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How Would You Like Your Television: With or Without Borders and With or Without Culture—a New Approach to Media Regulation in the European Union

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Abstract

This Essay analyzes the effectiveness of television broadcasting regulations as a means to effectuate the promotion and protection of a pan-European culture, namely, television broadcasting regulations. First, in Part I, this Essay considers the broader background developments in the audio-visual sector that led to the passing of the Directive. Part II looks at the advantages and disadvantages of the most controversial aspect of the Directive, namely, the quota provisions. Part III critiques the Directive's effectiveness in realizing its dual goals of both protecting and promoting a pan-European culture. Finally, Part IV compares the goals enunciated in the Federal Communications Act ("FCC Act") with those enunciated in the Directive. Both sets of goals reflect similar concerns and interests, although the United States takes a much broader approach in realizing its goals. This Essay concludes that the Community should, like the United States, take a more expansive approach to its audio-visual policy, similar to the approach reflected in the FCC Act, in order to strengthen and effectuate a more solid and unified European broadcast regulatory scheme that both protects and promotes a European culture.

HOW WOULD YOU LIKE YOUR TELEVISION: WITH OR WITHOUT BORDERS AND WITH OR WITHOUT CULTURE—A NEW APPROACH TO MEDIA REGULATION IN THE EUROPEAN UNION

*Kevin M. McDonald**

Movies, for us [Europeans], are not only products and merchandise, but also works that express our culture and our models.¹

Jack Lang, Ex-French Minister of Culture

TV is only about . . . ratings and profit.²

Michael Solomon, Warner Brothers Corp.

INTRODUCTION

One of the more controversial Directives passed by the European Community ("EC") is the "Television Without Frontiers" broadcasting directive ("Directive").³ Article 4 of the Directive has received considerable criticism for its quota provision, which calls for running at least fifty-one percent of television programming from EC sources.⁴ Despite amendments passed in 1997 to the 1989 directive, the quota provision was retained. Numerous observers have criticized the 1989 directive as being in violation of the General Agreement on Trade and Tariffs⁵ ("GATT") principles such as the ban on quantitative restrictions. What many of these critics have failed to consider, however, is a broader perspective on the Directive, namely, just how the Directive fits into

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1. See Laurence G.C. Kaplan, Comment, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 346 n.406 (1994) (citing Beinex: "La culture ne se negocie pas," LIBERATION, May 14, 1993, at 5).

2. See Ken Auletta, *Television's New Gold Rush*, NEW YORKER, Dec. 13, 1993, at 88.

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

4. *Id.* art. 4 O.J. L 298/23, at 26 (1989).

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

the European Community's overall approach to regulating the audio-visual industry. Specifically, U.S. critics of the quota have failed to consider that the Directive's major purposes, i.e., the protection and promotion of a pan-European culture, are based on an entirely different concept of the role television plays in European society than it does in the United States.

This Essay analyzes the effectiveness of television broadcasting regulations as a means to effectuate the promotion and protection of a pan-European culture, namely, television broadcasting regulations. First, in Part I, this Essay considers the broader background developments in the audio-visual sector that led to the passing of the Directive. Part II looks at the advantages and disadvantages of the most controversial aspect of the Directive, namely, the quota provisions. Part III critiques the Directive's effectiveness in realizing its dual goals of both protecting and promoting a pan-European culture. Finally, Part IV compares the goals enunciated in the Federal Communications Act⁶ ("FCC Act") with those enunciated in the Directive. Both sets of goals reflect similar concerns and interests, although the United States takes a much broader approach in realizing its goals. This Essay concludes that the Community should, like the United States, take a more expansive approach to its audio-visual policy, similar to the approach reflected in the FCC Act, in order to strengthen and effectuate a more solid and unified European broadcast regulatory scheme that both protects and promotes a European culture.

I. BACKGROUND

A. *Twentieth-Century Revolutions in the Audio-Visual Industry and State Responses*⁷

1. The Roots of Audio-Visual Regulation

Government regulation of television content has existed in

6. See Federal Communications Act, 47 U.S.C. § 151 (1994).

7. For an excellent discussion on the early interventionist tradition of European state involvement in the realm of audio-visual communications (as far back as the 1500s), see Kaplan, *supra* note 1, at 260 (stating that "[t]he European state has always been interested in controlling information"). Kaplan suggests that European state involvement in audio-visual communications is based on two interventionist traditions: (1) regulation of telecommunications, which began as early as the sixteenth century with the establishment of state postal monopolies; and (2) state regulation of printed publications. *Id.* at 260.

Europe since the 1930s. Even before televisions became commonplace, governments were concerned with the effects of foreign broadcasts, albeit radio broadcasts, on their people. Perhaps no other example of regulation best reflects this concern than the International Convention Concerning the Use of Broadcasting in the Cause of Peace⁸ ("Convention"). The Convention was signed in 1936 upon the urging of the League of Nations. The Convention's main purpose was to regulate, and even to prohibit, state radio broadcasts in one country that were received in another country and might upset the internal security of the receiving country.⁹ The signatories to the Convention recognized the need for "preventing, by means of rules [announced in the Convention], broadcasting from being used in a manner prejudicial to good international understanding."¹⁰ Thus, as early as the 1930's, European countries had expressly recognized the need to control the power of broadcasting through international agreements.

2. Post-World War II Revolutions and Responses in the Audio-Visual Industry

After World War II, the audio-visual market in Europe developed on the domestic, rather than on the international, scale. By the early 1970's, television growth and technological development resulted in a viewing population of no longer thousands,

8. International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, 186 L.N.T.S. 301 [hereinafter Convention].

9. *Id.* Article 1 of the International Convention Concerning the Use of Broadcasting in the Cause of Peace ("Convention") in pertinent part states that

[the Parties] mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.

Id. art. 1. The following European states were signatories of the treaty: Albania, Austria, Belgium, Denmark, Estonia, France, Greece, Lithuania, Luxembourg, the Netherlands, Northern Ireland, Norway, Romania, Spain, Switzerland, and the United Kingdom, and (then) Czechoslovakia. Turkey and Russia also signed this Convention, but the author leaves it to the reader whether these countries should be included under the rubric of "European" signatories.

10. *Id.* pmb. The Preamble of the Convention also notes the signatories' "desire to utilize, by the application of the [Convention's] rules, the possibilities offered by [radio broadcasts] for promoting better mutual understanding between peoples." *Id.*

but millions.¹¹ France was the first European country to respond officially to this new form of broadcasting by proposing a set of principles for regulating direct broadcast satellite ("DBS") to the U.N. Committee on the Peaceful Use of Outer Space Working Group on DBS.¹² As early as 1972, some, if not many, European countries also voiced concerns about the impact of "spillover," a euphemism for foreign programs and culture.¹³

As the popularity of DBS rose in the late 1970s and early 1980s, European officials increasingly expressed concern over the potential harmful effects that this new form of communication might have on the international and domestic audio-visual landscapes. One commentator argued that these concerns reflected the fear of three undesirable effects: de-stabilization of the media, lower quality of programs, and most importantly "domination of the screen by programs of American origin, to the detriment of the authentic cultural programs of European countries."¹⁴ In April 1982, the Federal Republic of Germany submitted a memorandum to the Committee of the Ministers of the Council of Europe that expressed concerns about the weakening of the intellectual and cultural plurality of Europe.¹⁵ In July 1982,

11. See generally John P.L. Roberts, *The Implications of the Globalization of Television and Its Cultures*, 15 *COMM.* 213 (1990). Today, the global scope of the audio-visual media is illustrated by the term "mediasphere." "Mediasphere" refers to the continuous, innate connections between the broadcasters and the viewer (target) audience. "Mediasphere" is a living body, whose skeleton is the technology and hardware, whose connective ligaments are cables and satellites, and whose tissue is programs and professionals. *Id.* at 223.

12. Proposed Principles to Govern Direct Broadcasts from Communications Satellites, reprinted in K. QUEENY, *DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS* 241-44 (1978), quoted in Steven Ruth, *The Regulation of Spillover Transmission from the Direct Broadcast Satellites in Europe*, 42 *FED. COMM. L.J.* 107, 117 (1989). The proposal identified several types of programs that the French felt should not be broadcast without the recipient-state's consent: (1) programs that specifically interfere with the internal affairs of foreign states; (2) propaganda prejudicial to international or internal peace; (3) attacks on the dignity or rights of the individual; (4) material offensive to the audience's moral, religious, philosophical, or political sensibilities (e.g., pornography); (5) material harmful to children (e.g., excessive violence); and finally, most relevant to the issues surrounding the "Television without Frontiers" Directive, (6) *material disrespectful of the cultures within the area of transmission or tending to destroy civilizations, cultures, religions, or traditions.* *Id.*

13. See Steven Ruth, *The Regulation of Spillover Transmission from the Direct Broadcast Satellites in Europe*, 42 *FED. COMM. L.J.* 107, 117-18 (1989).

