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## EUROPEAN REGULATION OF TRANSBORDER TELEVISION

C.A. GIFFARD\*

### INTRODUCTION

Western European nations have recently adopted legal frameworks that facilitate the free flow of television programs among themselves and limit imports of television programs from non-European countries. This was accomplished by coordinating national legislation governing broadcasts that cross national frontiers. The regulations stipulate that parties should guarantee free reception or retransmission of television programs across their territories from other signatories to the agreements. In addition, these cross-national regulations govern the amount and kind of advertising permitted, protect minors against exposure to pornography or gratuitous violence, and provide for a right of reply for persons whose reputations are injured by an assertion of incorrect facts.<sup>1</sup>

The regulations also seek to promote endogenous production of television programs, in part by specifying that the majority of programs be made in Europe. This latter provision has angered American exporters of television programs and movies, who argue that it restricts the free flow of information and abrogates provisions of the General Agreement on Tariffs and Trade ("GATT").<sup>2</sup>

### I. THE NEW EUROPEAN DIRECTIVES

Two documents set out the new European regulations. One is the Television Without Frontiers Directive ("Directive") adopted by the Council of the European Communities ("EC Council").<sup>3</sup> The EC Council deals with media law insofar as it is concerned with establishing a common market for goods and services. The draft Directive was first published in April 1986, but was modified considerably in March 1988 to take into account amendments proposed by the European Parliament.<sup>4</sup> The EC Council approved the Directive on October 3,

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1. *See infra* pp. 164-65.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 55 U.N.T.S. 194. *See infra* pp. 169-70.

3. *Television Without Frontiers Directive*, 32 O.J. EUR. COMM. (No. L 298) 23 (1989) [hereinafter *EC Directive*].

4. The EC Council of Ministers represents the national governments of the twelve member states and is the primary legislative body of the Community. The European Parliament directly represents the people of Europe. The Council must consult Parliament before making policy decisions.

1989.<sup>5</sup>

The Directive provides for the coordination of laws and regulations concerning television broadcasting in twelve member states of the European Economic Community ("EC"). The Directive is considered a "political obligation" rather than a legal obligation on member countries.<sup>6</sup> Nonetheless, it obligates each member to develop, adopt, and implement legislation, regulations, and administrative procedures to comply with the Directive by October 3, 1991.

In essence, the Directive lays down minimum rules needed to ensure free transmission of programs across national frontiers. Member states are permitted to organize and finance their national broadcasting systems. Members are also free to set stricter rules for broadcasters under their jurisdiction than those prescribed in the Directive.

A second agreement, the European Convention on Transfrontier Television ("Convention"),<sup>7</sup> parallels the Directive in content and purpose. The Convention was adopted in May 1989 by the Council of Europe, an organization of twenty-two Western and Eastern European states whose goal is to promote democratic values and human rights. The Council of Europe's recommendations are not binding on its members; however, its Committee of Ministers drafts agreements and conventions which become binding on the member states that ratify them.

The Council of Europe takes an active role in developing media law and policy. The Council's intention is to coordinate the approach of member states with respect to cultural, economic, and social aspects of the media.<sup>8</sup> In 1984, for example, the Council of Europe approved a recommendation addressing the use of satellite capacity for television and radio, program standards, responsibility, right of reply, and provision of information.<sup>9</sup>

While the EC Council's Directive and the Council of Europe's Convention differed significantly in early draft forms,<sup>10</sup> the final texts cover essentially the same areas and generally are phrased in similar language. However, there are still some distinctions. The regulations are spelled out in more detail in the Directive.<sup>11</sup> Since the twelve members of the EC are also members of the Council of Europe, the Convention stipulates that EC rules take precedence.<sup>12</sup> The EC Directive refers in its preface to the Council of Europe's Convention.

