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Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive

By PAUL PRESBURGER
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I. INTRODUCTION

On October 3, 1989, the European Council passed the *Council Directive On the Coordination of Certain Provisions Laid Down by Law*,

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*Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*¹ (Directive) designed to coordinate the various broadcasting laws of the Member States within the European Community. While this document certainly opens internal frontiers hindering trans-European broadcasting, it contains a controversial provision that many have argued raises an external barrier to non-Member States, particularly American, television programs.

Sections two and three of this Article will briefly describe the history of the Directive and how the Directive, popularly called Television Without Frontiers, harmonizes the divergent national laws relating to broadcasting within the Member States. Section four of the Article will describe in detail the controversy surrounding the local content requirement that has fostered so much debate. The latter portion of Section four will deal with the United States and European positions and conclude with an outline of potential responses to the Directive by the United States and its television and film industry.

II. THE TELEVISION WITHOUT FRONTIERS GREEN PAPER

Many of the provisions of the Directive have their origins in the European Commission's 1984 *Green Paper On the Establishment Of The Common Market for Broadcasting, Especially By Satellite And Cable*² (Green Paper). In this document, the Commission stated the case for the free movement of television broadcasts within the European Community, and in doing so provided an overview of the existing technical and legal framework of broadcasting within the Member States.

In the Green Paper, the Commission cited many reasons for extending cross-border broadcasting rights within the European Community. First and foremost, the Commission asserted that cross-border transmissions will promote the process of European integration: "The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."³ The Commission also argued that cross-border transmissions would be "a source of cultural enrichment,"⁴ would provide the

1. 32 O.J. EUR. COMM. (No. L 298) 23 (1989) [hereinafter Directive].

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

3. *Id.* at 28. The Commission also notes that cross-border transmissions will help educate voters for the European Parliament. *See id.* ("It is also essential to improve coverage of events in the other Member States if the citizens of Europe are to play their full part—in particular as voters in elections for the European Parliament—in building the Community.")

4. *Id.* at 30.

impetus for increased technical innovation in Europe in transmission media,⁵ and would prevent the "dominance of the big American media corporations."⁶

However, the Commission noted that many obstacles confront cross-border broadcasting within Europe. Technical standards differ and unification of the various national systems would be expensive.⁷ Moreover, the varied and complex national laws regulating television broadcasting in the Member States would be difficult to harmonize.⁸

For example, the widely divergent rules on advertising in the Member States restricted transnational transmissions.⁹ Some states, like Denmark, banned advertising altogether.¹⁰ Others, like the Federal Republic of Germany, allowed it, but imposed severe regulations—for example, limiting the timing and content of advertisements.¹¹ Many states restricted (or prohibited altogether) advertisements for alcohol and tobacco,¹² others prohibited advertisements which had elements "likely to offend against the moral, religious, philosophical, or political convictions of . . . viewers."¹³

Other regulatory barriers included national laws relating to the right of an individual to reply to statements in transmissions that "might impeach their honour or damage their reputation,"¹⁴ laws on performers' rights¹⁵ and on copyright in general;¹⁶ and laws relating to the protection of minors, which include various prohibitions or restraints on the display of sexual or violent acts.¹⁷

The Commission concluded that the European Community is competent to regulate and harmonize national broadcasting laws.¹⁸ On that basis the Commission set out a number of proposals for reform. In general, these proposals were derived from the core broadcasting rules of the Member States. The Commission attempted to set minimum broadcast-

5. *Id.* at 53.

6. *Id.* at 33.

7. *Id.* at 44.

8. *See id.* at 63-104 (describing the legal framework for broadcasting in the Member States).

9. *See id.* at 213-58 (describing advertising regulations in the Member States).

10. *Id.* at 213.

11. *Id.* at 217-18.

12. *Id.* at 238-43.

13. *Id.* at 247.

14. *Id.* at 294-98.

15. *Id.* at 310.

16. *Id.* at 306.

17. *Id.* at 288-91.