14. See Fritz W. Hondius, *European Principles on the Use of Satellites for Television and Sound Radio*, 10 *ANNALS OF AIR & SPACE L.* 367, 371 (1985).

15. *Id.*

France convened an intergovernmental conference in Paris for the purpose of drafting an agreement with its fellow EC Member States to "thwart the risk of DBS transmissions crushing the cultural identities of receiving countries with a flood of low quality and mostly non-European programs."¹⁶

Finally, in addition to the technological revolutions, e.g., DBS, that took hold in the European audio-visual industry, the most significant non-technological revolution occurring in the European audio-visual industry during the 1970s and 1980s was the industry's increasing inability to compete with Hollywood for programming. What was the explanation for U.S. dominance? First, English was the most widely spoken second language in Europe.¹⁷ Thus, the language barrier facing producers from countries with other languages, such as Spanish or German, proved relatively easy to overcome for English-speaking Americans. Second, Hollywood possesses the largest and most expensive pool of creative talent, which has access to the world's most extensive technical facilities in which to work. In addition, access to higher budgets translated into big stars, stunning sets and locations, special effects, and strong writing and producing talent.¹⁸ Lastly, U.S. studios and production companies benefited from the world's most extensive film and television archives, complemented by powerful marketing and distribution systems that placed films in both theaters and on the air all over the world.¹⁹ To summarize, Hollywood dominates Europe because "American shows are cheap, top quality, and breach the language barrier."²⁰

16. *Id.* France went a step further by tightening its domestic laws on direct broadcast satellite ("DBS"). Title III, Article 11 of the January 18, 1989 French law on audio-visual media broadly defined one of the "missions", i.e., legal obligations, of French television networks, namely to include the broadcast of programs "during prime time viewing, cinematographic and audio-visual works, a majority of which shall be original French works and original works from the European Community." See Kaplan, *supra* note 1, at 266 n.35 (citing LOI DU 17 JANVIER 1989 SUR LA LIBERTE DE COMMUNICATION art. 11 (J.O.) (D.S.L.)) (emphasis added).

17. This fact is of great significance because few of the Member States share the same first language. Recent statistics indicate that 50% of the citizens in the Community can speak English, either as the mother language or as a second language, in comparison to 15% for French and 9% for German. See *Die Hofste der Europa er kann Englisch*, DEUTSCHLAND NACHRICHTEN, Jan. 17, 1997, at 7.

18. See Richard W. Stevenson, *Hollywood Takes to the Global Stage*, N.Y. TIMES, Apr. 16, 1989, at C1.

19. *Id.*

20. See Steven Greenhouse, *The Media Business: For Europe, U.S. May Spell TV*, N.Y.

B. *EC Responses*

The Community considers the development of a European film and television program industry that is both globally competitive and capable of radiating the influence of European culture of utmost importance. The Community aims to encourage development within the industry both by removing internal barriers and by promoting the production and distribution of European programs. The "Television Without Frontiers" directive harmonizes national legislation and establishes the general framework of free movement of television broadcast services e.g., rules concerning advertising, protection of minors, right of reply, promotion of the production, and distribution of programs, etc.

1. EC Jurisdiction Generally

The European Economic Community²¹ was founded in 1951, following World War II, in an effort by the Europeans both to rebuild the steel and coal industries and to regain control over their own destiny by diminishing the Soviet menace and reducing their dependence on the United States.²² In 1957, the Treaty of Rome²³ ("EEC Treaty") officially established the European Economic Community to organize a single market among the Member States and to allow the free flow of goods, services,

TIMES, July 31, 1989, at D1. For example, European broadcasting executives can usually purchase the rights to broadcast an hour-long American program for less than one-tenth of what it would cost to finance the production of a new, hour-long domestic program. *Id.*

21. On November 1, 1993, the former European Economic Community ("EEC") became known as the European Community ("EC" or "Community"). See Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]).

22. See generally GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1993); PETRUS MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* (5th ed. 1990); FRANCIS SNYDER, *NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW* (1990); D. VAUGHN, *LAW OF THE EUROPEAN COMMUNITIES* (1986); J. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991); see also Leo Flynn, *Telecommunications and European Integration*, in *NEW LEGAL DYNAMICS OF EUROPEAN COMMUNITY* 217, 218 (Jo Shaw & Gillian More eds., 1995) (discussing political science accounts of policy development and implementation in Community over three decades in terms of several distinct models: proto-federation; international regime; and concordance system).

23. EEC Treaty, *supra* note 21.

and persons.²⁴

2. EC Jurisdiction over Broadcasting²⁵

The Community's competence to act in the field of broadcasting within the scope of the EEC Treaty was recognized by the European Court of Justice²⁶ (or "Court") in 1974. The Court stated that

[i]n the absence of [any] express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as a provision of services . . . it follows that the transmission of television signals, including those in nature of advertisements, comes, as such, within the rules of the Treaty relating to services.²⁷

24. *Id.*

25. As used in this Essay, the term "broadcasting" means any transmission or retransmission, either by (1) conventional television antenna, wire, or cable, or (2) satellite, encoded or unencoded, or television programs intended for reception by the public, or intended for rebroadcast to the public. It does not include communication services providing information on individual demand, such as telecopying, data banks, or cellular radio.

26. *See id.* art. 164, at 73. The European Court of Justice ("ECJ") functions as the judicial body that adjudicates disputes arising under the Community Treaties. *Id.* Although the ECJ's jurisdiction varies widely, its powers are precisely limited by the Treaty. *Id.*

27. *See Sacchi*, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177; *see also Procureur Du Roi v. Debauve*, Case 52/79, [1980] E.C.R. 833, [2982] 2 C.M.L.R. 362 (upholding decision in *Sacchi* that broadcasting of television signals, including those in nature of advertisements, comes, as such, within rules of EEC Treaty relating to services and further, that there is no reason to treat transmission of such signals by cable television any differently). In addition, the Commission, as stated in its green paper on the subject, *see infra* text accompanying notes 39-44, has argued that broadcasting is not only a service, but also an activity carried on by self-employed persons (broadcasters) for remuneration. Thus, under the EEC Treaty, restrictions on the freedom to broadcast in the European Union must be removed, and free movement across borders those services ensured. *See* AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 259 (1989). The designation as a *service* as opposed to a *good* is critical, when one considers the uproar from many U.S. observers who argue that the Directive's quota provisions violate the General Agreement on Trade and Tariffs ("GATT"). Whereas the GATT covers trade in goods, the General Agreement on Trade and Services ("GATS") covers trade in services. Surprisingly, little literature analyzes GATS implications; presumably the critics of the Directive, in their haste to label the Directive as a breach of the GATT, have overlooked any GATS implications. In any case, a discussion of GATS is far beyond the scope of this Essay. Whether the Directive violates prohibited GATT practices under Articles I and III turns largely on the characterization of television broadcasting as either a good or a service. Because the European Union has always recognized television broadcasting as a service, it argues that the Directive does not fall under GATT. The United States, by contrast, rejects the European Union's view and characterizes television programming as goods; thus, the Directive's quotas are GATT-

The EEC Treaty gives the EC jurisdiction to regulate the broadcasting industry.²⁸ Furthermore, broadcasting activities are considered part of "cultural life."²⁹ Thus, the Community may exercise jurisdiction over those elements of "cultural life" affected by broadcasting.³⁰

3. Historical Background of the "Television Without Frontiers" Directive

a. Material for a European Media Concept—1980

Concerned about the effects of changing technology on both the European culture and broadcasting industry, the Committee of Ministers of the Council of Europe established a committee of government-appointed experts in 1976 to examine a series of questions relating to the audio-visual media in the Member States of the Community.³¹ The Committee on the Mass Media ("CAHMM") spent four years researching media trends and issues, which it presented to the Council in 1980 in

illegal. See 135 CONG. REC. H7327 (daily ed. Oct. 23, 1989) (statement of Rep. Gibbons). Other countries recognize that the transmission of television programs is a service, not a good. See Timothy M. Lupinacci, Note, *The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?*, 24 VAND. J. TRANSNAT'L L. 113, 135 (1991) (explaining that British law recognizes that transmission of television programs is service). Even if the terms of the Directive do not violate GATT, the United States has the option to apply unilateral sanctions against the European Union pursuant to Section 301 (though whether the unilateral application of Section 301 would itself violate GATT is another question beyond the scope of this Essay). For an excellent discussion of potential U.S. responses to the Directive, see Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L COMP. L. REV. 495, 506-09 (1990).

28. See EEC Treaty, *supra* note 21. Many U.S. experts argue that the creation of standard regulation will provide additional development of European Union markets. Other U.S. experts argue that the European Union will only create additional barriers in an attempt to frustrate foreign competition. See Jamie Sheldon, Comment, "Television Without Frontiers: A Case Study of Turner Broadcasting's New Channel in the Community—Does It Violate the Directive?", 7 TRANSNAT'L L. 523, 526 n.31-32 (1994).

