Television without Frontiers: The European Union's Continuing Struggle for Cultural Survival

Shaun P. O'Connell

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NOTE

TELEVISION WITHOUT FRONTIERS: THE EUROPEAN UNION'S CONTINUING STRUGGLE FOR CULTURAL SURVIVAL

In September of 1989, any Eurocrats relaxing at the Chaloupe d'Or café in the Grand'Place of central Brussels must have looked at the scene unfolding before them in horror. While a massive outdoor screen bombarded the crowd with advertisements for a U.S. film television channel, young women distributed brochures with photos of such U.S. films as "Rocky IV," "Dirty Dancing," and "Black Widow." Scenes such as this had been repeating themselves throughout the European Union all too often in recent years, and in reply, the Council of Ministers of the European Union responded with a shot that resounded throughout the global trading community.\(^1\)

INTRODUCTION

The Council Directive On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities was passed on October 3, 1989.\(^2\) The "Television Without Frontiers Direc-

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2 The Council of Ministers acts upon legislative proposals emanating from the European Commission. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 145, 146, 155, 157 (as amended 1992). The European Commission presently consists of 20 members chosen by the Member States according to population and has as its primary responsibility the initiation of legislative proposals. See generally THE EUROPEAN COMMISSION 1995-2000 (1995) (explaining the function of the European Commission). The European Parliament is comprised of directly elected representatives of the Member States and may give advice on proposed legislation. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 10-17 (1992). The Council of Ministers consists of representatives from each of the Member States and has the final power to enact any proposed legislation. Id.
tive,” as the Directive has come to be popularly known, has obliged the Member States of the European Union for the past seven years to reserve the majority of their television broadcasting hours for programs of a European origin. Brussels maintains that the Directive is necessary to protect the fragile culture of the European Union and its Member States and European unity as a whole from encroaching destruction via the massive influx of television programs of non-European works. At the same time, Washington and Hollywood claim that television production is a commercial activity and the Directive is nothing more than economic protectionism.

First, this Note will examine the background and cultural rationale for the Directive and the necessity for action on the part of the European Union to protect the culture of the Member States and European culture as a whole. Next, it substantiates the ability of the European Union to legislate in the realm of culture as well as economics. Finally, this Note concludes that the Directive is legal with respect to international law via the exclusion of audiovisuals from the newly instituted General Agreement on Trade in Services (GATS), and therefore, the United States should work within the standards allowed by the Directive. This will be best accomplished by co-production, which will allow Hollywood to tap the lucrative European Union market and the Europeans to protect and preserve their heritage.

I. BACKGROUND

As the technological revolution of the 1980s took hold in Europe and cable television stations and satellite transmissions began beaming into the homes of Europeans, it became obvious that the traditional State monopolies that had existed since the 1940s had outlived their useful-

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4 The term “European Union” has replaced “European Community” as of January 1, 1994. See EEC Treaty, art. A. At the time of the Directive’s inception, “European Community” was the proper terminology. For purposes of this Note, the more current “European Union” will be used. Currently, 15 States comprise the European Union: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. See generally KLAUS-DIETER BORCHARDT, EUROPEAN INTEGRATION: THE ORIGINS AND GROWTH OF THE EUROPEAN UNION (1995).

5 See Hift, TV Trade War Heats Up, CHRISTIAN SCI. MONITOR, Nov. 2, 1989, at 10 [hereinafter TV Trade War].

ness. Since the early days of television, Member States had viewed broadcasting as an integral attribute of their national sovereignty, controlling everything from broadcast frequencies to news programs. However, this degree of control was problematic in light of the growing world trade system and economic interdependence among nations, as well as changes in technology and deregulation sweeping across Europe.

In response to these developments, as early as 1984, the Commission issued the Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable. This document was a foreshadowing of the Directive, giving preparatory notice of the need to harmonize the many disparate national laws of the Member States regarding television broadcasting. The Commission declared that television reached an impressive number of people in the Member States and had extraordinary cultural significance. More important, the Commission specifically recognized that television broadcasting would “play an important part in developing and nurturing awareness of the rich variety of Europe’s common cultural and historical heritage,” and “contribute towards a more widespread European identity.” Also, the great danger of “cultural domination” through television broadcasting was understood,
along with recognition of the fact that the United States contributed the majority of films broadcast on European television.  

