Vanderbilt Journal of Transnational Law

Volume 24
Issue 1 *Issue 1 - 1991*

Article 3

1991

# The Pursuit of Television Broadcasting Activities in the European Community

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# NOTES

# The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?


ABSTRACT

*In October 1989, the foreign ministers of the European Community (EC or Community) approved a Directive governing the "pursuit" of trans-European television broadcasting beginning in 1992. Controversial article 4 of the Directive requires Member States to devote a majority of their television air time to European-produced programs. Although the Community Council maintains that the quota is merely "a political commitment" intended to preserve Europe's cultural heritage, the United States challenges the legality of the quota as economic protectionism under the General Agreement on Tariffs and Trade (GATT), and section 301 of the United States Trade Act, as amended by the Omnibus Trade and Competitiveness Act of 1988 (section 301).*

*This Note examines the dispute between the United States and the EC concerning the implementation of the Directive's majority quota on non-Community television programming. First, discussion focuses on the implementation of the Directive against the backdrop of the expanding United States presence in the European television market. This note then sets forth the United States challenge to the adoption of the Directive. Next, the possibilities for successful United States challenge to the Directive under the GATT or section 301 are analyzed. This analysis evaluates the applicability of GATT principles to television broadcasting and discusses recent attempts to adopt a far reaching General Agreement on Trade in Services (GATS) governed by GATT principles. In examining the applicability of section 301 to this dispute, the author assesses past United States responses under section 301.*

*In conclusion, although the Directive raises legitimate concerns of the*

*extent to which the EC will use quotas to achieve Community goals after 1992, the United States strong response to the Directive lacks credibility given past United States practice. Further, the Directive's economic impact on United States suppliers of television programs is lessened by the increasing need for programming hours to fill the expanding EC television market and by the opportunity to circumvent the Directive's "suggested majority" quota through European expansion by United States programming suppliers.*

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## I. INTRODUCTION

On October 3, 1989, foreign ministers of the twelve Member States of the European Community (Community or EC)[1] approved a Directive[2] setting minimum standards for trans-European television broadcasting beginning in 1992.[3] Though the Directive primarily develops qualitative standards for broadcasting within the Community,[4] its adoption has increased trade tensions between the Community and the United States.[5] This tension arises largely from article 4 of the Directive, which requires Member States to devote a majority of their television air time to European-produced programs.[6] This majority quota, though less restrictive

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1. The current Member States of the European Community are Belgium, Denmark, Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. The Community's primary goal is to remove existing trade barriers between the Member States and thereby create a unified internal market in goods, services, and workers by 1992. *See Europe and America Prepare for 1992*, BROADCASTING, Apr. 17, 1989, at 35 [hereinafter *Europe and America*].

2. *Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*, 32 O.J. EUR. COMM. (No. L 298) 23 (1989) [hereinafter *Directive*]. The Directive is commonly called "Television Without Frontiers," a title that developed from the European Commission's *Green Paper on the Establishment of the Common Market for Broadcasting, Especially By Satellite and Cable*, COM (84) 300 final (1984) [hereinafter *Green Paper*]. The Green Paper proposed the establishment of a common market for broadcasting within the Community and provided an overview of the broadcasting industry in the Community as it existed at that time. For a further discussion of the Green Paper, see Presburger & Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495, 496-98 (1990).

3. *See Ministers Agree Minimum Standards for Cross-frontier TV Broadcasts*, Common Mkt. Rep. (CCH) No. 642, at 1 (Oct. 19, 1989) [hereinafter *Minimum Standards*].

4. *Directive*, *supra* note 2, arts. 10-19.

5. *See* du Bois & Truell, *EC Ministers Back Open TV Market, Local Programs*, Wall St. J., Oct. 4, 1989, at B7, col. 3.

6. *Id.*; *see infra* note 27; *see also* Lawrence, *TV Quota Plan Splits EC Nations*, J. Com., July 27, 1989, at 1A, col. 1. Excluded from the quota are programs involving news, sports, game shows, and advertising. *See Minimum Standards*, *supra* note 3, at 1; *see also* Lewis, *Euro Cavalry to the Rescue?*, Law Society's Gazette, Dec. 13, 1989

than a sixty percent quota proposed earlier,[7] is part of a broader Community goal "to remove all broadcasting barriers among the community's 12 member nations" in accordance with the goal of a unified internal market.[8] Through quotas, the Directive seeks to encourage the development of the European television production industry.[9]

The European Community Council maintains that the quota is merely "a political commitment" and not legally binding under Community rules.[10] The United States, however, challenges the legality of the imposed quota under the General Agreement on Tariffs and Trade (GATT)[11] and section 301 of the United States Trade Act, as amended by the Omnibus Trade and Competitiveness Act of 1988 (section 301).[12] Community officials counter that the United States threats under GATT are misplaced because television programs are not covered by the current GATT framework.[13] Despite the Community's "watered-down" compromise, critics in the United States believe the Directive will result in serious economic harm to both the United States television and movie industries.[14]

At stake in this dispute is a European television market experiencing explosive commercialization and growth. By 1992, this market will re-

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7. *See infra* Part II.A.

8. Lawrence, *supra* note 6, at 1A, col. 2; *see also Europe and America, supra* note 1, at 35.

9. *See European Regulatory Primer*, BROADCASTING, Apr. 17, 1989, at 36.

10. du Bois & Truell, *supra* note 5, at B7, col. 3.

11. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT], *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). United States Trade Representative (USTR) Carla Hills has called the adoption of the Directive "GATT-illegal." *U.S. 'Outraged' by EC Move to Restrict Foreign TV Programs, Will File GATT Case, Hills Says*, 6 Int'l Trade Rep. (BNA) No. 40, at 1292 (Oct. 11, 1989) [hereinafter *U.S. Outraged*].

12. Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43, *amended by* Pub. L. No. 100-418, § 1301(a), 102 Stat. 1164 (1988) (codified as amended at 19 U.S.C.A. § 2411 (West Supp. 1990)).

13. *See* du Bois & Truell, *supra* note 5, at B7, col. 3. Community Vice President Martin Bangemann remarked that "[c]ulture is not a commodity. You can't quantify it in dollars and marks." *Id.*

14. United States concern has increased due to Community plans to devote additional economic resources to aid European television producers and writers in expanding the European television industry. *See U.S. Outraged, supra* note 11, at 1292. Providing additional funding to the European television production industry "could enable European productions to gain an unfair advantage over non-subsidized, non-EC productions." *Id.* (statement of USTR Hills).

quire a one hundred percent increase in programming hours to fill available air time.[15] This tremendous growth is due principally to the greater number of channels and extended broadcasting hours that will exist by 1992.[16] The Community is currently a profitable and growing market for United States entertainment programming;[17] in 1989, European television stations paid over one billion dollars to United States suppliers for television programming and television rights.[18] This figure is expected to rise to two billion dollars by 1992.[19] For this reason, the United States entertainment industry strongly opposes the introduction of quotas that restrict trade with the Community.[20]

This Note examines the dispute between the United States and the Community concerning implementation of the Directive's majority quota provision on non-Community television programming. This Note first addresses the implementation of the Directive and the Community's response to United States challenges to the Directive. This Note then discusses the United States reaction to the Directive and analyzes the possibilities for successful United States challenge under the GATT or section 301. Finally, this Note concludes that although the Directive's provisions are excessively protectionist, the United States objections to

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15. *See* Nelson & Truell, *Some Support in EC is Seen for TV Quotas*, Wall St. J., July 10, 1989, at B1, col. 6.

16. *See id.* at B4, col. 6.

17. *See* Farnsworth, *U.S. Fights Europe TV-Show Quota*, N.Y. Times, June 9, 1989, at D1, col. 3. In 1992, the Community will comprise a single market larger than that of the United States and Japan combined, which will be unequalled in expected media revenue increases. "Spanish television will expand by nearly 70 per cent, . . . France by nearly 30 per cent, Italy by 20 per cent. During the same period, American television is expected to grow by only 10 per cent." *Passing Go: Europe's Media Moguls Play Monopoly*, SIGHT & SOUND, Winter 1988-89, at 19 [hereinafter *Passing Go*].

18. *See* Wingard, *Europe 1992: Mass Media Developments*, N.Y.L.J, Nov. 30, 1990, at 5.

19. *See id.*

20. *See* Nelson & Truell, *supra* note 15, at B4, col. 6. Jack Valenti, president of the Motion Picture Association of America (MPAA), stated that by imposing limitations on non-European programming, the "European Community . . . took a step backward in time. They said no to competition and viewers' choice, and yes to trade barriers." du Bois & Truell, *supra* note 5, at B7, col. 3; *see also* Valenti, *The European Community Makes Ominous Sounds About Broadcast Quotas*, COMMUNICATIONS LAWYER, Winter 1990, at 3 (finding the quotas to be "aggressively anti-consumer" and "an imperial decree that says to the citizens of each country, 'We public officials know better than you citizens what you ought to see and you want to see.' "). Similarly, officials at Turner Broadcasting System (TBS) express concern over the EC restrictions with regards to Cable News Network (CNN), its round-the-clock cable news program that is transmitted by satellite across Europe. *See Europe and America, supra* note 1, at 37.

majority quota programming are suspect in light of prior United States responses to discriminatory treatment of cultural identity and the drastic change in United States policy regarding a General Agreement on Trade in Services.

## II. IMPLEMENTATION OF THE DIRECTIVE

### A. *History of the Directive*

On April 30, 1986, the European Community Council of Ministers first proposed a directive (Council's Proposal) to regulate broadcasting within the Community.[21] The Council's Proposal established a general preference for the distribution and promotion of Community-produced television programming.[22] To effectuate this goal, the Council's Proposal included a provision that imposed a quota on non-Community television programming. This quota initially reserved thirty percent of programming time, not including news, sporting events, game shows, advertising, and teletext services for "Community works within the meaning of Article 4."[23] The Council's Proposal provided that the level of Community television would increase to sixty percent by 1992.[24] The definition of "Community works" included programs produced by any Member State, as well as programs produced jointly with non-Member States if the Member State contributed at least sixty percent of the total production cost.[25] An overwhelming majority of the EC Council of Ministers ap-

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21. *Proposal for a Council Directive on the Coordinator of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities*, 29 O.J. EUR. COMM. (No. C 179) 4 (1986) [hereinafter *Council's Proposal*].

22. *Id.* preamble. The Council's Proposal was introduced for the "establishment of a general preference for the distribution of television programmes of all kinds produced within the Community, and [to] promote employment and small and medium-sized enterprises within the Community's cultural industries . . . ." *Id.*

23. *Id.* art. 2.

24. *Id.* The quota provision of the Council's Proposal provides:

> 1. Member States shall ensure that internal broadcasters of television reserve at least 30% of their programming time not consisting of news, sporting events and game shows, advertising or teletext services for broadcasts of Community works within the meaning of Article 4 . . . .
>
> 2. This percentage shall be progressively increased to reach 60% after the expiry of three years from the date specified [by the EC].

*Id.*; *see also Fortress TV*, ECONOMIST, Sept. 10, 1989, at 19. France, bolstered by its film industry, supported the strict 60% content requirement. *See* Presburger & Tyler, *supra* note 2, at 499.