5. See *EC Directive*, *supra* note 3, at 30.

6. See *EC Adopts Quota Directive; To Take Effect in 18 Months*, VARIETY, Oct. 4-10, 1989, at 1, col. 2.

7. *European Convention on Transfrontier Television*, Council of Eur., Doc. No. 132 (Strasbourg, 1989) [hereinafter *Council of Europe Convention*].

8. Olsson, *Council of Europe and Mass Media Law*, 7 J. MEDIA LAW AND PRAC. 64 (July 1986).

9. *Id.* at 66.

10. See Engel, *Aussenhandel mit Rundfunk: Rundfunkrichtlinie der Europäischen Gemeinschaft versus Fernsehkonvention des Europarats*, 37 RUNDfunk UND FERNSEHEN 203-14 (Feb. 3, 1989); Hirsch, *Convention Over Directive*, CABLE & SATELLITE EUROPE 18-20 (Feb. 1989).

11. For example, the EC Directive is more specific in its definition of what constitutes European content. See *infra* text accompanying notes 42-60.

12. *Council of Europe Convention*, art. 27.1, *supra* note 7, at 11.

But Article 25 of the Directive makes it clear that "[m]ember states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 3 October 1991."

#### *A. The Basis for European Television Regulation*

The reasons for adopting these regulations are found in the technological, economic, and political factors which led to the expansion and internationalization of European broadcasting.<sup>13</sup>

1. *More Channels Available.* Until recently, most European television networks were government monopolies, largely because the limited number of channels available required that the broadcast spectrum be used for public service broadcasting, rather than for the benefit of commercial interests. However, the justification for limited channels no longer holds because of the rapid changes in communications technology: (1) cable systems are providing a variety of additional channels; (2) several direct broadcast satellites are offering programs ranging from news and sports to movies and music television that can be received simultaneously in several countries; and (3) new techniques for terrestrial broadcasting, like low power television, have increased the number of local channels.

As in the United States, the past few years in Europe have shown a trend towards deregulation and privatization in various sectors, including broadcasting. As a result, the number of private channels<sup>14</sup> now exceeds the number of public service channels.<sup>15</sup> Most European countries now have dual systems with private, commercial channels supplementing or competing with the national public service networks. Britain has had commercial television since 1955. More recently, private channels have been introduced in Belgium, France, Germany, Italy, and Spain, among others.

Public broadcasting systems, unable to raise their license fees for political reasons, and limited by regulation in the amount of advertising they can carry, cannot provide more services. Only a handful of the new channels introduced in the past decade are public services. The majority are privately owned commercial channels funded by advertising, subscriptions, or pay-per-view.

As a result of these developments, the number of channels available in the eighteen Western European nations comprising the EC and the European Free Trade Association increased markedly in the 1980s. In 1983, for example, there were thirty-seven Western European television channels. By mid-1987, the total

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13. Wilke, *Regionalisierung und Internationalisierung des Mediensystems*, B26/90 AUS POLITIK UND ZEITGESCHICHTE 3-19 (June 22, 1990).

14. Private channels generally are owned and operated by commercial interests, tend to be popular in their programming, and usually are funded by advertising or subscription fees.

15. Public service channels usually are controlled by government-appointed corporations, tend to emphasize informational and cultural programs, and are funded by license fees on receiving sets or by government subsidies, sometimes supplemented by advertising.

was seventy-nine, and by mid-1989, there were ninety-one.<sup>16</sup> Of these programs, twenty-two are in English, eighteen in German, and fourteen in French. Various other languages account for the rest.

More channels are on the horizon. Greece and Portugal are introducing new private channels. Several countries, including Austria, Britain, Norway, Sweden and Switzerland are contemplating additional national channels, and are planning several new international satellite services. There may be as many as 200 channels in Europe by 1992.<sup>17</sup> The amount of programming has increased even faster as stations expand their schedules. In 1987, Western European stations broadcast a total of 308,948 program hours.<sup>18</sup> By 1989, this number had risen twenty-six percent to 388,800 hours.<sup>19</sup> Estimates project that by 1992, programming time will have increased to more than 420,000 hours a year, and by the year 2000, to more than 620,000 hours.<sup>20</sup>