The 1984 Green Paper served as the guideline for the Commission’s proposal in 1986 of a directive to regulate television broadcasting within the European Union. The Commission’s objective was to take advantage of television programming and its cultural influence recognized in the 1984 Green Paper to further its goal of Union. This was to be accomplished through the “establishment of a general preference for the distribution of television programmes of all kinds produced within the Community.” Such a preference was to be accomplished through the reservation of thirty percent of broadcast time (excluding news, advertising, game shows, and sporting events) for “Community works”; however, this percentage was to be increased to sixty percent by 1992.

After three years of deliberations, the Council accepted the Commission’s proposal and sent it to the European Parliament for amendments. In response to United States pressure, after intense debate the Parliament approved a substantially modified version of the Commission’s proposal, and in October of 1989 the Council formally adopted the

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14 Id. at 33. Europeans, deeply aware of their past, remain conscious of the correlation between national memory (fundamentally a cultural affair) and national independence (a political affair) and have a deep-seated fear of having the icons of their ancestry replaced with the symbols of a foreign culture. 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, 262 n.23 (1994), citing Steven Ruth, The Regulation of Spillover Transmission from Direct Broadcast Satellites in Europe, 42 FED. COMM. L.J. 107, 108 (1989). In 1989, sales of U.S.-produced programming for television were in excess of $820 million annually in Europe, with a doubling of the market expected by 1993. LaFranchi, supra note 1, at 9.


16 EEC Treaty, art. 2.

17 Proposal, supra note 15, preamble. Through the promotion of a wide variety of European television programs, the Commission intended that the citizens of the Member States “deepen their knowledge of each other’s culture and development and contribute towards a more widespread European identity.” Green Paper, supra note 7, at 32.

18 Proposal, supra note 15, art. 2. For a discussion of what constitutes a “Community work,” see infra text accompanying notes 57-60.


20 See Aggressive U.S. Stance on Quotas May Have Hurt More Than Helped, VARIETY, Oct. 4-10, 1989, at 2.
Television Without Frontiers Directive. Major changes included restrictions on joint production with non-Member States and a reduction of the quota on broadcasting of European works to just over fifty percent. This reduction from the original Commission proposal angered some Parliamentary representatives who worried that the Directive was too “watered down.”

The debates in the Parliament indicate that the primary motivation of the European Union in enacting the Directive was to protect, preserve, and promote European cultural identity through the use of television broadcasts. Through the Directive, the European Union was seeking to encourage the development of the European television industry so as to create and produce more programs with European characteristics, which would logically expose viewers to more European culture, and thereby protect and preserve the culture of the Member States, and indeed European culture, from the invasion of U.S. television programs. Fear and anger over the threat of the large popularity and prevalence of U.S. television programs to the cultural identity of Europe resulted in the Directive as an effort to turn back the tide of overwhelming U.S. cultural domination.

The Directive was adopted on October 3, 1989, by a vote of ten to
two, with Belgium and Denmark dissenting on the grounds that the European Union lacked competence to regulate television broadcasting.\(^7\) Immediately, the United States protested that the Directive was in no way created as a measure to protect the culture of the European Union and the Member States, but that, rather, the Directive was an example of almost insidious economic protectionism.\(^8\) Carla Hills, then United States Trade Representative, argued the European Union was restricting freedom of choice, and staunchly maintained that the European Union’s cultural rational for the Directive was blatantly false.\(^9\)

II. THE NEED FOR THE EUROPEAN UNION TO PROTECT AGAINST “CULTURAL IMPERIALISM”

“Culture” encompasses much more than the common idea that a nation’s culture is simply embodied in its art and literature.\(^10\) In reality, a nation’s culture is comprised of “all the diverse elements, ideas, attitudes, and objects—such as a toothbrush, a sportscar, a way of asking for a drink, or the meaning attached to a gesture or a grimace—which go to make up life.”\(^11\)

It is the “pattern of living” of the members of a society that distinguishes them from another society.\(^12\) These behavioral patterns include the way people eat, the way they dress, their lifestyle, and methods of communicating with each other.\(^13\) Members of a society share a set of common values, beliefs, and norms that forge a common bond between its members and provide for continuity from generation to generation.\(^14\) To this end, television broadcasting forms an extremely important part of a nation’s cultural life, “and is the most effective and universally accepted means of upholding and developing the national culture, that is, the identity and ultimately the very existence of the country concerned.”\(^15\)

\(^7\) See Lupinacci, supra note 21, at 115.

