

HOLLYWOOD'S LAST HURRAH?
"TELEVISION WITHOUT FRONTIERS"
DIRECTIVE MAY CLOSE BORDERS TO THE
EUROPEAN COMMUNITY'S BROADCAST MARKET

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1. INTRODUCTION

Let us go forward [to a time] when programmes . . . will be receivable from satellites without relay in every home. No country will make penal laws against the reception of foreign programmes, because they could no more enforce such laws than could Nazi Germany. And we need not think of regulation by international convention. Who would accede to the Russian plea that no broadcast should criticise the Leninist interpretation of Marx? What answer would be given to the primitive savage who wished to protect his family against the American Way of Life? Let us acknowledge here and now that there is no prospect of international agreement on the intellectual or cultural quality of this, or any other mass medium. Everyone will receive what anyone transmits.¹

Lord Kilbrandon made this statement at a 1968 Symposium on Human Rights and Mass Communications organized by the Consultative Assembly of the Council of Europe. Twenty-five years later, the European Economic Community (the "EC") is been rapidly developing capabilities in direct satellite broadcast technology which will increase both the number of channels available and the number of households reached by television. This widening of the broadcast spec-

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¹ From an address by Lord Kilbrandon, General Rapporteur. Eamonn G. Hall & Patrick J.C. McGovern, *Regulation of the Media: Irish and European Community Dimensions*, 8 DUBLIN U. L.J. 1, 20-21 (1986) (citations omitted).

trum opens the way for increased dissemination of information through cross-border television transmissions among EC Member States as well as for the kinds of protectionist restrictions on information imports from non-Member States which Lord Kilbrandon feared.

"Television without Frontiers" is the popular name for a European Community Directive which regulates and standardizes media law among the twelve Member States, thereby promoting previously unavailable freedom to transmit across borders. The Directive also limits the amount of non-Member State broadcasting which can be imported into the Community, with the stated purpose of protecting Europe's cultural integrity through a "political" rather than legal quota on non-European broadcasting.² The European Council passed Directive 89/552, 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*³ on October 3, 1989. The Directive went into effect on October 3, 1991, and Member States have two years to transpose it into national law.⁴

Television without Frontiers went through several evolutionary stages prior to its adoption. Although approved by the European Parliament in May 1989, the Directive failed when six Member States rejected it.⁵ The rejections were based in part on Member States challenging the EC's sovereignty to regulate media law, and in part on the Directive's proposal of a sixty percent quota for Community programs, which excludes time reserved for news, advertising, game shows, sports or teletext services.⁶ The final Directive softened the quota to "a majority proportion of European-made programmes where

² Dovie F. Wingard, *Europe 1992: Mass Media Developments*, N.Y. L.J., Nov. 30, 1990, at 5.

³ Council Directive 89/552, 1989 O.J. (L 298) 23 [hereinafter Directive].

⁴ *Id.* art. 25.

⁵ *European TV Plan Rejected*, N.Y. TIMES (late ed. final), June 15, 1989, at D2. The six rejecting countries were Belgium, Denmark, France, Greece, the Netherlands and West Germany.

⁶ See Amended Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, 1988 O.J. (C 110) 3, 12.

practicable."⁷ With this quota reduction, the Directive passed with a 10-2 vote, Belgium and Denmark still dissenting.⁸

Specifically, the Directive addresses four main areas which will be discussed in this Comment:

1. The Directive standardizes laws regarding advertising time and content, prohibiting cigarette advertising and limiting alcohol advertising.⁹ It also bans programs and advertising that contain incitement to hatred because of race, gender, nationality, or religion.¹⁰

2. The Directive seeks to protect minors by restricting the broadcast hours of violent or sexually explicit programs.¹¹

3. Broadcasters are required to reserve at least ten percent of their transmission time or ten percent of their budget for works made by independent producers.¹²

4. The Directive institutes a 49.9% quota on non-Member State programming.¹³

The Directive also provides a right of reply for persons unfairly maligned by the media,¹⁴ and protects the movie industry by requiring that cinematographic works not be broadcast on television until at least two years after their first appearance in Member State cinemas, unless the rights holder and broadcaster agree to broadcast the work sooner.¹⁵ This Comment will not address these two provisions.

⁷ Directive, *supra* note 3, art. 4(1). EC Broadcasting Commissioner Jean Dondelinger says, "We dropped the quotas because Britain refused to accept them . . . Britain opposed them because the Thatcher government wanted to avoid diplomatic problems with the White House." Matthew Fraser, *Battle of TV Quotas Heats Up in Europe; EC Directive Leaves Few Satisfied*, INT'L HERALD TRIB., Oct. 7, 1991, available in LEXIS, Nexis Library, Currrt File.

⁸ Wingard, *supra* note 2, at 5.

⁹ Directive, *supra* note 3, arts. 10, 11, 13, 15.

¹⁰ *Id.* arts. 12(b), (c) & 22.

¹¹ *Id.* arts. 16, 22.

¹² *Id.* art. 5.

¹³ *Id.* art. 4(1). "Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works . . . a majority proportion of their transmission time." *Id.* Member states are also to ensure that broadcasters, where practicable, reserve 10 percent of broadcast time and budget for "European works created by producers who are independent of broadcasters." *Id.* art. 5.

¹⁴ *Id.* art. 23.

¹⁵ *Id.* art. 7.

The main purpose of the Television without Frontiers Directive is to harmonize audiovisual law among the Member States, providing a barrier-free zone of movement for television programs and advertisements. As a corollary, the EC hopes that "[t]elevision will play an important part in developing and nurturing awareness of the rich variety of Europe's common cultural and historical heritage. The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."¹⁶

Insofar as it eliminates trade barriers between the Member States, the Directive is fully in harmony with the European Convention on Human Rights. Article 10 provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."¹⁷ Because of the wide divergence in Member State media law prior to the Directive's adoption, cross-border transmissions were restricted on certain days, at certain times, or because of advertising or program content. Standardized laws will ensure that Member States have concurrent rights to send and receive programming with other Member States. This freedom, however, does not encompass broadcasts from third countries. EC Commission President Martin Bangemann described the quota as a political commitment, not a legal obligation;¹⁸ still, the quota does deny Member States the right to receive programming in excess of 49.9% from the United States and other non-European nations.

Two conflicts arise: the first, alleged by the United States, is that the quota is an economic, not a cultural barrier, and that it violates free trade agreements between the United States and the EC; the second is that, while the Directive grants greater freedom of broadcast transmission and recep-

¹⁶ Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM(84)300 final at 28 [hereinafter Green Paper].

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, done on Nov. 4, 1950, art. 10(1), Europ. T.S. No. 5 [hereinafter Human Rights Convention].