29. See Rebecca Wallace & David Goldberg, *EEC Directive on Television Broadcasting*, in YEARBOOK OF EUROPEAN COMMUNITY LAW: 1989, at 192 (A. Barav & D.A. Wyatt eds., 1990) [hereinafter Wallace & Goldberg].

30. *Id.*

31. Committee on the Mass Media for a European Media Concept: Reports Submitted to the Committee of Ministers (1980) [hereinafter Material for a European Media Concept]. For an excellent discussion of the Committee on the Mass Media ("CAHMM"), see Lucien J. Dhooze, *No Place for Melrose: Channelsurfing, Human Rights, and the European Community's "Television Without Frontiers" Directive*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 279, 289 (1996).

the form of a report ("Report").³² CAHMM concluded, to the surprise of many European observers, that the state's proper role did not include content regulation,³³ but rather, the encouragement of a plurality of information sources to serve the general public.³⁴ Why? CAHMM reasoned first that the freedom and autonomy of the mass media are essential elements of a democratic and pluralist society, "indeed as among the pillars of a social and political order safeguarding the liberty of the individual."³⁵ Second, the public is best served by a media that is "free and autonomous, politically and culturally varied, [thus] in a position to offer citizens the choice of a wide variety of sources of information and a multiplicity of ideas and opinions thereby [increasing the citizens'] possibility to better participate in public affairs."³⁶ Surprisingly, U.S. lobbyists who fought against passage of the Directive failed to use the CAHMM Report as evidence of an earlier EC policy *against* broad-based broadcasting regulations and thus inconsistent with the purposes announced in the Directive.³⁷

b. Commission's Green Paper—1984

CAHMM's conclusions fell on deaf ears. In May 1984, the Commission of the European Communities ("Commission") issued the influential Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable ("Green Paper").³⁸ The Commission intended the Green Paper to serve as a basis for harmonizing the national laws of television broadcasting among Member States. One of the means recommended to effectuate this end was the imposition of a quota upon television programming originating from within the Community.³⁹ The proposed quota recommended that

32. *Id.* Some of these issues became the focus of the "Television Without Frontiers" Directive.

33. Material for a European Media Concept, *supra* note 31, at 6, § 1.

34. *Id.* at 6, § 3.

35. *Id.* at 8, § 1.

36. *Id.*

37. Granted, the CAHMM report itself was inconsistent with the long-standing European policy to regulate broadcasts actively. *See supra* notes 4-6 and accompanying text (discussing tradition under Convention).

38. Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84) 300 Final (June 14, 1984) [hereinafter Green Paper].

39. Proposal for a Council Directive on the Coordination of Certain Provisions

thirty percent of broadcasting time be reserved for programming originating from the Community—to increase gradually to sixty percent by December 1992.⁴⁰ In addition, the Commission argued that cross-border transmissions would be “a source of cultural enrichment,”⁴¹ would provide the impetus for increased technical innovation in Europe in transmission media,⁴² and would prevent the “dominance of the big American media corporations.”⁴³ Many, but not all, Member States welcomed the Green Paper as a success.⁴⁴

c. European Convention on Trans-frontier Broadcasting—1989

On the heels of the Green Paper came the European Convention on Trans-frontier Television⁴⁵ (“Television Convention”), the immediate legislative and political precursor to the “Television Without Frontiers” Directive. In March 1989, numerous European states in the Council of Europe, including many EC Member States,⁴⁶ ratified the Television Convention, which obligated the signatories to “ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority of their transmission time.”⁴⁷ This language mirrors the language chosen by the drafters in the Pream-

Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, O.J. C 179/4 (1986) [hereinafter Proposed Directive].

40. *Id.* art. 2, O.J. C 179/4, at 7 (1986) (exempting news, sporting events, game shows, advertising, and teletext services from proposed quota).

41. Green Paper, *supra* note 38, COM (84) 300 Final at 30.

42. *Id.* at 53.

43. *Id.* at 33.

44. The Federal Republic of Germany and Denmark, after originally supporting the quota provisions, later opposed its adoption. These two states did not disapprove on economic or industrial grounds, nor on the adoption of a quota per se. Rather, opposition rested on the broad moral issue of *cultural control*. See *infra* text accompanying notes 120-24. For a similar rationale opposing broadcast regulations, see *supra* notes 31-37 and accompanying text (discussing CAHMM).

45. European Convention on Trans-frontier Television, May 5, 1989, Europ. T.S. No. 132 [hereinafter Television Convention].

46. The European Convention on Trans-frontier Television (“Television Convention”), adopted on March 15, 1989, just six months before ratification of the Directive, was signed by 24 members of the Council of Europe. See Kaplan, *supra* note 1, at 279.

47. Television Convention, *supra* note 45, art. 10(1), at 247 (exempting, as did Green Paper, time appointed to news, sports events, games, advertising, and teletext services from proposed quota). Article 10, entitled “Cultural Objectives,” set forth arguments familiar to the debate over cultural protectionism. See Kaplan, *supra* note 1, at 279.

ble and in Article 3 of the Directive.⁴⁸ The Convention called for a gradual progressive application of the broadcast quotas and transmission times.⁴⁹

d. Charter of Delphes—1989

Also on the heels of the Green Paper came the Charter of Delphes (“Charter”) in September 1989, a document formulated by the European artistic, scientific, and academic communities in unanimous support of programming quotas.⁵⁰ Though non-binding, the Charter was the intellectual and civilian rally-cry for the Directive. The Charter began with the premise that television was the dominant form of mass media and the most influential element of modern culture.⁵¹ Moreover, the television program was both “an essential expression of culture”⁵² and a reflection of the social and cultural values and characteristics of the broadcasting country.⁵³ Lamenting the “cultural crisis” in the European audio-visual sector, the Charter set forth a five-step plan⁵⁴ that ended with a desperate cry to Brussels: “Therefore, the integrity, and indeed the future of our cinemas and our televisions is your responsibility This is a fight for human development and for democracy. May the governments fight with us!”⁵⁵

48. See Directive, *supra* note 3, art. 3, O.J. L 298/23, at 26 (1989).

49. *Id.*

50. See Dhooge, *supra* note 31, at 286 (citing Incantation de Delphes, Charte Europeene de la creation audiovisuelle, Sept. 25-27, 1988, *reprinted in part in* DOSSIERS DE L'AUDIOVISUEL, Jan.-Feb. 1991, at 53).

51. *Id.*

52. *Id.*

53. *Id.* at 286-87.

54. The Preamble of the Charter of Delphes (“Charter”) consisted of five basic principles and a conclusion or demand. First, the drafters declared television the most influential element of modern culture because of its universal and nearly omnipresent nature. Second, the drafters defined “culture” to include both the public’s freedom of choice and the rights of artists and creators to express themselves free of constraint. Third, these two rights (freedom of choice and freedom from constraint) are often denied by economic forces, who often use the media as tools of power and control. Fourth, the institutions in society not only must safeguard but also must impose duties and responsibilities on the media to promote a real and true free circulation of ideas, information, and creations. Fifth, and finally, the drafters found that censorship, interference, and political and commercial manipulations were themselves menaces to society. See Kaplan, *supra* note 1, at 281-82 (citing Incantation de Delphes, Charte europeene de la creation audiovisuelle, Sept. 25-27, 1988, *reprinted in part in* DOSSIERS DE L'AUDIOVISUEL, Jan.-Feb. 1991); see also Dhooge, *supra* note 31, at 294-95.

55. *Id.* The Charter imposes on every European state the duty of protecting this

II. STATEMENT OF COUNCIL DIRECTIVE NO. 89/552:
"TELEVISION WITHOUT FRONTIERS"

A. *Procedural and Legislative History*

On April 30, 1986, the European Community's Council of Ministers ("Council") first proposed a directive ("Council's Proposal") to regulate broadcasting within the Community.⁵⁶ After four years of preparation and months of pre-ratification debate, the Council finally approved the "Television Without Frontiers" Directive by a vote of 10 to 2.⁵⁷

On April 13, 1989, the EC trade ministers sent the approved broadcast directive to the European Parliament.⁵⁸ Debate and controversy surrounding the proposed Directive ignited in the European Parliament, as members of the European film industry urged Parliament either to strengthen the Directive by imposing rigid quotas on non-European programs or abandon the proposed Directive altogether.⁵⁹ Carla Hills, then U.S. Trade Representative ("USTR"), sent a letter to each member of the European Parliament explaining the U.S. position that passage of the proposed Directive's local content quota requirement would violate GATT.⁶⁰ In May 1989, the Parliament agreed on a Directive that required television stations to broadcast a minimum of 50.1% of European programs by 1993.⁶¹

The Commission and Parliament finally sent their agreed upon directive and its 50.1% quota clause to the Council of Ministers in Fall 1989. Not surprisingly, the controversy and debate continued between those who supported protecting Europe's

expression of European culture through all available means, including subsidies and programming quotas. *Id.*

56. Proposed Directive, *supra* note 39, O.J. C 179/4 (1986). Note that this proposal called for broadcasters to reserve "only" thirty percent of their broadcast time for European works, not including news, sporting events, game shows, advertising, and teletext services.