2. *The Drive Towards Economic and Political Unity.* The push for greater economic and political unity in Europe was a major catalyst for the new regulations that encourage broadcasting across national frontiers, and retransmission of one nation's programs in another. The preamble to the Council of Europe's Convention notes that the Council's aim is to "achieve greater unity between its members." Similarly, the Directive states that its objectives include "establishing an even closer union among the people of Europe" and "fostering closer relations between the states belonging to the Community."<sup>21</sup>

In addition, the preambles to both the Directive and the Convention note that broadcasting is one manifestation of a more general principle—the freedom of expression set forth in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>22</sup> to which most European nations are signatories.<sup>23</sup> Article 10(1) states 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."<sup>24</sup> Article 10(1) does not, however, prevent states from requiring broadcasting licensing.<sup>25</sup>

16. Kessler & Schrape, *Fernsehmarkt Westeuropa*, MEDIA PERSEKTIVEN 25, 26 (Jan. 1990).

17. Farnsworth, *U.S. Fights Europe TV-Show Quota*, N.Y. Times, June 9, 1989, at D1, col. 3.

18. Kessler & Schrape, *supra* note 16, at 28.

19. *Id.*

20. *Id.* at 29.

21. *EC Directive*, preamble, *supra* note 3, at 23.

22. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 European T.S. No. 5, in 1 EUROPEAN CONVENTIONS AND AGREEMENTS 21-47 (1971) [hereinafter Human Rights Convention]. The convention entered into force on September 21, 1970.

23. As of December 1984, signatories to the Convention included Austria, Belgium, Cyprus, Denmark, France, West Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *State of Ratifications*, 1984 Y.B. EUR. CONV. ON HUM. RTS. (Council of Eur.) APP/TAB 12.

24. Human Rights Convention, art. 10, *supra* note 22, at 26.

25. *Id.*

More specifically, the EC Directive has its origin in the Treaty of Rome, which established the EC in 1957, and requires that obstacles to freedom of movement of goods and services be abolished. Broadcasting is considered a service within the meaning of the Directive;<sup>26</sup> thus, broadcasting across national frontiers is one way to achieve EC objectives.

The Single European Act ("SEA"),<sup>27</sup> which entered into force in July 1987, amended the Treaty of Rome and set guidelines to achieve a single internal market by the end of 1992—an area without internal frontiers in which the free movement of goods, persons, and capital is ensured. The SEA operates on the principle of mutual recognition of national standards. At present, member states to the SEA have different laws and regulations governing broadcasting; thus, there is a need to harmonize national standards to facilitate the unimpeded flow of information mandated by the SEA.<sup>28</sup> Member states are not required to give up their own law in favor of a community standard; however, they "must recognise the national standards of other states, provided that minimum EC standards are complied with."<sup>29</sup> SEA standards have been formulated for almost 300 sectors of commercial activity, including television broadcasting.<sup>30</sup> Member states adopt the SEA broadcasting standard to achieve the SEA goal of free-flowing transnational communication channels.

Under previous EC rules, any state could block incoming broadcasts, except in border regions where there is unavoidable overspill. Also, there was no rule which prevented a state from restricting the sale of decoders or satellite dishes.<sup>31</sup> In contrast, under the terms of the Directive and the Convention, states cannot object to programs from other member states being received and retransmitted in their own territory, provided these programs conform to the regulations. The intention under the Directive is to create a common market in broadcasting. The Directive accomplishes this objective through application of Articles 55 and 62 of the Treaty of Rome to broadcasting, which has the effect of prohibiting any restrictions on the free flow of television programs among the member states. To facilitate this free flow, both the Directive and the Convention propose common rules and standards for programs as well as advertising on television.

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26. *EC Directive*, preamble, *supra* note 3, at 23.

27. 30 O.J. EUR. COMM. (No. L 169) 3 (1987).