25. *Council's Proposal, supra* note 21, art. 4.

proved the Proposal.[26]

Prior to the Directive's adoption, the United States threatened to challenge the implementation of any television quota legislation.[27] Largely as a result of United States pressures,[28] the European Parliament significantly modified the Council's Proposal, adding measures that allowed the Member States to exercise discretion in meeting the quota and reducing the quota for "European works" to fifty percent.[29] Although the current definition of "European works" is similar to the Council's Proposal,[30] the restrictions on joint production with non-Member States are substantially different. Under the Directive, any work produced "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."[31] This standard allows for significantly less non-Community involvement than the Council's Proposal level of sixty percent.[32]

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26. *See Debates of the European Parliament, Pursuit of Broadcasting Activities,* 32 O.J. EUR. COMM. (No. 2-378) 110, 119 (1989) [hereinafter *Pursuit of Broadcasting*].

27. *See* Lawrence, *supra* note 6, at 1A, col. 1. In July 1989, the Bush Administration warned the Community "that if the proposal is enacted, it will be challenged [under the GATT] as contrary to international trade rules." *Id.*

28. *See Minimum Standards, supra* note 3, at 1. Some Community officials believe the proposed Directive has been "watered down" from its original to "reflect United States concerns." Farnsworth, *supra* note 17 at D1, col. 3.

29. *Directive, supra* note 2, art. 4.

> 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.

*Id.* (emphasis added).

30. Article 6 of the Directive defines "European works" as works originating from Member States or from European third states that are party to the Convention on Transfrontier Television of the Council of Europe if:

> (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.

*Id.* art. 6.

31. *Id.*

32. *See supra* notes 24-25 and accompanying text.

The Directive provides that the suggested majority of Community-produced programming should be achieved progressively.[33] In addition, the Directive requires Member States to report their progress toward the majority quota objective to the Commission every two years, beginning on October 3, 1991. The report must include a statistical breakdown of the television programming within each Member State, any reasons for failing to comply with the majority quota objective, and the measures adopted to achieve the Directive's purpose. The Commission then will inform other Member States and the European Parliament of the report and attach an opinion when necessary. The Commission's opinion letter addresses "progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters, and the specific situation of countries with a low audiovisual production capacity or restricted language area."[34]

### B. *The Community's Purpose in Enacting the Directive*

The Community's motive in enacting the Directive can be gleaned from the debates of the European Parliament. Much discussion centered around the strong desire to preserve a European cultural identity through the promotion and support of a trans-European television industry composed of Community-produced programming.[35] As Representative Schinzel noted, television broadcasting is a major cultural asset of the Community and significant to "cultural social coexistence within the EC."[36] Another representative declared that the Directive was intended not only to protect the European broadcasting market, but more importantly, to preserve Europe's cultural heritage, which "far more than we

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33. *Directive, supra* note 2, art. 4, § 1.

34. *Id.* § 3.

35. *See Pursuit of Broadcasting, supra* note 26, at 118 (statement of Rep. Petronio). According to Ulf Bruhann, head of the Commission's media sector: "The European programming industry is weak . . . . We want to put the industry in a position to increase its output." *European Regulatory Primer, supra* note 9, at 36. The Community has established an initiative to stimulate the European television industry: the Community government is offering subsidies of 250 million ECU (approximately $300 million) over five years to achieve this goal. *See* Wingard, *supra* note 18, at 5.

Quantitative restrictions on foreign programming purchases are already imposed in some Member States. These states include Belgium, Italy, and the United Kingdom, in which the British Broadcasting Company (BBC) and the commercial Independent Television (ITV) network each devote 86% of their time to domestic material. *See* Glenn, *Legal Issues Affecting Licensing of TV Programs in the European Economic Community from the Perspective of the U.S. Exporter*, in COPYRIGHT LAW SYMPOSIUM NUMBER THIRTY-THREE 115 (ASCAP 1987).

36. *Pursuit of Broadcasting, supra* note 26, at 113-14 (statement of Rep. Schinzel).

realize—is the victim of increasing Americanization."[37]

In adopting the Directive, the Community sought to encourage its independent programmers to develop new programming with a European "flair."[38] As a result, several parliamentary representatives expressed strong resentment towards the reduction of the original sixty percent quota. Representative Garcia Amigo, for example, stated that "at the end of the day the directive is left with a name and nothing else."[39] Representative Baudouin expressed a similar view, stating that "by agreeing to . . . replac[e] the system of quotas for European works by a majority proportion formula under European Commission supervision—which is, you have to admit, vague and can be circumvented,—this text has become a make-believe which we cannot accept."[40]

Despite its tag as a promoter of Community-made programming, the "watered down" Directive may have been motivated by other, less culturally-oriented goals. The Parliamentary discussions concerning the Directive also reveal resentment towards the United States.[41] According to

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37. *Pursuit of Broadcasting*, *supra* note 26, at 120 (statement of Rep. Kuijpers). According to members of the European Parliament, the purpose of the proposed 60% quota was to support European television production and foster "a culture, a tradition, a European identity that will, we trust—as a result of this progressively increasing European production . . . shine forth as a cultural beacon for the other parts of the world." *Id.* at 118 (statement of Rep. Petronio).

38. *See Id.*, at 120 (statement of Rep. Albion Inglez).

39. *Id.* at 115 (statement of Rep. Garcia Amigo). Commenting on the change in the quota from 60% to 50%, Representative Schinzel stated that "our once fine bird with its proud plumage is now a poor thin little thing whose tatty feathers have been well and truly plucked." *Id.* at 114 (statement of Rep. Schinzel).

40. *Id.* at 117 (statement of Rep. Baudouin). Despite Representative Baudouin's plea, the Parliament passed the "watered down" Directive. *Id.*

Representative Cassidy, a lone dissenter to the implementation of a quota, indicated that any quota on television broadcasting is "petty protectionism" and the "first brick of Fortress Europe." *Id.* at 121 (statement of Rep. Cassidy). Cassidy quickly lost speaking rights upon calling the Parliament President a fascist. *Id.* "Culture and information belong to everyone and must not be subject to national quotas." *Id.* at 112 (statement of Rep. De Vries). Representative De Vries also expressed concerns that the Directive's quota programming conflicted with the Community's efforts to achieve free movement of services. *Id.* at 111. He concluded, however, that the European cultural industry is of major significance in Community policy making, and he implored the Council to adopt the Directive in spite of the United States protests. *Id.* at 112.

41. Representative De Vries, for example, stated that "there are four things we want—to guarantee the diversity of cultures and their identity, to guarantee pluralism of expression, to protect copyright and to avoid an influx of cheap productions, primarily from the USA—and I have no hesitation in talking about American cast-offs here." *Id.* at 122 (statement of Rep. De Vries). However, as one commentator stated in more prosaic terms the Community implemented the 60% quota to "save Europe from wall-to-

Representative De Vries, "[t]he Americans are living in a glass house, because they protect their own television and film market."[42] Further, at several other points during the Parliamentary discussions, the representatives commented on the significant United States presence in the European television and film industry.[43]

### C. *Adoption of the Directive*

Despite criticism of the Directive by the United States, which objected to quotas in general, and by members of the European Parliament, who considered the Directive to be overly permissive, the EC Ministers adopted the language[44] recommending that the Community television industry produce a majority of programming broadcast in the Community by a ten to two vote. The opinions of the two dissenting states represent the conflicting interests among the Member States. Belgium argued against adoption of the Directive because it believed the Community lacks competence in the field of television broadcasting, and Denmark voted against the Directive insisting on "continued protection for its linguistically fragmented TV industry."[45]

Some Member States rely upon United States programming to bolster their less developed television production industries and, therefore, do

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wall American sitcoms and soaps." *Fortress TV*, *supra* note 24, at 19.

42. *Pursuit of Broadcasting*, *supra* note 26, at 122 (statement of Rep. De Vries).

43. *See, e.g.*, *id.* at 114 (statement of Rep. Schinzel). On several occasions, the representatives referred to Europe's dependence on imported productions from the United States. As Representative Schinzel noted:

> 60% of all films in Europe come from the USA, and the percentage is increasing. In recent years the proportion of American films has gone up by 50%. At the same time European productions have shrunk by 40% over the last 15 years. For every 12 or 13 films we buy from the USA, there is at most one which the Americans buy from us.

*Id.*

44. The Community adopted a "subtly worded compromise" that Community officials believed would mitigate United States concerns. *Minimum Standards*, *supra* note 3, at 1. Then British Foreign Secretary John Major indicated that the adopted Directive should "end talk of a trade war between the United States and the European Community over this issue." *U.S. Outraged*, *supra* note 11, at 1293. According to Major, although the United Kingdom would have preferred to have no quotas at all, the Directive as adopted is "acceptable because it has been watered down and is now a political objective and not a numerical straightjacket." *Id.*

45. *Minimum Standards*, *supra* note 3, at 1. Germany, the United Kingdom, the Netherlands, and France also registered strong opposition during lengthy discussion prior to the Directive's approval. *Id.*

not strongly support the television quotas.[46] France, on the other hand, strongly opposed the reduction of the quotas from that of the Council's Proposal and has implemented a strict sixty percent quota for its domestic programming.[47] The French legislation also provides for fines of ten thousand dollars for each hour of non-European programming shown beyond the sixty percent quota.[48]

### D. *The Community's Justification for the Directive*

The Community defends its implementation of the Directive on three grounds. First, the Community argues that the article 4 quota is merely a political goal and not legally binding under Community law. Second, the Community contends that article 4 will not have a significant impact on United States television programming sales in the Community. Third, the Community insists that the United States has passed similar legislation that limits the Community's access to the United States television market.[49]

#### 1. A Political Goal Only

Several Community officials have indicated that the Directive is merely a political commitment with no legally binding effect.[50] According to their arguments, the term "where practicable and by appropriate means" in article 4 of the Directive allows individual Member States considerable flexibility in adopting legislation to comply with the Directive.[51] Further, the Directive contains no enforcement provision, and the Community has no plans to treat the Directive as legally enforceable.[52]

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46. *See* Wingard, *supra* note 18, at 5.

47. *See id.*

48. France's Minister of Culture recently fined two French television stations a total of $10 million for showing excessive non-European programming. *See* Presburger & Tyler, *supra* note 2, at 503 & n.55; *see also* Dougan, *"Fortress Europe" of the Airways*, L.A. Times, Oct. 11, 1989, at B7, col. 4.

49. *See* Presburger & Tyler, *supra* note 2, at 502.

50. *See id.* Community Vice President Martin Bangemann, for example, has stated that article 4 is "not a legal obligation, it's a political obligation." Greenhouse, *Europe Reaches TV Compromise, U.S. Officials Fear Protectionism*, N.Y. Times, Oct. 4, 1989, at A1, col. 5.

John Major said that "[t]here is no reason for the U.S. to fear that we are creating a fortress Europe either in theory or in practice. The rules . . . should not affect U.S. exports." *U.S. Outraged*, *supra* note 11, at 1293.

51. *See supra* note 29 and accompanying text.