57. Only Belgium and Denmark voted against the measure.

58. See generally Suzanne Michele Schwarz, *Television Without Frontiers?*, 16 N.C. J. INT'L L. & COM. REC. 351, 352-54 (1991).

59. *Id.* at 352. Moreover, European cultural personalities also urged the Parliament to defeat the Directive unless strict quotas on non-European programs were included. *Id.*

60. *Id.* The United States claimed that passage would violate both the Most Favored Nation provision in Article I and the National Treatment provision of Article III. For an in-depth discussion of the U.S. position, see generally Lupinacci, *supra* note 27, at 135; Presburger & Tyler, *supra* note 27.

61. See Schwarz, *supra* note 58, at 353.

culture and tradition and those who feared the negative ramifications of a quota on the industry.⁶² After initially rejecting the proposed directive altogether,⁶³ the Council reversed its position and on October 3, 1989,⁶⁴ agreed on a diluted and ambiguous version. The Federal Republic of Germany, after initially voting against the proposed directive, supported the diluted version after officially declaring that Articles 4 and 5 are merely "political obligations."⁶⁵

Ironically, many EC insiders have fingered the United States' anti-quota lobbying as a main reason for passage of the Directive. David Webster, a former BBC director and U.S. based media consultant, argued that "[t]he American pressure [was] of such a nature that it . . . irritated most European countries. It may have persuaded the French that the Directive [was] a good idea after all, because if it annoys the Americans that much, [it] must be good."⁶⁶ After final passage of the Directive, one EC spokesman summarized the battle for passage as follows: "We have a Directive today, thanks to the Americans."⁶⁷

B. *Scope and Purpose of the Directive*

The primary purpose of the Directive is to permit television broadcasts that comply with the Directive's requirements to be received and re-transmitted freely in all Member States.⁶⁸ The

62. See Kaplan, *supra* note 1, at 284.

63. France, the Netherlands, and Greece resisted approving the plan because the language of "where practicable the European Community should require the majority of programs to be from Europe" was insufficient protection for European productions. See Schwarz, *supra* note 58, at 353. Moreover, the Federal Republic of Germany questioned whether the rules encroached their national responsibilities. *Id.* Finally, other countries opposed any binding limit on imports. *Id.*

64. As a side note, the Berlin Wall "fell" (was opened) just five weeks later, on November 9, 1989.

65. See Schwarz, *supra* note 58, at 353.

66. See *Aggressive U.S. Stance on Quotas May Have Hurt More than Helped*, VARIETY, Oct. 4-10, 1989, at 2.

67. See *EC Adopts Quota Directive: To Take Effect in 18 Months*, VARIETY, Oct. 4-10, 1989, at 1.

68. The disparity on matters such as producing and distributing programs, advertising and sponsorship, and the protection of children restrict the free movement of broadcasts. Thus, the Council adopted the Directive, *inter alia*, to coordinate national laws concerning television broadcasting. The Directive calls on Member States to ensure freedom of reception and re-transmission of television broadcasts from other Member States. See generally MARK BREALEY & CONER QUIGLEY, *COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY: 1992 HANDBOOK* 210 (1991).

Directive lays down the rules necessary to provide the minimum protection for the maintenance of the different interests involved, while leaving Member States free to impose stricter or more detailed requirements on broadcasts originating in their own territories.⁶⁹ The Directive seeks to realize the free movement of television broadcasting activity as a service under Article 60 of the EEC Treaty.⁷⁰

The Directive, however, has a more overarching purpose that is often overlooked by U.S. critics, despite the Commission's emphasis that the Directive should not be regarded in isolation, but rather as one important aspect of the Commission's overall approach to the audio-visual sector. The Directive reflects a general policy designed

to realize the same basic goals and form a coherent policy involving, in addition to the realization of an internal market for broadcasting, broadcast advertising and associated industries, the promotion of the Community's growing political, social and cultural identity, while simultaneously respecting and promoting the diversity and specificity of the audio-visual cultures of its Members.⁷¹

69. See Wallace & Goldberg, *supra* note 29, at 178. Several goals enunciated in the Directive included the establishment of guidelines to protect minors, the banning of advertisement for tobacco products, and the establishment of a quota designed to stimulate production of EC-made shows. See Directive, *supra* note 48, art. 3, O.J. L 298/23, at 26 (1989).

70. See *supra* note 19 and accompanying text.

71. See Explanatory Memorandum to Proposal for a Council Directive concerning broadcasting activities, COM (86) 146 Final (1986) (stating that goals are to assist, politically and financially, production and satellite distribution of European programs, covering news, politics, education, culture, entertainment, and sport). Such programs will be of European origin and subject matter being produced by a multinational editorial team with a European perspective in target audience, being multilingual and in transmission range, being trans-frontier. These goals included promoting, via the proposed Community financial aid scheme, European co-productions; promoting through the present Directive, the production of national programs and the development of national audio-visual industries within Member States; ensuring by the present Directive, an appropriate role for national productions and European co-productions as regards the distribution of television programs in the Community; ensuring, by the enforcement of the EEC Treaty and by the present Directive, the free flow of broadcasts within the Community; to promote, by the present Directive, trade in goods and services within the Community through broadcast advertising; ensuring, by common standards that different incompatible technical systems for direct satellite television broadcasting do not exist within the Community, and thus creating the common market for the equipment to be produced for direct reception of satellite television programs; facilitating, with the help of the same Directive, the broadcasting of multilingual television programs.

To summarize, the main goals of the Directive, are not only to promote a pan-European culture throughout the Member States, but also to *preserve* a European culture that encompasses and fosters the separate national cultures.⁷²

C. *The Directive*

The Directive generally adopts the proposals made by the Commission in the Green Paper by seeking to create a common television program production and distribution market.⁷³ Article 2 of the Directive adopts the Commission's general recommendation that broadcasting rights be extended within the Community by requiring that Member States ensure freedom of reception and re-transmission of television broadcasts from other Member States.⁷⁴ Article 2 reads: "Member States shall ensure freedom of reception and shall not restrict transmissions on their territory of television broadcasts from other Member States for reasons that fall within the fields coordinated by this Directive."⁷⁵

Article 4 of the Directive, the local content requirement, the

72. This may appear to be an oxymoron. A "European culture," however, is fluid and dynamic and influenced by its constituent members' cultural attributes. Indeed, the Directive specifically seeks to promote the "Community's cultural identity." See Directive, *supra* note 48, O.J. L 298/23 (1989) (emphasis added). The Community is composed of its constituent parts. Presumably, if the European Union wanted to promote only a single European culture to the detriment of its constituents, it would have written "European" cultural identity and not "Community." The two-fold purpose of the Directive can only make sense when seen in light of the promotion of a pan-European culture and protection of its cultural constituents. Danish parliamentary member Kristoffersen described a "European culture" in the following way: "In my opinion, there does exist a single European culture, but it is made up of a nuance of varieties and differences. It is like a patchwork blanket made up of several elements, and the role of television is to reflect this diversity." See EUR. PARL. DEB. (2-374) 51 (Feb. 14, 1989). Whether, on a sociological level, these goals can be reconciled, is beyond the scope of this Essay. This Essay accepts these legal premises at face value and asks how effective the Directive has been in realizing these goals. See Dhooge, *supra* note 31, at 317 ("This preservation effort was deemed necessary by the Community in light of the perceived flood of foreign broadcasting material, much of which was deemed inappropriate, bourgeois, and culturally regressive. The programming quota was therefore seen as essential to protect the Community viewing public from unsuitable foreign material. . .").

73. See *supra* text accompanying notes 38-44.

74. Directive, *supra* note 3, art. 2, O.J. L 298/23, at 26 (1989).

75. *Id.* Article 2 allows Member States to restrict re-transmissions 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.

most controversial provision of the Directive, 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 6,⁷⁶ a majority of their transmission time, excluding the time appointed to news, sports events, games, advertising and tele-text services."⁷⁷

The language of Article 4 left a vague standard wide open for interpretation. Many Community members were dissatisfied with the language "where practicable," viewing this standard as fatally ambiguous.⁷⁸ Some Member States, including Germany, have suggested that this language means that the Directive is not legally binding.⁷⁹ This interpretation, however, is not only "legally untenable,"⁸⁰ but is also the first time that a Community institution, i.e., a German Council member, has attempted to qualify a directive. Member States may not be selective in regarding the provisions of a directive that they adopt as binding—the provisions of a directive being no less binding in effect "than that of any other rule of Community law."⁸¹ A directive is binding as to the result to be achieved.⁸² Member States only enjoy

76. Article 6 has also generated much controversy, but is beyond the scope of this Essay. Article 6 defines "European works" as, *inter alia*, works originating from Member States of the Community, works originating from European third-party states party to the Television Convention; works from other European third countries if (a) they are made by one or more producers established in one or more of those States, (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. *Id.* art. 6, O.J. L 298/23, at 27 (1989).