28. EUROPEAN INSTITUTE FOR THE MEDIA, *EUROPE 2000: WHAT KIND OF TELEVISION?* 68 (1988) [hereinafter EUROPEAN INSTITUTE].

29. Flint & Hart, *1992: How Does it Plead?* CABLE & SATELLITE EUROPE 14 (Feb. 1989).

30. Papanthanasopoulos, *Beyond the Directive*, CABLE & SATELLITE EUROPE 38, 40 (Feb. 1990).

31. Tempest, *Tempest Over Strasbourg*, CABLE & SATELLITE EUROPE 43 (Mar. 1988).

### B. Scope of the Regulations

1. *Advertising and sponsorship.* The regulations under both the Directive and Convention limit the amount and kind of advertising.<sup>32</sup> Both regulations require that advertising should be recognizable as such, and prohibit subliminal and "surreptitious" advertising.<sup>33</sup> This means that the advertisement must represent the name or trademark of a supplier of goods or services with the intention of advertising only.<sup>34</sup>

The Directive and Convention clearly emphasize the goal of providing programs for viewers, rather than for advertising customers. Both regulations specify that programs should generally not be interrupted by advertising spots. Instead, advertisements should be inserted between programs, or, in the case of programs more than forty-five minutes long, programs may be interrupted once for each complete period of forty-five minutes. The regulations prohibit commercial breaks in news and current affairs programs, documentaries, or children's programs if the program duration is less than thirty minutes. Also, the regulations limit the total amount of advertising to fifteen percent of daily transmission time, or twenty percent in any one hour.<sup>35</sup>

Both the Directive and the Convention impose a complete ban on advertising for (1) cigarettes or other tobacco products, and (2) for drugs and medical treatment that are only available with a prescription from the transmitting party.<sup>36</sup> Advertisements for alcoholic beverages cannot be aimed specifically at minors, nor suggest that drinking leads to enhanced physical performance, or to social or sexual success.<sup>37</sup> Advertisements directed at children cannot encourage them to buy a product by exploiting their inexperience or credulity, nor encourage them to persuade their parents to buy the product advertised. The regulations, however, do not suggest how these prohibitions would be monitored or interpreted.

2. *Protection of minors.* Both documents seek to protect the "physical, mental or moral development of minors" through a ban on programs that involve pornography or gratuitous violence at times when children are likely to watch them. Thus, Article 22 of the Directive requires member states to ensure that television broadcasters do not include violent or pornographic programs "except

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32. *EC Directive*, arts. 10-21, *supra* note 3, at 28-29; *Council of Europe Convention*, arts. 11-18, *supra* note 7, at 5-8.

33. *EC Directive*, art. 10, *supra* note 3, at 28; *Council of Europe Convention*, art. 13, *supra* note 7, at 6.

34. *EC Directive*, art. 1(c), *supra* note 3, at 26.

35. *EC Directive*, art. 18, *supra* note 3, at 29; *Council of Europe Convention*, art. 12, *supra* note 7, at 6.

36. *EC Directive*, arts. 13-14, *supra* note 3, at 28; *Council of Europe Convention*, arts. 15(1) & 15(3), *supra* note 7, at 7.

37. *EC Directive*, arts. 15(b) & 15(c); *supra* note 3, at 28; *Council of Europe Convention*, art. 15.2(b), *supra* note 7, at 7.

where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts." Article 7 of the Convention requires that all program services "shall respect the dignity of the human being and the fundamental rights of others." Accordingly, programs should not be indecent or contain pornography, nor give "undue prominence" to violence. Programs that might have a harmful effect on children "shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them."<sup>38</sup>

3. *Cinematographic works.* To protect the interests of the cinema industry, the regulations require that movies not be broadcast on television until two years have elapsed since the work was first shown in cinemas in one of the member states, unless otherwise agreed between the rights holder and the broadcaster.<sup>39</sup>