18. *See, e.g., id.* at 105-24.

ing standards in the proposals, giving a certain amount of leeway to individual states to provide more stringent regulation if desired.

For example, in the advertising field, the Commission recommended a total ban on tobacco advertisements and strict regulation of advertisements for alcohol.¹⁹ The Commission also proposed minimum standards for the protection of minors,²⁰ and recommended uniformity with respect to the right to reply to television broadcasts.²¹

III. THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

The Council's Directive of October 3, 1989, generally adopts the proposals made by the Commission in the Green Paper. Article 2 of the Directive implements the Commission's general recommendation that broadcasting rights be extended within the European Community. Article 2 provides in pertinent part: "Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive."²²

According to article 2, the Member States can restrict retransmissions of broadcasts only if the broadcast "manifestly, seriously, and gravely infringes" the safeguards in article 22 of the Directive relating to the protection of minors.²³

Articles 10 through 19 of the Directive set forth minimum standards concerning the regulation of advertising. For example, articles 11 and 18 regulate advertising times, prohibiting advertisements during certain religious and news programs,²⁴ and limiting, among other things, advertising interruptions in programs.²⁵ Article 13 bans tobacco advertisements²⁶ and article 15 restricts advertisements for alcohol.²⁷

The Directive also includes minimum standards concerning the

19. *Id.* at 282, 285.

20. *Id.* at 293.

21. *Id.* at 294-98.

22. Directive, *supra* note 1, at 26.

23. *Id.* art. 2(a). Article 22 provides in part that "Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence." *Id.* at 29.

24. *Id.* at 28.

25. *Id.* at 28-29.

26. *Id.*

27. *Id.*

right of an individual to reply to a broadcast. Article 23 provides in pertinent part:

Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.²⁸

However, while the Directive generally follows the Green Paper, it diverges from that document in an area which is of particular importance to the United States. That divergence can be found in article 4 of the Directive, which deals with "local content" broadcasting rules.

IV. ARTICLE 4: ECONOMIC PROTECTION OR CULTURAL PRESERVATION

The provision of the Directive that has received the most attention in the United States is the local content requirement of article 4. Article 4 provides in pertinent part: "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."²⁹

France, backed by a large segment of the French film community including such famous actors and directors as Jean-Paul Belmondo and Claude Berri and the State's General of Culture, had originally called for a strict sixty percent European content rule.³⁰ Britain and West Germany strongly opposed that quota system.³¹ France finally gave up the fight in March 1989 and agreed to the flexible wording of article 4, approved in October 1989.

Article 6 defines European works as works originating from Member States of the Community or from the European third countries party to the Council of Europe Convention if

(a) they are made by one or more producers established in one or more of those States; or

28. *Id.* art. 23(1), at 29-30.

29. *Id.* art. 4(1), at 26-27.

30. Tempest, *France Wants to Slam Europe's Open Door to U.S. TV*, L.A. Times, Apr. 12, 1989, pt. 6, at 1, col. 5.

31. *Id.* According to Edith Cresson, French Minister of European Affairs, "France was totally isolated at this point." *Id.*

- (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 production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.³²

The definition includes works originating from other European third countries if "made exclusively or in co-production with producers established in one or more Member State[s] . . . in one or more European third countries with which the Community will conclude agreements . . . if those works are mainly made with authors and workers residing in one or more European States."³³ In addition, European works includes works "made mainly with authors and workers residing in one or more Member States, [but they] shall be considered . . . European Works [only] to an extent corresponding to the proportion of the contribution of Community co-producers to the total production costs."³⁴

The Directive further provides that transmission of a majority of European works should be achieved progressively, with regard to the broadcaster's informational, educational, cultural, and entertainment responsibilities to its viewing public.³⁵ However, as the broadcasters within the Member States move progressively toward a majority of European programming, the proportion of European works may not fall below averages for 1988 in the Member States concerned.³⁶ Currently more than seventy percent of fiction programs shown in the European Community are made outside the Community.³⁷

Article 4 also requires Member States to report to the Commission every two years beginning October 3, 1991 on the majority proportion objective, including a statistical statement on the achievement of the proportion, reasons for failure to attain a majority proportion of European works, and measures adopted or envisaged in order to achieve it.³⁸ The Commission then informs the other Member States and the European Parliament of each report, accompanying the report with an opinion

32. Directive, *supra* note 1, art. 6(2), at 27. This part of the definition also applies with regard to "television broadcasters falling within the jurisdiction of the Federal Republic of Germany, [to] works from German territories where the Basic Law does not apply." *Id.* art. 6(1)(a).