¹⁸ Steven Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at D20.
<https://scholarship.law.upenn.edu/jil/vol14/iss1/4>

tion among the Member States, it potentially denies to them freedom of reception of information from non-Member States. This is arguably inconsistent with the Human Rights Convention and other free information agreements amounting to customary law in the EC. This Comment will discuss the issue in three parts: first, the history of and reasons for Television without Frontiers and its impact on freedom of speech under the Human Rights Convention; second, the Directive's potential effects on the U.S. broadcast market and how the United States can protect its interests; and third, an overview of Television without Frontiers as it has been implemented to regulate television advertising in the EC.

2. THE HISTORY AND PURPOSE OF TELEVISION WITHOUT FRONTIERS

After several preliminary forays into the area of broadcast regulation,¹⁹ the EC adopted the Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable,²⁰ in 1984. The Green Paper was an initial proposal to standardize the Member States' diverse broadcast laws and facilitate free cross-border transmission of television programs and advertisements. In the Commission's view, the process of economic integration planned for 1992-1993 would be expedited by a free exchange of culture through media transmissions. "The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."²¹ The Commission also wanted to avoid the "dominance of the big American media corporations,"²² which perpetrated a phenomenon sometimes called *Wall-to-Wall Dallas*, a catch phrase for the capitulation of the European television market to U.S.-produced and culturally-centered television shows such as *Dallas* and *Dynasty*. Another impetus for harmonization was the need to comply with the Treaty

¹⁹ See European Parliament, Resolution on Radio and Television Broadcasting in the European Community, 1982 O.J. (C 87) 110-112, calling for a European television channel, and Realities and Tendencies in European Television Perspectives and Options, COM(83)229 final.

²⁰ Green Paper, *supra* note 16.

²¹ *Id.* at 28.

²² *Id.* at 33.

Establishing the European Economic Community²³ and its articles ensuring free movement of services.²⁴

2.1. *The Impetus behind Standardization: Transmission Technology*

Technical standards vary between Member States, and some States are technologically more advanced than others. Harmonization of such standards will be difficult and expensive,²⁵ but the technological explosion in direct satellite broadcast, cable television and low level or "terrestrial" television promises to expand the available spectrum space and hence the number of channels and hours available for broadcast time. "By converting their 'balkanized' and often inflexible networks into a world-class regional system, the EEC hopes that harmonization and coordination will jumpstart national economies and enable Europe to compete with the United States, Japan, and other leading telecommunications players."²⁶

The number of private, commercial channels funded by advertising or cable fees and catering to popular programming only recently surpassed the number of public, government-run channels. Prior to the Directive's adoption, most television networks in Europe were government monopolies, because limited spectrum space demanded that public service programs take precedence over commercial broadcasts.²⁷ The privatization of television and direct broadcast by satellite, however, will render television's broadcast range virtually boundless. The average European viewer chose from approximately 3.5 channels in 1990. This number is expected to double by 1995.²⁸ Europe had a total of 56 channels in 1989,²⁹ and it

²³ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty].

²⁴ *Id.* arts. 59-66. Broadcasting is considered a service, not a good, within the meaning of the Treaty and the Directive. See *infra* note 88 and accompanying text.

²⁵ See Green Paper, *supra* note 16, at 44.

²⁶ Robert M. Frieden, *Open Telecommunications Policies for Europe: Promises and Pitfalls*, 31 JURIMETRICS J. 319, 319 (1991).

²⁷ C.A. Giffard, *European Regulation of Transborder Television*, 27 CAL. W. L. REV. 159, 161 (1990).

²⁸ Charles Moore & David St. John White, *European Television in the*

is predicted that this number will exceed 120 by 1995.³⁰

Germany's TV-SAT, Europe's first direct broadcasting satellite, went into orbit on November 21, 1987, followed by France's TF1. Ten to twelve direct broadcasting satellites are scheduled to reach all or part of the EC soon.³¹

Logically, an increase in the number of channels will increase the aggregate amount of available air time. While estimates vary, some sources predict that Europe's current 275,000 hours of television time per year will grow to 400,000 by the year 2000.³² This expansion leaves the European media market wide open for both program and advertising development. The quota, however, may prevent the United States from benefitting from the expanded hours, and restricts Member States' freedom to receive information under the Human Rights Convention. It further raises the question of whether Member States will be able to fill the available broadcast hours with their own programming. In 1989, more than seventy percent of the fiction programs shown in the EC were imported from non-EC countries.³³

2.2. *Broadcast and Advertising: Europe-Wide Harmonization*

Perhaps the major impetus for Television without Frontiers was that broadcast rules between the Member States were so different that they prevented cross-border program and advertising transmissions. National rules on freedom of broadcasting, affecting both the content of television programs and advertising in each Member State, diverged widely.

The clearest case is that of a total ban on broadcast

1990s: *Tuning Out American Producers?*, 8 ENT. & SPORTS L. 1, 2 (1990).

²⁹ Daniel Pederson, *A Grenade Aimed at Hollywood*, NEWSWEEK, Oct. 16, 1989, at 58.

³⁰ *Buddy, Can You Spare a Reel?*, ECONOMIST, Aug. 19, 1989, at 56. At least one other source predicts a higher number, estimating 200 channels by 1992.

³¹ Brian L. Ross, Note, "I Love Lucy," but the European Community Doesn't: Apparent Protectionism in the European Community's Broadcast Market, 16 BROOKLYN J. INT'L L. 529, 535 n. 26 (1990) (citing Office for Official Publications of the European Communities, *The Audio-Visual Media in the Single European Market*, Periodical 4/1988 at 12, 13).

³² *Buddy, Can You Spare a Reel?*, *supra* note 30, at 56.

³³ Leyla Ertugrul, *EC Agrees Rules for "TV Without Frontiers"*, Reuter Libr. Rep., Mar. 14, 1989, available in LEXIS, Europe Library, Allnws File.

advertising as in Belgium: domestic cable firms, for example, may then be prevented from relaying foreign advertising. The effect is similar where domestic advertising is permitted but advertising must be blacked out if foreign programmes are relayed within the country (Italy): discrimination against non-nationals is an additional factor here.³⁴

In order to promote truly free transmission of cultural ideas through the media, the Commission concluded that broadcast laws must be standardized and that the EC had the authority to perform the task through the Directive.³⁵ Before the Directive came into effect, Member States had more at stake than just regulations regarding content and timing of programs and advertising: "Since its earliest days, broadcasting has been viewed as an attribute of national sovereignty,"³⁶ and the EC's arrogation of this power from the Member States was both a step toward cultural and economic unity and an indication of the EC's sovereignty to the Member States. The Directive implemented these considerations by imposing a total ban on tobacco and alcohol advertising, regulating time and placement of advertising breaks, and establishing certain restrictions on programming content and protection of minors.³⁷

2.3. *Freedom of Information and Opinion in Customary Law*

"The European Community itself is 'a new legal order of international law for the benefit of which the States have limited their sovereign rights albeit within a limited field.' Community law cannot be divorced from principles of general international law."³⁸ In light of international, or customary law, the freedom of information exchange between the Member States was perhaps inevitable.