4. *Right of reply.* Television broadcasters are required, under both regulations, to provide a right of reply, or equivalent remedies, to persons whose reputation and good name have been damaged by an assertion of incorrect facts in a broadcast. The means of enforcing this right is left to the member states. The Directive stipulates, in Article 8, that "[e]ach transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies. . . ." Furthermore, transmitting parties "shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised." Article 23.3 of the Directive requires that member states "adopt the measures needed to establish the right of reply or equivalent remedies and shall determine the procedure to be followed for the exercise thereof." The Directive states further that application for exercise of the right of reply may be rejected if (1) it is not justified, (2) would involve a punishable act, (3) would render the broadcaster liable to civil law proceedings, or (4) would transgress standards of public decency.<sup>40</sup>

5. *Independent producers.* One requirement in the Directive which is not adopted in the Convention is that broadcasters are expected to ensure that at least ten percent of their transmission time (or alternatively, at least ten percent of their programming budget) be reserved for works created by independent European producers. The intention, according to the Directive's preamble, is to stimulate new sources of television production, especially the creation of small and medium-sized enterprises, and to offer new opportunities for employment in the cultural field.<sup>41</sup>

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38. *EC Directive*, art. 22, *supra* note 3, at 29; *Council of Europe Convention*, art. 7(2), *supra* note 7, at 4.

39. *EC Directive*, art. 7, *supra* note 3, at 27; *Council of Europe Convention*, art. 10(4), *supra* note 7, at 5.

40. *EC Directive*, art. 23.4, *supra* note 3, at 30.

41. *EC Directive*, preamble, *supra* note 3, at 25.



6. *European content.* The terms in the regulations that have aroused the most controversy are those restricting imports by requiring that a majority of the programs broadcast be of European origin.<sup>42</sup> The arguments justifying the European content regulations fall into two general classes: economic and cultural.

The economic argument addresses the fact that the European Single Market (including a united Germany) will be one of the largest and richest in the world, with 340 million consumers—nearly as many as the U.S. and Japan combined—and a GNP of more than \$4.5 trillion. At present, however, the market for television producers is fragmented and lacks the benefit of economies of scale. Consequently, it is much cheaper for European nations, especially the smaller ones, to import programs from larger nations than to make their own. For example, a program imported from the U.S. for viewing in Europe often costs about one-tenth as much as a local production. The reason for this disparity is that most of the American production costs are recovered in the huge domestic market.

As a result of the high European production costs, a large and growing proportion of the television programs shown in Western Europe are imported despite local content rules being applied in some countries like Britain and France.<sup>43</sup> A 1984 survey found imports accounted for about twenty-seven percent of Western European air time.<sup>44</sup> Of that, forty-four percent of the programs came from the U.S. In sum, about thirteen percent of the programs were of U.S. origin.<sup>45</sup> A more recent study by a West German research institute estimated the American share of the market at about twenty-two percent.<sup>46</sup> This share is worth a great deal of money to American producers. For example, in 1988, the U.S. realized \$1.8 billion in sales of movies and television shows to members of the EC.<sup>47</sup> In 1989, European television stations paid about \$1 billion for American program rights.<sup>48</sup>

While the number of programming hours in Europe is increasing as new channels are established, production of television programs and movies has not kept up with this pace. Although most European nations subsidize local productions, film production has declined by forty percent over the last fifteen

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42. *EC Directive*, arts. 4-6; *supra* note 3, at 26-27; *Council of Europe Convention*, art. 10, *supra* note 7, at 5.

43. French networks must carry at least fifty percent locally-produced programs, and at least ten percent non-Francophone European programs. Alderman, *Drama at La-Cing Moves Away From the Small Screen and into the Boardroom*, VARIETY 74 (Oct. 11-17, 1990). British TV stations are required to show a "reasonable" proportion of European programs—the government's current interpretation of "reasonable" being 86%. *Buddy Can You Spare a Reel?*, 312 THE ECONOMIST 56, 57 (Aug. 19, 1989).

