12, 1991).

114. Assume the non-EC market share of the individual network television market (I.N.T.M.) reflects the non-EC market of the Total European Market, and remains at 70%, and further assume the U.S. holds 42% of the total I.N.T.M. Non-EC countries hold 70% of the total I.N.T.M., and the United States holds 60% of that non-E.C. market, which is 42% (60% of 70% = 42%). When the non-EC market share (70% of I.N.T.M.) is reduced to 49% of I.N.T.M. pursuant to the Directive, and all proportions remain the same, the U.S. market share will be reduced from its present 42%, to 29% (60% of 49% = 29%).

115. Motion Picture Association of America [hereinafter MPAA] estimates of U.S. industry television sales to the EC. See *Request of the MPEAA*, *supra* note 101, at 10.

116. When they bargain for future delivery of U.S. programming, European buyers bargain for lower prices because they will need less U.S. programming due to the quotas. This is especially true in the French market. Interviews with U.S. government officials and entertainment industry executives (Mar. 14 & 15, 1991).

117. *Id.*

118. *Id.*

of TV hours of output in EC countries was greater than ten percent per year.¹¹⁹ The number of viewers watching satellite television in Europe more than doubled between 1988 and 1989.¹²⁰ Television revenue in the United Kingdom and Italy increased by seven percent, in West Germany by thirty percent, and in Denmark by 400%.¹²¹

The Europeans contend that isolating Article 4 without considering the larger impact of the Directive is unfair. As a result of the Directive's provisions requiring a freer flow of broadcasting between states and uniform broadcasting regulation in Europe, the amount of viewing time available throughout Europe will dramatically increase. Therefore, the size of the European market for programming will also increase. Thus, the United States will share in this larger market and will not be adversely affected by the Directive as a whole. Observers of the industry expect that implementing the Directive will increase total broadcasting time to 440,000 hours by the end of 1992, compared with 250,000 hours in 1987.¹²² United States government and industry sources respond that at present European production entities have insufficient capacity to meet that demand.¹²³ Moreover, principles of free trade require that the U.S. industry share in the increased market in proportion to its present market share.¹²⁴

VI. THE FIRST OF THREE POSSIBLE RESPONSES: TAKING ACTION IN THE GATT

This section attempts to analyze the possible legal arguments available under GATT in response to the Directive.¹²⁵

119. *Id.*

120. *Satellite Channel Viewing Soars in Europe, Study Says*, DAILY VARIETY, Sept. 12, 1990 (citing a European Television Audience Research Survey).

121. *Request by MPEAA*, *supra* note 101, at 12 (citing VIDEONWS INTERNAT'L, Aug. 1990, no. 6).

122. Sayeste Daser & Brett Richey, *U.S. Broadcasters Stand to Gain as European TV Market Grows*, 24 AM. MARKETING ASS'N 14, July 9, 1990, at 10.

123. Interviews with U.S. government officials responsible for monitoring the Directive, *supra* note 120. See also Dovie F. Wingard, *Europe 1992: Mass Media Developments*, N.Y.L.J., Nov. 30, 1990, at 5.

124. Interviews with U.S. government officials responsible for monitoring the Directive, *supra* note 121.

125. Given the fact that the ultimate decisions of GATT panels can be influenced by politics, the author has chosen not to engage in a detailed analysis of the politics which would influence a panel's decision, as doing so would require access to and revelation of confidential material.

A. *The Purpose Behind International Trade Regulation and the GATT*

International regulation of trade is based upon the assumption that an international regulatory mechanism is necessary to maintain a stable and efficient system of international trade. Thus, international trade regulation is necessary to prevent nations from erecting self-serving trade barriers which harm other nations, spark retaliatory reaction, and result in the severe and inefficient restriction of international trade.¹²⁶ This doctrine was based in part upon economic theory and in part upon the post World War I experience of nations engaged in substantial world trade.

Those seeking international trade agreements held several opinions concerning the economics of international trade. They thought that world trade created wealth for those nations participating in it. World trade enabled larger economies of scale to operate, bringing down the expense of producing goods. It created an efficient worldwide trading system in which the benefits of an efficient market exchange and the workings of the law of comparative advantage could take place. Each country would be encouraged to make those commodities that it had the greatest advantage of producing. The producing state would export them wherever it could sell them at a price below that prevailing in the importing state while still making a profit.¹²⁷ This global competition in pricing would drive prices down to the lowest possible price anywhere in the world.¹²⁸

On the historical side, those who sought international trade agreements believed that nationally self-interested economic regulation contributed, at a minimum, to misunderstanding and instability in international relations, and, at worst, to war.¹²⁹ International trade agreements are necessary even if most nations act independently to promote trade. Initially, trade promoting nations are often met with trade barriers imposed by other states. This frustrates trade promoting nations and forces retaliation.¹³⁰ The historical initiative that brought many nations to form GATT was the "beggar-my-neighbor" policies of the 1920's and 1930's, which

126. JOHN HOWARD JACKSON, *WORLD TRADE AND THE LAW OF GATT* 9 (1969).

127. Detlev Vagts, *TRANSNAT'L BUS. PROBS.* 3 (1986). See also Jackson, *supra* note 126, at 9.

128. Vagts, *supra* note 127, at 3.

129. Jackson, *supra* note 126, at 10.

130. *Id.*

involved high tariff laws and the manipulation of currency.¹³¹ These policies damaged world trade and the post World War I economies of many nations; many leaders believe these policies were responsible for World War II.¹³²

As a result of this historical experience in world trade and the economic theories mentioned above, draftsmen of the GATT articulated several goals in the preparatory conferences and draft charters. The United States outlined several principles that it termed basic to the proposed organization:

(1) Existing barriers to international trade should be substantially reduced (2) International trade should be multilateral rather than bi-lateral (3) International trade should be nondiscriminatory (5) The rules for international commerce should be drafted so that they apply with equal fairness and equal force to the external trade of all nations regardless of whether their internal economies were organized upon the basis of individualism, collectivism or some combination of the two.¹³³

Some concerns were political as well as economic. The Contracting Parties felt that GATT ought to be limited so as not to impose too much uniformity upon particular social and political systems, or too greatly restrict the individual freedom of particular nations to pursue national goals.¹³⁴ This system of allocating power between local, national, and international entities has been analogized to the issue of federalism.¹³⁵

Other political goals were articulated at the 1947 Geneva Conference by the United Nations official representative. He said:

Apart from the fact that this meeting will play an important part in determining the course of the United Nations in economic matters, it may well be that our political future will be affected by what happens here. Political frictions too often flow from difficulties in trade relationships Unrest and trouble breed in empty stomachs. . . .¹³⁶

131. *Id.* at 9, 37.

132. *Id.*

133. See U.N. Doc. EPCT/PV.2, at 5 (1946); see also Jackson, *supra* note 126, at 54.

134. *Id.* at 29.

135. *Id.*

136. U.N. Doc., *supra* note 133; see also Jackson, *supra* note 126, at 55-56.

B. The Threshold Question for the Applicability of GATT: Does the Regulation Affect a Good or a Service?

GATT applies only to goods and not to services.¹³⁷

Consequently, the threshold question of whether the Directive violates GATT is the issue of whether the Directive affects goods or services. In order to resolve this issue it must be determined whether television, itself, is a good or a services. No GATT working party, panel, or any other body which has been delegated the task of interpreting GATT has expressly resolved this issue.¹³⁸

The issue of defining the concept of a service is an extremely difficult task and has been a point of much disagreement among GATT parties.¹³⁹ In 1985, GATT held a conference in which delegates from the working parties presented issues and factual information concerning international trade and the regulation of services.¹⁴⁰ During that conference, a number of delegates articulated the proposition that there is no commonly accepted definition of services.¹⁴¹

In the absence of a common agreement amongst the delegates as to the difference between a good and a service, one must look to other sources. Commentators often give examples of service industries as including accounting, legal representation, engineering and construction services, tourism, banking, transportation, insurance, equipment leasing, hotel and management services, data banks and data transfer, licensing, advertising, and computer services.¹⁴²

137. The preamble of GATT refers only to the "production and exchange of goods." GATT, *supra* note 84, at preamble. The Interpretative Note to Article XVII, ¶ 2, states, "[t]he term 'goods' is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services." *Id.* at art. XVII, interpretative note. The Europeans have taken this position in the debate concerning the Directive as well. Cate, *supra* note 5, at 5. Also note that some member states including the United States have it on their agenda to amend GATT to apply to services. See Terrence G. Berg, *Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 HARV. INT'L L. J. 1 (Winter 1987).

138. See Jackson, *supra* note 126, at 24-25.

139. Berg, *supra* note 137, at 3.

140. *Summary of Issues Raised in Exchange of Information in Services*, GATT doc. MDF/W/58 (1985).