33. *Id.* art. 6(3).

34. *Id.* art. 6(4).

35. *Id.* art. 4(1), at 26.

36. *Id.* art. 4(2). Also, in respect to Greece and Portugal, the base year 1990 will be used. *Id.*

37. Ertugrul, *EC Agrees Rules For "TV Without Frontiers"*, Reuters, Mar. 14, 1989 (PM cycle). "That figure varies widely within the Community." *Id.*

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

when appropriate.³⁹ The Commission's opinion considers "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."⁴⁰

A. The United States Position and the European Response

The United States House of Representatives, angered by the inclusion of article 4 in the Directive, and fearing a so-called Fortress Europe, denounced the Directive in a 342 to 0 vote calling it "trade restrictive and in violation of the GATT [the General Agreement on Tariffs and Trade]."⁴¹ The House Resolution accused the European Community of infringing upon the ability of United States broadcasting, film, and related industries to market their goods in the Community, calling article 4 "a local content requirement in the form of both a quota and a minimum floor."⁴²

The House Resolution also strongly urged "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 Community broadcasting market."⁴³

Carla Hills, the United States Trade Representative, claims that "[the] Directive is blatantly protectionist and unjustifiable, and discriminates against U.S. and other non-EC film goods."⁴⁴

The United States position is driven by strong economic interests. The United States film and television industry contributes a 2.5 billion dollar annual trade surplus to the economy, with approximately half its worldwide revenue coming from European sales.⁴⁵ In 1987 the United States sold 675 million dollars worth of television programs to Western

39. *Id.*

40. *Id.*

41. 135 CONG. REC. H7,326, H7,327 (daily ed. Oct. 23, 1989). General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. GATT is the principal international legal agreement governing international trade relations.

42. 135 CONG. REC. H7,326, H7,326 (daily ed. Oct. 23, 1989).

43. *Id.* at H7,327.

44. Office of the U.S. Trade Representative, Press Release No. 56, at 1 (Oct. 10, 1989). Ambassador Hills also claims that the Directive "conflicts with international efforts to increase the free flow of information and ideas to all peoples around the world, so that individuals can choose what they wish to read and view and think about from a wide range of sources." *Id.*

45. Frank, *European Television Without Borders or Without Americans?*, Reuters, July 26, 1989 (AM cycle).

Europe and in 1988 that number grew to 844 million dollars, a five-fold increase since 1980.⁴⁶ The market researchers Frost & Sullivan have estimated that the amount of television sales to Western Europe will be 2.691 billion dollars by 1992.⁴⁷

United States Congressman Edward J. Markey, Chairman of the House Energy and Commerce Subcommittee on Telecommunications and Finance which held hearings on the Directive in July 1989, stated that "[the] quota was strongly opposed by [the] administration as aimed at reducing a 2.5 billion dollar trade surplus in one of the few remaining sectors where the United States enjoys a trade surplus."⁴⁸

The European Community believes that the United States concerns are unwarranted and unjustified for three reasons: Article 4 is a political goal and not legally binding; article 4 will not impact United States sales; and the United States television market is closed to the rest of the world. These points are addressed below.