77. Directive, *supra* note 48, art. 4(1), O.J. L 298/23, at 26-27 (1989). A discussion of the other articles in the Directive is outside the scope of this Essay.

78. See *EC Television Without Frontiers Plan Runs Aground*, REUTERS AM CYCLE, June 14, 1989, available in LEXIS, Nexis Library, Wires File; see also *EC Ministers Against Import Limit on TV Shows*, REUTERS AM CYCLE, Feb. 27, 1989, "Financial Report," available in LEXIS, Nexis Library, Wires File.

79. Throughout the period of debate over the Directive and its quota system, described above, the United Kingdom, the Federal Republic of Germany, and the Netherlands opposed legally binding minimum levels of EC content on the grounds of broadcasting freedom. These countries were supported by Denmark, Ireland, and Portugal, all of whom have small television industries and import a high proportion of programs. *Id.* These states clearly expressed economic motivations by their initial opposition to the quota. Their dependency on international, i.e., U.S., programming was so large that they would not be able to fill the grid without it.

80. See Wallace & Goldberg, *supra* note 29, at 192.

81. See *Commission v. Italy*, Case 79/72, [1973] E.C.R. 667, [1973] 1 C.M.L.R. 773.

82. See Treaty establishing the European Community, Feb 7, 1992, art. 189, O.J. C

discretion as to the form and means that they use to achieve the desired goal.⁸³ If a Member State cannot selectively choose the directives with which it wishes to comply, then it is also “untenable to suggest that a Community institution [i.e., Council or the Commission] could be so selective.”⁸⁴ The Directive was adopted in accordance with normal procedures and as such every provision is legally binding.⁸⁵

D. Post-Directive Events—“Status Quota”

On November 12, 1996, the European Parliament failed to agree on an amendment to the Directive that would have forced compliance by removing the “where practicable” clause with the fifty-one percent European programming quota.⁸⁶ At a first reading of the legislation in February 1996, Members of European Parliament (“MEPs”) backed proposals for strict legally-enforced quotas.⁸⁷ The MEPs, however, could not muster enough votes under the co-decision procedure⁸⁸ to alter the terms of the Council and Commission’s agreement, which said that broad-

224/1, at 65 (1992), [1992] 1 C.M.L.R. 573, 693 [hereinafter EC Treaty] *incorporating changes made by* TEU, *supra* note 21.

83. *See* Commission v. Italy, Case 163/82, [1983] E.C.R. 3273 [1984] 3 C.M.L.R. 169.

84. *See* Wallace & Goldberg, *supra* note 29, at 193. Granted, the Commission does enjoy discretion under Article 169, paragraph 2, in that if pursuant to a reasoned opinion a Member State has violated a treaty obligation, the Commission may bring the matter to the European Court of Justice, if the State fails to comply with the Opinion within a prescribed time period. The Commission enjoys discretion on whether to act against a breach of the Treaty; however, it can not authorize a system that violates Community law. *Id.*

85. *See id.* (arguing that position of Germany and others is to be discouraged if uniform interpretation and application of EC law is to be preserved).

86. *European TV Quotas to Remain Unenforceable*, SCREEN DIGEST, Dec. 1, 1996. Although a majority of Members of European Parliament (“MEPs”) who voted supported legally enforced quotas (the vote was 291-170 in favor), the vote was 23 shy of the required vote needed to force EU Ministers to remove the “where practicable” clause from the directive. Lamenting the vote, British Socialist Deputy Carole Tongue, a member of the Parliament’s Culture Committee, stated, “[v]ery powerful interests have won today,” referring to the US\$6 billion trade surplus of the United States with the EU in the audio-visual sector. *See* Alisa M. Kelly, *European Report*, WALL ST. J., Nov. 13, 1996.

87. Neil Buckley, *TV Quota Move Fails*, EUR. NEWS DIG. (FIN. TIMES), Nov. 13, 1996.

88. The practical effect of the co-decision procedure is to give the Parliament greater powers. In essence, the Parliament may reject legislation by absolute majority. Usually, however, the Parliament will just propose amendments. *See* EC Treaty, *supra* note 82, art. 189b, O.J. C 224/1, at 66 (1992), [1992] 1 C.M.L.R. at 694.

casting quotas would remain compulsory “where feasible,”⁸⁹ thus sticking with the Directive’s toothless language. This agreement, reached in July 1996,⁹⁰ differed vastly from the European Parliament’s First Reading urging strict quotas. Under the co-decision procedure,⁹¹ however, the MEPs would have had to get an absolute majority in order to amend, which they failed to do.⁹²

Nonetheless, compromise was reached and a directive amending the 1989 Directive succeeded on June 30, 1997. Despite changes to the advertising rules, sponsoring, and youth protection, the quotas were left standing.

III. “KULTURKAMPF”⁹³

Assuming that the Directive’s dual purpose of both protecting and promoting a European “culture” by means of regulating television broadcasting is proper, as the United States has recog-

89. *Broadcasting: Council Embraces Commission Plan for Television Quotas*, EUR. REP., June 15, 1996. As a side note, the issue whether to include also new broadcasting services, specifically extending foreign-content restrictions to video-on-demand and on-line services, was initially not resolved and continues to remain the topic of intense debate among the Ministers. See *Culture/Audiovisual Council: EU Ministers Dig in on TV Quotas Directive*, EUR. REP., Apr. 27, 1996. The Ministers attempted to resolve the video-on-demand issue in the Common Position, though critics have argued that the agreement shows “scant regard for technical feasibility.” See, e.g., *Back from the Land of Make-believe*, *ECONOMIST*, June 15, 1996, at 60; *European Broadcasting: Advantage Mickey Mouse*, *ECONOMIST*, Jan. 7, 1995, at 42 [hereinafter *European Broadcasting*] (criticizing “guardians of French culture” at EU level). Extending the idea of applying quotas to multi-media services is “silly” and “won’t work in an Internet, on-line environment,” said one Bertelsmann AG lobbyist. See Julie Wolf & Brian Coleman, *Politics & Trade: European Firms Fight Effort to Tighten EU’s TV Quotas*, WALL ST. J., Feb. 12, 1996.

90. See Common Position (EC) No. 49/96 adopted by the Council of 8 July 1996 with a view to adopting Directive 96/. . ./EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. C 264/09 (1996).

91. The common position formally agreed on in Brussels on July 8, 1996, by the Council of the European Union had been agreed to in substance on June 18, 1996, in Luxembourg, at the Culture and Audiovisual Council meeting. See *Common Position on Review of TV Broadcasting Directive Adopted*, EUR. REP., July 10, 1996.

92. In addition to heavy lobbying on behalf of U.S. interests, one should also consider the negative press associated with the Directive. *THE ECONOMIST*, to name just one example, has continued to thrash the Directive, on occasion chastising supporters of the Directive as “self-appointed guardians of European culture.” See *Back from the Land of Make-believe*, *supra* note 89, at 60. In addition, Ms. Luciana Castellina, chairwoman of the culture committee, labeled some MEPs “cultural fascists” at times. See Michael Foley, *MEPs Put TV Quota in Place to Save European “Culture,”* IRISH TIMES, Feb. 15, 1996, at 7.

93. German term for “cultural struggle” (author’s translation).

nized in other contexts, specifically in the U.S.-Canada Free Trade Agreement,⁹⁴ several issues arise with regard to the effectiveness of the Directive in achieving its listed goals. An initial problem is to ascertain just why Europe cannot seem to compete with Hollywood. Second, what is meant by a “European culture”? A culture as defined by Eurocrats in Brussels? Finally, the issue arises as to whether the means chosen fit the ends, i.e., is Brussels choice of regulating television broadcasting doing enough to “promote and protect” European culture in the audio-visual sector?

A. *Why Can't Europe Compete—Who Is Stopping Whom?*

If European culture were so important to the Europeans, then they would likely ignore the “Beavis & Butthead” rubbish without the need for a Directive, right? European producers and film-makers would simply fill the cultural abyss on their own, and enough Europeans would consume these European programs so that Hollywood could no longer compete. This Essay argues that several factors explain why European film-makers simply cannot compete with Hollywood.

1. Financial Dominance

Financially, the Community cannot compete with Hollywood. In 1996, the United States enjoyed a US\$4 billion trade surplus with the Community in the film and music industry.⁹⁵ Hollywood productions accounted for about eighty percent of the EC market for feature films in 1994, up from sixty percent in 1984.⁹⁶ The European film industry produced only

94. As debatable as this assumption may appear at first glance, especially from U.S. critics, the reality is that the United States has already officially recognized the cultural preservationist argument. Specifically, the U.S.-Canada Free Trade Agreement explicitly exempted Canadian cultural industries from its laissez-faire provisions by not placing cultural products on the same plane as general merchandise. In that treaty, the United States “agreed to respect very strict quotas on [its] audiovisual products in Canada.” Moreover, in Article 2005, the United States recognized Canada’s right to protect its cultural identity. In addition, U.S. law forbids foreigners from owning a U.S. television station. If a foreigner is determined to own a U.S. television station, then he or she must first become a U.S. citizen. “If all this is not recognition that television films are a separate case of cultural identity, then my name is Throttlebottom.” See Roy Denman, *Television Without Frontiers*, WASH. POST, Nov. 24, 1989, at A23.