44. T. VARIS, INTERNATIONAL FLOW OF TELEVISION PROGRAMMES 20 (Reports and Papers on Mass Communication No. 100, 1985).

45. *Id.*

46. Kessler & Schrape, *supra* note 16, at 29.

47. Revzin, *The Battle for Europe's TV Future*, Wall St. J., Oct. 6, 1989, at B1, col. 3.

48. 135 CONG. REC. H7331 (daily ed. Oct. 23, 1989) (statement of Rep. Levine).

years. In Britain, film production has dropped by forty-three percent in the last four years even though British feature films are increasingly low-budget compared to U.S. movies.<sup>49</sup> European producers argue that the money now paid for U.S. imports could be used instead to improve the amount and quality of locally-produced programs.<sup>50</sup>

The cultural argument for supporting European regulation is concerned with the idea that Europe is being invaded by programs from the U.S. that threaten to submerge its traditional cultures. The 1984 Green Paper, "Television Without Frontiers," which served as a working document for preparing the Directive, points out that "television will play an important part in developing and nurturing awareness of the rich variety of Europe's common cultural and historical heritage."<sup>51</sup> Furthermore, the Green Paper notes that most of the films shown in the EC come from one single non-member country—the United States. "As a result there is already a certain uniformity in the range of films screened on television in the Community. Programmes such as 'Dallas' are carried by almost every television channel in the Member States. The creation of a common market for television production is thus one essential step if the dominance of the big American media corporations is to be counterbalanced."<sup>52</sup> As Jacques Delors, then president of the European Commission explains, "we have the right to exist and to maintain our traditions."<sup>53</sup>

There is yet another cultural argument for limiting imports from the U.S. Imported programming has an adverse impact on Europe's traditional concept of public broadcasting, which emphasizes information, culture, and education, rather than commercial entertainment, which is the focus of programming in the U.S. The new commercial channels, both cable and satellite, show a high proportion of American imports because they are relatively cheap and appeal to large audiences that can be sold to advertisers. Since the public service systems depend on listener license fees for their revenue, the concern is that if viewers were to abandon these channels in favor of commercial offerings, there would be political pressure to do away with license fees. This is precisely what is happening now in Britain.<sup>54</sup> The public service channels would either have to abandon traditional programming concepts and modify their standards to compete for mass audiences viewing commercial services, or dwindle into an

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49. Papathanassopoulos, *supra* note 30, at 40.

50. EUROPEAN INSTITUTE, *supra* note 28, at 73.

51. *Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable* (Communication from the Commission to the Council), COM (84) 300 final, at 28 (1984).

52. *Id.* at 33.

53. EC Press Release No. 33, at 2 (1989).

54. Alan Peacock, who chaired a commission that resulted in the Broadcasting Bill now being considered by the British Parliament has suggested that the BBC should be funded by subscription, instead of license fees. 316 THE ECONOMIST, at 49 (Sept. 1, 1990). For details about the bill, see The Times (London) 1 (daily ed. Dec. 8, 1989).

elitist media with limited support.<sup>55</sup>

The need then, as perceived by the EC Council's Directive and the Council of Europe's Convention, is to encourage the development of European audio-visual production and distribution, particularly in countries with a low production capacity or restricted language areas. This objective can be accomplished by: (1) obtaining markets of sufficient size for television producers in the member states to achieve economies of scale and recover their investments, and (2) protecting member state broadcasters from outside competition.<sup>56</sup>

To this end, Article 4 of the EC Directive and Article 10 of the Council's Convention both require that member states shall "ensure where practicable and by appropriate means, that broadcasters reserve for European works . . . a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services."<sup>57</sup> The Directive specifies further that, where this proportion cannot be attained, "it must not be lower than the average for 1988 in the Member State concerned."<sup>58</sup> The Convention defines European works simply as "creative works, the production or co-production of which is controlled by European natural or legal persons."<sup>59</sup> The Directive is more specific, and requires that European works originate from member states of the EC, or from European states who are parties to the European Council's Convention. The Directive also provides for co-productions with European nations that are not members of the EC or the Council of Europe.<sup>60</sup>