1. Article 4 Is Not Legally Binding

Martin Bangemann, the European Community Vice President responsible for the internal market and industrial affairs, defended article 4, stating, "It's not a legal obligation, it's a political commitment."⁴⁹ This sentiment was echoed by British Foreign Secretary John King.⁵⁰

The European Community points out that although Member States are under legal obligation to pass legislation in line with the Directive within two years of its adoption, the addition of the words "where practicable and by appropriate means" grants the Member States considerable flexibility in doing so.⁵¹ In addition, individual broadcasters will retain a great degree of latitude to air programs they find best suited for their purposes. Moreover, there is no enforcement provision within the Directive, and the European Community has made it clear that it does not regard article 4 as a legally enforceable commitment.⁵²

46. Weber, *Turning the Volume Down*, L.A. Times, July 26, 1984, pt. 4, at 1, col. 1.

47. *Id.*

48. Arnold, *Maxwell to Congress: Don't Fight EEC on U.S. Programming*, Associated Press, July 26, 1989 (AM cycle).

49. Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. Times, Oct. 4, 1989, at A1, col. 5. For instance, the British government has already informed BSB, its film channel, that it need not show a majority of European films because it is not practical to do so. See *Buddy, can you spare a reel?*, ECONOMIST, Aug. 19, 1989, at 57.

50. Jacobsen, *European Foreign Ministers Adopt TV Proposal Opposed by U.S.*, Associated Press, Oct. 4, 1989 (PM cycle).

51. Greenhouse, *supra* note 49.

52. Denman, *Television Without Frontiers*, Washington Post, Nov. 24, 1989, at A23.

Such proclamations have not eased the United States concerns. Even nonbinding rules could arguably serve as a first step toward mandatory quotas. One United States broadcasting official stated, "[i]f it's just rhetoric this time, it might not be next time," adding that, "[i]t's better to fight now, because if you say it's all right as they move down the road toward quotas, the reversing trend will be difficult."⁵³

United States studios argue that "[a]ny quota, even a vague one, will encourage bureaucrats to enforce it," and point out that the Directive sets only a minimum, allowing more hardline governments such as France to set more strict quotas.⁵⁴ In fact, France has already implemented more stringent quotas which include \$10,000 fines for each hour of non-European programming beyond the quota.⁵⁵

2. Article 4 Will Not Impact United States Sales

According to the European Community, the Directive will not negatively impact United States television sales. The Community calculates that United States sales comprise only twenty-eight percent of the Community market.⁵⁶ According to another source "hardly any network programs more than forty-two percent American shows."⁵⁷ Thus, the Community reasons that the Directive does not mandate cuts in United States exports.⁵⁸ Instead the United States could double or even triple its sales to the European Community because the Directive will allow an ever expanding European market.⁵⁹ Frost & Sullivan estimate that European programming hours will increase from 250,000 hours in 1987 to 440,000 hours in 1992 and the number of stations will increase from sixty-one to eighty-six in the same period.⁶⁰ The response of the United States television industry is that while article 4 may not affect the quan-

53. Greenhouse, *supra* note 49.

54. *Buddy, can you spare a reel?*, *supra* note 49, at 56.

55. Dougan, "Fortress Europe" of the Airways, L.A. Times, Oct. 11, 1989, at B2, col. 4. Jack Lang, France's Minister of Culture and Communication, recently fined two channels a total of \$10 million for showing too much foreign material. See *Buddy, can you spare a reel?*, *supra* note 49, at 56.

56. Delegation of the Comm'n of the Eur. Comm., Press & Pub. Affairs, Questions and Answers about the European Community's "TV without Frontiers" Directive 2 (Nov. 1, 1989) [hereinafter Delegation of the Comm'n of the Eur. Comm.].

57. Hift, *TV Trade War Heats Up*, Christian Sci. Monitor, Nov. 2, 1989, Arts, at 10.

58. "In practical terms [article 4] does nothing more than reflect present day reality in Europe." Delegation of the Comm'n of the Eur. Comm., *supra* note 56, at 3.

59. *Id.* at 2.