95. See *Int'l: EU Denies French Plan to Restrict American Programming in Europe*, CABLEFAX, Nov. 13, 1996.

96. See *Battling for the Box*, ECONOMIST, Apr. 9, 1994, at 52.

500 features in 1990, down from 778 in 1970.⁹⁷ Not even a US\$270 million subsidy to the European audio-visual industry for the production of feature films and television programs has seemed to help the Europeans compete.⁹⁸

But numbers alone do not adequately explain the weak European film industry. Is it that Europeans simply do not support European works, or is it that Hollywood's bombardment of programs has left Europeans feeling without alternatives?

2. The "Iron Law of Television"⁹⁹

The "iron law of television" is a cultural, economic-based theory that explains the tie among society, television, and the free market.¹⁰⁰ According to the "iron law of television" theory, a television policy based on liberalization will lead invariably to a flood of low-quality imports.¹⁰¹ These low-quality imports drive out higher-quality enriching domestic programs, leaving impressionable viewers imprinted with U.S. values and ideals as depicted in the U.S. "garbage television."¹⁰²

An everyday situation validates the "iron law" theory: a television network—especially a new one—deciding how to fill its programming schedule is faced with the choice between commissioning costly domestic programs and importing U.S. products for a marginal fee. The decision from a cost-benefit perspective is quite simple, namely, the second option. Moreover, in order to attract commercial sponsors/advertisers, programming directors must decide whether to speculate on a new, domestic show or to import a proven, successful U.S. program.¹⁰³ The program director's decision is thus quite simple; budget

97. See Dhooge, *supra* note 31, at 332. Between 1970 and 1990, European television programming had captured less than two percent of the United States' market. *Id.*

98. *Id.*

99. For an excellent discussion of this theory, see Kaplan, *supra* note 1, at 335-36.

100. See *id.* at 335 (citing Michel Colonna D'Istria, *La Television est invitee a concilier la qualite et l'audience*, *LE MONDE*, July 28, 1993).

101. *Id.*

102. See Dhooge, *supra* note 31, at 319 (acknowledging that there are those television critics who would conclude that most, if not all, television programming consists of such "video trash"); see also *id.* at 281 n.8.

103. The continued dismantling of government broadcasting monopolies and the advent of new technology in cable networks and satellite TV have added to a proliferation of new channels. The programming directors of these prolific private commercial channels, especially in smaller countries, are eager to buy U.S. television shows because "they are cheaper to buy than to produce." See Sayeste Daser & Brett Richey, *U.S. Broad-*

constraints and profit-maximization incentives force the director to choose the cheap import. Over the long run, the cheap imports will become economically more attractive than the local product, and hence Hollywood programs will—and often does—dominate.¹⁰⁴

A concrete example is Silvio Berlusconi, whose successful method of broadcasting serves to validate the “iron law” theory. Mr. Berlusconi successfully started a trend in Europe that the “Television Without Frontiers” Directive later tried to reverse. In the early 1970s, Berlusconi searched Hollywood’s old movie and television libraries¹⁰⁵ for bargains that he could bring back to Italy. The following account summarizes the result of his trip.

[H]is Hollywood shopping spree laid the groundwork for the solution . . . to how to fill [European] programming grids that would attract a viewer audience and sponsors. For the last decade, a generation of European broadcasters has looked to Hollywood to fill the void created by the privatization in Europe. By the mid-1980’s, one of Berlusconi’s competitors bid \$70,000 for the Italian rights to broadcast a single episode of *Dynasty*.¹⁰⁶

3. Importance of Programming Diversity to Combat “Cultural Uniformity”

A consequence of the “iron law of television” in Europe is a lack of diversity in television programming. With over ninety percent of EC households owning a television¹⁰⁷ and children of today spending more time in front of the television set than at their desks in school, television clearly plays a large role developmental behavior. “[D]iversity and balance between the forms of culture being offered are crucial to the development of a truly

casters Stand to Gain as European TV Market Grows, *MARKETING NEWS*, July 9, 1990, vol. 24, no. 14.

104. See Kaplan, *supra* note 1, at 335. Cynically, the author concludes: “Thus, traditional political pessimism (‘the Russians are coming’) and economic pessimism (‘the Japanese are coming’) is joined by cultural pessimism (‘Hollywood is coming’).” *Id.*

105. See text accompanying notes 95-98 (explaining Hollywood’s extensive libraries).

106. Jonathon Weber, *Turning the Volume Down: Hollywood Nervous over Possible European TV Quotas*, *L.A. TIMES*, July 26, 1989, pt. 4, at 1.

107. This statistic does not include Portugal. See Kaplan, *supra* note 1, at 336 (citing Serge Regourd, *LA TELEVISION DES EUROPEENS* 9 (1992)).

democratic broadcasting system.”¹⁰⁸ Television viewers subtly and subconsciously develop and alter their ways of thinking and reacting based on what they see on the screen.¹⁰⁹

The theory of “cultural uniformity” purports that television is used to distribute the same message to millions of people who have in common only the fact that they are all watching and consuming TV. By only showing a small part of a refracted reality—generally urban, middle-class lifestyles—television homogenizes people, thus marginalizing languages and national cultural identities. Television disrupts and can even destroy families and personal relationships: nobody talks to anyone anymore; everyone just watches television.

Thus, if what the viewers see is largely American products, which reflect largely American values and beliefs, the viewers will subtly and subconsciously develop their thinking to fit the American belief system.¹¹⁰ The “iron law” encourages programmers to purchase cheap American imports, consisting of “wall-to-wall sitcoms and soaps” that create an “ostentatious, fake, parasitic, standardized subculture of poor taste” representing “cultural regression.”¹¹¹

Why can't the Europeans compete? The answer lies in part with economic realities reflected in the “iron law” and in part in an analogy to drugs. Once hooked on the cheap, low-quality material, viewers seem to adopt the content (“cultural uniformity theory”).¹¹² The Community recognized this problem and attempted to correct it by passing a quota in the Directive mandat-

108. *See id.* at 336.

109. *Id.*

110. Proponents see U.S. programs as “garbage television.” *See* Dhooge, *supra* note 31, at 319 n.224.

111. *Id.* at 319.

112. *But see* Brian L. Ross, Note, “*I Love Lucy*,” *but the European Community Doesn't: Apparent Protectionism in the European Community's Broadcast Market*, 16 *BROOK. J. INT'L L.* 529, 548-50 (1990) (arguing that as newer EC television stations, using programs made in United States to fill out their schedules, obtain audience and advertisers, programmers will be irked to begin commissioning original European programming). Mr. Ross, however, naively assumes that Europeans prefer European programs over U.S. programs. In 1994, the top three box-office draws in French cinemas were “The Lion King,” “Mrs. Doubtfire,” and “Four Weddings and a Funeral.” *European Broadcasting*, *supra* note 89, at 42. Mr. Ross ignores the economic reality explained in the “iron law,” namely, that the profit margin is much higher with U.S. programming. Moreover, reality cuts against Mr. Ross. If his theory were correct, more television stations would promote regional development of programs. This, however, is not the case. *See supra* text accompanying notes 99-106.

ing a majority of time for European works. But just what is “European” in the sense of “European culture” deserving of protection?

B. Fear of a “Euro-Culture”?

Simply stated, can Brussels define “culture” not only broad enough to include all Member States’ interests, but also concrete and coherent enough to still make sense? Assuming that the Community can properly effectuate the promotion of a European culture by means of an audio-visual regulation, the issue arises as to who will determine just what this “culture” is?

1. Pan-European Culture Equals French, British, and German Culture

A common fear, especially among small Member States, is that what Brussels deems worthy of protection and promotion is a “culture” absolutely *foreign* to their natural cultural identities.¹¹³ These fears appear well-grounded and based on economic realities. Due to the high cost of producing programming,¹¹⁴ smaller Member States experience little or no economies of scale in the television programming industry.¹¹⁵

Moreover, because English, French, and German reflect the three predominant languages spoken within the Community,¹¹⁶ television programs produced in countries with small industries and in secondary languages, e.g., Danish, Finnish, and Portuguese, cannot compete outside of their own national markets with television programming produced in one of the “Big Three” languages.¹¹⁷ The end result is that the television markets of smaller Member States are overrun and dominated by English programs produced in Britain, French programs produced in France, and German programs produced in Germany.¹¹⁸ Such a market stifles development of the television programming industry within the smaller states.