\(^8\) See Peter Turell, U.S. Criticizes E.C. Over Issue of T.V., Seeks Arbitration, WALL ST. J., Oct. 11, 1989, at A15. None of the parties involved in the debate over the Directive (i.e. the United States and the European Union) ever denied the importance of culture or that it was worth protecting, rather, the United States claimed that there simply was no culture-protection basis in the Directive and no genuine need for Europe to protect its culture in this particular situation. Kaplan, supra note 24, at 285.


\(^11\) Id.

\(^12\) Id.

\(^13\) Id.

\(^14\) Id.

\(^15\) Council of Europe, Steering Committee on the Mass Media (CDMM), Observa-
The Directive was passed in order to protect and facilitate cultural exchanges via television programs among the Member States, thereby promoting European integration. Through the promotion of Europe-produced television programs, Europeans will "deepen their knowledge of each other's culture and development and contribute towards a more widespread European identity."

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 the television is to reflect this diversity.

While the European Union, through the Directive, is intent on fostering the growing notion of a distinct European identity as a means of strengthening the Union and the common market, it believes that this can only be accomplished by protecting the cultures of the Member States from U.S. "cultural domination." In effect, the European Union believes

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6 Green Paper, supra note 7, at 28.
7 Id. at 32. The European Union recognizes that some television programs will have more of the desired effect than others, hence the exemption for news, advertising, game shows, and sporting events. Directive, supra note 3, art. 4. In a roundtable discussion with U.S. broadcast industry and government representatives, the European Union's head of the Directorate-General for Information, Communications, and Culture "stressed that the E.C. is not at all interested in cultivating a homogenized European identity or European product in the cultural field. The aim of the E.C. initiatives in the cultural field are not to promote a Euro-culture, but to preserve the diversity of cultures in the E.C. at the present. The E.C. wants citizens of each Member State to be able to respect peoples from different countries and to understand the diverse cultural heritages within the Community." THE INTERNATIONAL COMMUNICATIONS STUDIES PROGRAM, EUROPEAN COMMUNITY COMMUNICATION POLICIES: AN UPDATE 4 (1991) [hereinafter COMMUNICATION POLICIES].
8 EUR. PARI. DEB. (2-374) 51.
9 Green Paper, supra note 7, at 33.
that by threatening the cultures of the Member States, the United States is preventing the unitary development of the European Union.\footnote{Id. at 28. "European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity." Id. To control this threat "requires action to counter and direct rather than disguise the bias of the electronic revolution; it means cultural and quantitative checks." CAREY, supra note 35, at 138. "Large firms are exporting their products to many countries. This export, mostly composed of rather low-quality entertainment programmes, uses the channels of the former colonial system. It is therefore possible to speak of a sui generis 'imperialism of mass media' representing a tool of neocolonialism." Krzysztof Przeclawski, The Impact of Cultural Industries in the Field of Audio-Visual Media on the Socio-Cultural Behavior of Youth, in CULTURAL INDUSTRIES: A CHALLENGE FOR THE FUTURE OF CULTURE 67, 68 (UNESCO, 1991).}