60. Weber, *supra* note 46. The Community predicts that by 1993 there will be 200 European television stations, including cable and satellite reception, double the number today. See Delegation of the Comm'n of the European Communities, *supra* note 56, at 2.

tivity of American programming in Europe, it will depress prices by dividing television programming into local and international markets.⁶¹

3. The United States Television Market Is Closed

Some critics in Europe, especially in France, have claimed that the United States position is unwarranted because the United States television market itself is closed to the rest of the world.⁶² However, the United States has no legal restrictions of any kind to the importation and exhibition of foreign films or television programs. Jack Valenti, President of the Motion Picture Association of America, explains that the reason few are screened is because of language barriers or viewer preference.⁶³ "The arbiter of what is shown or not shown is the American viewer, not some government bureaucrat."⁶⁴

Many in the European Community counter that viewers' choices require a cultural "safety net" due to the competitive advantage the United States enjoys in production.⁶⁵ With immense growth in programming time, broadcasting executives in the European Community will scramble to fill up air space. Those executives are bound to turn to American programming regardless of the viewers' preferences, because it is far cheaper than producing their own shows. According to the European Community, article 4 was one of the methods adopted to address this imbalance and to promote and preserve the culture of Europe.⁶⁶

61. Weber, *supra* note 46. According to Colin Davis, President of MCA Television International, "if a show is made in Germany, it will be worth more than a U.S. show, because it will qualify as (local) production." *Id.*

62. Jack Lang, the French Minister of Culture, stated that "The Americans don't have a seventy percent quota, or an eighty percent quota. They have a hundred percent quota against us." Hift, *supra* note 57, at 10.

63. Valenti, *Television with Manacles*, Washington Post, Dec. 1, 1989, at A27.

64. *Id.*

65. United studios routinely spend \$1 million an hour on a program, an amount beyond the means of most European producers. However, because United States producers can make up most of their costs in domestic sales, they can export at a low marginal cost. "In short, Hollywood has a lead so enormous in television as in movies, that the Europeans will have to run faster just to keep up." Marcom, Jr., *Empty Threat?*, FORBES, Nov. 13, 1989, International, at 43.

66. In late September 1989, France hosted a three-day conference, the Audiovisual Assizes, to find new ways of boosting European television programs and technology. At the Assizes, European officials approved a \$270 million aid package to stimulate production of films and television shows and provide more cooperation among film schools and state-owned television stations. Greenhouse, *supra* note 49. Those subsidies, in addition to article 4, have heightened United States concerns about its stake in the EC market. Office of the U.S. Trade Representative, *supra* note 44, at 2.

B. The European Community Justification and the United States Response

The European Community justifies article 4 as a legitimate method of preserving national and regional identities.⁶⁷ As explained above, they view it as a cultural safety net to the planned deregulation in the Directive and argue that it should not be confused with economic protectionism.⁶⁸

The United States, through Ambassador Hills, has called the cultural argument a smokescreen for economic protectionism.⁶⁹ In October, Ambassador Hills said:

We do not understand why the Spanish culture is more protected by a film produced in Germany by "Europeans" than by a Spanish film of Mexican origin, or why the English culture is promoted more by a film produced in France by "Europeans" than by a film of New Zealand origin. We do not understand why a film about French cultural history, in the French language, promotes French culture any less simply because it is "not of European origin." The definition of "European works" is economic, not cultural.⁷⁰

Taking the culture issue head on, United States Trade Ambassador Dougan argues that "European cultures won't be preserved by trying to restrict exposure to non-European cultures, especially when the restrictions target the origin of the programs and not their cultural merit or social acceptability."⁷¹

These arguments fail to recognize the importance of a common European identity to European unification. According to the Green Paper, "[t]elevision will play an important role in developing and nurturing awareness of the rich variety of Europe's common cultural historical heritage. The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."⁷² In this way, European works will promote European integration.

67. France's European Affairs Minister, Edith Cresson, asks: "What would remain of our cultural identity if audiovisual Europe consisted of European consumers sitting in front of Japanese television sets showing American programs?" See Johnson, *In Search of . . . the European T.V. Show*, 291 *EUROPE* 22 (1989).