The Green Paper lists several international agreements

³⁴ Green Paper, *supra* note 16, at 254.

³⁵ *See id.* at 105-24.

³⁶ Kelly L. Wilkins, Comment, *Television Without Frontiers*, 14 B.C. INT'L & COMP. L. REV. 195, 196 (1991).

³⁷ *See supra* notes 9-12 and accompanying text.

³⁸ Hall & McGovern, *supra* note 1, at 2 (quoting Case 26/62, Van Gend en Loos [1963] E.C.R. 1 at 12).

guaranteeing freedom of information through broadcast. The Universal Declaration on Human Rights, unanimously adopted by the United Nations General Assembly in 1948, states in Article 19 that:

[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³⁹

Article 19(1) and (2) of The International Covenant on Civil and Political Rights, which came into force in 1976,⁴⁰ states that

[e]veryone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include 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 . . . choice.⁴¹

The Declaration of the Freedom of Expression and Information, adopted at the Committee of Ministers of the Council of Europe's 70th session in 1982 composed a statement addressed to the whole world by the Council of Europe's members on the meaning of freedom of information in Western Europe, specifically providing:

- a. Protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights; [and]
- b. Absence of censorship or any arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information.⁴²

³⁹ Green Paper, *supra* note 16.

⁴⁰ Hall & McGovern, *supra* note 1, at 3 n.11.

⁴¹ Green Paper, *supra* note 16, at 24.

⁴² Hall & McGovern, *supra* note 1, at 3, 4 (quoting The Declaration of the

The Human Rights Convention both guarantees the right to impart and receive information and imposes restrictions on the transmission of information. Specifically, Article 10 provides:

- 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals.⁴³

The Human Rights Convention nowhere indicates that freedom to receive information exists only between Member States and not between Member States and third countries. While Articles 56(1) and 66 of the Treaty state that freedom to provide services "shall not prejudice the applicability of provisions . . . providing for special treatment for foreign nationals on grounds of public policy," the Green Paper clearly indicates that "grounds of public policy may not be involved to service economic ends."⁴⁴ The EC has escaped this safeguard by declaring its quota to be culturally, not economically, protective. "[P]ursuant to Article 56(1), national provisions are inapplicable which . . . shield [local broadcasters] from outside competition."⁴⁵ Even with its focus on cultural protection, which in U.S. terminology could be translated as affirmative action for Member State broadcasters, the quota shields Member State broadcasts from outside competition. Because the EC is an economic community, its foray into cultural regulation is suspect.

The second paragraph of Article 10, while broadly provid-

Freedom of Expression and Information).

⁴³ Human Rights Convention, *supra* note 17 and accompanying text.

⁴⁴ Green Paper, *supra* note 16, at 126.

⁴⁵ *Id.*

ing for restrictions "necessary in a democratic society,"⁴⁶ arguably should not stretch far enough to limit freedom of speech in its attempt to restrict views inciting racial hatred, or denigrating persons by their race, religion, gender or nationality.⁴⁷ While the effect of such a restriction may be desirable, the means are an erosion of freedom of speech and opinion guaranteed by Article 10 of the Human Rights Convention. The only challenges so far, however, have been to freedom of commercial speech, addressed in section 4 of this Comment.

3. EFFECTS ON THE U.S. BROADCAST MARKET AND PROTECTION OF U.S. INTERESTS

Because of its language, the effects of the Directive depend upon the strictness with which it is enforced. The main controversy over the Directive arose over Article 4(1), which stipulates:

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.⁴⁸

⁴⁶ Human Rights Convention, *supra* note 17.

⁴⁷ Directive, *supra* note 3, arts. 12(b), (c) & 22.

⁴⁸ Directive, *supra* note 3, art. 4(1) (emphasis added). Article 6 defines "European works" as:

1. (a) works originating from Member States of the Community . . . 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 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:

3.1. The "Where Practicable" Standard: Political Commitment or Legal Obligation?

If the quota's purpose is cultural protection rather than economic protection, the "where practicable" clause leaves Member States with considerable latitude in enforcing the quota. EC Vice President Martin Bangemann, in charge of internal markets, emphasized that the Commission did not view Article 4 as a legally enforceable obligation.⁴⁹ The Directive's loose language may allow the United States and other third countries a loophole through which to avoid the Directive's provisions, but "[t]here appear to be no cases from the European Court interpreting a 'where practicable' clause within a directive."⁵⁰ And the Directive clearly provides for stricter enforcement of the quota by the Member States, especially regarding the amount of broadcasting which must be originally produced in the native language of the Member State.⁵¹ If Member States do not comply with the Directive,

(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 States by producers established in one or more European third countries with which the Community will conclude agreements in accordance with the procedures of the Treaty, if those works are mainly made with authors and workers residing in one or more European States.

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

Id. art. 6.

⁴⁹ Roy Denman, *Television Without Frontiers*, WASH. POST (final ed.), Nov. 24, 1989, at A23.

⁵⁰ Wilkins, *supra* note 36, at 207.

⁵¹ Directive, *supra* note 3, art. 3(1). "Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this directive." *Id.* The

Article 169 of the Treaty provides that the Commission may bring suit in the European Court of Justice if it believes the Member States are not sufficiently enforcing a directive.⁵²

3.2. *British Response to the Quota Issue*

The British government has already told British Satellite Broadcasting, one of the country's pay channels, that "its film channel need not follow the Directive, because it is 'not practicable' to show a majority of European films."⁵³ Currently, Britain requires its networks to show a "reasonable proportion" of European works, which in practice amounts to about eighty-six percent of total broadcasts. This includes news, sports, and game shows.⁵⁴ The Directive excludes news, sports, and game shows from its 50.1% European-produced program mandate,⁵⁵ so the British enforcement and the Directive's quota may be more equal than the percentages appear at first glance.

3.3. *French Response to the Quota Issue*

France is undoubtedly the strictest enforcer of the Television without Frontiers Directive. Even before the Directive passed, France took a protectionist stance, fining two channels ten million dollars for broadcasting an excess of foreign programs in July of 1989.⁵⁶ In July 1992, it fined the private station TF1 six million dollars for not meeting its hourly

Council of the European Communities also notes, "[i]n order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules . . . on the basis of language criteria, as long as these rules are in conformity with Community law." *Id.*

⁵² Treaty, *supra* note 23, art. 169. Under Article 170, Member States may also take this action against each other. *Id.* art. 170. The Commission has used this action to force Member States to implement other Directives. See Case 94/81, Commission v. Italian Republic, 1982 E.C.R. 739, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8,816 (1982); case 128/76, Commission v. Italy, 1977 E.C.R. 1449, 23 C.M.L.R. 460 (1978).