141. *Id.* at 2, 5. India, Japan, the United States, Canada, the EEC, and Egypt agreed that there was no common definition of services. *Id.*

142. See Paul Bravender-Coyle, *International Trade in Services and the GATT*, 13 AUSTRALIAN BUS. L. REV. 217, 218 (1985); Raymond J. Krommenacker, *Trade-Related Services and GATT*, 13 J. WORLD TRADE 510, 510-11 (1979). See also Mario Kakabadse, *Trade in Services and the Uruguay*, 19 GA. J. INT'L & COMP. L. 284 (1989); Bernard Ascher, *Multi-lateral Negotiations on Trade in Services: Concepts, Goals, Issues*, 19 GA. J. INT'L & COMP. L. 392 (1989).

Commentators often include "motion-picture" in the above list.¹⁴³ It has been suggested that what characterizes these industries as "trade-related service industries" is that their principal output is not tangible.¹⁴⁴

It is difficult to characterize the "principal output"¹⁴⁵ of the television industry. Is it the audiovisual product, such as the tangible video tape, which is the result of the combined efforts of actors, directors, technicians, and cameramen working together? Is it the image which appears on television's screen? Is it the television signal? Arguably, the video tape is the principal output since it is the item that retains economic value. Individuals do not pay for the television signal, or the image on the television, but the broadcaster does pay for the use of the video tape. If video tape is the principal output of the television industry, and video tape is a product, then television is a product.

However, this "principal output" theory is of limited use. There is no leading authority on how to define what constitutes the "principal output." The "principal output" theory of services was probably designed for the purpose of conceptualizing the initial stages of GATT negotiations on services, rather than as a legal definition governing the applicability of the GATT provisions.¹⁴⁶

The "principal output theory" is not the only rational criteria which characterizes services industries. These industries have other elements in common. They do not require the use of a tangible product in a manner which is inseparable from the other activities of the industry. For example, an accountant's ability to conduct an audit is not inextricably bound up with any tangible product. The tools of accountants are variable and changing. Historically, accountants audited by hand using pencils. In later years, calculators were used. Presently, many use computers. None of these tools were so inherent in the process of auditing that they were inseparable from it. The real substance of accounting has always been the application of intellectual property and formulas by a human being to a set of intangible symbols and numbers. This process does not require any particular tangible good and therefore, is considered a service, not a good.

Restricting these industries through regulation does not have an impact upon tangible goods. In the international arena, regula-

143. See *infra* text accompanying notes 180-184.

144. Bravender-Coyle, *supra* note 142, at 218; Krommenacker, *supra* note 142, at 510.

145. See *infra* text accompanying notes 150-52.

146. See generally *id.*

tions which discriminate against foreign trade related services do not have a negative economic impact upon the treatment of tangible foreign goods. For instance, in many countries foreign banking is regulated by restricting the number of foreign banks that may enter the market, the types of business they conduct, and the amount and type of assets they can own.¹⁴⁷ Often foreign insurance companies may not offer certain policies for sale unless local authorities decide that local companies cannot offer those services.¹⁴⁸ Many states require foreign accounting firms to be supervised by local firms in order to conduct audits.¹⁴⁹ The restrictions on these industries does not directly affect the value of foreign owned products associated with these services. When government regulation restricts foreign accountants from auditing, such regulation does not devalue any tangible foreign product.¹⁵⁰

These service industries are distinctly different than the television industry. Unlike the other industries mentioned above, the creation of television is the result of the interaction of several tangible products. The broadcaster applies electricity to a broadcasting device which applies that electricity to the video tape or other audiovisual product. This interaction creates a television signal, which is then received by a television set. Although if considered in isolation, the signal may be a service,¹⁵¹ the transformation of this signal into the final television product requires the use of goods.¹⁵² Therefore, even if one considers the broadcasting of a television signal a service, the production of the ultimate television product requires a combination of services and goods.

It is not only this interdependent means of production which differentiates television from other industries. It is the economic impact which the regulation of one element of television production has on the other elements that sets the television industry apart from service industries. This impact has significant international free trade ramifications. When a state regulates the broad-

147. Ascher, *supra* note 142, at 395.

148. *Id.*

149. *Id.*

150. One could theoretically argue that a financial statement is the result of an audit and is, therefore, a tangible good. By making it illegal for foreign accountants to conduct audits, the value of that financial statement is devalued to the point of being worthless. However, a financial statement is not a tangible good. It cannot be traded or valued except as a one time service to the patron who requests it.

151. The United States and the EC dispute this point. See text accompanying footnotes 158-61.

152. This is not necessarily true of live television. However, the Directive does not affect U.S. live television, but non-EC recorded television.

casting of television by discriminating against the airing of foreign made audiovisual products,¹⁵³ as the Directive does, the value of that product is affected.¹⁵⁴ This impact is highly relevant. The real economic impact of television regulation is upon a tangible good, the audiovisual product, and not upon the broadcasting of the signal. Since the Directive interferes with the free market for television product between states, it contradicts the policies of the GATT concerned with world wide economic efficiency.¹⁵⁵ The present world market for television highly values U.S. television products. The EC Directive artificially limits consumer access to that product by raising its price¹⁵⁶ and interfering with the television industry's economies of scale.¹⁵⁷

The Directive regulates the use of the audiovisual product, not the signal. The Directive does not require that the broadcast television signal used must be of EC origin or that European broadcasters must be EC owned. It only requires that the work used by the broadcaster be of EC origin. Therefore, the regulation concerns an audiovisual work, a product, not the television signal associated

153. Note that it may be debated whether the actual audiovisual product—the video tape—which contains the material that will ultimately be broadcast is a product. Upon close examination it becomes clear that it is. The audiovisual product is tangible, unlike the items categorized by most commentators as services. Moreover, even *Guiseppe Saachi, infra* note 164, which held that a television signal was a service, also held that, "trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to the freedom of movement for goods (under EC law)." *Id.*

One should not get sidetracked with the notion that there is an intangible aspect of intellectual property involved here; that it is not the physical audiovisual product itself which is being devalued but rather the intangible intellectual property rights embodied in that product. The fact that a legal regime, i.e. copyright law, designates rights to the use of a physical product is not new or abnormal in the world of goods. Intellectual property also governs the use of computer goods, electronic technology, etc. Moreover, even outside the regime of intellectual property, when a state enacts regulation which devalues a foreign good it does so through limiting the rights associated with that good. For instance, even in the case of a basic restriction on imports, the state does not physically destroy the imported good. Rather, it removes one of the rights associated with that good, the right to move it freely into the state.

Finally, one should note that the language of the Directive recognizes that television programming is a product. Article 4 of the Directive requires broadcasters reserve for "European Works" a majority of their transmission time. In defining "European Works", the Directive refers to works that are "made by" producers with residence in European Countries. *Request of the MPEAA, supra* note 101, at 5.

154. See text accompanying note 126.

155. See *supra* text accompanying notes 131-132.

156. See *infra* text accompanying note 221.

157. Often feature film studios and television show producers rely on the sale of reruns of a few successful shows in foreign markets to make up for the financial failures of the majority television shows or movies.

with it.

One may look to the domestic law of the Contracting Parties for guidance as to whether television is a service.¹⁵⁸ Both the United States and the EC have held that electricity is a good, not a service. In *Baldwin-Lima-Hamilton Corp. vs. The City and County of San Francisco*,¹⁵⁹ a California Court of Appeals held that "[e]lectricity is a commodity, which like other goods, can be manufactured, transported or sold."¹⁶⁰ That case involved a contract proposal made by the City of San Francisco to furnish equipment for the development of an electric plant. The contract required that all equipment covered by the contract be made in the United States. The court held such an agreement conflicted with GATT, Article III, which prohibits discrimination in the purchase of products based on their national origin, and was therefore illegal. The Defendants claimed that an exception to Article III applied. The exception provides

the provisions of this Article [III] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.¹⁶¹

However, the court held

the exception contained in paragraph [8 of Article III] is not operative . . . since the turbines and other equipment are for use in the generation of electric power for resale and hence for use in the production of goods for sale. *Electricity is a commodity which, like other goods, can be manufactured, transported and sold.*¹⁶²

If electricity is a good because it can be manufactured, sold, or transported, then it follows that a television signal must also be a good. A signal is only a modified form of electricity which may also be "manufactured, sold or transported."¹⁶³

This reasoning has been refuted in the European court of Justice. The case of *Guiseppe Saachi*¹⁶⁴ held that although electric

158. Jackson, *supra* note 126, at 25.

159. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962).

160. *Id.* at 819.