The Directive, therefore, is an attempt by the European Union to protect the very idea of European integration by exposing the peoples of the Member States to more European works through the tactic of restricting the number of non-European television programs and allowing European producers the chance to create television programs with a European essence.\footnote{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, 529 (1990). See also Anthony D. King, Introduction: Spaces of Culture, Spaces of Knowledge, in WORLD-SYSTEM supra note 35, at 16 (The State will create a national culture over time through its monopoly of policies and resources even if none existed before).} This is necessary because of the sheer volume of inexpensive U.S. films and television programs broadcast in the European Union.\footnote{For a thorough overview of the U.S. television threat to the culture of the European Union, see generally Kaplan, supra note 14 (arguing that the U.S. negotiators have a philosophical misunderstanding of European Union arguments that it must protect its culture). See also CAREY, supra note 35, at 114-15 (The United States will supersede all other social systems by virtue of its number one position in the electronic revolution).} When the Directive was passed in 1989, U.S.-produced television programming in Europe was in excess of $820 million annually and was expected to double by the 1990s.\footnote{LaFranchi, supra note 1, at 9.} Furthermore, the European television market has expanded exponentially in recent years, with a doubling of the available broadcasting airtime.\footnote{See Philip Revzin & Mark M. Nelson, European T.V. Industry Goes Hollywood, WALL ST. J., Oct. 3, 1989, at A18. Much of this growth can be attributed to two factors: a steadily rising per capita income among the Member States, and the gradual deregulation of the television industry in several Member States. Bruce Stokes, Tinseltown Trade War, NAT'L J., Feb. 23, 1991, at 432.} This has created a demand for television programming that European producers cannot meet,
and new broadcasting stations cannot afford. In order to fill their programming schedules, European broadcasters have turned to filler material from the United States, which is available in great abundance and at a low cost. As a result, sellers of U.S. television programs receive seventy-five percent of all their foreign revenue from European sales.

III. PROVISIONS OF THE DIRECTIVE AT ISSUE

The Television Without Frontiers Directive harmonizes the television broadcasting laws of the Member States of the European Union through use of a quota, while exempting advertising, news, sports, and teletext services from that quota. Three principal areas are covered in the Directive: (1) quotas on European programs and independent European production; (2) rules of advertising; and (3) rules for the protection of minors. Those specific articles at issue are discussed below.

A. Article 3

Article 3 stipulates that Member States may force “television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the area covered by this Directive.” In effect, this article opens the door for Member States to go beyond the fifty percent minimum European works transmission time required by the Directive and further restrict

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47 Greenhouse, supra note 45.
49 Directive, supra note 3, art. 4.
51 Directive, supra note 3, art. 3.
the influence of foreign culture. This compromise ensured that France, which had originally lobbied for a sixty percent European quota, would support the final agreement.52

B. Article 4

Since its very inception, much of the intense debate regarding the Directive has centered around Article 4. In part, the article stipulates:

Member states shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, and teletext services.53

In general, “majority” means above fifty percent, with no ultimate ceiling limiting the maximum proportion of airtime a Member State may require its broadcasters to reserve for European works.54 The language “where practicable” raised questions of proper interpretation among the Member States, with some objecting that the language was far too ambiguous and did not afford sufficient incentive for European production of television programs.55 In effect, this article gives the State rather than the channel the authority to decide what is practicable.56

C. Article 6

Along with Article 4, Article 6 of the Directive has created great controversy. In very complex terms, Article 6 serves to define exactly what a European television program consists of for purposes of the Directive.57 Basically, in order for a television program to be considered a “European work,” it must originate from one of the Member States of the European Union or non-Member European States that are party to the

53 Directive, supra note 3, art. 4.
56 See Bruce Alderman, E.C. Quota Vote, VARIETY, Oct. 3, 1989. A good example of impracticability is the Disney Channel; a European Union official asked, “How can you have a channel called Disney if it’s not allowed to play Disney products?” See also Yank Fallout Minimal, VARIETY, Sept. 27, 1989, at 4.
57 Directive, supra note 3, art. 6.
European Convention on Transfrontier Television of the Council of Europe.\textsuperscript{58} In order to originate from one of these States, the television program must also have been mainly made by workers and authors residing in one or more of those States in accordance with the following conditions:\textsuperscript{59}

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

(b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or

(c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.\textsuperscript{60}

While this is clearly a very permissive definition, it is done in an effort to promote the creation of television programs with more of a European plot and style than is found in imports from the United States. A European plot involves story-lines based more upon European social themes than those of typical U.S. television shows, while European style depicts European manners of expression and customs of behavior in contrast to those of U.S. programs.