68. *Id.* Italian director Ettore Scola criticized the amount of American imports, saying that "[American] colonization is not only economic, but chiefly cultural." *Id.*

69. Arnold, *U.S. Complains About European Limits on Imported TV Programs*, Associated Press, Oct. 11, 1989 (PM cycle).

70. Office of the U.S. Trade Representative, *supra* note 44, at 2.

71. Dougan, *supra* note 55.

72. Green Paper, *supra* note 2, at 28.

This finding does not support the proposition that the existence of a legitimate cultural interest justifies economic protectionism. However, the Community is quick to point out that the United States has recognized the validity of the cultural preservation argument in several other contexts. For instance, the United States-Canada Free Trade Agreement explicitly exempts cultural industries from its provisions and the United States "agreed to respect very strict quotas on [its] audiovisual products in Canada."⁷³ Also, the United States has accepted the Organization for Economic Cooperation and Development (OCD) Code on Liberalization of Invisible Operations which allows screen quotas and production subsidies for films and other audiovisual works.⁷⁴

C. Potential United States Responses

1. General Agreement on Tariffs and Trade

In October 1989, the United States formally challenged article 4 before the ruling council of the ninety-seven member General Agreement on Tariffs and Trade⁷⁵ (GATT). Specifically, the United States contends that article 4 violates the most favored nation provision in article 1⁷⁶ and the national treatment provisions of article 3⁷⁷ of GATT.⁷⁸

73. Denman, *supra* note 52.

74. Delegation of the Comm'n of the Eur. Comm., *supra* note 56, at 3-4.

75. Such notification is a procedural formality that precedes an eventual request for a disputes panel.

76. Article 1, section 1 of GATT reads in pertinent part:

[W]ith respect to all rules and formalities in connection with importation and exportation . . . 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.

GATT, *supra* note 41, at A12, T.I.A.S. No. 1700, 55 U.N.T.S. at 196-97.

77. The relevant sections of article 3 provide that internal taxes and other internal charges should not be applied to imported or domestic products so as to afford protection to domestic production. *Id.* art. 3(1), at A18, T.I.A.S. No. 1700, 55 U.N.T.S. at 204-06. In addition,

[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Id. art. 3(2), at A18, T.I.A.S. No. 1700, 55 U.N.T.S. at 206. Article 3 also provides that no contracting party shall establish or maintain any "internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or proportions" which require, directly or indirectly "that any specified amount or proportion of the product [which is the subject of the regulation] must be supplied from domestic sources." *Id.* art. 3(3)(a), at A18, A19, T.I.A.S. No. 1700, 55 U.N.T.S. at 206.

78. 135 CONG. REC. H7,326, H7,326 (daily ed. Oct. 23, 1989).

The European Community has taken the position that the Directive is fully compatible with international trading rules and GATT. The Community makes the distinction that the Directive regulates a service and not a product.⁷⁹ Currently GATT covers only products, and the regulation of services is still under negotiation in the Uruguay round of multilateral trade negotiations.⁸⁰ The United States disputes the European Community's position.⁸¹

Television was only in its embryonic stages when GATT was drafted in Havana in 1947. Therefore, GATT does not deal directly with media regulation. However, the European Community will surely argue that GATT's treatment of cinematograph films is both instructive and persuasive on how television programming should be analyzed. Article 3 of GATT provides that its provisions shall not prevent any contracting party from establishing or maintaining "internal quantitative regulation relating to exposed cinematograph films and meeting the requirements of Article [4]."⁸² Article 4 of GATT allows screen quotas for works of national origin.⁸³ The United States Trade Ambassador has promised to establish a GATT panel to examine its complaint.⁸⁴

2. Super 301

The House Resolution passed in October 1989 strongly urges the United States Trade Representative to consider action under section 301 (Super 301) of the Trade Act of 1974.⁸⁵ Subsection (a) of Super 301 requires the President to take certain actions when the President determines that

the rights of the United States under any trade agreement or . . . any act, policy, or practice of a foreign country . . . is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable, unreasonable or discriminatory and burdens or restricts United States commerce.⁸⁶

79. *International Trade, EC Defends Passage of Broadcasting Directive in Response to U.S. Criticism*, Daily Report for Executives (BNA) No. 196 (Oct. 12, 1989); see also *Delegation of the Comm'n of the Eur. Comm.*, *supra* note 56, at 3.