52. *See* Presburger & Tyler, *supra*, note 2, at 502. A spokesperson for the Motion Picture Export Association of America (MPEAA), which includes the eight largest pro-

2. Impact on United States Sales in the Community

The Community calculates that United States sales account for only twenty-eight percent of the EC market.[53] The Community believes that the expanding European television market will provide United States programming suppliers greater opportunity for growth under the Directive.[54] It is estimated that by 1992, European programming needs will nearly double, and the number of television stations will increase from the sixty-one existing in 1987 to eighty-six by 1992.[55]

3. Limited Access to the United States Television Market

Responding to United States criticism of the Directive's quota on programming, the Community notes that the United States similarly restricts access to its television market.[56] According to Representative De Vries, the United States Communications Act is a prime example of United States legislation equivalent in scope to the Directive.[57] Section 310 of the Communications Act prohibits non-United States citizens from owning greater than twenty percent of the capital in any domestic

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ducers and distributors of films in the world, said that even if the proposed quota is not enforced rigidly, "it's a first step toward protectionism in the European television and movie industry." Nelson & Truell, *supra* note 15, at B1, col. 5.

53. *See* Presburger & Tyler, *supra* note 2, at 502 (citing Delegation of the Comm'n of EC, Press & Pub. Affairs, Questions and Answers about the European Community's "TV Without Frontiers" Directive 2 (Nov. 1, 1989)).

54. *See id.*

55. *See* Weber, *Turning the Volume Down*, L.A. Times, July 26, 1984, pt. 4, at 1, col. 1. Estimates indicate that 440,000 programming hours will be available by 1992, up from 250,000 in 1987. By 1993, the EC predicts that over 200 Community television stations will exist, inclusive of cable and satellite reception. *See* Presburger & Tyler, *supra* note 2, at 503 & n.60; *see also* Farnsworth, *supra* note 17, at D1, col. 3.

According to the MPAA, producers such as Warner, Columbia, Paramount, Fox, Universal, and MGM/UA sold $4.2 billion dollars worth of products abroad in 1988. This figure included theatrical releases, television programs, home video, films, and pay-television material, resulting in a trade surplus of $2.5 billion. *See Europe and America, supra* note 1, at 38. By 1998, the Community estimates that European broadcasters will import $4 billion in television programming, a market in which the United States wants to play a significant role. *See They Don't Love Lucy*, TIME, Oct. 16, 1989, at 47 [hereinafter *Lucy*].

56. French Minister of Culture Jack Lang has accused the United States of brandishing not "a seventy percent quota, or an eighty percent quota. They have a hundred percent quota against us." Hift, *TV Trade War Heats Up*, Christian Sci. Monitor, Nov. 2, 1989, at 10.

57. *See Pursuit of Broadcasting, supra* note 26, at 112 (statement of Rep. De Vries).

broadcasting company.[58] Representative De Vries also remarked that strict limitations on the temporary employment of non-United States citizens in the audiovisual industry under the United States Immigration and Nationality Act further demonstrate that United States legislation exists that is similar to the Directive.[59]

## III. UNITED STATES CHALLENGE TO THE DIRECTIVE

### A. *United States Presence in the European Television Market*

Historically, television broadcasting in Western Europe was limited to two or three programming outlets in each state. The channels typically were owned and operated by the government of the individual state.[60] Under this regime, most states regulated their television broadcasting through stringent program quotas.[61] In recent years, as Community governments have relaxed their control of television stations, United States

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58. 47 U.S.C. § 310 (1988). The statute states that a license to broadcast:

> shall not be granted to or held by—
> (1) any alien or the representative of any alien;
> (2) any corporation organized under the laws of any foreign government;
> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

*Id.* § 310(b).

59. This legislation prompted Rupert Murdoch, a major presence in the world television market, to apply for United States citizenship in order to operate his business in the United States. *See Pursuit of Broadcasting, supra* note 26, at 112 (statement of Rep. De Vries).

60. *See Europe and America, supra* note 1, at 38. Prior to the privatization of European television, most countries now comprising the EC operated television stations under either strict government control or a public monopoly regime. "A common denominator in all EEC countries except Italy and Luxembourg [was] the concentration of program purchasing power for television broadcasting in the hands of a publicly controlled monopoly or near-monopoly." Glenn, *supra* note 35, at 120. Under this regime, government purchasers, in making program-buying decisions, were economically motivated to help foster domestic programming and, thus, stimulate the domestic economy. United States government efforts to alleviate protectionism were not successful. *Id.* at 125.

61. *See* Glenn, *supra* note 35, at 124.

suppliers of television programming have begun to focus their sales efforts on the increasing number of privately owned stations and satellite services operating in the EC.[62] The liberalization of commercial broadcasting in Europe helped the established program suppliers, such as those in the United States, take advantage of the newly opened market and meet the increased programming demands.[63]

The United States presence in the European programming market increased significantly prior to the Directive's adoption.[64] In 1988, the United States sold television programming worth 844 million dollars to the Community, up from 675 million dollars in 1987.[65] Projections indicate that this figure will triple to 2.7 billion dollars by 1992.[66] The importance of the Community's entertainment market to the United States is evidenced by the large trade surplus the United States enjoys in this industry. The United States presence in the Community accounts for approximately half of the United States television and film industry's 2.5 billion dollar annual trade surplus.[67]

Despite the Commission's concern over United States domination in Community television broadcasting, the largest viewer audiences in the EC typically watch domestically produced programming.[68] United States officials contend that the success of European programming exposes a major flaw in the Community's stated purpose for implementing the Directive.[69] Given their past success, the United States believes that higher rated Community-produced programs will receive the largest portion of

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62. For an overview of the development of private broadcasting industries in the Community, see Wildman & Siwek, *The Privatization of European Television: Effects on International Markets for Programs*, 22 COLUM. J. WORLD BUS. 71 (Fall 1987).

63. *Id.* at 73.

64. There are estimates that "U.S.-made entertainment and movies comprise more than half of the broadcasts in some EC countries such as Greece, but the level is much lower in other countries such as Britain, France and Germany." Nelson & Truell, *supra* note 15, at B4, col. 5. The French Culture Ministry estimates that United States programs occupy less than 40% of total Community entertainment broadcast time. *Id.* Other figures indicate that "American-made shows account for some 70% of the Continent's programming." *Lucy*, *supra* note 55, at 47. One European Parliament representative suggested that the United States controls 80% of the world market in television programs. *See Pursuit of Broadcasting*, *supra* note 26, at 111 (statement of Rep. Barzanti).

65. *See* Weber, *supra* note 55, at 1, col. 1. The 1988 figures represent a 500% increase since 1980.

66. *See id.*

67. Frank, *European Television Without Borders or Without Americans?*, Reuters, July 26, 1989 (LEXIS, Nexis library, lbyrpt file).

68. *See* Tracy, *European Viewers: What Will They Really Watch?*, 22 COLUM. J. WORLD BUS., 77, 82 (Fall 1987).

69. *See* Nelson & Truell, *supra* note 15, at B4, col. 5.

advertising dollars, thus encouraging and further supporting domestic programming.[70]

The United States also contends that by allowing the transmission of programs produced by a large Member State, like Germany, into a small Member State, like Luxembourg, the Directive discourages smaller Member States from developing and producing their own television industry.[71] Further, given the fragmented viewing habits that exist within Europe,[72] the United States claims that the policy behind the Directive's

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70. *See* Wildman & Sidwek, *supra* note 62, at 75. Although privatization has been profitable for United States producers, evidence suggests that European-produced programming eventually may satisfy the large demand of trans-border broadcasting. "The increased demand and competition accompanying privatization will inexorably lead to larger production budgets and higher quality for programs produced in Europe, which increasingly will displace imports." *Id.*

A study of the implementation of commercial television in Latin America indicates one way the Community market may develop. *See* Antola & Rogers, *Television Flows in Latin America*, COMM. RES., Apr. 1984, at 183. During the early years of Latin American television, United States-produced programming accounted for a large portion of broadcasting time in a manner similar to the early years of privatization in Europe. As Latin American population, income, and television ownership increased, locally produced programming gradually replaced United States imports. Viewers' preferences for domestic programming were greatest particularly during peak viewing hours when audiences were largest. *Id.*

Similarly in Japan, Japanese-produced programming dominated peak viewing hours, while United States imports were relegated to hours with fewer viewers. *See* Wildman & Sidwek, *supra* note 62, at 75.

71. *See* Nelson & Truell, *supra* note 15, at B4, col. 6. Within the Community there are genuine concerns that larger Member States will dominate smaller ones. These feelings are strongest in Member States where Danish, Dutch, and Portuguese are spoken because there exists "almost no economies of scale when it comes to making programs." *Id.* Jan Bauwens, Director of Programming and Services of the Dutch-speaking Belgian channel BRT, states that "[e]ven with European quotas, we are going to be overrun by the French, the Germans, and the Italians." *Id.* Many United States observers believe that German programming, for example, will "dilute British culture at least as much as *Dynasty* or *Dallas* would." *Europe and America, supra* note 1, at 38. Although domestic programs appear "pretty weak stuff around which to raise the protectionist barriers, it may be because these shows need all the protection they can get." Revzin, *La Boob Tube: Europe Complains About U.S. Shows*, Wall St. J., Oct. 16, 1989, at A1, col. 4.

72. European programming usually targets only the Member State's local market and often only a portion of that audience. Accordingly, "[m]ega-hits in Germany or Italy rarely make it even to France or Great Britain, and almost never show up on U.S. screens." Revzin, *supra* note 71, at A1, col. 4. Past attempts to produce "pan-European" programming have resulted in limited success. *Id.* Superchannel, a 24-hour pan-European satellite service offering British broadcasting aimed at the "Euro-yuppie," illustrated many of the problems facing those engaged in the European television market when it had difficulty attracting viewers and advertising revenue. *Id.* at 77-78. "The

implementation clearly indicates that the legislation is unnecessary and protectionist in nature.[73]

### B. *Initial United States Response to Implementation of the Directive*

Unsatisfied with the quota reduction embodied in the Directive, the United States still opposes any Community programming quota on the broadcasting of non-Community material.[74] The Directive's adoption caused great recalcitrance in the United States and an immediate call for retaliatory measures.[75] On the same day the Community adopted the Directive, the United States House of Representatives introduced a resolution (House Resolution 257) renouncing the Directive.[76] In a unanimous vote, the House denounced the adoption of the Directive, deplored the damage caused by the "GATT-illegal" restrictions of the Directive, and urged the United States President and Trade Representative to take appropriate action, including action under section 301 of the Trade Act, to

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structural weakness of pan-European television is the logical assumption it makes about there being a pan-European *audience*, rather than *audiences*." *Id.* at 78 (emphasis in original). "One can only understand the role and use of television if one understands how it does or does not tap into the rhythms, moods, traditions and moralities which are already present in a nation's popular culture." *Id.* at 82 (citing an unpublished manuscript by Michael Hoffman of the University of Mainz). Perhaps as a result of this phenomenon, no imported United States program has competed with the critical acclaim or viewer popularity of the top-rated domestic programs.