161. GATT, *supra* note 84, at art. III, ¶ 8(a); see also *Baldwin-Lima-Hamilton Corp.*, 208 Cal. App. 2d at 819.

162. *Id.*

163. *Id.*

164. 155/73, 439 (1974).

energy was a good, a television broadcast was not. The court held that the technical fact that electricity is used in broadcasting was not relevant in resolving the issue. The relevant point was that information was being broadcasted.¹⁶⁵ The implication was that information cannot be a good. This conclusion has been subject to criticism by European commentators.¹⁶⁶

Aside from looking to the decisions of domestic courts, one can also look to possible consequences to GATT, should it hold that television is a good. Such a finding could open the GATT forum to a number of complaints involving several analogous barriers effecting industries such as those which provide services such as data and money transfers. The transfer of money and information may be accomplished by electricity and therefore would be a product. This rationale breaks down any distinction between goods and services.¹⁶⁷ The question then becomes what are the negative consequences of the breaking down of the distinction between goods and services. Contracting Parties continue to have barriers to services for a number of reasons. First, many developing nations resist trade in services because they view developing indigenous service industries through "traditional infant industry models," rather than through foreign presence, as crucial to economic development.¹⁶⁸

Second, an underlying fear is that "[b]ringing services under the GATT free trade regime is likely to interfere with domestic economic policies and thereby undermine national autonomy."¹⁶⁹ This concern is shared by the European Court of Justice as implied by its reasoning in *Saachi*. As mentioned above, the *Saachi* court chose to avoid the technical question of whether a television signal is simply electricity and therefore a good. Instead, the court

165. *Id.*

166. One commentator stated,

We are faced in reality with two different forms of transportation, the difference being that between sending a photographic print or matrix from the *Financial Times* in London to its second printing plant in Frankfurt by post . . . and sending it by wireless or teleprinter or fax. The end result is exactly the same: the physical object in London has been transported into the hands of the recipient in Frankfurt. The conceptual blockage which prevents this equivalence being acted upon is the lawyer's reluctance to move from Newtonian physics to quantum physics, an inability to attribute physical characteristics to anything that cannot be held in the hand and thus an unwillingness to accept that one can "import" electronic signals.

Neville March Hunnings, 17 COMMON MKT. L. REV. 564, 568 (1980).

167. *Id.*

168. Ascher, *supra* note 142, at 399.

169. Berg, *supra* note 137, at 3.

analyzed a television broadcast as information and immediately concluded it was a service. This view implies that "information" holds a special position and is not subject to being "commoditized" as normal goods. The EC may argue that information has a special significance because its cultural content affects the receiving state's national identity. Forcing a nation to remove all barriers to receiving information goes beyond the original intention of the draftsmen of GATT. It goes beyond the principles of free trade and infringes upon national sovereignty and identity. The EC may then argue that GATT overstepped the boundaries of its role as wealth enhancer to become an institution for cultural conformity and homogeneity.

If GATT found that all service barriers that had a disparate impact on goods violated its charter this would make GATT too far reaching: complaining states would attempt to trace the indirect effects of regulating services on goods, even when such effects would be remote.

The United States has a number of available responses. It may respond to the objection of cultural infringement by showing that in past disputes, GATT refused to recognize cultural protection as a justification for trade discrimination based on national origin. In the case of *Japanese Measures on Imports of Leather*,¹⁷⁰ Japan maintained restrictions upon the import of certain semi-processed and finished leather. Japan had not invoked any provision of GATT to justify maintenance of those restrictions. The panel found that,

the special historical, cultural and socioeconomic circumstances referred to by Japan could not be taken into account by it in this context since its [the panel's] terms of reference were to examine the matter 'in light of the relevant GATT provisions' and those provisions did not provide such a justification for import restrictions.¹⁷¹

The panel found that this restriction violated Article XI:1.¹⁷² This finding implies that GATT does not recognize cultural factors as relevant to a determination of whether its provisions apply. Therefore, cultural justifications cannot override the GATT non-discrimination provisions.

Even if one accepted the argument that domestic cultural in-

170. BISD 31S/94 (1984).

171. *Id.* at 111, ¶ 44.

172. *Id.*

tegrity was important to the policies of GATT,¹⁷³ and that in a borderline case national cultural integrity should be a factor, this argument is not applicable to the Directive. The Directive is not a restriction which is based on the foreign content of the broadcast, but rather upon its point of origin, and the origin of its creators.¹⁷⁴ A television show with U.S. themes which was made in Europe would not be subject to the quota of the Directive, while a U.S. show made about European themes would.¹⁷⁵ Therefore, the Directive is an economic, not a cultural regulation. It is simply an alternative form of a structure originally designed to subsidize local film industries.¹⁷⁶ The Europeans viewed it this way when drafting the Directive. The relevant chapter heading of the Directive setting the domestic broadcast quotas is entitled "Promotion of distribution and production of television programmes."¹⁷⁷

The United States also has a response to the fear that complaining states would use a "disparate impact on goods" theory to claim that every regulation of a service with even a minute impact on goods would be a violation of GATT. GATT could use the following proposed standard: its provisions would only be violated where three conditions existed: (1) the activity would be extricably bound up with a good; (2) regulation of the activity would have a direct and primary impact upon a foreign good; and (3) the regulation substantially alters the market conditions in favor of domestic goods.¹⁷⁸ Using such a standard prevents unintended and far reaching results of GATT, while still invalidating local laws which facially only regulate services, but in fact have their substantive impact upon goods.

GATT contemplated this concept when it dealt with restrictions upon the showing of films. Article IV handles the issue of whether states can require a minimum amount of cinema screen time to be devoted to films of domestic origin.¹⁷⁹ The relevant provisions provide as follows:

ARTICLE IV

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quan-

173. See *supra* text accompanying notes 134-35.

174. Directive, *supra* note 1, at art. 6.

175. *Id.*

176. See *supra* text accompanying notes 39-47.

177. Directive, *supra* note 1, at ch. 3.

178. See *supra* text accompanying notes 118-23.

179. GATT, *supra* note 84, at art. IV.

titative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to following requirements:

(a) screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall not be allocated formally or in effect among sources of supply;

(b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;¹⁸⁰

Article IV was designed as an exception to the Article III National Treatment obligation. Article III required that each Contracting Party's laws and regulations treat foreign and domestic goods equally favorably.¹⁸¹ This has important implications. Because the drafters of GATT felt the need to include this provision indicates that without it, screen quotas violated GATT.¹⁸² This indicates that the process of showing film in a theater constitutes the use of a good. By analogy, one could argue that the broadcasting of television does as well. However, there is a flip side to this argument. If television is a good by virtue of the fact that film is good, then an exception which allows screen quotas could allow television quotas. This issue will be resolved in the following detailed discussion of actual violations of GATT provisions.

C. Violations of the National Treatment Provision and Elimination of Quantitative Restrictions Provision

1. Application of the National Treatment Provision

The National Treatment provision, Article III, states in its relevant sections,

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the INTERNAL SALE, OFFERING FOR SALE, PURCHASE,

180. *Id.*

181. See *infra* text accompanying notes 134-35.

182. *Application of GATT to International Trade in Television Programs*, GATT doc. L/1646, 3 (1961).

TRANSPORTATION, DISTRIBUTION, OR USE OF PRODUCTS and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. . .

4. 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. . . .

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.¹⁸³

The drafters of GATT felt that unless they included the Article IV exception to Article III, screen quotas violated Article III.¹⁸⁴ However, the question then becomes how did screen quotas violate Article III.

The history preceding the enactment of Article III would prove helpful in understanding this issue. The United States felt that the subject of national treatment was necessary to a trade agreement and an "indispensable minimum" to GATT.¹⁸⁵ Both the United States and the United Kingdom had similar "national treatment" clauses in many of their own commercial treaties.¹⁸⁶ However, before such a clause could be inserted into the GATT a controversy erupted.

One group of delegates wanted the national treatment obligation to apply only to those items included in the tariff Schedules.¹⁸⁷ They felt that the sole purpose of general provisions such as Article III was the protection of tariff concessions. Thus, any general trade conduct obligations would have to await the formation of a more institutional international trade organization.¹⁸⁸ But this proposition failed. Instead, the draftsmen decided that the national treatment obligation would be drafted and interpreted to protect not only scheduled concessions but also prevent the use of

183. KENNETH R. SIMMONDS & BRIAN H.W. HILL, EDS., *LAW & PRACTICE UNDER THE GATT*, art. III, ¶ 1, 4, 10, at 7, 9 (1988).

184. See *supra* text accompanying note 182.

185. Jackson, *supra* note 126, at 277.

186. *Id.* at 277.

187. *Id.*

188. U.N. Doc. EPCT/TAC/PV.10, at 13-15 (1947).

government regulations as a system of domestic protection.¹⁸⁹ Several reasons were given for including the national treatment provision: (1) it was required by existing international commercial trade policy; (2) many treaties already had it; and (3) it was necessary not only to protect the items on the GATT schedule, but all exports and imports.¹⁹⁰

The preparatory history of Article III, although complex, indicates that the provision was intended to be interpreted broadly and was also intended to cover a wide range of governmental regulation which could be used to treat local products more favorably than foreign ones. Each attempt by representatives to narrow its affect was rebuffed in favor of broader, more far reaching language.¹⁹¹ The language of Article III, paragraph 4 supports this interpretation. The terms are broad, indicating an intent to have a far reaching effect. The Article III terms that create the obligation to treat imported products "no less favorably" than 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" demonstrate an intent to prevent virtually any governmental regulatory attempt to benefit a local good at the expense of a foreign one.