⁵³ *Buddy, Can You Spare a Reel?*, *supra* note 30, at 57.

⁵⁴ *Id.*

⁵⁵ Directive, *supra* note 3, art. 4(1).

⁵⁶ *Buddy, Can You Spare a Reel?*, *supra* note 30, at 57. The going rate in France for exceeding the quota is \$10,000 an hour. Diana Lady Dougan, 'Fortress Europe of the Airways,' L.A. TIMES, Oct. 11, 1989, at B2.

broadcast quota of independent (French-made) productions.⁵⁷ When the Directive was still in its proposal stages, France “originally supported the adoption of a mandatory quota that would have required broadcasters in all EC Member States to set aside at least sixty percent of their air time for European-made programs,”⁵⁸ and France’s minister of culture and communication, Jack Lang, wanted to produce at least half that amount, thirty percent, in France.⁵⁹ In January of 1990, France strengthened its administrative proceedings further, eliminating national loopholes which the Directive left open regarding the definition of works of “European origin.” France defines “European origin” by five requirements:

1. Works must be produced by a company whose head office is in the Member States. Its president, managing partner, and the majority of board members must be citizens of a Member State. The Company must control or share jointly the initiative and financial, technical and artistic responsibility for making the program and cannot be controlled by producers established outside the EC;
2. At least 50 percent of production costs must come from EC citizens or companies headquartered in the EC;
3. A minimum of two-thirds of the total final cost of the production must come from costs incurred in the EC;
4. Two-thirds of the actors, authors, producers, musicians, scriptwriters and technicians must be EC residents; and
5. Two-thirds of the technical services must be performed in film or sound studios or laboratories located in the EC.⁶⁰

France’s actions have generated criticism, and the European Commission even stepped in when TF1, France’s leading television station, complained that language quotas discrimi-

⁵⁷ John Chalmers, *French TV Watchdog under Fire after Fine on Channel*, Reuter Libr. Rep., July 31, 1992, available in LEXIS, Europe Library, Allnws File.

⁵⁸ Ross, *supra* note 31, at 534.

⁵⁹ *Buddy, Can You Spare a Reel?*, *supra* note 30, at 57.

⁶⁰ Moore & White, *supra* note 28, at 9.

nated against other Community productions. After two months of negotiations, France agreed to reduce a fifty percent language quota to forty percent, and to change the definition of French language work to include works shot in French and not just works scripted in French.⁶¹ France, however, has no tradition of private broadcasting. Until 1984, French television was run entirely by the state, and several commercial stations have complained that quotas do not promise quality.⁶²

3.4. Enforcement

On November 2, 1992, the EC took its first steps toward enforcement of Television without Frontiers on recalcitrant Member States. The European Commission sent "pre-litigation" letters to all twelve Member States asking for implementation information and warning that some governments have not properly implemented the Directive into national law.⁶³ Spain, Italy, and Denmark were most conspicuously in violation,⁶⁴ but Italy took steps to remedy its deficiencies in advertising time and content by proposing regulations which will become effective, with Italian parliamentary approval, in July 1993.⁶⁵ The Commission admonished Britain as well for its nationalistic attitude. Britain, the Commission alleged, imposed too many controls on continental European television broadcasts into the United Kingdom by satellite.⁶⁶ The Member States must provide information or correct problems by January 1993,⁶⁷ or face infringement proceedings under

⁶¹ *Audiovisual Sector: Friendly Settlement to French Quota Issue*, MONTHLY REP. ON EUR., Sept. 1991, at 14.

⁶² Roni Amelan, *France: CSA Broadcasting Authority Power May Save Television*, Reuter Textline, Nov. 22, 1991, available in LEXIS, Europe Library, Allnws File.

⁶³ *EC Countries Warned on Cross-Border Television*, Reuter Libr. Rep., Nov. 16, 1992, available in LEXIS, Europe Library, Allnws File.

⁶⁴ Julian Newman, *EC: EC Gets Strict over Frontiers Directive-Television Limits*, Reuter Textline, Nov. 20, 1992, available in LEXIS, Europe Library, Allnws File.

⁶⁵ David Stansfield, *Italy: Italians Take EC Line*, Reuter Textline, Nov. 27, 1992, available in LEXIS, Europe Library, Allnws File.

⁶⁶ Andrew Hill, *Britain Breaks Rules on Satellite TV, Says Brussels*, FIN. TIMES, Nov. 16, 1992, at 14.

⁶⁷ As of January 1993, no further enforcement or litigation proceedings

Article 169 of the EC Treaty.⁶⁸

3.5. Co-Production Agreements

Without additional national restrictions, Article 6⁶⁹ allows at the Community level some leeway for the United States and other third countries to produce "European" works through co-production agreements. The United States may preserve its access to the European market by establishing partnerships and joint ventures with European producers. The Directive provides that works originating from other European third countries qualify if "made exclusively or in co-production with producers established in one or more Member State[s] . . . in one or more European third countries with which the Community will conclude agreements . . . if those works are mainly made with authors and workers residing in one or more European States."⁷⁰

3.5.1. Britain

Britain may be an ideal target for US television companies attempting to circumvent the "European origin" quota because there is no language barrier and Britain is the only Member State which has achieved substantial success in exporting programs to the United States.⁷¹ Further, the United States has already established some media relationships in Britain, including a co-production agreement between the Arts and

had taken place.

⁶⁸ See *supra* note 23.

⁶⁹ See text of Directive, *supra* note 48.

⁷⁰ *Id.* art. 6(3). The very vagueness of the Directive's wording allowed co-production of *Riviera*, a European in-name-only soap opera.

Conceived by the European subsidiary of the big U.S. advertising firm McCann Erickson, the \$45 million soap is directed and supervised by veterans of long-running American soaps such as *Guiding Light* and *As the World Turns*. What's more, the series is shot in English and later dubbed . . . Critics say the vaguely-worded Directive has erected a Maginot line against U.S. programs and moreover allows soaps like *Riviera* to qualify as European productions. In early July [1991] close to a thousand of Europe's best known cinema and TV personalities . . . accus[ed] 'Eurocrats' of selling out the Continent's television industry.

Fraser, *supra* note 7.

⁷¹ Moore & White, *supra* note 28, at 11.