73. *Id.*

74. *See* Nelson & Truell, *supra* note 15, at B4, col. 5. USTR Hills called the quota "censorship of fine programs developed in this country [and] simply unacceptable," Farnsworth, *supra* note 17, at D1, col. 3, and stated that the United States consistently has expressed "very sharp and strong opposition to local content quotas in broadcasting," *id.*

75. *See U.S. Outraged, supra* note 11, at 1292. The United States also has expressed concern over the damaging precedent that programming quotas will have on similar measures in other industries within the Community. *See* Lawrence, *supra* note 6, at 1A, col. 3 (quoting J. Michael Farren, U.S. Undersecretary of Commerce for Int'l Trade). Several United States industries in the Community, unrelated to the production and distribution of television programming, have indicated that the removal of programming quotas is a matter of vital importance. *See U.S. Services Industry Seen Facing "Continued Pressure" From Foreign Firms*, 6 Int'l Trade Rep. (BNA) No. 44, at 1447 (Nov. 8, 1989).

76. H.R. Res. 257, 101st Cong., 1st Sess., 135 CONG. REC. H6558 (daily ed. Oct. 3, 1989). In addition to House Resolution 257, Representative Bill Richardson indicated that "[a]s a result of this blatantly anti-U.S. action," he would introduce legislation to bar public television stations in the United States from purchasing television programming from any foreign country that limited United States-produced programming. 135 CONG. REC. H7326 (daily ed. Oct. 23, 1989).

protect United States access to the Community broadcasting market.[77]

77. House Resolution 257, as amended, provides:

Whereas the European Community (EC) Council of Ministers adopted on October 3, 1989, a broadcasting directive . . . that obliges member states of the EC to take steps to ensure that each broadcaster reserves a majority of programming time for European works;

Whereas such broadcasting directive contains a local content requirement, in the form of both a quota and a minimum floor, that infringes upon the ability of United States broadcasting, film, and related industries to market their goods in the EC;

Whereas such local content requirement violates the [GATT], specifically Article I relating to most-favored-nation treatment and Article III relating to national treatment;

Whereas the adoption of this restrictive and discriminatory broadcasting directive is inconsistent with claims by EC officials that the program to achieve the economic integration of Europe by the end of 1992 is not a program of protectionism and will not deny market access to non-European entities;

Whereas section 301 of the Trade Act of 1974 requires the United States Trade Representative to take action when the Trade Representative determines that rights of the United States under any trade agreement are being denied, or an act, policy, or practice of a foreign country violates, or is inconsistent with, the provision of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce; and

Whereas such section 301 also authorizes the United States Trade Representative to take action in response to an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce: Now, therefore, be it

*Resolved*, That the House of Representatives—

(1) denounces the action taken October 3, 1989 by the EC Council of Ministers in adopting a broadcasting directive that is trade restrictive and in violation of the GATT;

(2) deplores the damage which will be inflicted on United States broadcasting, film, and related industries as a result of the implementation of the GATT-illegal restrictions under the broadcasting directive;

(3) regrets the adverse consequences which the EC action will have on—

(A) the bilateral trade relationship between the United States and the EC, particularly with respect to EC steps to achieve economic integration, and

(B) efforts to strengthen the multilateral trading system and achieve open and fair trade through the GATT Uruguay round of negotiations;

(4) strongly urges the President and the United States Trade Representative to take all appropriate and feasible action under its authority, including possible action under section 301 of the Trade Act of 1974, to protect and maintain United States access to the EC broadcasting market;

(5) requires the United States Trade Representative to consult regularly with the Committee on Ways and Means of the House of Representatives on the status of this dispute and any action which it is considering with respect to the dispute; and

(6) directs the Clerk of the House to transmit a copy of this resolution to appro-

The legislative debates preceding the adoption of House Resolution 257 manifest the varied forms of United States condemnation of the Directive.[78] During the discussions, legislators expressed their concerns over the erection of trade barriers around "Fortress Europe,"[79] domestic content legislation,[80] and economically motivated "protectionism masquerading behind cultural patriotism."[81] According to Representative Frenzels, countries should not be permitted to use culture, health, and safety arguments to the extent these items "become the last refuge of trade scoundrels."[82] Because of these concerns, the House members rec-

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priate officials in the EC.

135 CONG. REC. H7327 (daily ed. Oct. 23, 1989). The representatives final vote totaled 342 in favor and none opposed, with 90 abstentions. *Id.* at H7357.

78. *See id.* at H7326-33.

79. *Id.* at H7328. (statement of Rep. Gejdenson). Representative Gejdenson drew the following analogy:

> This resolution today is as if the captain of the *Titanic* was warned there was a small chunk of ice ahead. . . . [T]his is simply the tip of the iceberg as the European Community proceeds to integrate its own economy. However, in that process, the European Community is beginning to raise walls to American products.

*Id.* Representative Markey stated that the Directive is one of the first signals of what the United States can expect from Europe in 1992 and "comes across more like a red flag flying over Fortress Europe than as a friendly invitation to be neighbors in a global telecommunications village." *Id.* at H7332 (statement of Rep. Markey).

80. *Id.* at H7327 (statement of Rep. Gibbons). Noting the seriousness of the resolution, Representative Gibbons stated that the United States does not "support and always [has] opposed any kind of domestic content legislation. Particularly domestic content legislation based upon cultural differences and cultural background." *Id.* Representative Matsui remarked that the Directive's restrictions were based exclusively on the country of origin of the product, rather than on the cultural content. *Id.* at H7328 (statement of Rep. Matsui).

81. *Id.* at H7333. (statement of Rep. Markey). Representative Markey indicated his support for a less restrictive, "vibrant" European television market under the Directive, but warned that implementation of the quota will result in protectionism of the European television market. According to Markey, what the United States "truly want[s] is television without frontiers, not television without Americans." *Id.* According to Representative Lagomarsino, the Directive "is a very discriminatory and protectionist move aimed directly at the United States." *Id.* at H7328 (statement of Rep. Lagomarsino). Representative Crane stated that "[s]uch a protectionist directive cannot be justified merely because it is cloaked in the rhetoric of cultural sovereignty." *Id.* at H7332 (statement of Rep. Crane).

82. *Id.* at H7330 (statement of Rep. Frenzel). In an effort to retaliate against the Directive, Congressman Bill Richardson introduced a proposed amendment to a Federal Communications Commission (FCC) budget reauthorization bill. *See* 135 CONG. REC. H7735 (daily ed. Oct. 27, 1989). Under Richardson's proposal, the FCC, upon application by a foreign country, would have the statutory authority to consider the applicant country's unfair or discriminatory treatment of United States telecommunications compa-

ommended United States action under the GATT and section 301 of the Trade Act.[83]

## IV. Analysis of the United States Challenge to the Directive

Although the United States displays a confident assurance of challenging the Directive as "GATT-illegal" or contrary to United States trade laws, successful retaliation under the GATT or section 301 of the amended Trade Act is unlikely.

### A. *The Role of the General Agreement on Tariffs and Trade*

#### 1. General Principles

The GATT arose in 1948 largely from unsuccessful attempts to establish an International Trade Organization within the United Nations.[84] Today, it provides a mechanism for establishing and maintaining a unitary code of conduct to regulate international trade in goods,[85] with over four-fifths of world trade currently occurring under the GATT's dominion.[86] The GATT also developed the structure and procedure for the settlement of disputes among GATT-member states. Recently, however, the GATT dispute settlement procedures have come under criticism.[87] Although the GATT taken as a whole is complex, its two basic princi-

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nies, products, and services. *See Hubbub Intensifies: Congress Lashes Out at European TV Content Restrictions*, Comm. Daily, Oct. 13, 1989, at 1 (LEXIS, Nexis Library, comdly file). Under the amendment, the FCC would consult with the USTR to determine the effect of discriminatory practices against United States industries. *Id.* If either the President or the USTR indicated that a foreign country is engaging in discriminatory action, the FCC would be required to deny all filings or applications of companies from that country. *Id.* Richardson stated that he intended the proposal as a direct response to the Directive, which he characterized as "the most recent and most public example of protectionism, but certainly not an isolated example." *Id.*

83. 135 CONG. REC. H7332 (daily ed. Oct. 23, 1989) (statement of Rep. Crane).

84. *See* 1 LAW AND PRACTICE UNDER THE GATT 1 (K. Simonds & B. Hill eds. 1990). The International Trade Organization, operating as a specialized agency of the United Nations, was designed to provide the machinery necessary to "reconstruct the pre-war economic and monetary system with due safeguards against defects which had militated against free trade." *Id.*; *see also* L. LAZAR, TRANSNATIONAL ECONOMIC AND MONETARY LAW: TRANSACTIONS & CONTRACTS 1.007 (1976).

85. *See* 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 2.

86. Dunkel, *'Trade Policies for a Better Future' and the Uruguay Round*, in TRADE POLICIES FOR A BETTER FUTURE: THE LEUTWILER REPORT, THE GATT AND THE URUGUAY ROUND 67 (1987) [hereinafter TRADE POLICIES].

87. *See* 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 1-2, 13.

ples of nondiscrimination and open-markets are deceptively simple.[88] Alleging violations of these basic principles, the United States challenges the legality of the Directive under article I of the GATT,[89] relating to most-favored-nation treatment[90] and article III, relating to national treatment.[91]

a. Nondiscrimination and Most Favored Nation Treatment

The principle of nondiscrimination is derived from article I of the GATT.[92] Barring any statutory exception,[93] each signatory is required to extend equal or "most favored nation" (MFN) treatment to other GATT member states. It is well established that MFN treatment under article I is the most important general provision of the GATT.[94] MFN treatment is that treatment "accorded by the granting State to the beneficiary State . . . not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[95] An important aspect of the MFN clause is that

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88. Roessler, *The Scope, Limits and Function of the GATT Legal System*, in TRADE POLICIES, *supra* note 86, at 71, 72.

89. *See Minimum Standards, supra* note 3, at 2. The Community is not a contracting party to the GATT, but speaks in the GATT for its Member States, which are all GATT signatories. Roessler, *supra* note 88, at 75.

90. GATT, *supra* note 11, art. I.

91. *Id.* art. III.

92. *Id.* art. I. Article I, entitled "General Most-Favoured-Nation Treatment" states:

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

*Id.*

93. One major exception exists in the area of customs unions and free-trade areas, in which members can give better trade treatment to each other, so long as they meet certain criteria to avoid raising new trade barriers. A more recent example allows trade preferences to be given to developing countries. *See* Dunkel, *supra* note 86, at 67.

94. *See* Blanar & Arcand, *The Future Monitoring Role of GATT in an International Arena of Non-Tariff Barriers: A Proposal from a Law and Economics Perspective*, 7 DICK. J. INT'L L. 301, 303 (1989).

95. E. MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY 255 (1986) (quoting article V of the GATT).

it is unconditional; each signatory is entitled to MFN treatment regardless of whether it provides equivalent benefit to the state from which MFN treatment is expected.[96]

b. Open Markets and National Treatment

The purpose of open markets is to prohibit all trade protectionism through the elimination of quantitative restrictions and other restrictive nontariff provisions.[97] This principle is subject to exceptions explicitly provided for in the GATT.[98] The principle of national treatment in article III of the GATT supplements the principle of open markets. Article III requires imported goods to fall within the same taxation and regulatory standards that govern domestic goods.[99] The United States claims that articles I and III of the GATT provide competent authority for challenging the Directive as GATT-illegal.[100]

2. Application of GATT Principles to the Dispute Between the United States and the Community

Whether the Directive violates prohibited GATT practices under articles I and III turns largely on the characterization of television broad-

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96. *See* Ehrenhaft, *A US View of the GATT*, 14 INT'L BUS. LAW. 146, 147 (1986).