The EC treats foreign made television programming less favorably than domestic. It governmentally limits non-EC television program "distribution or use" by restricting the amount of time it may be broadcast on European television.¹⁹²

GATT cases support this proposition. The case of *Italian Discrimination Against Imported Agricultural Machinery*¹⁹³ involved an Italian law which provided special credit facilities to farmers for the purchase of agricultural machinery produced in Italy. The GATT panel recommended that the law be modified so that credit facilities would be made available for the purchase of agricultural machinery, whatever its origin. The panel interpreting Article III in light of the Italian law stated,

the text of paragraph 4 referred both in English and French to laws and regulations and requirements affecting internal sale, purchase, . . . and to laws, regulations, and requirements governing the conditions of sale or purchase. The selection of the

189. Jackson, *supra* note 126, at 277.

190. *Id.*

191. GATT, *supra* note 84, at art. III

192. Directive, *supra* note 1, at art. 4.

193. 7/S BISD 60 (1959).

word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.¹⁹⁴

Imposing quotas on the broadcast of foreign made television adversely modifies the conditions of competition between domestic and imported products in a nation's internal market.¹⁹⁵ By limiting the amount of market share foreign made television is permitted to occupy, the EC is modifying the conditions of competition between EC and non-EC produced television to benefit local product. This is evidenced by the decrease in U.S. sales and the reduction in price of U.S. programming due to the impact of the Directive.¹⁹⁶

The *Italian Machinery* case lends further support to the argument that GATT disallows the regulation of a service which results in the less favorable treatment of a foreign good.¹⁹⁷ Even if GATT were to find that television broadcasting was a service, under *Italian Machinery* the Directive would still violate Article III. In *Italian Machinery* it was the use of credit facilities, a service like banking, which treated domestically produced agricultural machinery more favorably than foreign made machinery. When the panel required that credit facilities be made available for the purchase of agricultural machinery, whatever its origin, the panel held that a state cannot use the regulation of a domestically produced service to discriminate in favor of a domestic good.

The Directive's regulation of television broadcasting violates Article III. Article III was intended to have far reaching application. It was intended to void any regulation that hinders the use of a foreign product vis a vis a domestic one, or modifies the conditions of competition between foreign and domestic products in the internal market. Assuming arguendo, that television broadcasting is a service, Article III still intended to prevent the regulation of television broadcasting which results in a domestic audiovisual good receiving more favorable treatment than a foreign one.

The question then becomes whether the Article IV exemption for cinematographic films applies to television. When the drafters created Article IV, they did not contemplate it applying to televi-

194. *Id.* at 64.

195. *Id.*

196. See *supra* text accompanying notes 115-21.

197. See *generally* text accompanying note 154.

sion. In 1962, GATT created a working party to study the application of GATT to television.¹⁹⁸

Although the working party was unable to agree on what action to take,¹⁹⁹ it did create draft recommendations in several alternative versions. France dissented from all of these, asserting that it was premature to consider the issue of television regulation. It expected that new technical developments, particularly the introduction of communications satellites, would change the intrinsics of the communications field. France felt that it would be more appropriate to discuss the application of GATT provisions to television once the full impact of that development had been evaluated.²⁰⁰

Aside from the French dissent, each of the recommendations started with the statement,

THE CONTRACTING PARTIES, RECOGNIZING that, when the General Agreement was drawn up, international trade in television programmes was virtually non-existent so that the implications of the application of the relevant provisions of the General Agreement to such trade were not considered. . .²⁰¹

This statement of the draft recommendation, although never part of a formal agreement, indicates a common understanding of the parties. The ramifications of trade in television, unlike film, were never contemplated. The drafters of GATT did not consider the major economic impact that television would have. The draft recommendation also stated,

RECOGNIZING that trade in television programmes [sic] has similarities to trade in cinematograph films for which special provision was made in the General Agreement. . .²⁰²

Apparently, the drafters concluded that television shared some characteristics with film, although the extent to which these characteristics were shared was unclear. The only conclusions that can be drawn from the statements of this 1962 working party are as follows: television is not excepted from the National Treatment provisions of Article III; and unlike film, was not contemplated in Article IV.

Article IV was intended to be construed narrowly. Most mem-

198. GATT, *supra* note 84, at Analytic Index, art. IV.

199. GATT Doc., L/1741 (1962).

200. *Id.* at 6-8.

201. *Id.*

202. *Id.*

bers of the 1962 Working Party on International Television found that at the

time of drafting Article III, it was, . . . recognized that the application of these provisions [provisions of Article III] could cause difficulty. The tariff was not an effective means of protecting domestic cinematograph film industry and many countries found it necessary to resort to quotas on screen time. In recognition of this, Article IV of the GATT, the provisions which are an exception to those in Article III, permits the establishment of screen quotas in favor of films nationally produced.²⁰³

This drafting history indicates that Article IV was intended as a specific concession to a specific need of the Contracting Parties at the time they signed GATT. They wanted to protect a particular industry—the film industry. They chose a particular solution, the use of quotas as opposed to tariffs to create that protection.

This history shows that Article IV was not intended to be read broadly. It was not intended to carve out all visual communication activity from the non-discrimination provisions. Rather, it was intended as a specific compromise tailored to protecting local film industries during a time when they were in their infancy. It cannot be drawn from this narrowly conceived and specific provision that the Article IV should apply to the television industry of the 1990's. The television industry had not been conceived of at the signing of GATT, nor had its basic characteristics been contemplated. Some members of the working party argued that Article IV provides a useful analogy of how television should be handled.²⁰⁴ However, at the working party there was much disagreement as to the exact relationship between television and film, and no recommendation was implemented concerning this issue. Since the analogy on parallel terms was considered but never accepted, Article IV does not apply to television.

2. General Elimination of Quantitative Restrictions Provision

Some have argued that the Directive, in addition to violating the Article III National Treatment provision, violates, Article XI, the Elimination of Quantitative Restrictions Provision of GATT.²⁰⁵ This provision states,

Article XI

203. *Id.* at 3.

204. *Id.* at 4.

205. *Request of the MPEAA*, *supra* note 101, at 4.

General Elimination of Quantitative Restrictions

1. 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.²⁰⁶

A logical argument similar to the argument made under Article III could also be made under Article XI. The EC is maintaining a "defacto" import quota on the amount of non-EC television allowed into the EC by putting limitations on the amount of non-EC television programs shown by EC broadcasters.²⁰⁷ "If a broadcaster cannot show more than a certain percentage of foreign programming, the broadcaster will not buy programming that it cannot use."²⁰⁸ However, GATT panels have held that Article XI does not apply to such situations. One panel stated that,

the General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products", which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover internal requirements, Article III would be partly superfluous The Panel did not find, either in drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI.²⁰⁹

This interpretation requires that Article XI:1 only apply to regulations which govern the actual importing of the product into the country. However, once the imported product is in the country, Article III, not Article XI:1, applies to internal requirements which affect it. Since the EC regulation does not put quotas on the amount of actual audiovisual product which comes into the EC, only Article III is applicable.

3. Issues of Nullification and Impairment

Since the Directive violates the legal obligations of Article III, the question becomes whether the United States needs to show the

206. SIMMONDS & HILL, *supra* note 183, at 22-3.

207. *Id.*

208. *Id.* at 6.

209. *Canada-Administration of the Foreign Investment Review Act*, Report of the Panel, GATT Doc L/5504 (1984), 140. See also Jackson, *supra* note 126, at 315.

extent of the economic impact of the Directive upon trade in U.S. television to make a prima facie case of nullification or impairment. The short answer is no. In the *Understanding Regarding Dispute Settlement*²¹⁰ the Contracting Parties stated,

In practice . . . cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complain so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge.²¹¹

Therefore, where a panel finds that the EC has breached Article III through enacting the Directive, there is a presumption that this has an adverse impact on the United States.

D. Conclusion

The GATT does apply to the Directive. The Directive's framework recognizes that television programming is a good. The television industry differs from most service industries because the production of television requires the use of tangible products. The use of discriminatory regulation of television broadcasting has a negative economic impact upon a tangible product. Even if television broadcasting were considered a service, a GATT panel has held that the regulation of a domestic service cannot be used to benefit a domestic good at the expense of a foreign one. Such discriminatory regulation interferes with the free trade model upon which GATT was founded.

The drafters of GATT believed that governmentally imposed limits on the screening time of audiovisual works constituted quotas on a product. The fact that they felt the need to make a limited exception for film-screen quotas shows that they believed that restrictions on the use of audiovisual works violated GATT obligations. Since GATT applies to audiovisual works, and the Directive regulates the use of audiovisual works, GATT applies to the Direc-

210. BISD 26S/210 (1979).

211. *Id.* at 216, ¶ 5.

tive. Any argument that television regulation should be excepted from GATT obligations because of its cultural significance must be rejected. GATT panels have explicitly rejected cultural justifications for violating GATT obligations in other contexts.