<https://scholarship.law.upenn.edu/jil/vol14/iss1/4>

Entertainment cable network ("A&E") and the BBC; another between NBC and Yorkshire Television; and Paramount's recent purchase of a forty-nine percent share and worldwide distribution rights in Zenith Productions, an independent British producer.⁷²

3.5.2. Luxembourg

Luxembourg is gearing up to become to television what the Cayman Islands are to foreign bank accounts: a haven. Two Luxembourg broadcast stations, Compagnie Luxembourgeoise de Telediffusion ("CLT") and Societe Europeenne des Satellites ("SES") reach an audience of 120 million. "The government is . . . pushing the Grand Duchy's attractions as a 'mediaport,' as the publicity material calls it, offering a favourable environment to media groups and film-makers."⁷³ The government also established a system of tax incentives in 1988, but though twenty million dollars have been spent for film financing so far, most producers are transients and few have established permanent facilities.⁷⁴ Paul Zimmer, advisor to the prime minister on audiovisual issues, says Luxembourg has no plans to become the next Hollywood, but perhaps he protests too much: "CLT is setting up a post-production company aimed at helping foreign producers who want to take advantage of the incentive scheme [and use] the Grand Duchy as a slipway for, say, US broadcasters who want to launch broadcasting services under a Luxembourg flag of convenience."⁷⁵

3.5.3. Alternative Marketing Strategies

A new spin on co-production agreements is called a "format deal." Format deals basically involve taking the general plot and setting of a U.S. television show and licensing the concept for production with local actors and the culture and language of the target country. "The best example is the world's most popular game show, 'Wheel of Fortune,' now licensed in fifteen

⁷² *Id.* at 12.

⁷³ Andrew Hill, *Luxembourg, Industry and Investment 3; Media Giant for Europe—Audiovisual Industries*, FIN. TIMES (Survey section) Oct. 2, 1991, at 33.

⁷⁴ *Id.*

⁷⁵ *Id.*

different countries."⁷⁶

a. Economic Impact of the Quota

Because the Directive so recently entered into force, it is difficult to predict exactly how it will impact the United States economically. The entertainment industry is the United States's second largest export after defense,⁷⁷ and in 1988 accounted for \$1.8 billion worth of television programs and motion pictures sold in the EC alone.⁷⁸ Sales to Western Europe account for fifty-six percent of U.S. film and television sales overseas,⁷⁹ and amount to a trade surplus of \$2.5 billion.⁸⁰ "As the largest supplier of television programming and motion pictures in the world, the United States would be hardest hit by the implementation of broadcast quotas by the EC member states,"⁸¹ both in terms of the export industry and because production costs are so high that many shows would not break even without the additional revenue from overseas sales.⁸² While the quota appears benign now, it has no clause preventing Member States from raising it from 50.1% to ninety-nine percent European shows; nor does it have time limitations lifting the quota when Europe's cultural identity is no longer in danger.

b. The General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (the "GATT"),⁸³ of which both the EC Member States and the United States are members, is a multilateral treaty that guarantees equal treatment of imported products and domestic

⁷⁶ Wingard, *supra* note 2, at 5.

⁷⁷ *Buddy, Can You Spare a Reel?*, *supra* note 30, at 56.

⁷⁸ WALL ST. J., Oct. 6, 1989, at B1.

⁷⁹ Richard W. Stevenson, *TV Boom in Europe is Aiding Hollywood*, N.Y. TIMES, Dec. 28, 1987, at D3.

⁸⁰ Jacqueline Frank, *European Television Without Borders or Without Americans?*, Reuter Libr. Rep., July 26, 1989, available in LEXIS, Europe Library, Allwns File.

⁸¹ Ross, *supra* note 31, at 540.

⁸² Steven Greenhouse, *For Europe, US May Spell TV*, N.Y. TIMES, July 31, 1989, at D1.

⁸³ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

products to its members. When the Directive first passed, the United States protested vigorously, citing trade violations of Articles I and III of the GATT.⁸⁴ The U.S. House of Representatives denounced the Directive's Article 4 quota by a vote of 342 to 0, alleging that it violated the GATT.⁸⁵ But now, four years later, the Directive is in force and the United States has, at present, failed to find a way to include television under GATT's auspices.

The GATT's purpose is to reduce restrictive trade practices and national government intervention in the sale of products between its member countries. The European Community, however, has always considered television to be a service, not a product.⁸⁶ The Directive itself states in its preamble that television is a service,⁸⁷ as does case law from the Court of Justice of the European Communities.⁸⁸

⁸⁴ Wilkins, *supra* note 36, at 205 n.75. The United States alleged that the Directive violated articles I and III of the GATT. See H.R. Res. 257, 101st Cong., 1st Sess., 135 CONG. REC. H7326-27 (daily ed. Oct. 23, 1989).

Article I provides, in part: "[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 83, art. I.

Article III provides, in part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin [N]o regulations shall be made which, formally or in effect, require that any specified amount or proportion of the product in respect of which such regulations are applied must be supplied from domestic sources.

Id. art. III.

⁸⁵ 135 CONG. REC. H7357 (daily ed. Oct. 23, 1989).

⁸⁶ Wilkins, *supra* note 36, at 206 n.79 (citing Jeannine Johnson, *In Search of . . . the European TV Show*, EUROPE, Nov. 1989, at 22, 47). See also ERIC STEIN ET AL., EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE; TEXT, CASES AND READINGS, Contemporary Legal Education Series 530 (1963). "The term 'services' in arts. 59-65 connotes activities moving across national frontiers without resulting in an 'establishment' in the recipient state . . . freedom to supply services is applied to all activities which do not specifically fall under the rubric of free movement of goods, capital, or persons." *Id.*

⁸⁷ Directive, *supra* note 3, at 23 ("[T]elevision broadcasting constitutes, in normal circumstances, a service within the meaning of the Treaty").

⁸⁸ The Court of Justice has held that "[i]n the absence of express provision to the contrary in the Treaty, a television signal must, by reason

The GATT's very structure and timing indicate that it does not cover television, and will not unless specifically expanded to include services as well as products. Television was hardly a major export when the GATT was drafted in 1947. Further, for more than 40 years, the United States has accepted Article IV of the GATT, which recognizes as legitimate national quotas on cinematographic films.⁸⁹

[S]elling television films is not like selling refrigerators. Television films raise the question of cultural identity. This should not be a revelation to Americans. They specifically accepted in the US-Canada Free Trade Agreement not only that cultural products should not be placed on the same footing as general merchandise, but beyond that agreed to respect very strict quotas on US audiovisual products in Canada. Moreover, US law forbids foreigners from owning a US television station.⁹⁰

Trade liberalization discussions, however, may lead to inclusion of television in the GATT. For the past six years, the United States and the other 107 GATT members have been deadlocked in the Uruguay Round of trade liberalization negotiations in Geneva, Switzerland.⁹¹ The United States has been fighting against a proposed services text which would

of its nature, be regarded as a provision of services." Case 155/73, Italian Republic v. Sacchi, E.C.R. 409, 2 C.M.L.R. 117 [1974]. The Court of Justice has distinguished for the purpose of copyright law between products and services as tangible and intangible art forms:

A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the *material form* of the works, as in the case of books or records.