Since the Directive was passed seven years ago, all Member States have implemented it into their national laws and the result has been that a gradual decline in the number of U.S. television programs shown in the Member States has taken place, so that as of 1994, roughly only fifty percent of television programs broadcast on European Union Member States’ television channels are of U.S. origin.\textsuperscript{61} Even U.S.-owned broad-

\begin{itemize}
\item \textsuperscript{58} Id. art. 6(1)(a)(b).
\item \textsuperscript{59} Id. art. 6(2). Therefore, for the purposes of the Directive, it appears that Europe extends from Vladivostock to Iceland, and from the North Cape to the Mediterranean littoral. Collins, supra note 9, at 377. "As one official noted, ‘there is a broad consensus that it is Europe in the cultural sense that is in question, not in the geo-political sense’" Id. (quoting Confidential Interview (Dec. 18, 1991)).
\item \textsuperscript{60} Directive, supra note 3, art 6(2). The European Union is well-aware of the problems this ambiguous definition has created, and is currently considering revising its definition of "European work" to provide clearer standards of what constitutes a truly European television program. Report by the Think-Tank on the Audiovisual Policy in the European Union 38 (Mar. 1994) [hereinafter Think-Tank].
\item \textsuperscript{61} See Pinheiro Goes to Hollywood, TECH EUROPE, Mar. 4, 1994, available in LEXIS, INTLAW Library, ECNEWS File. In contrast, in 1991, 54% of Member States’ television programming was of U.S. origin. Michael Williams & Chris Fuller, Protectionist Stance Thwarts E.C. Deadline Push: France Adamant on GATT, VARIETY, Oct. 18, 1993, at 41. While all Member States have adopted at least a 51.1% European
casting station NBC Superchannel has fully complied with the Directive. Furthermore, in 1989, many anticipated that the Directive would have a devastating effect on small broadcasting stations within the Member States. It was believed that by denying fledgling broadcasting stations access to cheap and plentiful U.S. television programming, they would be unable to compete. This has proven largely false because small broadcasters may circumvent the Directive's quota restrictions by broadcasting programs such as sports events or game shows which are exempt from the quota, or even "padding" their schedules with marathon programming events. Moreover, it has recently been determined that most harm and impairment to small European television broadcasters appears to be a direct result of the lack of any efficient Europe-wide distribution network.

The Directive has forced U.S. television studios to work together with Europeans within the co-production framework of the Directive, or effectively be locked out of the market of the European Union.

Since works quota, France has established a sixty percent minimum, and the United Kingdom sixty-five percent. Kaplan, supra note 14, at 295-96.

63 Greenhouse, supra note 45.
64 Id.
65 See Quotas are "Harmful, Costly and a Drag," NEW MEDIA MARKETS, June 30, 1994, available in LEXIS, INTLAW Library, ECNEWS File. This is not as great a circumvention as American television viewers might expect. In general, European television broadcast stations operate for significantly fewer hours than their U.S. counterparts. Normally, there is no late-night or morning broadcasting, so European broadcasters' "off-hours" fall in the daytime viewing schedule, and are therefore watched by many more viewers than would be expected by U.S. audiences. Charles Moore & David John White, European Television in the 1990s: Tuning out American Producers?, 8 ENT. & SPORTS L. 1, 2 (1990).
66 See Audiovisual Production: A Strategy to Create Jobs and Save European Culture, TECH EUROPE, Apr. 8, 1994, available in LEXIS, INTLAW Library, ECNEWS File [hereinafter Strategy]. This is because "the American 'majors' controlling all the links in the audiovisual chain from production to distribution are the only actors equipped to distribute . . . in all the European countries simultaneously." MATTEO MAGGIORE, AUDIOVISUAL PRODUCTION IN THE SINGLE MARKET 61 (1990). This has the practical effect of restricting European distributors to their national markets. Id. See also Think-Tank, supra note 60, at 16 (discussing the decline in European audiovisual industry due to weakness of the distribution networks).
67 TV Trade War, supra note 5. For example, co-production within the framework of Article VI of the Directive would allow for a U.S. company to provide the capital financing for a television program in exchange for distribution rights, while the artistic control over the program would necessarily remain with the European workers, authors, and producers. Directive, supra note 3, art. 6.
the passage of the Directive, the largest U.S. studios have been investing in co-production ventures.\(^{66}\) Paramount Pictures acted first by acquiring a forty-nine percent stake in Zenith, the largest independent television production company in the United Kingdom.\(^{69}\) Lorimar Television followed soon afterward, entering into a co-production venture with TV3 in Spain.\(^{70}\) ABC has acquired interests in Italy, Luxembourg, and Germany,\(^{71}\) and NBC has taken its own path with NBC Superchannel.\(^{72}\) Most recently, Warner Brothers hired an executive for the specific task of discovering investment opportunities in the European audiovisual field.\(^{73}\)