## II. THE U.S. PERSPECTIVE

To American producers of movies and television programs, the European content rules are perceived as a threat. Despite the size of the U.S. domestic market, export earnings are often essential for a television studio to break even on the cost of producing a program. In addition, sales of American films and television programs abroad are the second largest export after defense,<sup>61</sup> and a major contributor to the U.S. trade balance, returning about \$2.5 billion in surplus each year.<sup>62</sup> American producers view the European market as having the greatest potential for growth in the coming decade, not only for exports but

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55. See Rowland & Tracey, *Worldwide Challenges to Public Service Broadcasting*, 40 J. OF COMM. 8, 27 (Spring 1990).

56. *EC Directive*, preamble & art. 4, *supra* note 3, at 23-25, 26-27; *Council of Europe Convention*, art. 10, *supra* note 7, at 5.

57. *EC Directive*, art. 4, *supra* note 3, at 26-27; *Council of Europe Convention*, art. 10, *supra* note 7, at 5.

58. *EC Directive*, art. 4.2, *supra* note 3, at 26.

59. *Council of Europe Convention*, art. 2(e), *supra* note 7, at 3.

60. *EC Directive*, art. 6.1(c), *supra* note 3, at 27.

61. See *Buddy, Can You Spare a Reel?*, *supra* note 43, at 56-57.

62. 135 CONG. REC. H7333 (daily ed. Oct. 23, 1989) (statement of Rep. Crane).

for mergers and takeovers.<sup>63</sup> Thus, they are determined to protect their investment interests.

American producers fear that the European quotas will limit their export earnings. As Jack Valenti, chairman of the Motion Picture Association of America, argued in a letter to Congress, "[t]he Directive will stifle growth in existing TV markets, and impose severe limits on emerging markets, including private TV and satellite broadcasters. The real impact may not be felt so much in existing markets as in markets just beginning to develop. One thing is certain. The quota will hurt us. Count on it."<sup>64</sup>

The issue was taken up by Congress when the House Energy and Commerce Subcommittee on Telecommunications and Finance held hearings on the Directive in July, 1989.<sup>65</sup> On October 23, 1989, the House unanimously passed a resolution denouncing the Directive and deploring the damage that it could inflict on the U.S. broadcasting and film industries.<sup>66</sup>

A common complaint voiced by congressmen in the debate on the Directive was that the local content rules are not, as Europeans claim, a matter of cultural sovereignty, but instead an attempt to protect European industries from foreign competition. Particularly, U.S. Representative Samuel Gibbons (D-Fla.), Chairman of the House Ways and Means Committee, said that cultural protectionism was not the issue: "The issue is censorship, the issue is restrictive trade practices."<sup>67</sup> Gibbons said he was worried about the whole principle of freedom. "We're talking about free trade, the free flow of products. And certainly you can't have a free flow of products if you're going to have control of intellectual material that flows across borders into the public."<sup>68</sup> As U.S. Representative Bill Frenzel (D-Minn.) phrased it, "we should never let culture become the last refuge of trade scoundrels."<sup>69</sup>

The larger concern is that a unified Europe will close its borders to American imports in general. Carla Hills, the U.S. Trade Representative, stated in a letter to the European Parliament that "[t]his directive sends a message to Americans that the EC 1992 initiative is indeed being used to construct a fortress Europe."<sup>70</sup> Hills threatened to sue under the intellectual property provisions of the 1988 U.S. Trade Act,<sup>71</sup> and to demand compensation under the GATT.<sup>72</sup>

In addition, there is concern that the European action could encourage other

63. *Buddy, Can You Spare a Reel?*, *supra* note 43, at 56-57.

64. Valenti's letter is reprinted in 135 CONG. REC. H7331 (daily ed. Oct. 23, 1989).

65. Int'l Trade Rep. (BNA) 1020 (Aug. 2, 1989).

66. H.R. 1210, 101st Cong., 1st Sess., 135 CONG. REC. H7326-7333 (daily ed. Oct. 23, 1989).

67. *Id.* at H7327 (statement of Rep. Gibbons).