Case 62/79, Coditel v. Cine Vog Films, E.C.R. 881 [1980] (emphasis added).

⁸⁹ Denman, *supra* note 49, at A23. Denman, now at Harvard University's Kennedy School of Government, formerly headed the European Community's delegation to the United States.

⁹⁰ *Id.*

⁹¹ Stuart Auerbach, *Hopes Fade for Trade Agreement; U.S. Official Says GATT Talks Stalled*, WASH. POST, Dec. 18, 1992, at B9.

include language condoning television quotas,⁹² while the twelve European Member States have fought for a cultural exemption to the text, excluding television from any additions to GATT in an attempt to protect the EC from "culturally polluting" U.S. television.⁹³ Studio executives appealed to former U.S. trade representative Carla Hills and to the Clinton administration to discontinue the talks if the television industry is excluded.⁹⁴

c. A Better Choice of Cultural Protection

Assuming that the EC's focus really is cultural harmonization, the Commission has perhaps not chosen the best way to achieve it. There is danger not only of cultural disunity from non-Member State imported programming but, because the Television without Frontiers Directive requires Member States to accept broadcasts from other Member States, those with strong television facilities may overtake the weaker markets of other Member States.

In 1990, France made plans to show advertisements specifically aimed at Belgians on its TF1 station, and to debut its new station La Cinq in Belgium. Belgian magazine advertisers protested the move because some publication advertising revenues fell forty percent in 1989. Advertisers blamed the loss on Belgium's state-run RTBF network, which showed advertising for the first time with the advent of the Television without Frontiers Directive and an agreement with Luxembourg network RTL.⁹⁵ The effects were not all bad, however. "In return for the broadcasting concession, La Cinq has promised to invest ten million francs (250,000 dollars) in Belgian-made television programmes for every percentage point of audience share it wins."⁹⁶

⁹² Nancy Dunne, *GATT: U.S. Officials Plan to Refine the Compromises*, FIN. TIMES, Dec. 23, 1991, at 13.

⁹³ Phil Reeves, *Hollywood Fears GATT Deal Could Damage Exports*, INDEPENDENT, Jan. 16, 1993, at 17.

⁹⁴ *Id.*

⁹⁵ See Yves Clarisse, *French TV Stations Ready to Storm Belgian Media*, Reuter Libr. Rep., Mar. 1, 1990, available in LEXIS, Europe Library, Allnws File.

⁹⁶ *Id.* La Cinq, however, went bankrupt in April 1992, losing \$386 million before it had time to earn many audience shares. *Rival Takes Aim*

As former U.S. trade representative Carla Hills pointed out, European cultural identity is not necessarily protected by European-produced works:

We do not understand why the Spanish culture is more protected by a film produced in Germany by 'Europeans' than by a Spanish film of Mexican origin We do not understand why a film about French cultural history, in the French language, promotes French culture any less simply because it is not of 'European origin.'⁹⁷

Reducing the amount of U.S. programming may leave both empty air time—fifty-seven percent of all programs (both fiction and nonfiction) on EC screens are U.S.⁹⁸—as many small local stations cannot afford to produce their own television shows to fill the hours now dominated by cheaper programs from the United States. "[A] program imported from the US for viewing in Europe often costs about one-tenth as much as a local production."⁹⁹ Other, less restrictive means to promote European culture through television could both eliminate the quota and provide funding for independent producers.

For example, the EC could raise funds to support independent production through duties on programming imported from the United States and other members.¹⁰⁰ Under the EC's own reasoning, the GATT's Most Favored Nations Clause should not create an obstacle, because it refers to products,

at *French Media Giant*, L.A. TIMES, Oct. 9, 1992, at D3.

⁹⁷ 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, 505 (1990) (citing Office of the U.S. Trade Representative, Press Release No. 56, at 2 (Oct. 10, 1989)).

⁹⁸ Fraser, *supra* note 7.

⁹⁹ Giffard, *supra* note 27, at 166.

¹⁰⁰ GATT, *supra* note 83, art. 1(1). Article 1(1) states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id.

and television is a service. The duties could be raised to a high enough level that third-country exports would be price-prohibited after a certain point, allowing room for EC produced broadcasts. Because the United States is the major importer, this would achieve cultural preservation without potentially infringing the Human Rights Convention. Revenue from the duties could be channeled into subsidies directed specifically at independent producers who need money to finance culturally harmonious programs.

4. "TELEVISION WITHOUT FRONTIERS" IN ACTION: ADVERTISING AND FREEDOM OF COMMERCIAL SPEECH

Advertising is one small part of the huge spectrum of change the Television without Frontiers Directive brings to the EC. Because the Directive is so new, little is available on the effect that the quota has had on European and U.S. television program markets. The post-Directive harmonization of advertising law, however, has received greater press attention and may be a predictor of the eventual effects of standardization of programming law.

Prior to the Directive, advertising laws between the Member States varied greatly, requiring standardization to ensure transborder transmission. As one commentator stated in 1986:

Pan-European television threatens to become a regulator's nightmare. West German states prohibit television advertising on Sundays. Sweden and Denmark prohibit all television ads. Belgium allows only generic, not brand, advertising. France forbids the television advertising of, among other things, jewellery, furs, newspapers and magazines. Austria once forbade the use of children, but not dwarfs, in television ads.¹⁰¹

Greece and Italy disallowed television advertisements on Good Friday, the Netherlands blocked them on Good Friday, Christmas, and Ascension Day, and Germany forbade all advertising on Sundays.¹⁰² Most other Member States

¹⁰¹ *Tied up in Knots*, ECONOMIST (U.S. Edition), Feb. 8, 1986, at 72.

¹⁰² Green Paper, *supra* note 20, at 236.

permitted advertising on Sundays and public holidays, so their broadcasts to more restrictive Member States required advertising to be blacked out, a costly and inconvenient process. This process forced a Munich cable communications company in May 1984 to temporarily delay the broadcast of a Sunday program which contained advertising from the British company Satellite Television PLC.¹⁰³ Regulations on advertisement of tobacco and alcohol also differed widely between the Member States. For example, Belgium, Germany, France, Greece, Ireland, the Netherlands, the United Kingdom and Italy forbade all advertisements for tobacco products, while the tobacco industries of Denmark and Luxembourg operated under a voluntary ban.¹⁰⁴ Most Member States permitted alcohol advertising, with the exception of France, which restricted it by law, and Ireland, which prohibited advertisements for hard liquor.¹⁰⁵

Articles 10 to 21 of the Directive set forth the EC's standards for the harmonization of advertising law. The Directive negatively affects freedom of commercial speech by placing content restrictions on advertising. These restrictions disallow material derogating race, religion, nationality, gender or political beliefs.¹⁰⁶ The Directive promotes freedom of noncommercial speech, however, by specifically stating that advertisements and sponsorships cannot affect the content of news or programs.¹⁰⁷ A comparison of EC broadcast rules to current European and U.S. advertisements may shed light on how the Directive will impact freedom of commercial speech.