The Directive violates the Article III provisions and their purposes. Further, although there are some analogies between film and television, Article IV does not provide an exception for television, as it does for film. Article IV was intended as a compromise solution to a specific problem. It was not created as a broad provision, far reaching in its application. The concept of television was not contemplated when Article IV was enacted. Since Article III is far reaching in its application and bars discriminatory regulation of television, while Article IV is narrowly construed and excepts only cinema films from the Article III obligation, the Directive violates Article III without exception. The Directive does not violate Article XI:1, since it applies to imported goods, not the importation of goods. Finally, the United States need not prove actual economic impact of the Directive to show nullification.

VII. THE SECOND OF THREE RESPONSES: THE DIRECTIVE AS A VIOLATION OF THE CODE OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS

The Organization for Economic Co-operation and Development (OECD) was created in 1961 as a successor to the Organization of European Economic Cooperation.²¹² The OECD was designed,

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy
- to contribute to the expansion of world trade on a multilateral, nondiscriminatory basis in accordance with international obligations.²¹³

The OECD serves several functions. It sets up several committees

212. Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, 12 UST 1728, TIAS No. 4891; JOHN JACKSON & W. DAVEY, *INT'L ECON. REL.*, 278 (1986).

213. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS, inside front cover (1990). See also EDMUND MCGOVERN, *INT'L TRADE REG.: GATT, THE UNITED STATES, & THE EUR. COMMUNITY* 56 (1986); JACKSON & DAVEY, *supra* note 212.

to examine world trade topics.²¹⁴ It also generates recommendations and decisions. These are binding unless a member has not voted for them or has not complied with its own constitutional requirements.²¹⁵ Often member states have engaged in "understandings," or "gentlemen's agreements," rather than formal treaties because of their reluctance to create binding agreements.²¹⁶

In an OECD departure from its usual non-binding acts it created the Code of Liberalization of Current Invisible operations through a Council Decision.²¹⁷ The Code is legally binding because it was promulgated as the result of a council decision.²¹⁸ The basic obligations of the Code are

Article 1

General Undertakings

a. Member states shall eliminate between one another, in accordance with the provisions of Article 2, restrictions on current invisible transactions and transfers, hereinafter called "current invisible operations." Measures designed for this purpose are hereinafter called "measures of liberalization."²¹⁹

Article 2

Measures of Liberalization

a. Members shall grant any authorization required for a current invisible operation specified in an item set out in Annex A to this Code.²²⁰

The relevant section of Annex A states,

E. Films

E/1. Exportation, importation, distribution and use of printed films and other recordings—whatever the means of reproduction—for private or cinema exhibition, or for television broadcasts.²²¹

The United States could argue that the EC is restricting the

214. *Id.*

215. *Id.*

216. McGOVERN, *supra* note 213.

217. OECD, Code of Liberalization of Current Invisible Operations, looseleaf [hereinafter Code]. See also McGOVERN, *supra* note 213, at 53.

218. *Id.*

219. Code, *supra* note 217, at art. 1.

220. *Id.* at art. 2.

221. Code, *supra* note 217, at Annex A, E/1. These provisions do not apply to Canada. The US and some EC members states have made reservations to this part of the Code. McGOVERN, *supra* note 213. Additionally, Annex IV to Annex A allows for national screen quotas similar to GATT, art. IV.

United State's ability to distribute its films through television broadcasts. The EC might respond that these provisions only apply where regulations limit the importation of material. They do not apply once the audiovisual product is in the state. However, the provision states that it applies to the "importation, distribution and use of printed films . . . whatever the means of reproduction" including "television broadcasts."²²² This language indicates that drafters of Annex A considered that the duty to "liberalize" applied to restrictions on the "use" of audiovisual products, even once inside the importing state.

The EC could argue that the commitments contained in the these sections only require a minimum act. They only require liberalization of restrictions to the point of authorization of the invisible operation,²²³ nothing more. They would interpret the Article 1 statement "Member states shall eliminate between one another, in accordance with the provisions of Article 2, restrictions on current invisible transactions. . . ."²²⁴ to mean that member states have an obligation to eliminate restrictions on invisible operations only to the extent that Article 2 requires. Since Article 2 only requires authorization of the invisible operation, the Directive satisfies that requirement because it does authorize the broadcasting of U.S. films on television, it just limits the quantity.

The question then becomes whether the "obligation to authorize" is a minimal requirement? If a state only allows for a fixed amount of U.S. material to be exploited, is such an allowance sufficient to fulfill the Article 1 obligation? If such an interpretation were accepted it would make the obligation meaningless. Under such an interpretation, if the Directive allowed only one percent U.S. programming, U.S. programming would be technically authorized and hence the obligation would not be violated. For the Article 1 obligation to have any meaning it must require unlimited authorization.

There is further evidence of this interpretation. Like the drafters of Article IV of GATT, the drafters of this provision felt the need to draft an exception for national screen quotas.²²⁵ Therefore, they must have believed that screen quotas violated the Article 1 obligation. Screen quotas, like the Directive, do not necessarily impose a full prohibition upon the showing of foreign films.

222. *Id.*

223. *Code, supra* note 217, at art. 1-2.

224. *Id.* at art. 1.

225. *Id.* at Annex A, Annex IV.

They may simply limit such showings in favor of some specific percentage of domestic material. If these quotas violated the Code without an exception so would quotas on foreign material shown on television.

However, no argument can be made that the screen quota exception applies to television. The Code clearly contemplated television. It expressly provides for the removal of restrictions on television broadcasts.²²⁶ If the drafters of the Code had intended for the exceptions for screen quotas to include television broadcasts they would have provided for it.

The Directive violates the obligation of the Code in another respect. The Code provides:

A member shall not discriminate as between other Members in authorizing current invisible operations which are listed in Annex A and which are subject to any degree of liberalization.²²⁷

If member states follow the Directive, they violate Article 9. They will be favoring the television programming of other European States over the United States. This is especially compelling considering that notwithstanding Article 4 of the Directive, the purpose of the Directive is increase the movement of trade in television programmes between member states of the EC.²²⁸ If restrictions on the free movement of television programs between member states are removed, while analogous restrictions on U.S. programming are increased, Article 9 is violated. EC states are discriminating in favor of each other in "authorizing current invisible operations."²²⁹

Using the Directive's quotas to subsidize the European entertainment industry does not further the OECD goal of aiding economic expansion. If people do not like what is being shown on television they will simply go elsewhere for entertainment. Observers of the European television market believe that if quotas on

226. *Id.* at Annex A, § E.

227. *Id.* at art. 9.

228. The preamble to the Directive states as follows:

Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes . . .

Directive, supra note 1, at pmb. ¶ 20.

Article 2 of the Directive states:

Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

Id. at art. 2(2).

229. *See supra* note 231.

U.S. programming take hold in Europe, European viewers will simply find alternative means of seeing shows that they cannot see on television. They will just have to pay more to see them.²³⁰

VIII. THE THIRD OF THREE RESPONSES: ATTACKING THE DIRECTIVE AS A VIOLATION OF THE INTERNATIONAL DOCTRINE OF THE FREE FLOW OF INFORMATION

A. The Concept of the International Free Flow of Information

The doctrine of the international free flow of information or free expression stems from the human right to receive and impart information. This right has had lesser and greater degrees of respect throughout world history. It was not respected in antiquity.²³¹ It started to be recognized in England in 1644, and was recognized in the United States and in France about one hundred and fifty years later.²³² However, it only received widespread international recognition after World War II.²³³

It was said at the General Assembly of the United Nations that freedom of information—the right to seek, receive, and impart information and ideas is the touchstone of all freedoms to which the United Nations is consecrated.²³⁴ The right of free expression is considered by United States courts and commentators as fundamental to the other freedoms²³⁵ and forms the content of those freedoms.²³⁶

Although the importance of this right has hit a high point during the later half of this century, it has been interpreted differently depending upon the political objectives of the interpreter. The United States has generally had the most liberal practice concerning regulation of the free flow of information.²³⁷ Third world nations and the ex-Soviet Union adopted more restrictive prac-

230. Video rentals are one alternative. Telephone Interview with Kathy Goodman, Associate, White & Case (Mar. 31, 1991).

231. THEODOR MERON, HUMAN RIGHTS IN INT'L LAW: LEGAL AND POLICY ISSUES 182 (Vol. 1 1984).

232. *Id.*

233. *Id.*

234. G.A. Res 59, U.N. Doc. A/64/Add.1 (1946), at 95.

235. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

236. MERON, *supra* note 231.

237. See Cate, *supra* note 2, at 371-92 (discussion of conflict between the United States and third world nations over free flow of information and the New World Information Order).

tices.²³⁸ These divergent practices make it difficult to locate a universally accepted custom which forms the basis of the current international law of free expression.²³⁹

B. The Doctrine of the Free Flow of Information Between the United States and Europe

1. The Application of the Universal Declaration of Human Rights

Perhaps the oldest document that both the United States and European nations have signed that expresses an intention to have a free flow of information between the continents is the Universal Declaration of Human Rights.²⁴⁰ However, the member states of the United Nations did not consider this document binding on them.²⁴¹ Therefore, this document has a persuasive but not binding effect on member states. Although not binding, the document does provide a record of at least the broad intentions of member states in their approach to human rights. This is relevant because the International Covenant on Civil and Political Rights,²⁴² a more binding document,²⁴³ uses almost the identical free speech language of Article 19 of the Declaration, and refers to the principles of the Declaration. The analysis of the Declaration is useful, not only for its own statement of member states intentions regarding human rights, but also for guidance in interpreting the Covenant.