So, by inducing U.S. studios to relinquish artistic control (and therefore, cultural control) into the hands of the European authors, workers, and co-producers in exchange for the more profitable distribution rights, the quota and co-production provisions of the Directive are orchestrating the hoped-for result of more television programs being created with a European artistic plot and style, while still allowing U.S. studios to profit from the European Union market.\(^{74}\)

While many commentators have been predicting devastating economic effects to the European Union’s film and broadcasting industry (especially to new studios and foreign investment) as a result of the Directive, there are strong indications that this may not be the case.\(^{75}\) As discussed earlier, a recognized problem with the Directive is that new studios could circumvent the quota restrictions by broadcasting quota-exempt programs, or “padding” their schedules in off hours.\(^{76}\) In light of the rush of investment-seeking co-production ventures since 1989, it is quite clear that foreign investment is suffering little as a result of the Directive.\(^{77}\) Further...
thermore, expected growth in demand for television programs will necessi-
tate increased production of European television programs within the
meaning of the Directive, and generate two million jobs in Europe within
the next five years. European producers have begun taking advantage
of this boom, and are producing more “European works.”

The Directive has also worked to facilitate the integration of the
Member States into the hoped-for Single Market by promoting increases
in transborder television broadcasting and increasing competition within
individual markets. This harmonization has also caused television
broadcasting markets to reorder on a linguistic basis as opposed to a
political basis, with those stations willing to dub or subtitle their pro-
grams moving to the forefront of the market.

IV. LEGALITY OF THE DIRECTIVE UNDER EUROPEAN UNION LAW

Although the European Union was strictly an economic community
at its inception and was thought to have no legal jurisdiction to intrude
upon the cultural sovereignty of the Member States, this conception has
gradually changed over time. This change has taken place largely as a
result of the completion of the internal market and the ensuing abolish-
ment of frontiers allowing the free movement of goods, persons, capital
and services. Any national legislation of the Member States in these
fields that might restrict the free movement within the European Union,
but may be justified under European Union law, requires harmonization
(the bringing of the national laws of the Member States into comity). The
most prevalent method of accomplishing this is the directive.

at 4; Super Pledges E.C. Quota, supra note 62; Monster Movies, supra note 73, at 28.
78 Strategy, supra note 66. “[A] number of production companies are springing up
in Europe today.” COMMUNICATION POLICIES, supra note 37. The demand for television
programs has risen from 200,000 in 1981 to 650,000 in 1992 as a result of an increase
in the number of available television channels: 40 in 1981 and 100 in 1994. Think-
Tank, supra note 60.
79 COMMUNICATION POLICIES, supra note 37, at 5.
80 Collins, supra note 9, at 379.
81 Id.
82 See generally ANNEMARIE LOMAN ET AL., CULTURE AND COMMUNITY LAW:
BEFORE AND AFTER MAASTRICHT 177 (1992). With the coming into force of the
Maastricht treaty on Nov. 1, 1993, and its amendments to the Treaty of Rome, culture
is now acknowledged as an integral part of the European Union. See Maastricht Treaty
Since the 1980s the European Union has had a “cultural policy.” COMMUNICATION
POLICIES, supra note 37, at 3.
83 LOMAN ET AL., supra note 82, at 145. See also EEC Treaty, arts. 8A, 130A.
84 LOMAN ET AL., supra note 82, at 145.
Therefore, "[t]he cultural sector, too, is directly or indirectly susceptible to the harmonization of the Community," because, in many instances this involvement of the European Union in cultural affairs stems from "the general tasks of establishing the internal market and ensuring economic and social cohesion in the development of the Community." So, cultural activities are often also economic activities, or are at least connected with economic activities via their economic effects. "This simple fact brings them 'automatically' within the scope of the powers of the Community." However, the Television Without Frontiers Directive is an example of how, in recent years, measures have been adopted that tip the scale as being far more cultural in character than economic. This "can be explained by the drive in the Community to become a more meaningful entity for the citizens of the Community."