97. *See* Dunkel, *supra* note 86, at 68.

98. *Id.* Quantitative restrictions are allowed primarily for three reasons: "to protect the balance of payments; for development purposes; and for agricultural and fisheries products, when this is necessary to implement programmes restricting domestic production of the products concerned." *Id.*

99. Article III of the GATT states, in pertinent part:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.
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> . . . .
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT, *supra* note 11, art. III.

100. 135 CONG. REC. H7327 (daily ed. Oct. 23, 1989) (statement of Rep. Gibbons).

casting as either a good or a service. The Community argues that the United States GATT contentions are flawed because the GATT's prohibitions apply only to the trade in goods between states.[101] According to the Community, under both the Directive's legislative history and judicial precedent within the Community, television broadcasting is deemed a service and, therefore, falls outside the GATT.[102] The United States, by contrast, rejects the Community's view and characterizes television programming as goods. Under the United States analysis, therefore, the Directive's quotas are GATT-illegal.[103]

a. European Court of Justice Opinions

The Community relies upon the 1974 European Court of Justice (ECJ) opinion in *State v. Sacchi*,[104] cited in the original proposal of "Television Without Frontiers,"[105] for the proposition that television programming is a service.[106] The Court, however, distinguished the products used to send television signals from the actual transmission of television signals.[107] The Court found that the material support of television programming is subject to those rules governing the free movement of goods, such as the GATT.[108] The Court concluded that although "the existence of an undertaking having a monopoly of commercial television broadcasts is not in itself contrary to the principle of the free movement of goods, such an undertaking would contravene this principle by discriminating in favour of national materials and products [in broadcasting the program]."[109] Subsequent case law has not developed this distinction expressed in *Sacchi*.

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101. *See* Note, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 GEO. L.J. 417, 453 (1987).

102. *Id.* at 453. Currently, the GATT does not protect trade in services explicitly. *Id.; see also, Minimum Standards, supra* note 3, at 2.

103. *See* 135 CONG. REC. H7330 (daily ed. Oct. 23, 1989) (statement of Rep. Frenzel).

104. 1974 E. Comm. Ct. J. Rep. 409, 14 Comm. Mkt. L.R. 177 (1974). The decision was affirmed in *Procureur du Roi v. Marc J.V.C. Debauve*, 1980 E. Comm. J. Rep. 833, 31 Common Mkt. L.R. 362 (1981).

105. *See Green Paper, supra* note 2, at 105.

106. In *Sacchi*, the Court held that "a television broadcast must, because of its nature, be regarded as a supply of services . . . . It follows [therefore] that the transmission of television broadcasts . . . belongs, as such, to the rules . . . relating to supplies of services." *Sacchi*, 1974 E. Comm. Ct. J. Rep. at 427, 14 Comm. Mkt. L.R. at 201-202.

107. *Id.*, 14 Comm. Mkt. L.R. at 202.

108. *Id.*

109. *Id.*

In *Bond Van Adverteerders v. Netherlands*,[110] the ECJ discussed extensively the nature of television signals and intra-Community broadcasting in the context of satellite and cable communication.[111] The Court found that, "[i]n the final analysis it can be said that the service provided by a broadcaster to subscribers of a distributor in another Member State constitutes a supply of services."[112]

In addition, under English copyright law, the consequences of broadcasting a television show are similar to the reduction to material form of a copyright work.[113] Also, British defamation law, treats broadcasting as analogous to publication in permanent form.[114] Thus, British law indicates that the transmission of television programs is a service.

b. Characteristics of Services

An analysis of the nature of services is necessary to determine whether a television program is characterized properly as a service or a good. Three principles are thought to govern trade in services: first, services are processes; second, trade in services requires personal contact between the provider and the consumer; and third, trade in services must be regulated.[115] Trade in services, unlike tangible goods, involves the dissemina-

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110. 1988 E. Comm. Ct. J. Rep. 2085, 56 Comm. Mkt. L.R. 113 (1988).

111. *Id.* at 2110-14, 56 Comm. Mkt. L.R. at __.

112. *Id.* at 2110, 56 Comm. Mkt. L.R. at __. Finding that a television signal, by nature, is a provision of services, the court stated:

> [B]ut what are those services and, above all, what is the nature of the provision? We shall start by observing that intrinsically the content, or perhaps better the essence, of the phenomenon is the contemporaneous remote broadcast of pictures and sounds, which, moreover, cannot be broken down into segments, each with a value proportional to the whole. Consequently, from that point of view the signal is a single and indivisible supply of services. However, a service is not pure essence; as the word suggests it must serve, that is to say it must have utility. . . . All that matters is that the process should be fully implemented, that is to say that the signal should deploy all its utility by reaching its natural addresses: television viewers.

*Id.* at 2113, 56 Comm. Mkt. L.R. at __.

113. *See* Bridge, *The EEC Green Paper 'Television without Frontiers': Coditel and Debauve Revisited*, 14 INT'L BUS. LAW. 113, 117 (1986).

114. *See id.* After speculating on the ramifications of treating television programs as intangible goods, Bridge concludes that "[n]otwithstanding the attractions of the above ideas, it must be admitted that there is an inherent fancifulness about the idea of intangible goods and perhaps the better view is still that broadcast signals cannot be regarded as goods." *Id.* Despite this conclusion, his analysis provides the groundwork for an argument that television programs should be treated as intangible goods. *See id.*

115. *See generally* D. RIDDLE, SERVICE-LED GROWTH: THE ROLE OF THE SERVICE SECTOR IN WORLD DEVELOPMENT (1986).

tion of skill and knowledge,[116] and ultimately, it is the consumer who benefits from the service provider's skill.[117] A service necessarily entails the movement of either the provider or the receiver to the other and requires some manner of contact between the two.[118] In an effort to distinguish between the various service provider's skill and quality, some form of regulation is necessary.[119] Another critical difference between goods and services is that the exporter of goods can alter the characteristic of its product over time whereas an exporter of services may be unable to do so.[120] In addition, transactions in services traditionally do not involve the transfer of property rights, as does trade in goods.[121]

c. The Role and Function of the GATT

In addition to the different characterizations of trade in television programming, much of the dispute concerning the legality of the Directive's quotas can be traced to fundamental differences over the role and function of the GATT. The United States perceives the GATT in legalistic terms as a "set of normative rules and a 'court' designed to enforce those rules, [as] a system for resolving disputes and punishing the guilty."[122] By contrast, the Community views the GATT as "a negotiating forum in which the normative rules give some guidelines as to the contours of the negotiations."[123] The United States seeks to impose procedures within the GATT framework to resolve trade disputes with certainty and speed.[124] The Community, on the other hand, sees the dispute resolution procedures of the GATT only as a tool of persuasion during negotiations.[125]

Of the more than one hundred member states of the GATT, the United States and the Member States of the Community have been the

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116. Nicolaides, *Economic Aspects of Services: Implications for a GATT Agreement*, 23 J. WORLD TRADE 125, 126 (1989).

117. *Id.*

118. *Id.* at 127.

119. *Id.* "Regulation usually takes the form of rules on who can do what and how." *Id.*

120. "[E]xporters of goods are able to change their characteristics (e.g. a new car model), while the exporters of services may be unable to modify their characteristics because of regulations on the nature of their activities." *Id.*

121. *Id.* at 126.

122. Cassidy, *National Trade Policy Instruments and the GATT: A US Lawyer's Perspective*, in 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 155, 161.

123. *Id.*

124. *See* Ehrenhaft, *supra* note 96, at 148.

125. *Id.*

most frequent protagonists in GATT dispute resolution settlements. Since the early 1960s, there have been sixty GATT dispute resolution panels. The United States has invoked the panel thirty times, twenty of which related to the policies and practices of the Community.[126] In recent years, however, other states have increasingly resorted to the formal panel mechanism of dispute resolution.[127]

### 3. General Agreement on Trade in Services

The expansion of GATT policies and rules to cover trade in services is of great significance to the implementation of the Directive.[128] The current round of multilateral trade negotiations, the Uruguay Round, has been viewed widely as the forum in which to discuss the liberalization of GATT trade regulations.[129] One goal of this liberalization process is to adopt a General Agreement on Trade in Services (GATS).[130]

The United States has indicated that one of its primary objectives entering the Uruguay Round was to include trade in services under the GATT.[131] The Community also is interested in creating a framework

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126. *See* van Phi, *A European View of the GATT*, 14 INT'L BUS. LAW. 150 (1986).

127. *See* Cassidy, *supra* note 122, at 163. GATT officials are concerned about this growth because of the magnified pressures it places on the GATT system, which "on balance has not worked all that badly, is becoming increasingly creaky and less satisfactory to everybody involved." *Id.* This is especially true given that the current GATT dispute resolution procedure is neither the legalistic system the United States would require, nor the pure negotiating forum the Community would propose.

128. *See id.*

129. *See U.S. Trade Objectives in the Uruguay Round*, DEP'T ST. BULL., Feb. 1989, at 35.

130. *See generally id.*

131. *See* 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 16 (citing Economic Report of the President, Jan. 1987, at 141-145 and United States Objectives in the New Round of Multilateral Trade Negotiations, Testimony of Ambassador Clayton Yeutter before the United States Senate Committee on Finance, May 14, 1986). Then Ambassador Yeutter stated on the eve of the Punta del Este meeting:

> These issues—agriculture, services, investment, and intellectual property protection—are all mentioned in the draft declaration supported by a majority of countries. We are hopeful that all nations will recognize that having these items on the negotiating agenda is in their own economic interest and in the interest of a healthy world trading system. Without them there will be no standstill-rollback commitment, no reduction in tariff and non-tariff barriers, no negotiation on a safeguards code, no improvement in the GATT dispute settlement mechanism, and no discipline for the "gray area" measures that so plague international trade today.

Yeutter, *An Agenda for the New GATT Round*, DEP'T ST. BULL., Nov. 1986, at 43, 45 (Yeutter address to United States Chamber of Commerce on Sept. 10, 1986).

for trade in services similar to GATT.[132] The Community has articulated its desire "to provide conditions for, and achieve real progress in, a further liberalization of world trade in goods, and to begin a similar process in the field of services on the basis of reciprocity and mutual advantage."[133] The Community's call for liberalization of trade in services is fostered by the desire to stimulate economic growth through increased competition.[134]

In 1987, the United States introduced to the members of the GATT a comprehensive proposal for liberalizing trade in services.[135] The proposal called for the GATT to recognize "the sovereign right of every country to regulate its services in industries subject only to an external control over measures which had [the] 'purpose or effect' of restricting market access by foreigners."[136] The proposal also referred to existing GATT principles of nondiscrimination and national treatment.