238. Up until very recently the Soviets saw communication as a good properly controlled by the state. See Leslie R. Strauss, *Press Licensing Violates Freedom of Expression, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 55 U. CIN. L. REV. 891, 897 (1987). Also note the position the Third World has taken concerning the freedom of press. See also Michael J. Farley, *Conflicts Over Government Control of Information—The United States and UNESCO*, 59 TUL. L. REV. 1071 (1985).

239. Stephen Raube-Wilson, *The New World Information and Communication Order and International Human Rights Law*, 9 BOSTON C. INT'L & COMP. L. REV. 107, 113 (1986)(citing L. OPPENHEIM, INT'L L. 29 (8th Ed. 1955)).

240. G.A. Res. 217, U.N. Doc. A/810 (1948)[hereinafter Declaration].

241. Raube-Wilson, *supra* note 239, at 116 (citing H. LAUTERPACHT, INT'L LAW & HUMAN RIGHTS 397 (1968)). However, some commentators believe that the Universal Declaration does impose legal obligations on states party to the agreement "because it is an authoritative of the human rights guaranteed by the U.N. Charter (arts. 55,56)". *Id.* at 116 (citing Buergenthal, *The Right to Receive Information Across National Boundaries, In Control of the Direct Broadcast Satellite: Values in Conflict* 73 (Aspen Institute Program on Communications and Society 1974)). Conversely, if the Universal Declaration is an authoritative interpretation of a legally binding document, it would also legally binding itself. However, it was intended not to be. *Id.* (citing LAUTERPACHT, *supra* at 408-409).

242. G.A. Res 2200, 21 U.N.G.A.O. R., Supp. (No. 16) 52, U.N. Doc. A/6316 at 52 (1966) [hereinafter Covenant].

243. *Id.*

The preamble to the Declaration brings out some basic purposes which the covenant attempts to implement. It states,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,²⁴⁴

Whereas it is essential to promote the development of friendly relations between nations,²⁴⁵

Examination of the first statement reveals that freedom of speech was given a high priority vis a vis the other rights enumerated. The second statement illustrates an intention to construe the principles articulated in the Articles consistent with creating a common understanding between peoples of various nations so as to develop friendly relations between them.

In light of these purposes, the relevant article of the Declaration, Article 19 states

ARTICLE 19

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁴⁶

This statement indicates several characteristics concerning the international right to free expression. The right embodies the right to impart information as well as receive it. The right applies "regardless of frontiers."²⁴⁷ Considering the international context for which the document was designed, this phrase means that the right to impart and receive information applies regardless of national borders. It also applies to "any media." This phrase implies that the right applies not only to the forms of media that were dominant at the Article's drafting in 1948, but also to any other forms of media which would become dominant in the future, such as television.

The document also contains an exception:

ARTICLE 29

2. In the exercise of his rights and freedoms, everyone shall be

244. Declaration, *supra* note 240, at pmbl. ¶ 2.

245. *Id.* ¶ 4.

246. *Id.*

247. *Id.*

subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²⁴⁸

In light of the high priority which the drafters gave to the right of free expression, however, the limitations upon free speech referred to should be construed narrowly.

Some writers have taken the view that Article 29 gives the state "complete control over the granting and restricting of the rights provided."²⁴⁹ This view ignores the framework by which Article 29 grants individual states the power to put limitations upon the rights enumerated in the Declaration. Article 29 allows limitations upon human rights by domestic law

solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²⁵⁰

This framework indicates that the state has the power to limit human rights only when the limitation serves one of the above mentioned purposes. State law may limit human rights only out of "respect for the rights and freedoms of others"²⁵¹ or "[when] meeting the just requirements of morality, public order or the general welfare in a democratic society"²⁵²

In conclusion, the Declaration has recorded an intent by member states to give the freedom of expression a priority position vis a vis other human rights enumerated. Additionally, any limitations upon that right should be construed narrowly and will only be valid where done for specified purposes. An important purpose of these articles is to encourage an understanding between the peoples of member states so as to develop friendly relations. Finally, the right to free expression includes the right both to receive and impart information across national borders, and through any media which the speaker deems appropriate.

248. G.A. Res. 217, U.N. Doc. A/810, at 71, art. 29. (1948).

249. Raube-Wilson, *supra* note 239, at 115.

250. Declaration, *supra* note 240, at art. 29.

251. *Id.*

252. *Id.*

2. Application of the International Covenant on Civil and Political Rights

Most commentators agree that the main difference between Article 19 of the Declaration and Article 19 of the Covenant is that the latter is more binding.²⁵³ The preamble to the Covenant states:

[R]ecognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,²⁵⁴

The Covenant preamble incorporates the principles and purposes of the Declaration into its own aims by recognizing the Declaration and using language similar to that of the Declaration's preamble.

The Free Expression clause of the Covenant states, Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputations of others;

(b) For the protection of national security or of public order or of public health or morals.²⁵⁵

The threshold issue raised by the Article 19 is whether television is a type of "media" to which the article applies. Article 19 addresses

253. The states that signed the Covenant agreed "to respect and to ensure to all individuals . . . the rights recognized in the present Covenant." Covenant, *supra* note 242, at art 2. This statement indicates that the principles of the Covenant are legally binding principles. However, in order to gain the benefits of its implementation mechanism, both the complaining party and the defendant must have made an optional declaration under art. *Id.* Raube-Wilson, *supra* note 239, at 118. The United States and some European Nations have not done so. Also note that the United States has signed, but not ratified, the Covenant.

254. Covenant, *supra* note 252, at pmbl.

255. *Id.* at art. 19.

this issue by stating that the "freedom to seek, receive, and impart information" applies "either orally, in writing, or in print, in the form of art, or through any other media of his choice."²⁵⁶ This statement indicates that the right may be exercised through all forms of media available. If the speaker chooses the television broadcast the right applies in that context. The right also applies to artistic expression as indicated by the statement that it applies "in the form of art." Since Article 19 of the Declaration and the Covenant require that the right applies to whatever media the speaker chooses, and considering that Article 19 of the Covenant applies to creative expression, the right applies to the television broadcasts of fiction works.

As mentioned in the analysis of the Declaration, the right to impart and receive information transcends national borders because the right applies "regardless of frontiers."²⁵⁷ The question then becomes how do these principles apply to the Directive. The U.S. theory would be that the EC is interfering with the United States' right to impart information. It is governmentally limiting the amount of broadcasting that the United States can impart to the citizens of the EC.

At first it may seem that the EC is not implementing content regulation because it is not censoring American themes from the broadcasts. However, the U.S. counter-argument would be that by limiting U.S. origin work, the EC is conducting viewpoint discrimination. It is artificially excluding the expression of cultural information of a distinctly American flavor. It is theoretically possible to imagine that European producers could produce television about American themes. But common sense indicates that by having lived in the United States and experienced uniquely American culture, American talent, producers, and writers would have a special viewpoint when it comes producing television. Their product would reflect an American view of American culture. Therefore, EC origin-based restrictions regulate content by governmentally imposed viewpoint discrimination.

The EC might respond that this argument, although theoretically sound, does not comport to international custom. Many states, including the United States regulate the content of their broadcasting.

The United States has had a rich history of broadcast content

256. *Id.*

257. *Id.*

regulation.²⁵⁸ Many of these restrictions concerned indecency,²⁵⁹ advertising for cigarettes,²⁶⁰ and lotteries.²⁶¹ However, these restrictions differ from the Directive in that they seek to protect the public from dangers to health and "morality" in the narrow sense of the word. It could not be seriously argued that exposure to American culture is a threat to fundamental moral precepts or encourages viewers to undertake fatal habits.

United States content restrictions have also gone beyond these categories. As early as the Radio Act of 1927, the federal government required broadcasters to provide equal time to political candidates. Thus, a "broadcaster that carr[ie]d the advertisements of one political candidate [had] to give or sell equal time to opposing candidates."²⁶² In 1934, the U.S. Congress gave the Federal Communications Commission [hereinafter FCC] the power to regulate broadcasting according to "public necessity and convenience."²⁶³ In 1949, the FCC introduced the fairness doctrine.²⁶⁴ Under this approach, broadcasters were required to air issues that were "so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely."²⁶⁵ In 1958, the FCC generated two rules which flowed from the Fairness Doctrine. The first rule was the personal attack rule. It required that where a station broadcasted a program which attacked a person's character during discussion of a controversial issue of public importance, the station must inform the person and offer an opportunity to respond.²⁶⁶ The second rule was the political editorializing rule. This rule gives candidates the right to respond to editorials criticizing them or favoring their opponents.²⁶⁷ It was in response to the personal attack rule that the United States Supreme Court handed down its seminal case *Red Lion Broadcasting Co. v. FCC*.²⁶⁸ In *Red Lion*, the Court held that the personal attack rule violated the

258. Cate, *supra* note 2, at 397.

259. 18 U.S.C. § 1464 (1988).