68. *Id.*

69. *Id.* at H7330 (statement of Rep. Frenzel).

70. Dawkins, *U.S. Threatens Europe in TV Broadcasts Dispute*, *The Times* (London), May 20, 1989, at 2, col. 8 (quoting EC officials).

71. The intellectual property rights provisions are to be found in Section 2206 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1333.

72. Dawkins, *supra* note 70, at 2.

nations to restrict imports on the grounds of culture, health, or safety as a means of solving trade problems outside the multilateral discipline of GATT. Congressman Samuel Gejdenson (D-Conn.) noted in the debate that "like the broadcasting Directive, we have the potential for walls to be put up for American auto parts."<sup>73</sup>

The House resolution maintains that the European quotas violate Articles I and III<sup>74</sup> of GATT and calls on the President to "take all appropriate and feasible action, including possible action under section 301 of the Trade Act of 1974, to protect and maintain United States access to the EC broadcasting market."<sup>75</sup>

A more specific threat of retaliation was made by Representative Bill Richardson (D-N.M.), who announced that "[a]s a result of this blatantly anti-U.S. action I am preparing legislation which would bar public television stations from purchasing television programming from any foreign country which limits U.S.-made programming. Any support from taxpayer supported institutions in furthering the European entertainment industry is unacceptable as long as the European Community broadcast initiative is in effect."<sup>76</sup>

#### CONCLUSION

There is no indication that the EC or the Council of Europe will back down in the face of U.S. threats. And so far, talk of retaliation by the U.S. remains just that. After the initial alarmed rhetoric, U.S. producers seem to have come to the realization that there still are considerable opportunities for increased exports to Europe. They are not close to supplying fifty percent of the existing market, nor is there a larger market share forecast for the future.<sup>77</sup> The problem most likely will arise in the case of new commercial cable and satellite channels that do not have the resources to produce their own programs. From

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73. H.R. Res. 257, 135 CONG. REC. H7329 (daily ed. Oct. 23, 1989) (statement of Rep. Gejdenson).

74. Article I of the GATT concerns "most favored nation" treatment and stipulates that "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." General Agreements on Tariffs and Trade, Oct. 30, 1947, art. I, 55 U.N.T.S. 194, 198.

Paragraph 2 of Article III states that "products of the territory of any contracting party . . . shall be accorded treatment no less favorable than that accorded to like products of national origin. . . ." *Id.* art. III, 55 U.N.T.S. 194, 206.

75. H.R. Res. 257, 135 CONG. REC. H7327 (daily ed. Oct. 23, 1989). Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, stipulates that if the United States Trade Representative determines that the rights of the U.S. under any trade agreement are being denied, it may suspend benefits of trade agreement concessions with the foreign country concerned, or impose import duties or other restrictions on the goods from the other country, Omnibus Trade and Competitiveness Act of 1988, § 1301, *supra* note 71, at 1164-65.

76. 135 CONG. REC. H7326 (daily ed. Oct. 23, 1989) (statement of Rep. Richardson).

77. McDougal, *Europe TV Quota Doesn't Rattle Hollywood*, L.A. Times, Oct. 10, 1989, at VI, col. 1; Mahler, *The Boom Abroad: Global Market Takes off in the '80s*, ELECTRONIC MEDIA 78 (Jan. 15, 1990).

the European perspective, the unanswered question is whether the Convention and the Declaration will in fact enhance the amount and quality of European programming.

This question, however, is being addressed in yet another forum. At the GATT talks now being held in Geneva, the EC has served notice that it wants special treatment for television programs and movies in any agreement which removes barriers to trade in services. The EC wants to ensure that the trade agreement, scheduled to be concluded by December 1990, is in accord with the new European regulations requiring a majority proportion of European content. Not surprisingly, the proposal is being opposed by the United States.