4.1. General Advertising Prohibitions

The Directive forbids advertising which is not clearly distinguishable from programs;¹⁰⁸ advertising which discrim-

¹⁰³ *Id.* at 255.

¹⁰⁴ *Id.* at 238.

¹⁰⁵ *Id.* at 240-42.

¹⁰⁶ Directive, *supra* note 3, arts. 12(b), (c) & 22.

¹⁰⁷ *Id.* art. 17.

¹⁰⁸ Directive, *supra* note 3, at 28. Article 10 provides:

1. Television advertising shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.
2. Isolated advertising spots shall remain the exception.

inates on grounds of race, gender, or nationality or is offensive to religious or political beliefs;¹⁰⁹ any advertising for cigarettes;¹¹⁰ sponsorship of news and current affairs programs, or sponsorship of sports events and the like by companies whose products cannot be advertised on television;¹¹¹ and the influence of advertising on program content.¹¹²

4.1.1. Advertising which Masquerades as a Program

The Directive forbids advertising which is not clearly distinguishable from a regular program and also disallows coercive or misleading advertising aimed at children. It seems unlikely that “program-length” advertisements, such as Saturday morning television shows like the *Care Bears* and *Teenage Mutant Ninja Turtles*, which are used primarily to sell products, would pass muster in Europe.

4.1.2. Discriminatory Advertising

While obviously aimed at promoting human dignity by eliminating advertisements which derogate people based on their race, gender, nationality, religion, or politics, such advertising restrictions also limit the free dissemination of ideas. For example, in the 1991 Louisiana gubernatorial race, the opponent of former Klan leader David Duke ran advertisements belittling Duke’s involvement in the Ku Klux Klan and his one-time membership in the Nazi party. Such advertisements would most likely be prohibited in the EC. Of course, one could argue that the news media would adequately cover Duke’s background, but long after the press has moved on to other topics, a paid advertisement may still run.

3. Advertising shall not use subliminal techniques.

4. Surreptitious advertising shall be prohibited.

Id. art. 10.

¹⁰⁹ *Id.* art. 12. Article 12 also prohibits encouragement of behavior that is prejudicial to health and safety or to protection of the environment. *Id.*

¹¹⁰ *Id.* art. 13 (“All forms of television advertising for cigarettes and other tobacco products shall be prohibited.”).

¹¹¹ *Id.* art. 17(2), (3).

¹¹² *Id.* Article 17(1)(a) states that sponsored television programs “may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes.” *Id.* art. 17(1)(a).

4.1.3. Cigarette Advertising and Sports Sponsorship

Like the EC, the United States also bans cigarette advertising on television. The EC, however, has gone a step further, and in May of 1991 proposed a total ban on all forms of cigarette advertising.¹¹³ The proposed ban was softened in November 1991 because of protests from the United Kingdom, Germany, Denmark, and Greece.¹¹⁴ Health and Social Affairs Commissioner Vasso Papandreou said the goal of the ban is to reduce consumer demand. Nearly 440,000 people die annually in the EC from complications related to the use of tobacco products.¹¹⁵

Cigarette sponsorships of sports events or public service announcements are common in the United States. Broadcasts of the Virginia Slims Women's Tennis Tournament, and Philip Morris' public service announcements about the U.S. Constitution are prime examples. Broadcast of such sponsorships would be banned under the EC's proposed Tobacco Directive, with one controversial exception which might allow sponsorships such as the Philip Morris' announcement. The Tobacco Directive would not prohibit tobacco companies' sponsorship of sports or cultural events so long as the company did not use the name or symbol of any cigarette. The Commission has made a distinction "between companies in which tobacco provides the major share of revenue and those where cigarettes represent only a minority. [Papandreou] cited the example of Dunhill, which makes many products besides cigarettes. The firm, therefore, could continue to place the Dunhill label on all its product line."¹¹⁶

The Confederation of European Community Cigarette

¹¹³ Modified Proposal for a Council Directive on Advertising for Tobacco Products, COM(91)111 final [hereinafter Tobacco Directive].

¹¹⁴ *Advertisers Outline Concerns about Sweeping EC Measures*, 1992 - THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, Vol. 3, No. 18 (Dec. 13, 1991). The Directive needs 54 votes to pass, but its supporting countries have garnered only 43 votes. If Britain, which opposes the Directive and holds 10 votes, along with any one other country voted favorably, the Directive would pass. David Fletcher, *MPs Seek Total Ban on Tobacco Adverts*, DAILY TELEGRAPH, Jan. 21, 1993, at 5.

¹¹⁵ *Draft Directive Would Authorize Comparative Advertising Throughout EC*, 1992 - THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, Vol. 3, No. 5 (May 31, 1991).

¹¹⁶ *Id.*

Manufacturers Ltd., protests this, saying that tobacco use is an individual choice, and prohibiting advertising will only affect brand choice rather than actually decreasing buyer demand.¹¹⁷ It further stated that the proposal "is at odds with marketplace realities, protects state-owned cigarette monopolies, and may run counter to their declared public health objectives."¹¹⁸

4.1.4. Advertising's Influence on News and Program Content

Article 17 of the Television without Frontiers Directive attempts to promote press freedom by limiting advertising's power to control program content. The Directive prohibits advertising sponsorship of news and current affairs programs, and specifically states that: "content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster."¹¹⁹

These regulations promote freedom of information in ways as yet unimplemented in the United States. For example, the television show *thirtysomething* lost \$1.5 million in advertising dollars because of an episode featuring two gay men talking in bed.¹²⁰ The episode was not rebroadcast and the network lost another half million dollars for showing the same two characters at a party.¹²¹ EC rules would safeguard against such advertiser control. In the United States, advertiser control has delayed reporting of important health news. For nearly twenty years, because of pressure from cigarette

¹¹⁷ EC Commission Proposes Total Ban on Cigarette Ads in Member States, Daily Rep. Exec. (BNA) No. 95, at A-3 (May 16, 1991), available in LEXIS, Nexis Library, Drexec File.

¹¹⁸ 1992 - THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, *supra* note 115. The four Member States that favor a total ban on tobacco advertising, France, Spain, Italy, and Portugal, all operate State tobacco monopolies. 1992 - THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, *supra* note 114.

¹¹⁹ Directive, *supra* note 3, art. 17(1)(a).

¹²⁰ Geraldine Fabrikant, *Ads Reportedly Lost Because of Gay Scene*, N.Y. TIMES, Nov. 14, 1989, at D21.