260. 15 U.S.C. § 1335 (1988).

261. 18 U.S.C. § 1304 (1988).

262. Cate, *supra* note 2, at 397 (citing Pub. L. No. 69-32, 44 Stat. 1162 (1927)).

263. See 47 U.S.C. § 155 (1982); Cate, *supra* note 2, at 397.

264. *Id.* at 398 (citing *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949) (Report)). See *Syracuse Peace Council v. Television Station WTVH*, Syracuse, N.Y., 52 Fed. Reg. 31,768 (1987) (the FCC ultimately found that the Fairness Doctrine violated the First Amendment).

265. T. BARTON CARTER, ET AL., *THE FIRST AMENDMENT & THE FIFTH ESTATE: REG. OF ELECTRONIC MASS MEDIA* 59 (1986).

266. 47 C.F.R. § 73.1920 (1987).

267. 47 C.F.R. § 73.1930 (1987).

268. 395 U.S. 367 (1969).

First Amendment.

Finally, U.S. courts have upheld rules which mirror Article 4 of the Directive. A U.S. Court of Appeals has held that it was permissible for the FCC to consider a station's "local community orientation" and "responsiveness to community needs" in an evaluation to determine whether the license should be renewed.²⁶⁹ The principle behind this rule parallels the one supporting the Directive. Hence, the Directive could be viewed simply as a "local content requirement" for EC members.

The EC could argue that a local content requirement is especially appropriate in the context of the EC. The EC has developed into a quasi-political organization with political goals and aspirations.²⁷⁰ Members need information about one another to make informed decisions concerning community wide issues.

However, even if the EC does have political goals and EC members need political information about one another, the Directive does not facilitate this process. This is best illustrated by comparing the application of the FCC local content rule to the application of the Directive. The application of the FCC local content rule focuses on the need to give the local community political information, rather than culture. In *Central Florida v. FCC*,²⁷¹ the court discussed the FCC's use of the local content rule. The Court stated:

In this case . . . the Commission (FCC) was painstaking and explicit in its balancing. The Commission discussed in quite specific terms, for instance, the items it found impressive in Cowles' past record. It stressed and listed numerous programs demonstrating Cowles' "local community orientation" and "responsiveness to community needs", discussed the percentage of Cowles' programming devoted to news, public affairs, and local topics.²⁷²

Based on the court's discussion, the local content factor constitutes an evaluation of the amount of local political material which a given station broadcasts. It evaluates the amount of time devoted to "news, public affairs, and local topics,"²⁷³ and presumably favors

269. *Central Florida Enterprises v. FCC*, 683 F.2d 503, 505 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983). See also 47 C.F.R. § 73.3526(a)(8) (1989).

270. Some argue that under the Single European Act the purpose of the EEC is to pursue the "strengthening of its [the EEC's] economic and social cohesion." Single European Act, *supra* note 4, at ch. II, art. 130(a). However, the issue of exactly how much individual sovereignty member states have given up to the Community is unresolved.

271. 683 F.2d 503 (D.C. Cir. 1982).

272. *Id.* at 508.

273. *Id.*

those broadcasters who devote a substantial amount of time to those topics.²⁷⁴ In contrast, the Directive does not augment the dissemination of political material concerning local community issues.²⁷⁵ Rather, the Directive's impact is to put a larger quantity of European fiction work on European television. Showing more European soap operas vis a vis U.S. serials does not increase the sharing of various European states' political thoughts with one another.

The EC could respond that the Directive is consistent with a state's responsibility to maintain some sense of national identity and culture. The Directive does not totally exclude U.S. programming. Rather it simply limits non-EC programming to forty-nine percent. The broadcasting spectrum is limited, and as such constitutes a limited resource. Therefore, the state has a duty to make sure that a diversity of viewpoints, especially those originating within its national borders, are heard for the benefit of the public. The Supreme Court of the United States in *Red Lion Broadcasting Co. v. FCC*, recognized that

[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive to suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.²⁷⁶

The Court also stated:

The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.²⁷⁷

The EC can argue that it has a responsibility to encourage the presentation of its own cultural viewpoint. The EC can buttress this argument by pointing out that the right to cultural enjoyment is protected in the Covenant. The preamble to the Covenant states:

[t]he ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural

274. *Id.*

275. News is excluded from the calculation of the quota. *Id.*

276. 395 U.S. 367, 390 (1969).

277. *Id.* at 387.

rights,²⁷⁸

Article 1 of the Covenant states,

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²⁷⁹

Moreover, there is an entire covenant, the International Covenant on Economic, Social and Cultural Rights devoted to the right to cultural development.²⁸⁰ The International Covenant states in its relevant part:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

2. The steps to be taken by the States Parties to the Covenant to achieve full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. . . .

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and the development of international contacts and co-operation in the scientific and cultural fields.²⁸¹

Examining the text of Article 15, one cannot but notice the potential for conflict between on the one hand, Article 15 paragraph 2 of International Covenant, the preamble and Article 1 of the Covenant and on the other hand, Article 15 paragraph 4 of the International Covenant. The preamble and Article 1 of the Covenant both recognize the general right to cultural development. Article 15, paragraph 2 of the International Covenant rights recognizes a state right to take action to conserve culture. In contrast, paragraph 4 of the same document recognizes the benefits to be derived from the development of international contacts in cultural fields. Therefore, although the right exists to impart information across borders for the purpose of development of international contacts in cultural fields as long as such contacts do not interfere with the conservation of domestic culture, it is difficult to determine where to draw the line and how this standard applies to the Directive.

The issue may be approached by determining whether U.S. tel-

278. Covenant, *supra* note 253.

279. *Id.* at art. 1.

280. G.A. Res. 2200, 21 U.N. G.A.O. Supp. (no.16) 49, U.N. Doc. A/6316) (1966) [hereinafter International Covenant].

281. *Id.* at art. 15.

evision programs constitute a threat to European culture. Can reruns of Dallas do to French culture what a several year occupation by Nazi Germany failed to do? That is, destroy it?²⁸² Moreover, why is the Directive necessary now to preserve European Culture? Europe has been inundated with U.S. television for close to forty years. Has European Culture been destroyed by this exposure?

The EC could argue that the issue is a matter not only of retaining and developing member states cultures, but of developing a pan-European culture.²⁸³ Non-EC television broadcasts interfere with this process by occupying the broadcast channels with United States and other foreign material. If this were true why would the Directive's allowable forty-nine percent non-EC programming not interfere with the process?

In conclusion, international agreements on free speech apply to television broadcasts of fictional programs. Those agreements prohibit content regulation through viewpoint discrimination. The United States may argue that U.S. regulation of its own broadcasting differs from the Directive because U.S. regulation augments the democratic process, whereas the Directive does not. It can even be argued that the Directive does not enrich pan-European culture, but rather the pan-European broadcasting industry. However, the ultimate problem is that the right to cultural conservation directly conflicts with the freedom to impart information across national borders. Information and viewpoints of other cultures by their very nature affect the culture and the nations upon which they are imparted. It is perhaps upon this tenet which paragraph 4 of Article 15 was based. The "benefits" that states derive from "international contact and cooperation" in the "field of culture" are a greater understanding of each other. But, such interchange alters the relationship between one's own culture and others. By being exposed to another culture, that other culture becomes less foreign and consequently, cultural stereotypes dissipate. The very exposure to another culture results in the assimilation of that other culture into one's own. As this process occurs the differences between the two original cultures are reduced. To the extent that cultural differences equal cultural identities, exposure to other cultures leads to the loss of an originally pure cultural identity.

This process, however, fulfills one of the basic purposes of the

282. See Jack Valenti, *The European Community Makes Ominous Sounds About Broadcast Quotas* (remarks to the Advisory Comm. on Int'l Comm. and Info. Pol'y, Dep't of State, Wash., D.C., 3, July 17, 1989).

283. *Green Paper*, *supra* note 49, at 28.

UN documents, to "promote the development of friendly relations between nations."²⁸⁴ Once people understand other cultures, the chance for misunderstanding, hatred, and international political tension is lessened.

3. Application of the Helsinki Accords

The Helsinki Accords,²⁸⁵ which both Europe and the United States signed,²⁸⁶ support the view that it is only through constant and mutual exchange of cultural information that friendly relations among nations and stability in the world can be maintained. The preamble states,

Reaffirming their objective of promoting better relations among themselves and ensuring conditions in which their people can live a true and lasting peace free from any threat or attempt against their security. . . .