Under nondiscrimination, the proposal required signatories to extend unconditionally all the benefits of the GATT to trade in services, but it allowed limited exceptions for states unable to participate fully.[137] As for national treatment, the proposal required GATT members to institute identical regulation, except in limited circumstances, for foreign and domestic service firms.[138] The principle of national treatment is critical to implementation of any general international agreement on trade in services.[139] Contrary to GATT regulation of trade in goods, a legal system governing trade in services necessarily regulates the provider of the service rather than the product itself.[140] Therefore, an effective implementation of rules governing trade in services requires that the principle of

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132. Luyten, *Services in the Uruguay Round: The EC Viewpoint*, in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 199, 204 (1989) [hereinafter CONFLICT AND RESOLUTION]. "The time has come to work out the framework for services. In the field of services, we are now in the same place, at the international level, as we were in 1947 in the GATT with respect to trade goods." *Id.*

133. 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 18.

134. *See* Luyten, *supra* note 132, at 200. "We have learned since the War that one of the ways to stimulate economic growth is to liberalize trade and increase competition, thereby helping to lower prices, increase supply and demand, and in turn create jobs." *Id.* The Community would like to extend this theory to trade in services. *Id.*

135. *See* 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 31.

136. *Id.* at 32-33.

137. *See id.* at 33.

138. *See id.*

139. Reinstein, *Services in the Uruguay Round: The US Viewpoint*, in CONFLICT AND RESOLUTION, *supra* note 132, at 207, 213.

140. *Id.*

national treatment "extend to the supplier as well as the product supplied."[141]

The major opponents to the United States GATT proposal on trade in services were Brazil, India, and other developing countries.[142] These GATT members viewed trade in services as inappropriate for the GATT framework since the trade in services is not within the objectives and purpose of the agreement.[143]

Since the United States made its proposal, many commentators have addressed the feasibility of extending the GATT to trade in services,[144] delineating the extent of modifications of current GATT mechanisms to include trade in services and the best manner to achieve this objective.[145] An important distinction between the current GATT regulation of goods and any future extension to cover trade in services involves the product versus person dichotomy.[146] To liberalize trade in goods, it is sufficient to eliminate trade barriers existing in GATT member states.[147] The liberalization of trade in services requires the elimination of restrictions not only on the actual services provided, but also on the providers of the service.[148]

Proposals before the Group for Negotiations on Services at the Uruguay Round indicate that a common goal of GATT signatories is to facilitate entry into international markets.[149] Several of these proposals address the option of "conditional MFN" treatment for trade in services.[150] This break from the current unconditional MFN status ensures that foreign service producers meet the qualitative standards required of domestic providers.[151]

Conditional MFN treatment has come under attack because of the opportunity for abuse and protectionism by the implementing countries.[152] Proponents of conditional men fail to perceive the effect a prop-

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141. *Id.*

142. *See* 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 34.

143. *Id.*

144. *Id.*

145. *See, e.g.*, Nicolaides, *supra* note 116, at 125.

146. *Id.* at 127-28.

147. *Id.* at 128.

148. *Id.* "Movement is often not an alternative to cross-border trade. Hence, obstructing movement is equivalent to obstructing the liberalization of particular services." *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. *See id.* "An objection that may be raised against conditional MFN treatment for safeguarding regulations is that it is against the fundamental GATT tenet of nondis-

erly implemented GATS will have in fashioning a credible and open international trading system for services.[153] Allowing the equal treatment of service providers from all GATT member states under an unconditional MFN framework will encourage individual states to relax stringent domestic qualitative regulations governing trade in services in an effort to raise the international competitiveness of their industries.[154] If the current unconditional MFN status is adopted in the GATS, however, an international review process must be established to ensure that competitive deregulation within Member States does not cause the collapse of the agreement.[155]

Despite the strong desire for the liberalization of trade in services, the GATT talks, which addressed such a proposal, stalled in December 1990.[156] However, lobbying by major United States service companies helped introduce modifications to the proposed agreement covering services.[157] Contrary to a primary principle of the GATT, the revised United States plan rejected MFN treatment of trade in services.[158] Concerned with the binding effect of the MFN principles and the subsequent influx of foreign services into the United States,[159] the United

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crimination." *Id.* at 128-29.

153. *See id.* at 129.

154. *See id.*

155. *Id.* When a service provider complies with a country's entry requirements, further differential treatment by the domestic state among foreign suppliers is unnecessary. Upon entering a state, the foreign service producer then would receive national treatment under current GATT principles relating to goods. Thus, liberalization of trade in services can occur if GATT signatories adopt specific regulations regarding the treatment of the providers of services and implement such legislation within current GATT rules. Signatories also must adopt stronger international policies addressing the review and settlement of trade disputes. *Id.*

156. *See* Stokes, *Little Hope for Stalled GATT Talks?*, NAT'L L.J., Dec. 15, 1990, at 3037; *GATT Delegates Asking 'What Went Wrong?' As Concluding Uruguay Round Session Begins*, 7 Int'l Trade Rep. (BNA) No. 48, at 1851 (Dec. 5, 1990) [hereinafter *What Went Wrong*]; La Ganga, *How U.S. Industries View the GATT Results*, L.A. Times, Dec. 8, 1990, at D1, col. 2; Montagnon, *US Takes the Flak for Failure*, Fin. Times, Nov. 14, 1990, at 20, col. 2.

157. *See What Went Wrong, supra* note 156, at 1851.

158. *See id.* at 1892.

159. *See id.* "There is, as the United States has now belatedly realised, an irreconcilable contradiction between MFN and its own unilateral approach to trade policy." Montagnon, *supra* note 156, at 20, col. 2. If the United States allows foreign providers access to its service industries under the non-discrimination principles of MFN, "it would forfeit the right to retaliate unilaterally against those whose markets could remain closed, even though the latter could still argue that they were respecting the new GATT agreement to the letter." *Id.*

States proposed that the GATT be governed by bilateral agreements between GATT member states.[160] This change in the United States position particularly disturbs the developing Member States of the GATT. These countries initially opposed any agreement on trade in services until its proponents, primarily the United States, convinced them of the significant economic advantages available under the MFN principle of the proposed GATS.[161]

Another major conflict over the proposed GATS was the Community's insistence on excluding from the GATS anything relating to culture.[162] A cultural exception to the GATS would allow the Community to limit non-Community films and television programming with less fear of GATT retaliation.[163] USTR Hills, on the other hand, supported the inclusion of movies and television programming in the GATS, and MPAA President Valenti led lobbying efforts against the Community's GATS proposal.[164] However, the extent of the USTR's commitment to combat a "cultural services" exception is uncertain,[165] and the future of trade negotiations surrounding the proposed GATS and the Uruguay Round of the GATT is unknown.[166]

The apparent failure of the GATS reinforces the need to characterize television programming properly. If television broadcasting is characterized as a service, the United States challenge of the Directive under cur-

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160. *See id.*, at 1852.

161. *See id.*

162. *See* Tumulty & Havemann, *An Uncommon Market for U.S. Entertainment*, L.A. Times, Dec. 5, 1990, at F2, col. 3.

163. *See id.*

164. *See* Jessell, *Valenti Stumps Against European Quotas,* BROADCASTING, Nov. 12, 1990, at 72. Valenti indicated that exempting television and film from the GATS would allow the continuation of the Directive's quotas. "France has already barricaded its TV stations with even heavier quotas. Other EC countries are eyeing those quotas with the relish of a hawk hovering over a chicken farm." *Id.*

165. *See* Tumulty & Havemann, *supra* note 162, at F2, col. 5. Although USTR Hills has offered strong support of Valenti's lobbying against the Community exemptions, "recent experience suggests that the cultural quotas issue is one that the United States may be willing to bargain on in the final hours of talks." *Id.* During negotiations on the United States-Canada Free Trade Agreement, "Secretary of State James A. Baker telephoned Valenti at home at midnight and said: 'I'm sorry, Jack. We had to throw you overboard.' " As a result, Canada was permitted to impose trade quotas to protect its culture. *Id.; see also infra* notes 219-243 and accompanying text (discussion of the United States-Canada Free Trade Agreement).

166. Stokes, *supra* note 156, at 3037. USTR Hills has indicated that unless the Community displays flexibility in negotiating, the United States will not return to the bargaining table. *Id.* MPAA President Valenti, however, indicated that "no agreement is better than a worse agreement." La Ganga, *supra* note 156, at D1, col. 2.

rent GATT rules is unwarranted. On the United States side, however, many GATT member states argue against protectionist action, like the Directive, and they desire liberalized trade in services. The underlying purpose and function of the GATT legal system is the prevention of policies through which various states attempt to obtain economic advantages at others' expense through the restriction of imports and the subsidization of exports.[167] One authority indicates that the preferred view of the GATT is as a part of "the framework of pressures and constraints in which the public choice between protection and open markets is made."[168] In the end, however, the United States believes the Directive concerns trade in goods, and therefore, is subject to current GATT authority.[169]

### B. *The Role of Section 301 of the Amended Trade Act*

#### 1. The Goals and Structure of Section 301

The United States position as a leader in world trade has diminished in recent years.[170] According to United States policy makers, this is a direct result of the greater access to United States markets provided to foreign traders compared to the access provided by trading partners of the United States.[171] Although the United States tolerated this inequality of access when its products and services dominated the imports of other countries in foreign markets,[172] in recent years the United States has begun to change its position.[173] Insisting that its trade partners liberalize access requirements, the United States trade industry has pressured the United States government to take action.[174] In response, Congress passed the amendments to section 301 of the Trade Act.[175] Although the main objective of section 301 is to provide additional negotiating leverage for greater access to foreign markets for United States products and ser-

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167. Roessler, *supra* note 88, at 84. Mr. Roessler is a legal affairs Counselor in the Secretariat of the GATT in Geneva, Switzerland.

168. *Id.* at 85.

169. *See* 135 CONG. REC. H7332 (daily ed. Oct. 23, 1989) (statement of Rep. Crane).

170. *See* Tarullo, *The US-EC Trade Relationship and the Uruguay Round*, 24 COMMON MKT. L. REV. 412 (1987).

171. *Id.* at 412.

172. *See id.*

173. *See id.* at 413.

174. *See id.*

175. Pub. L. No. 93-618 § 301, 88 Stat. 1978, 2041-43, *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107 (1988) (codified as amended at 19 U.S.C.A. § 2411 (West Supp. 1990)).

vices,[176] the USTR's powers under the amended section 301 include strong retaliatory measures.[177]

United States officials believe that the Directive is actionable under United States trade statutes, specifically section 301 of the amended Trade Act.[178] Section 301 authorizes the President of the United States to implement action against other states that participate in unfair trade practices that adversely affect United States commerce in goods or services.[179] For this reason, section 301 has become the "trade remedy that foreigners love to hate."[180] Under the 1988 amendments of section 301, which required mandatory action by the USTR, Congress sought greater certainty of United States retaliation against unfair trade practices.[181] Section 301 is virtually the only means of relief for United States service industries encountering discriminatory foreign government actions.[182]

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176. *See* Bello & Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197, 1205-06 (1988).

177. *See id.* at 1201-02.

178. *See* Coffield, *Using Section 301 of the Trade Act of 1974 As a Response to Foreign Government Trade Actions: When, Why and How*, 6 N.C.J. INT'L L. & COM. REG. 381, 381 (1981).