¹²¹ Rick DuBrow, *Television: When Does TV Cross the Line? Censorship v. Good Taste - The Debate Continues as the Networks Get Pressed Tighter in the Iron Triangle of Views, Advertisers, and Folks Who Create Those Prime Time Shows*, L.A. TIMES, Nov. 3, 1991, at 7.

advertisers, media comment on tobacco use was deliberately omitted or favorable. "NBC's news program in the early 1950s was called 'Camel News Caravan' after its sponsor, Camel cigarettes, which banned all film of news that happened to take place where a No Smoking sign could be seen in the background."¹²² Such control existed until the end of televised cigarette commercials in the United States in 1970.¹²³ Theorists in the United States have identified at least two major advertising "filters" on program content: the first is advertising as a primary source of income for the mass media, with the result that broadcasters cater to a specifically targeted buying audience, not a general audience;¹²⁴ the second is 'flak' from advertisers who boycott programs because of their controversial content.¹²⁵ The elimination of advertiser content influence should lead to a freer inter-community broadcast market.

4.2. Alcohol Advertising

Like other advertising laws, alcohol advertising regulations varied widely between the Member States prior to the Directive. The EC's regulations are aimed primarily at the image alcohol advertisements portray rather than at the product itself. The Directive prohibits alcohol advertising directed at minors, or which links alcohol consumption to enhanced physical performance, social or sexual success, or as a means of resolving personal conflicts.¹²⁶ Among many possible examples, this could preclude advertisements for alcohol, which show couples resolving their conflicts over love and commitment with a bottle of wine.

¹²² BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 156 (3d ed. 1990).

¹²³ *Id.* at 158. Bagdikian also notes Brown & Williamson Tobacco Corporation's sponsorship policy for programs carrying cigarette advertising: "Tobacco products should not be used in a derogatory or harmful way. And no reference or gesture of disgust, dissatisfaction or distaste be made in connection with them." *Id.*

¹²⁴ EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 14-18 (1988).

¹²⁵ *Id.* at 26-28.

¹²⁶ Directive, *supra* note 3, art. 15.

4.3. Freedom of Commercial Speech

“Freedom of speech is guaranteed by the European Convention on Human Rights and Fundamental Freedoms. (Art. 10.). The Commission emphasises that the Community considers itself to be bound by the Convention and recognises that freedom of speech includes freedom of commercial speech (which in turn includes advertising).”¹²⁷

Some advertisers view these restrictions as instituting a “nanny state,” as John Ritchie, deputy chairman of the London ad agency Collett Dickenson Pearce termed it,¹²⁸ as well as an economic infringement of their rights. While the European Commission on Human Rights states that commercial speech merits less protection than political ideas, it does recognize freedom of commercial speech as protected under Article 10 of the Human Rights Convention.¹²⁹ In reference to restrictions on programming imports and advertising content, Ray Gallagher of Britain’s Sky Television commented that the Commission “is in danger of bringing not ‘television without frontiers, [but] technology without programs.’”¹³⁰ Because of the ban on tobacco ads and the restrictions on alcohol ads, Norman Vale, director general of the International Advertising Association, predicted that restrictions on commercial speech would cost the EC ten to fourteen billion dollars in ad revenue.¹³¹ Gallagher also complained about the time restrictions on advertising.¹³² “Films 110 minutes long are limited to two ad breaks. ‘We view this as extremely paternalistic, based on the assumption that consumers don’t know enough to shape their own diets,’ [Gallagher] said.”¹³³ The opening of

¹²⁷ Brian Harris & Michael Hutchings, *Cross-Frontier Broadcasting and the Law*, 83 LAW SOC’Y’S GAZETTE 1816, 1818 (June 11, 1986). See also Green Paper, *supra* note 20, at 127-36.

¹²⁸ Maurice Chittenden & Jonathan Miller, *Eurocrats Hit the Ads other Laws Can’t Reach*, LONDON SUNDAY TIMES, Oct. 27, 1991, at 7.

¹²⁹ Green Paper, *supra* note 20, at 129.

¹³⁰ Peter D. Lambert, *Un-Deregulation Seen in European Satellite*, 120 BROADCASTING, July 1, 1991, at 51.

¹³¹ *Id.*

¹³² See Directive, *supra* note 3, at 29. Article 18 further limits spot advertising to 15% of daily transmission time; however, this percentage may be increased to 20% if part of the ads include direct offers for sale.

¹³³ Lambert, *supra* note 130, at 51. See Directive, *supra* note 3, art. 11(3), for number of advertising breaks allowed per 45 minute program

the market brings more than regulations, however. It brings a diverse, multinational audience spread across several time zones. "[A]dvertisers will face targeting audiences with nine languages and different habits, including dinner and prime times. Multinational advertisers must be prepared to wait years for profits . . . but already homogeneous teen and young professional audiences will probably assure advertiser participation."¹³⁴

5. CONCLUSION

Not only advertising, but programming will be targeted at the EC's new multinational audience. These broadcasts, with the undeniable potential to harmonize the Community, also have the potential to limit world views and restrict freedom of information for millions of Community residents.

[I]t is beyond doubt and has been fully recognized by the Commission . . . that the cultural aspects of broadcasting are as clearly outside the powers conferred by the Treaty as the economic aspects are within them. . . . It is one thing for the Community authorities to claim that the Treaty covers such matters as television advertising; it would be quite another if the community authorities sought to interfere with programme choice and content.¹³⁵

Because of the Directive's structure, the beneficial effects of increased freedom of information between Member States and reduced control of advertising over news and programs are counterbalanced by restrictions on imports of third country broadcasts and advertising content rules that curtail freedom of commercial speech. While the Directive does not appear to violate the GATT, it is open to challenge under the Human Rights Convention, should one of the Member States choose to fight the quota. Because the quota is at present nonbinding, such an attempt may be unlikely. It is also unlikely that the United States will feel much financial impact from the quota in the near future. However, if Member States choose to

period.

¹³⁴ Lambert, *supra* note 130, at 51.

¹³⁵ Harris & Hutchings, *supra* note 127, at 1817.

follow the French example and implement stricter rules raising the quota and tightening restrictions on co-productions, the United States could easily find itself squeezed out of a lucrative market.¹³⁶ Beyond economics, however, a tighter quota, which the Directive leaves ample room for, would severely limit Member States' freedom to receive information, and individual citizens' freedom of opinion. To address Lord Kilbrandon's question, "What answer would be given to the primitive savage who wished to protect his family against the American Way of Life?"¹³⁷ The answer could be "Go right ahead."

¹³⁶ Moore & White, *supra* note 28, at 10 ("Quotas are likely to become more conservative once European countries discover their ability to create programming for their own markets.").

¹³⁷ Hall & McGovern, *supra* note 1 and accompanying text.