Most pertinent to a discussion of pan-European culture is

113. See Dhooge, *supra* note 31, at 325.

114. See *supra* text accompanying notes 99-106.

115. See Mark M. Nelson & Peter Truell, *Media: Some Support in EC Is Seen for TV Quotas*, WALL ST. J., July 10, 1989, at B4.

116. See *supra* note 17.

117. See *supra* text accompanying notes 99-106.

118. See Dhooge, *supra* note 31, at 325.

that the national and regional cultures, which the Directive purports to protect and promote, may be subordinated to a Pan-European culture comprised mainly of English, French, and German national cultures.¹¹⁹ The Community would do well to heed the advice of its smaller members not to forget the "other" contributors to a European culture.

2. Pan-European Culture Equals Loss of Individual Self-Determination?

During deliberations on the Green Paper,¹²⁰ the Federal Republic of Germany and Denmark expressed deeply held concerns on the broad moral issue of cultural control. Most of the Member States viewed the quota system as a means of preventing a tacit, deliberate loss of control over their own respective cultural identities to Hollywood. The Federal Republic of Germany and Denmark in voting against the Green Paper, however, saw a loss of their own internal control to Brussels. Germany maintained that its own federal statutory scheme prohibited it from voting for the Green Paper because federal law mandated municipal control over cultural matters. Denmark maintained a similar position and argued, further, that the Community could not infringe upon control and protection of Danish culture.¹²¹ In short, while most Member States preferred not, if given the choice, to cede cultural authority to Hollywood or Brussels, most would choose Brussels. Nevertheless, at least Germany and Denmark expressed concern about ceding control even to Brussels.

Further supporting the German and Danish positions, argue many critics, is the principle of "subsidiarity," which is supposed to guide all European legislation.¹²² The Treaty establishing the European Community ("EC Treaty") states that the capacity to make decisions should not be transferred to a higher level when decisions could be better made at a lower level. Attempts to promote a European culture via broadcast quotas could violate constitutional protection afforded to freedom of expression in many Member States.¹²³

119. *Id.* at 326.

120. *See supra* text accompanying notes 38-44.

121. *See* N.C.M. Peck, *Transfrontier Television and Europe 1992: A Common Position?*, 4 *TEMP. INT'L & COMP. L.J.* 307 (1990).

122. *Culture Cops on the Loose*, *ASIAN WALL ST. J.*, Feb. 14, 1996.

123. *See id.* (arguing that at least in Germany, writing broadcast regulations be-

Despite the arguments by Germany and Denmark during discussions of the Green Paper, both countries eventually supported the Directive.¹²⁴ The idea of cultural unity is just as important as a single, stable currency representing economic unity. Accordingly, the importance of the Directive to the Community seems apparent; television is the ultimate form of pan-European communication and artistic expression. The Community, and especially France, view culture as an arm of the state, indicative of a nation's health and power. Thus, not only is the Community the proper authority to promote and protect European culture, but also the Community is compelled to do so for the sake of the Community's health and power. The Community, however, should not forget the concerns of its smaller Member States, who urge the Community not to forget their cultures in formulating a broadcasting regulatory scheme designed to promote and protect a "European" culture.

C. *Do the Means Fit the Ends?: A Status Report Nine Years Later*

Nearly a decade has passed since the Community passed the "Television Without Borders" Directive. One may ask the question: how the Member States are performing under the Directive? Do the Member States broadcast a majority of their television programs of European origin, especially considering the Community's weak stance on the Directive?¹²⁵

1. Recent Data: A Glance Through the European TV Guides

Recent data released from a European trade group indicate that nearly seventy percent of films broadcast on eighty-eight television channels throughout the Community were U.S.-made.¹²⁶ Thus, European programming directors are about twenty percent shy of the goal established in the Directive, namely, to carry fifty percent of the films from European origin—this assumes

longs to Länder, or states, neither to Bonn nor Brussels). The implications of the Directive could thus harm traditional federalism principles, especially in Germany. A discussion of this point is, however, beyond the scope of this Essay.

124. Germany continually insists that the Directive is not legally binding, an interpretation that flies in the face of every EC Treaty ever signed. *See supra* text accompanying notes 78-85.

125. *See supra* text accompanying notes 78-85 (explaining how EU refuses to tighten language of Directive).

126. *See Int'l: EU Denies French Plan to Restrict American Programming in Europe, supra* note 95.

that the other thirty percent of films were all of European origin and not, for example, of South American or Asian origin. Moreover, as of November 1996, the U.S. entertainment industry continues to enjoy a gigantic trade surplus of at least US\$4 billion with the Community in the film and music industry.¹²⁷

Official numbers from the Community support the studies described above. Though somewhat older, a 1994 Commission study suggested that the levels of effectiveness in carrying out the Directive vary. The Commission surveyed 148 channels. Ninety-one channels, or a little more than sixty percent, broadcasted a majority proportion of European works.¹²⁸ In a similar study done by the Commission in 1992, seventy of the 105 channels surveyed, or exactly two-thirds (66.67%), broadcasted a majority proportion of European works.¹²⁹ Thus, after slipping from 66.67% compliance to sixty percent in 1994, the numbers just released by the independent trade group indicate a compliance rate of nearly seventy percent, a growth in compliance by television programming of about ten percent in two years time.

2. Are the Means Appropriate to the Ends?

Assuming, as we have for purposes of this discussion, that culture is worthy of protection and promotion via television broadcasting regulations, a major issue arises as to why the Community has not done *more* to effectuate this goal? Why did the Parliament fail in November 1996 to obtain the required majority needed to strike the "where practicable" clause of the Directive, which renders the Directive toothless? A further question arises as to why the Commission failed to give the Parliament amendments that would strike the language to begin with, thus avoiding the need for Parliament to override?

The Community need look no further than across the Atlantic for a model of how to protect and promote culture via broadcasting regulations. After all, U.S. law forbids foreigners from owning a U.S. television station.¹³⁰ In order for a foreigner to own a U.S. television station, he or she must first become a U.S. citizen, reflecting at least implicit—if not explicit—disapproval

127. *Id.*

128. *Id.*

129. See *Commission Presents Report on "Television Without Frontiers,"* REUTER EUR. COMMUNITY REP., Aug. 1, 1996.

130. See *supra* note 94.

of foreign influence over television broadcasts. The Directive does not even go this far. The, Directive, however, in order to best promote and protect European culture, should be amended to contain similar ownership requirements as the U.S. ban on foreign ownership.

What remains unexplained is exactly why the Community, specifically the Commission and Council, continues to resist strengthening the Directive's language. By refusing to remove the largest loophole in the Directive during the most recent amendment procedure, namely, refusing to delete the "where practicable" language,¹³¹ the EC seems content to have a Directive that purports to promote and protect European culture without any real enforcement mechanism—especially when labeled as "non-binding." Although supporters of a stronger Directive blame U.S. lobbyists for stopping any further work on the Directive, this proposition ignores the fact that the Community initially passed the Directive despite heavy U.S. lobbying—so the Community can, and has, stood up to rich U.S. lobbies.¹³² Moreover, the Community shares the blame both in refusing to remove language that renders the Directive toothless and for failing to dispel adequately notions that the Directive is somehow not legally binding.¹³³ In addition to urging the Community both to strike the "where practicable" language and to dispel more adequately the notion of a non-legally binding Directive—which flies in the face of the EC Treaty¹³⁴—this author sees aspects of U.S. law,¹³⁵ more specifically language from the FCC Act's Preamble, as a model for a more comprehensive audio-visual policy that can more effectively both protect and promote European culture.

131. See *supra* text accompanying notes 76-85.

132. See *supra* text accompanying notes 63-67.

133. See *supra* text accompanying notes 73-85.

134. Statements by EU Vice-President Martin Bangemann and the EU's broadcasting minister, Jean Dondelinger, which characterize the quota requirement as merely a political commitment with no binding legal obligation, only serve to cheapen the meaning of the EC Treaty. See *supra* notes 73-85.

135. See *supra* text accompanying notes 130-35 (discussing U.S. law that prohibits foreign ownership of television stations).

IV. *MODELING THE "TELEVISION WITHOUT FRONTIERS"
DIRECTIVE OFF THE FCC ACT'S PREAMBLE*

The FCC Act has much to offer the "Television Without Frontiers" Directive. The Preamble of the FCC Act reflects congressional purposes similar to the Community's purposes in passing the Directive. This Part argues that the Community should model the Directive in line with the FCC Act in order to effectuate a real audio-visual policy that protects and promotes a European culture instead of continuing to leave dangling a Directive that fails to establish clearly any clear and binding normative qualities.