179. Section 301, as amended in 1988, provides in pertinent part:

(a) Mandatory action

(1) If the United States Trade Representative determines . . . that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representatives shall take action authorized in subsection (c) of this section subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

19 U.S.C.A. § 2411(a) (West Supp. 1990). The USTR is not required to take action (1) if dispute resolution proceedings under the GATT disclose no violation of United States trade rights, (2) if the foreign government is taking, has agreed to take, or it is impossible to take appropriate measures, (3) if the retaliation would have an excessive adverse impact on the United States economy, or (4) if the retaliation would cause serious harm to United States national security. *Id.* § 2411(a)(2).

180. 5 Int'l Trade Rep. (BNA) No. 40, at 1366 (Oct. 12, 1988) (statement of J.H. Bello, General Counsel, Office of the USTR).

181. *See* H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1 at 62 (1987); 134 CONG. REC. S4543 (daily ed. Apr. 22, 1988) (statement of Sen. Bentsen).

182. *See* Stoler, *The Border Broadcasting Dispute: A Unique Case Under Section*

Section 301 also gives discretionary authority to the USTR to take appropriate action[183] when "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce."[184] The statute defines acts that burden or restrict United States commerce as those that are unreasonable,[185] unjustifiable,[186] or discriminatory.[187] It also gives private "interested parties" the statutory right to petition the government to take action under the section.[188] The statute, however, does not define the term "interested party" clearly.[189]

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*301*, 6 INT'L TRADE L.J. 39, 54 (1980).

183. The USTR is authorized to:

(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to . . .

(B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate . . . .

19 U.S.C.A. § 2411(c)(1)(A)-(B).

184. *Id.* § 2411(b)(1).

185. *Id.* § 2411(d)(3). This section provides that an "act, policy, or practice is unreasonable if [it], while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." *Id.* This section also furnishes examples of unreasonable actions, including any act or combination of acts, policies, or practices, that—

(i) denies fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights, or

(III) market opportunities . . .

(ii) constitutes export targeting. . . .

*Id.*

186. *Id.* § 2411(d)(4)(A). According to this section, an act is unjustifiable if the "act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States." *Id.*

187. *Id.* § 2411(d)(5). Acts that are discriminatory include "any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment." *Id.*

188. *See* Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1123 (1987). "Any interested person may file a petition with the Trade Representative requesting that action be taken under section 2411 of this title and setting forth the allegations in support of the request." 19 U.S.C.A. § 2411(a)(1).

189. *See* Bradley, *Amendments to Section 301 of the Trade Act of 1974*, in THE NEW TRADE LAW: OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 at 131, 135 (P.L.I. 1989).

An "interested party" within section 301 includes "domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user

For these reasons, one commentator has referred to the authorization of retaliatory action against "unreasonable" foreign practice found in section 301 as the "most powerful weapon for achieving elimination of unfair distortionary commercial policies."[190] Section 301 is an increasingly important statute in protecting United States trade policy.[191]

Under the amended section 301, the United States can place quantitative restrictions on imports or impose increased duties against any foreign state violating the statute.[192] In a section 301 challenge, the USTR first must quantify the burden placed upon the United States by the alleged unfair trade practice.[193] To do this, the USTR must compare the competitiveness of the United States industry effected to similar export performances in other markets, the extent of the effect on trade by the alleged unfair practice, and the historical presence of the effected industry in the market concerned.[194] This evaluation provides the United States the information necessary to retaliate under section 301 "in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce."[195]

Four stages generally follow the completion of this economic study: public hearings, development of retaliatory restrictions, recommendations to the USTR, and subsequent action by the United States government.[196] A public hearing before a section 301 committee enables each party to present its views and allows the United States to determine the potential harm retaliatory measures will have on the effected industry.[197] The USTR then outlines the products and services that the offending state exports to the United States to determine the industries where retaliatory measures will be most effective.[198] This stage is an attempt to place pressure upon the foreign country to reform its protectionist measures.[199]

The amendments to section 301 require that the USTR impose trade duties, rather than other forms of import restrictions, as a means of re-

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of any goods or services. . . ." 19 U.S.C.A. § 2411(d)(a).

190. Hansen, *supra* note 188, at 1133.

191. *See* Eichmann & Horlick, *Political Questions in International Trade: Judicial Review of Section 301?*, 10 MICH. J. INT'L L. 735, 735 (1989).

192. *See* Bello & Holmer, *supra* note 176, at 1202.

193. *See id.*

194. *Id.*

195. 19 U.S.C.A. § 2411(a)(3).

196. Bello & Holmer, *supra* note 176, at 1203-05.

197. *Id.* at 1203.

198. *See id.* at 1202.

199. *Id.* at 1202-03.

taliation.[200] As an alternative, however, the USTR may implement quotas.[201] When the section 301 committee reaches agreement on the principal course of retaliation, the United States International Trade Commission drafts a proclamation, which the White House then reviews.[202] Subject to specific Presidential discretion,[203] section 301 authorizes the USTR to take action directly.[204] Moreover, the USTR must monitor any measures taken or agreements reached concerning the matter.[205]

The Community and other GATT signatories, have expressed resentment toward the amended section 301.[206] In 1987, the Community issued a report of thirty United States actions it considered unfair trade practices.[207] The Community has warned that unilateral action by the United States under section 301 could "easily be mirrored by equivalent action against United States exports."[208]

The United States Congress inserted many of the amendments to section 301, in part, to circumvent the longevity of processing a GATT case.[209] Almost two-thirds of the petitions filed under section 301 contained complaints that the proceedings under the GATT were too lengthy.[210] Two frequently cited examples of this longevity are a citrus case, which took the GATT over eleven years to resolve, and a wheat case, which is still in dispute after twelve years. These cases emphasize

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200. 19 U.S.C.A. § 2411(c)(5).

201. *See* Bello & Holmer, *supra* note 176, at 1204. "In the EEC enlargement case, for example, the United States responded to GATT-illegal EEC quotas on grains, oilseeds, and oilseed products in Portugal with reciprocal quotas on EEC chocolate, candy, apple and pear juices, beer, and some white wine." *Id.*

202. *See id.* at 204-05.

203. 19 U.S.C.A. § 2411(b).

204. *Id.*

205. *Id.* § 2416.

206. *See* Phillips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?*, 22 VAND. J. TRANSNAT'L L. 491, 526 (1989) (citing 133 CONG. REC. H2760 (daily ed. Apr. 29, 1987) (statement of Rep. Crane)).

207. *Id.*

208. *Id.*

209. Congress accomplished this by requiring the USTR, in most trade agreement investigations, to make a determination in a maximum of eighteen months after the USTR's investigation begins. *See* 19 U.S.C.A. § 2414(a)(2). The average GATT case takes forty-five months to resolve, compared to thirteen months for non-GATT cases. For this reason, the GATT dispute settlement process has been referred to as a "black hole." Phillips, *supra* note 206, at 516. "One industry representative called the GATT process a 'joke' and an 'oxymoron.' " *Id.*

210. Philips, *supra* note 206, at 516.

the need to implement shorter settlement procedures for discriminatory trade disputes.[211]

The MPAA filed a section 301 unfair trade complaint aimed at preventing the discrimination United States program producers embodied in the Directive.[212] The USTR has encouraged and supported this action.[213]

2. Examples of Section 301 Actions

Recently, the United States has threatened to use section 301 in three major cases. Two of these illustrate the process through which the United States is able to gain greater access to foreign markets. The third case, however, shows that the United States will use section 301 sanctions as an expendable bargaining chip. This example, in which the United States abandoned its section 301 claim for the larger goal of a trade agreement with Canada, gives the Community a strong argument against the United States use of section 301 in the case of the Directive.

In 1986, the United States insurance industry lacked fair and equitable entry into the five billion dollar South Korean insurance market.[214] Believing that the South Korean restriction of access to its insurance market was inconsistent with the United States-South Korea Treaty of Friendship, Commerce and Navigation,[215] the United States Department of Commerce threatened retaliation under section 301. This threat led to an agreement that significantly increased United States access to the South Korean market.[216]

In September 1988, the MPEAA filed a section 301 complaint against South Korea for failure to abide by an earlier agreement covering impor-

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211. *See id.*

212. *See* Valenti, *supra* note 20, at 4; *see also supra* note 188 and accompanying text (discussing private rights of action under section 301).

213. *See* Valenti, *supra* note 20, at 4.

214. *See* Bello & Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 NW. J. INT'L L. & BUS. 633, 661 (1986) (citing the initiation by the USTR of an investigation into Korean restrictions on insurance services).

215. Treaty of Friendship, Commerce and Navigation, *entered into force*, Nov. 27, 1957, United States-Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (Nov. 28, 1956). The treaty provides that "[n]ationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity." *Id.* art. V.

216. *See* Bello & Holmer, *supra* note 214, at 662.

tation of United States film, home video, and television programming.[217] The implementation of the section 301 action and the threat of United States retaliation against South Korean products and services resulted in a settlement in which South Korea assured United States film companies that they would have full access to the South Korean market.[218]

The third example of United States use of section 301 gives the Community its strongest argument in support of the Directive. The critical factor for the Community is the United States response in a previous television broadcasting dispute with Canada. According to Community ministers, the United States complaints concerning the Directive are "unjustified given that similar Canadian restrictions on foreign broadcasting were grandfathered by the United States-Canadian Free Trade Agreement."[219]

A "longstanding paranoia" exists among Canadians over the potential for being overrun by United States culture and identity.[220] The adoption of the United States-Canada Free Trade Agreement (FTA)[221] in 1987

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217. *See* Note, *The Omnibus Trade and Competitiveness Act of 1988: The Section 301 Amendments—Insignificant Changes From Prior Law?*, 7 B.U. INT'L L.J. 115, 145-46 (1989).

218. *See* Fimi, *United States, South Korea Reach Accord on Movie Distribution, Avoiding 301 Case*, 5 Int'l Trade Rep. (BNA) No. 42, at 1310 (Nov. 2, 1988). According to the MPEAA, "South Korea will eliminate its limitation on the number of film prints in circulation and will ensure that its censorship procedures do not act as a bottleneck to restrict the number of U.S. films that can be imported." *Id.*

219. *U.S. Outraged, supra* note 11, at 1292. USTR Hills has responded to those arguments by stating that "[i]f you think that the U.K. has more of a cultural affinity with Portugal than with the United States, I think you're buying into an argument that doesn't stand up." *Id.*

220. *See* Stoler, *supra* note 182, at 40. As a result of both the geographic proximity of Canada to the United States and the demographic patterns within Canada (the bulk of the Canadian population lives within 100 miles of the United States border), United States television programming dominates the Canadian airwaves. A prominent practice of Canadian cable networks has been to retransmit "spill-over" signals from United States broadcasting stations located near the United States-Canada border while deleting American commercials and adding Canadian commercials. In addition, Canadian advertisers have spent $20 million with bordering United States television stations, resulting in a loss of revenue to Canadian stations. *Id.* at 40-41; *see also* Winter, *Film and Television Production and Distribution in Canada: Recent Developments*, 22 BEV. HILLS B.J. 123 (1988).