80. *Delegation of the Comm'n of the Eur. Comm.*, *supra* note 56, at 3.

81. 135 CONG. REC. H7,326, H7,327 (daily ed. Oct. 23, 1989).

82. GATT, *supra* note 41, art. 3(4)(b), at A19, T.I.A.S. No. 1700, 55 U.N.T.S. at 206.

83. *Id.* art. 4, at A20, T.I.A.S. No. 1700, 55 U.N.T.S. at 208.

84. *U.S. Challenges European Television Rules in GATT Trade Forum*, Reuters, Oct. 11, 1989 (BC cycle).

85. 135 CONG. REC. H7,326, H7,327 (daily ed. Oct. 23, 1989).

86. 19 U.S.C.A. § 2411(a) (West 1988).

Under either of these situations, the scope of the President's⁸⁷ authority is broad. For instance, he may "suspend, withdraw, or prevent the application of . . . benefits" under trade agreements to the foreign country⁸⁸ and "impose duties or other import restrictions on the products of . . . [that] foreign country."⁸⁹

3. The Richardson Proposal

In October 1989, in response to the Directive, United States Congressman Bill Richardson offered an amendment to a Federal Communications Commission (FCC) reauthorization bill.⁹⁰ The proposed amendment requires the FCC to solicit the views of the President or his designee to determine whether foreign countries discriminate against television or motion pictures produced in the United States before deciding whether to grant a request filed by an "affiliate of a foreign person" for forbearance or lessening of regulation.⁹¹ If the President or his designee represents to the FCC that the foreign country with which the affiliate is associated engages in discriminatory conduct, the FCC shall not grant the request unless it is otherwise justified by the public interest.⁹² As of April 1990, the amendment has not yet become law.

4. European Expansion by American Studios

One certain effect of article 4 will be an increase in the presence of American studios in Europe either through coproduction with European companies or actual mergers and acquisitions of European companies.

Co-productions will act to ease European financial burdens and also allow American studios to work around the provisions of article 4. However, as the president of one Hollywood production company said, "The more they need the quota rights, the more you have to give up."⁹³ He cited the example of a coproduced miniseries in Britain in which the American company gave up artistic control to the British coproducer and retained only distribution rights because the show had to qualify under British quotas.⁹⁴

87. United States Trade Representative makes recommendations to the President regarding what action to take under section 2411. *Id.* §§ 2411(c)(2), 2414.

88. *Id.* § 2411(b)(1).

89. *Id.* § 2411(b)(2).

90. Amendment to H.R. 3265 Offered by Congressman Richardson (H.R. 3265, 101st Cong., 1st Sess. (1979)).

91. *Id.*

92. *Id.*

93. Weber, *supra* note 46.

94. *Id.*

Many of the larger American studios have acquired production companies in Europe. In November, Paramount Pictures purchased forty-nine percent of Britain's largest independent television production company.⁹⁵ Also, the Walt Disney corporation has established itself in Europe with its development in France. Others are actively seeking acquisition targets.⁹⁶

V. CONCLUSION

The Television Without Frontiers Directive will open the door for trans-European broadcasting and will allow for enormous growth in television programming. It is unfortunate that such an opportunity has been overshadowed by the provisions of article 4 and the debate about the so-called Fortress Europe. Regardless of the outcome of the trade dispute, the flexible wording of article 4, the enormous growth in programming time, and the expansion of American studios into Europe promise that the United States television and film industry will have a large stake in the projected growth of the European broadcasting.

95. Brooks, *Paramount Buys 49% Stake in British Television Firm*, L.A. Times, Nov. 17, 1989, at D5, col. 1.

96. General Electric Company's NBC unit continues to search for European acquisitions and MCA Corporation is trying to build a European studio near London. Marcom, Jr., *supra* note 65.