Mindful of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations, and desiring to search, fully taking into account the individuality and diversity of their positions and views, for possibilities of joining their efforts with a view to overcoming distrust and increasing confidence, solving the problems that separate them and co-operating in the interest of mankind²⁸⁷

The relevant part of the text then states,

2. Information

The participating States,

Conscious of the need for an ever wider knowledge and understanding of the various aspects of life in other participating States,

Acknowledging the contribution of this process to the growth of confidence between peoples,

Desiring, with the development of mutual understanding

284. Declaration, *supra* note 240, at preamble, ¶ 4.

285. Final Act Conference on Security and Cooperation in Europe, Aug. 1, 1975, 73 Dep't State Bull. 323 (1975); reprinted in 14 Int'l Legal Mat. 1292 (1975) and Appendix A [hereinafter Final Act].

286. The binding nature of the Final Act is a complex question which remains open to debate. See Alexandre Charles Kiss & Mary Frances Dominick, *The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act*, 13 VAND J. TRANS-NAT'L L. 293 (1980). However, the Final Act "has entered the discourse of international human rights as if it were equivalent in legal effect to the International Covenants." HENTRY STEINER & DETLEV VAGTS, TRANSNAT'L LEGAL PROBS. 462 (1986).

287. Final Act, *supra* note 287, at pmb1.

between the participating States and with the further improvement of their relations, to continue further efforts towards progress in this field,

Recognizing the importance of the dissemination of information from the other participating States and a better acquaintance with such information . . .

Emphasizing therefore the essential and influential role of the press, radio, *television*, cinema, news agencies and of the journalists working in these fields,

Make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and improve the conditions under which journalists from one participating State exercise their profession in another participating State,

Express their intention in particular:

(iii) Filmed and Broadcast Information

- To promote the improvement of the dissemination of filmed and broadcast information. To this end:

they will encourage a wider showing of broadcasting of a greater variety of recorded and filmed information from other participating States, illustrating the various aspects of life in their countries . . . ;

they will facilitate the import by competent organizations and films of recorded audio-visual material from other participating states.²⁸⁸

The Europeans could make several responses to the use of the Final Act to attack the validity of the Directive. They could argue that the problem the Final Act intended to solve was the tension between the Soviet Bloc and the West,²⁸⁹ not a United States - West European problem. They could also point out that the Final Act requires that they "encourage a greater variety of recorded and filmed information from other participating states."²⁹⁰ The Directive facilitates that process by requiring that non-EC material, especially United States material, does not dominate European television. By requiring that fifty-one percent of television programming be EC, the Directive facilitates a wider showing of European material between European states.

Although the context within which the Final Act was written may have been detente, that does not detract from the fact that

288. *Id.* at Co-operation in Humanitarian and Other Fields (Basket II) Information.

289. See generally VAGTS & STEINER, *supra* note 288, at 461.

290. See Final Act, *supra* note 287.

it has become an international norm in the field of human rights.²⁹¹ Moreover, the fact that it was written in an attempt to facilitate detente has other implications. Informational exchange between states was seen as an important method to breaking down distrust between the populations of the East and West. If the use of cultural exchange through television and other media breaks down mistrust, the inverse could be true. If nations create blockages to the free flow of information, they run the risk of creating mistrust.

Although there clearly is no danger of war between the United States and the EC, the free flow of information between nations is a necessary underpinning to ensuring that relations between nations remain friendly and stable. This is not the type of rule which can be applied haphazardly, especially forcefully during times of international tension and more lightly during times of friendly co-existence. The purpose of the rule is prophylactic, to create and maintain a stable sense of peace and mutual understanding in the world.

The thorny question of allocation of broadcast resources remains. Even if all the arguments are true concerning the importance of the free flow of information, the issue becomes not whether it should exist, but who decides how it is allocated. The United States could argue that it is bad precedent for states to take it upon themselves to decide which cultures should have "priority exposure." For the sake of preservation of power, governments will only expose their populations to cultures which they favor. Based on human nature these "favored cultures" are likely to be cultures similar to those of the regulating state. Thus, once states get in the business of deciding which cultures should have priority exposure, there will ultimately be cultural stagnation and isolationism. A basis for free expression is a market place of ideas theory. In this theory political and cultural truths are only arrived at by allowing them to compete for the majority's acceptance through various forms of expression. This marketplace can only function efficiently if the government remains clear of the process.

Of course, the *Red Lion* principle that the government has a duty to ensure that a diversity of viewpoints are aired must be respected.²⁹² However, there is no evidence that Europeans have not been exposed to television from other European states. The economic reality in Europe is that entertainment shows originating in one European country rarely have much popularity in other Eu-

291. *Id.*

292. See *supra* text accompanying notes 278-79.

ropean States.²⁹³ It is not that EC states have not had exposure to each other's broadcasts but rather that the receiving public has chosen not to watch them.

The Helsinki Accords establish a international norm among its signatories that the mutual unfettered exchange of information is necessary to maintain friendly relationships between nations. The process by which a given nation allocates the inflow of information from other states must be dictated by its viewers not its government, as long as a diversity of viewpoints have been exposed. If a state's government decides which culture should have "priority exposure" it will choose the most similar to its own so as to hold onto political power. If citizens are unable to choose from among the international marketplace of ideas, they will lose opportunities for choosing the best political and cultural path for themselves. Those nations—in the recent past the Eastern Bloc—in which the governments have dictated which political systems and cultures are exposed to their populations, and to what degree that exposure occurs, are now only starting to realize the cultural and political enrichment that they have missed. This issue also has an impact on international relations. The unfettered free flow of information between states is not a principle which can be applied haphazardly. The purpose of the rule is prophylactic, to maintain a constant tenor of international stability and peaceful coexistence. If one waits until tensions erupt to invoke the rule, it may be too late.

IX. CONCLUSION

The Directive impacts international obligations both in the areas of free trade and the free flow of information. In the area of free trade area, the United States has a strong argument that the Directive violates Article III of GATT, and the OECD Code of Liberalization of Invisible Operations. In the area of the international free flow of information the U.S. argument is more tenuous. The United States can argue that the Directive violates its right to impart information to Europe based on various international human rights documents. However, this argument open the U.S. position to attack because of its own judicial and legislative willingness to impose content restrictions similar to the Directive. The United States can attempt to make distinctions between its own laws and that of the Directive by showing that economic, instead of political goals are furthered by the Directive. The facilitation of the politi-

293. Telephone Interview with Kathy Goodman & James Primm, *supra* note 39.

cal process whether within the United States or the EC is the only legitimate foundation upon which to base content regulation. Since U.S. legislation accomplishes this goal, and the Directive does not, U.S. legislation may be distinguished from the Directive.

However, the strongest U.S. argument in the free speech area is reminding the Europeans of the underlying goals which are the basis for many of the international agreements on free speech as well as free trade: the long term maintenance of stable and friendly international relations. The United States can argue that cumulatively the obligations embodied in GATT, the OECD, and international human rights documents represent the result of an international consensus on more than just their particular issues. Those leaders that emerged from the horrors of World War II recognized fundamental truths about the nature of exchanges whether, economic or cultural between different states. Free exchange of both material and information between peoples creates material, cultural, and political enrichment for those nations participating, and soothes international tension by reducing inequality and prejudice. As people understand the mutual values and traditions that they share, they are less likely to generate the mistrust and prejudices necessary to fight.

Free trade and the free flow of information go hand in hand. The very European states that created the Directive recognize this truth. They enacted the Directive to create a free flow of information in Europe as response to the Single European Act's mandate to create a free flow of trade in Europe.²⁹⁴ Those states recognized the importance of the free exchange of information in the context of the European Community. They hope to create a Pan-European culture where petty national differences which have plagued the continent in the form of mistrust, prejudice and even wars, will dissipate so that they can cooperate in an unfettered movement of goods, persons, services, and capital. The Directive is a means to engender that result. European States, by recognizing the need to liberalize the free of flow information for the purpose of creating lasting trading relationships between states, have recognized the fundamental link between free trade, the free flow of information, mutual understanding, cooperation and peace.

The EC, on the one hand, recognizing the need to create a free flow of information and trade in Europe, while on the other hand, erecting trade and information barriers between Europe and the

294. *Green Paper*, *supra* note 49, at 24.

rest of the World is behaving inconsistently. The former may sooth tensions between European states, but the later unnecessarily creates tension between Europe and the rest of the World.

Perhaps the debate over the Directive is a test of an international commitment to avoid regression to the "beggar-my-neighbor" policies of pre World War II, and to sustain the human right of free expression which occasionally blossoms and withers in the course of world history. One hopes that the result of the test will reaffirm these commitments instead of rejecting them. If states take a loose interpretation of these commitments, applying them haphazardly, they become weak. The nature of these commitments requires that when serious international tension arises, and a crisis comes to ahead, they be strong. At that point, the only means to turn to resolve the crisis besides arms, are past relationships, not just between leaders of the states but between their peoples, built through a history of political, cultural, and economic exchange.