A. *Purposes of the FCC Act: Public Policy and Function*

Congress had several major purposes in mind, some functional and some policy-oriented, when it enacted the FCC Act,¹³⁶ which created the Federal Communications Commission ("FCC"). Broadly speaking, in enacting the FCC Act, Congress intended to occupy the field of telecommunications at a national level, to make available to all people of the United States a rapid, efficient, reasonably priced communications service, governed by one uniform regulatory scheme.¹³⁷ The creation of the FCC also served the broad congressional purpose of establishing an expert agency capable of coping with the ever-changing and constantly increasing problems of a booming industry.¹³⁸

The functional purpose of the FCC Act was to vest in a single governmental agency, namely, the FCC, the power and means to regulate the broadcasting industry in such a comprehensive manner as to assure uniformity and constructive growth, i.e., a need for unity.¹³⁹ Courts construe the FCC Act in light of this functional purpose and the need for comprehensive regulations with an eye toward avoiding the practical difficulties inher-

136. See Federal Communications Act, 47 U.S.C. § 151 (1994).

137. See *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511 (D. Utah 1994).

138. See *American Broadcasting Co. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951).

139. See *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652 (D.C. Ohio 1968); see also *Cawley v. City of Port Jervis*, 753 F. Supp. 128 (S.D.N.Y. 1990) (holding city ordinance regulating installation of television that receive only dish antennas was preempted by FCC regulation that warranted permanent injunction against city from enforcing that section against homeowners).

ent in state-by-state regulations of parts of an organic whole.¹⁴⁰

The underlying public policy purpose of the FCC Act is to secure and protect the public interest.¹⁴¹ In other words, Congress designed the act to protect customers against unjust and discriminatory services.¹⁴²

B. *Comparison of the Directive to the FCC Act*

1. Generally

Both the Directive and the FCC Act attempt to occupy the field of telecommunications at a larger level—the U.S. law at the national level; the EC directive at the supranational level. Both the Directive and the FCC Act, from a general standpoint, attempt to serve their respective constituencies for the better. Congress acted to make available to all U.S. persons a rapid, efficient, reasonably priced communications service governed by one uniform regulatory scheme.¹⁴³ In a similar vein, the Community acted to promote a harmonious development of economic activities services under Article 60 of the EC Treaty, a continuous and balanced expansion, an increased stability throughout the telecommunications market, an accelerated raising of the standard of living, and closer relations between its Member States for the benefit of all EC citizens.¹⁴⁴

2. Functionally

Both the United States and the Community recognized the problems that a telecommunication system without uniformity would not grow constructively. In the United States, the FCC was thus created and given power to regulate the broadcasting industry in a manner so as to assure uniformity. Moreover, U.S. courts read the FCC Act with a cautious eye to prevent difficulties that inevitably arise in state-by-state regulations.¹⁴⁵

The Community also recognized problems that numerous Member State regulations could have on the establishment of a

140. See *General Tel. Co. of Cal. v. FCC*, 513 F.2d 390 (D.C. Cir. 1969).

141. See *WOKO, Inc., v. FCC*, 109 F.2d 655 (D.C. Cir. 1939).

142. See *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 462 F. Supp. 1072 (N.D. Ill. 1978).

143. See *supra* notes 136-140 and accompanying text.

144. See Sheldon, *supra* note 28, at 528 (citing Article 2 of EEC Treaty as serving purposes of Directive).

145. See *supra* text accompanying notes 68-72.

unified telecommunications policy and equal access to services, as called for under Article 60 of the EC Treaty.¹⁴⁶ Although every Member State system exercised some form of control, none is exactly alike. Each form of regulation differs from State to State, as a function of how each audio-visual system was created and developed.¹⁴⁷ Thus, similar to the FCC Act, the Directive serves to effectuate the realization of a unified internal broadcasting market, which would alternatively be harmed and made inefficient by State-by-State regulations.

3. Public Policy

Both the FCC Act and the Directive seek to secure and protect public interest. How the United States and the Community define "public interest" for purposes of their respective legislation, however, differs. Congress valued the need to protect U.S. citizens against unjust and discriminatory services.¹⁴⁸ The Community took a broader approach. The unifying of Member State broadcast regulation served, *inter alia*, to promote the EC's growing political, social, and cultural identities, while simultaneously respecting and promoting the diversity and specificity of the audio-visual cultures of its Members.¹⁴⁹ Thus, from a public policy perspective, while both the FCC Act and the Directive seek to protect customers in the larger sense, the former focuses primarily on financial protection against "unjust and discriminatory services,"¹⁵⁰ and the latter focuses not only on financial protection but also on protection against the erosion of cultural diversity.

C. *A Call for a "European Communications Commission" ("ECC")*

Though sharing the same general, functional, and public policy purposes, the Community failed to take the next step, as Congress did, in establishing an agency responsible for coping

146. *See supra* notes 21 & 23.

147. A discussion of the various States' audio-visual policy is beyond the scope of this Essay and unnecessary for purposes of this discussion. Suffice it to say that, as recognized the passage of the FCC Act, state-by-state regulation detracts from a unified whole. For an excellent discussion on each Member State's audio-visual policy, see Kaplan, *supra* note 1, at 295-301.

148. *See supra* note 137.

149. *See supra* notes 68-72.

150. *See supra* note 137.

with the ever-changing and constantly increasing problems of the telecommunications industry. Moreover, the Community failed, and continues to fail, in strengthening the language of the Directive to give the broadcasting policy the same bite as the U.S. policy.

The Community should either create a full-time agency or its equivalent to oversee the application of the Directive.¹⁵¹ Theoretically, the Commission is responsible for overseeing that the Directive is implemented in the Member States.¹⁵² The Commission, however, has neglected its duty thus far, even suggesting on occasion that the Directive is not legally binding.¹⁵³ Empowering an independent agency or its equivalent like the FCC, would remove any doubt on whether the Directive is “merely political” by institutionalizing an agency with the oversight of a unified broadcast policy. As a result, an ECC could effectuate the protection and promotion of a European culture in a more efficient manner.

Successful application of the Directive’s policies presupposes a Directive with some bite. As already discussed, the Community must strike the “where practicable” language of the Directive in order to effectuate the numerous purposes, not least of which include the protection and promotion of European culture. To its credit, the Community has already taken a major step. This goal of eliminating barriers between Member States—the “functional” objective was accomplished by recognizing one “European license” sufficient in all Member States.¹⁵⁴ The Directive specifically allows EC broadcasters, who obtain one license from any Member State, to broadcast thereafter throughout the European Union without having to obtain a separate license from individual nations in which the broadcasters seek to

151. Concerns that such an agency would somehow violate the principal of subsidiarity are misplaced. For a brief discussion of subsidiarity, see *supra* text accompanying notes 122-26 (explaining that Maastricht Treaty states that capacity to make decisions should not be transferred to higher level when decisions could be better made at lower level). Because we are talking about a European culture here, decisions must be made from a supranational level. See *supra* text accompanying 125. The need for a cultural unity is as important as the need for economic unity. One agency is more effective in effectuating a cultural unity/harmony via broadcasting regulations than 15 national agencies.

152. See EEC Treaty, *supra* note 21.

153. See *supra* notes 73-85.

154. See Directive, *supra* note 3, art. 2(2), O.J. L 298/23, at 26 (1989).

broadcast.¹⁵⁵ The Community must now take a further step in completing its vision of a unified, efficient broadcasting policy that protects and promotes European culture. The establishment of an ECC would effectuate all the purposes espoused by the Directive in a cohesive, unified, efficient institution.

V. CONCLUSION

The "Television Without Frontiers" Directive—even as amended—reflects a long-standing tradition in Europe to regulate the power of the audio-visual industry. The Directive represents the Community's first attempt, however, to harmonize the audio-visual industry comprehensively via broadcast regulations that call for a majority of the programming to be of European origin. A major dual-purpose in enacting this Directive was both to promote and protect a European culture. The means chosen, namely broadcast regulations, appear at first glance to serve as effective tools in effectuating this dual-purpose. The Community, however, should "sharpen" these tools in order to best serve the dual-purpose.

As an initial matter, the Community must not forget to consider the concerns of its smaller Member States, who fear not only a lack of respect, but also a loss of sovereignty to Brussels. The former point refers to the Community's tendency to consider "European" culture as French, English, and German. The latter point flows from the former: by failing to acknowledge appropriately contributions by smaller states to a "European culture" in the formulation of broadcasting laws designed to further that "culture," the smaller states have ceded legal control over broadcasting to Brussels without having any say on how to protect *their* cultures.

Second, the Community ought to implement similar television ownership requirements as the United States. The Directive should be amended to require EC citizen status as a requirement for ownership of television stations.

Third, and most important to the effective functioning of the Community, is the need to dispel any notions that the Directive is somehow non-binding. Major officials of the Community

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

continue not only to cheapen the meaning of the Directive, but also to contravene well-established EC law—as reflected, *inter alia*, in the Art. 189 of the EEC Treaty—by suggesting that the quota provision is non-binding on Member States. The Community could best serve the valid and laudable end of promoting a European culture both by refraining from statements that the Directive does not bind the Member States and by tightening the Directive's language by removing Article 6's "where practicable" clause.

Finally, after making the needed changes to the Directive, the Community should establish an ECC modeled after the purposes behind the establishment of the FCC in order to institutionalize and effectuate the protection and promotion of a European culture in the audio-visual industry.