221. Canada-U.S. Free Trade Agreement, *opened for signature* Jan. 2, 1988, H.R. DOC. NO. 100-216, 100th Cong., 2d Sess. 534 (1988), *reprinted in* 27 I.L.M. 281 (1981) (entered into force on Jan. 1, 1989) [hereinafter FTA]. The FTA "incorporates the principles of national treatment, the right of establishment, the right of commercial presence, transparency in regulation, and a dispute settlement mechanism. It does not cover existing measures but it does impose a standstill on the imposition of new restric-

only heightened this concern. The adoption of the FTA began "an unprecedented era of free trade" between the United States and Canada,[222] resolving a long history of trade disputes between the two countries.[223] Many Canadians, however, view the FTA as another step toward foreign control of their national culture, economic regulation, and domestic policy.[224] As a result of Canada's concerns, the FTA exempts "cultural industries"[225] from its provision on trade in services.[226] Concerns over cultural identity in the trade relationship between the United States and Canada are most evident in the area of television broadcasting.[227] In an effort to strengthen its domestic programming and television production industry, the Canadian government effectively doubled the cost of Canadian advertisers' broadcasting on United States stations directed at the Canadian market through a new income tax (Bill C-58).[228]

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tions." 1 LAW AND PRACTICE UNDER THE GATT, *supra* note 84, at 31-32.

222. Note, *The Canada United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK J. TRANSNAT'L L. 299, 299 (1989).

223. *See id.* at 300. The FTA is a more impressive document, given the past trade history between Canada and the United States and the Canadian citizens' strong sense of nationalism.

224. Battram, *Canada-United States Trade Negotiations: Continental Accord or a Continent Apart?*, 22 INT'L LAW. 345, 387-88 (1988). This fear stems from "the regional nature of the Canadian character, which is more secure in its regionalism than it is in its Canadian image of itself." *Id.* at 380.

225. Under the FTA, cultural industry is defined as any enterprise engaged in:

a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

b) the production, distribution, sale or exhibition of film or video music recordings;

c) the production, distribution, sale or exhibition of audio or video recordings;

d) the publication, distribution, or sale of music in print or machine readable form, or

e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

FTA, *supra* note 221, art. 2012.

226. *Id.* art. 2005; *see also* D. STEGER, A CONCISE GUIDE TO THE CANADA-UNITED STATES FREE TRADE AGREEMENT 49 (1988). The effect of the exemption is that "Canadian federal or provincial governments will be able to design new programs or policies in [the] future for these industries that discriminate against U.S. investors or U.S. firms." *Id.*

227. *See, e.g.*, Stoler, *supra* note 182.

228. Section 19.1 of the Income Tax Act of Canada. R.S.C. 1985 C-58, as amended. R.S.C. 1970, C.I-63, as amended [hereinafter Bill C-58]. *See generally* Stoler, *supra* note 182, at 43.

Bill C-58 strengthened the financial viability of the domestic programming and broadcasting industry and made United States border broadcasting less attractive.[229] Because of this tax, United States broadcasters located along the Canadian border experienced a fifty percent decline in revenue from Canadian advertisers amounting to a loss of approximately fifteen to twenty million dollars per year in advertising fees.[230] As a result, the United States brought suit under section 301.[231] The case became the first section 301 case resolved through United States retaliation.

Fifteen United States border television stations petitioned for action because of the discriminatory, unreasonable, unjustifiable, and burdensome effect of Bill C-58 on United States commerce.[232] The USTR conducted public hearings on the issues and suggested that appropriate reciprocity could be developed under United States tax law. The Canadian government argued that it had "been very conscious of U.S. interests in regard to the problems" and refused to recognize most of the broadcasters' contentions.[233] The section 301 committee determined that the Canadian Bill was neither discriminatory, nor unjustifiable.[234] The committee, however, found Bill C-58 unreasonable because the law placed the cost of attaining a stronger Canadian broadcast industry on United States companies and, therefore, the action was unnecessarily burdensome on and restrictive of United States commerce.[235]

To counter Bill C-58, the United States enacted mirror legislation in 1984 denying foreign broadcast stations income tax deductions for ex-

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229. The Bill provides that "in computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred after this section comes into force for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking." Stoler, *supra* note 182, at 43. Expenses for advertisements placed in Canadian media, however, remain deductible. *Id.* at 43.

230. *See id.* at 42. According to a 1983 United States Department of Communications report, however, this figure may be substantially understated. *See* Battram, *supra* note 224, at 282.

231. Stoler, *supra* note 182, at 52.

232. *Id.* at 45-46. The United States alleged that Bill C-58 constituted a violation of international law, specifically the principal of national treatment. It also argued that Bill C-58 did not provide United States programs "national treatment" because "firstly, it subjected them to less favorable tax treatment than domestic Canadian programming received and, secondly, because it constituted an unreasonable restraint on international trade." Battram, *supra* note 224, at 382.

233. Stoler, *supra* note 182, at 49.

234. *Id.* at 52.

235. *Id.* at 52-53.

penses incurred in advertising directed at United States markets.[236] The legislation currently operates only against Canada and would become unenforceable upon the repeal of Bill C-58.[237] The United States retaliatory action under section 301, however, failed to cause the repeal of the Canadian legislation.

By virtue of Canada's heightened sense of nationalism, the Canadian government has sought at length to isolate the development, production, and distribution of its domestic television programming from United States influence.[238] By excepting television broadcasting from the FTA, the Canadian government continues "to apply, modify, [and] create new programs, to regulate, subsidize, [and] encourage the development of distinctive Canadian cultural products and services, and to restrict entry or investment by U.S. entertainment enterprises."[239] In addition, the FTA allows Canada to maintain virtually all of its discriminatory practices relating to television programming on domestic stations.[240] By grandfathering prior television broadcasting legislation in the FTA, Canada "fared much better"[241] than the United States broadcasting industry, which survived the FTA as "the real losers, having come to the table with much to gain but ending up with virtually nothing."[242] The Community refers to the resolution of border broadcasting dispute between the United States and Canada as precedent for the imposition of programming quotas.[243]

### C. *United States Expansion in the Community Television Market*

As a result of the dispute over the Directive, United States suppliers of television programming have begun to expand their economic presence in Member States of the Community. Under the joint production language of the Directive, United States companies are attempting to circumvent the programming quotas through coproduction with Member States. In November 1989, Paramount Pictures purchased a forty-nine percent interest in the United Kingdom's largest independent television production

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236. *See* Battram, *supra* note 224, at 382.

237. *Id.* The United States legislation applies "only when a foreign country denies deductions of advertising aired on United States stations." *Id.*

238. *See* Stoler, *supra* note 182, at 43.

239. D. STEGER, *supra* note 226, at 51.

240. *See* 2 U.S.-CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE (BNA) E-111 (1988).

241. *Id.* at E-112.

242. *Id.* at E-111.

243. *U.S. Outraged, supra* note 11, at 1292.

company, Zenith.[244] The Walt Disney Corporation also has established a strong entertainment base in France.[245]

In October 1990, Lorimar Television entered into a coproduction partnership for new television dramas with Spain's TV3.[246] The agreement provides that the television programs will be produced and filmed in Spain and, therefore, will qualify as "European works" under the Directive.[247] In addition to circumventing the quotas, the agreement also provides the mechanism for United States programming suppliers to lessen financial risk.[248]

## V. CONCLUSION

The Community's adoption of the Directive and its quotas on non-Community programming raise legitimate trade concerns. Although the protection of culture and national identity are reasonable aims, the Directive appears motivated by other, less honorable purposes. By implementing the Directive, the Community has sent a clear signal to the United States that attempts to pressure the Community to not adopt broadcast legislation will be ineffective. Moreover, given the desire of Community television audiences for domestic programming, the Community's claims of cultural preservation are questionable. The number of broadcasting hours necessary to fill available air time allows for both Community and non-Community produced programming.

Similarly, the United States threats in challenging implementation of the Directive are suspect. The United States threat of retaliation under

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244. Brooks, *Paramount Buys 49% Stake in British Television Firm*, L.A. Times, Nov. 17, 1989, at D5, col. 1. The transaction gives Zenith access to Paramount's global distribution operations. United States analysts note that the acquisition aids Paramount in dealing with the Community quotas. An analyst with Crowell, Weedon & Co., however, has stated that the purchase is not "a matter of getting around" the quotas, but rather providing Paramount social and political insight into the Community. *Id.* at col. 2.

245. *See* Presburger & Tyler, *supra* note 2, at 509.

246. Mahoney, *Lorimar Sets Series With Spain's TV3*, Electronic Media, Oct. 8, 1990 (LEXIS, Nexis library, emedia file). Lorimar is the United States most prolific supplier of prime-time television programming, and this arrangement with TV3 is the company's first international coventure. *Id.*

247. *Id.*

248. *Id.* The financial risk involved in producing one hour television programs is well-documented. The Walt Disney Corporation recently ceased its production of such programing because of the excessive costs and the closing of international markets for such products. Lippman, *Disney Will Stop Making One-Hour Television Shows*, L.A. Times, Sept. 15, 1990, at D1, col. 6. The typical one hour drama averages over $1.2 million to film, but television networks have recently refused to pay more than $600,000 to $700,000 for the rights to air the programs. *Id.* at D6, col. 2.

the current GATT framework appears unlikely. Despite the underlying policy and purpose of the GATT and the widespread support for adoption of a an agreement on services, the breakdown of the Uruguay Round in December 1990 indicates that the extension of the international legal principles governing trade in goods to trade in services is uncertain. In addition, United States reliance on the underlying policy of the GATT to retaliate against the quota on television broadcasting should not be countenanced given the United States withdrawal of the MFN provisions from their GATS proposal. The United States encouraged the adoption of a GATS governed by GATT principles of MFN and national treatment and lobbied developing countries for support by indicating the advantages of such an agreement. Subsequent United States modifications to their original proposal that deleted sections critical to developing countries, like MFN treatment, are unsettling. Therefore, United States action under the GATT should fail not only because the Directive fails to address a trade practice covered by the GATT (because television programming is not a "good"), but likewise, United States actions in negotiating the GATS should preclude a plea for retaliation based upon the underlying purpose and policies of the GATT, the very principles that the United States are attempting to exclude from the GATS.

The statutory provisions of section 301 of the amended United States Trade Act allow the United States to retaliate against the Directive. Although the Directive is a prime example of the type of trade practice to which section 301 is meant to apply, prior United States acceptance of similar Canadian television quotas weakens the United States argument. In addition, other United States legislation similarly limiting foreign access to United States television must be considered in addressing the United States retaliatory response. If section 301 action is undertaken, the retaliatory measures adopted must significantly affect Community trade to be effective. Otherwise, the EC will continue the domestic favoritism adopted in the Directive.

One important result of implementation of the Directive is the expansion of United States television production industry in the Community. This enables the United States to circumvent the Directive's Community-produced television quotas. In addition, this United States influence undoubtedly will aid the development of the Community television production industry, a significant goal of the Directive.

The fear that the Directive is yet one more brick in a "Fortress Europe" appears overstated. Current international agreements covering trade in goods and regulating some trade in services severely limit the extent to which the Community can adopt similar quotas governing

other industries. While the Community's Directive certainly is not to be applauded, the United States strong response appears somewhat hypocritical given past United States practice. The Directive is significant in implementing a fully developed Community television broadcasting industry. Unfortunately, the quota contained in article 4 clouds the otherwise impressive document. In the end, article 4 of the Directive will not have significant financial impact on the United States television industry, given the increasing need for programming hours in the Community, and the opportunity to circumvent the "suggested majority" quota through European expansion.

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