Even before the Maastricht Treaty explicitly acknowledged culture as an integral part of the European Union, the Directive was legal under Article 59 of the EEC Treaty. Article 60 of the EEC Treaty stipulates that services are only considered services within the meaning of the Treaty "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons." In simple terms what this means is that if a television program is distributed via videocassette, it is a tangible good and therefore falls within the scope of the Treaty provisions concerning the free movement of goods. However, the European Court of Justice has ruled that television broadcasts themselves are services within the meaning of the EEC Treaty. This

also supra text accompanying note 3.
51 EEC Treaty, art. 59. "Within the framework of the provisions set out below, restrictions on freedom to provide services within the community shall be progressively abolished during the transitional period in respect of nationals of member States who are established in a State of the Community other than that of the person for whom the services are provided." EEC Treaty, art. 59. The right to provide services under Article 59 is conditional on the issuing of Directives. Steiner, supra note 2, at 208.
52 EEC Treaty, art. 60.
53 See Cases 60-61/84, Cinéthèque SA v. Fédération Nationale des Cinémas Français, 1 C.M.L.R. 395 (1986). See also LOMAN, supra note 82, at 81-82.
54 Sacchi, 1974 E.C.R. 409, 426-427. See also Procureur du Roi v. Debauve, 1980 E.C.R. 833 (extending the Sacchi court's ruling to include cable and satellite broadcasts).
means that if that same television program is broadcast on Member States' television stations, it is covered by Article 59. The Court of Justice then expanded on its earlier decisions by ruling that the Member States could develop their own national television broadcasting policies on cultural grounds, therefore, each Member State could regulate television programming as it wished. This meant that harmonization of the national cultural broadcasting policies became absolutely necessary for the furtherance of European unity; "the only way to create the conditions of a single market ... was by establishing Community rules for the protection of the interests which were the subject of these national provisions."

Even if the Directive could not have been based on Article 59 at the time it was created, the EEC Treaty would have provided another legal basis in Article 235. Article 235 supplies a general grant of power for action should no other provision of the Treaty provide the legal basis for an action by the Community that is necessary to achieve an objective of the Community. Harmonization of the Member States' national television broadcasting laws was thought to be necessary to achieve the most important of all Community objectives, that of Union. So, any action by the European Union that had no real connection to the economical aspect of the common market would have to be tied to Article 235.

Articles 59 and 235 have been used to illustrate the gradual intrusion by the European Union into culture, an area which, at the inception of the European Community, was thought to be wholly and safely a sovereign attribute of the Member States. The Directive is but an example of this evolution. Other examples of this gradual evolution of the European Union into cultural affairs are the creation of various inter-Union institutions that engage in the promotion and promulgation of cultural expressions.

Twice a year, the Ministers responsible for culture in the individual
Member States meet with the Council of Ministers to discuss cultural issues and indicate objectives that are of particular importance to the European Union. 104 Recent meetings have discussed business sponsorship of cultural activities, the Year of European Cinema and Television (1988), and established "priority actions" in the realm of culture. 105 The Television Without Frontiers Directive is the direct result of the culture Ministers of the Member States establishing a "priority action" in the field of audiovisuals. 106

The European Commission itself has incorporated cultural affairs into its dominion and has created a Commissioner and department (Directorate-General X) to oversee audiovisuals, communication, information, and culture. 107 Through its primary task of promulgating European Union legislation, the Commission may affect culture. 108 The Commission also issues statements on European Union cultural policy in general, and on more specific cultural policies such as the preservation of the national heritage of the Member States and the audiovisual sector. 109 Other evidence of growing Commission interest in cultural affairs in recent years is the fact that it has begun participating in cultural exhibitions, giving official recommendations on cultural affairs, establishing awards and prizes in culture, and granting subsidies for cultural events. 110 Furthermore, the Commission has established the Committee of Cultural Advisors, which is comprised of representatives from the world of the arts and culture and whose task it is to advise the Commission on its intended

104 Id. at 142. In preparation for the formal meetings, a Cultural Council has been created by the Council of Ministers which serves to remove obstacles to the Ministers making decisions on cultural issues. Id.

105 Id. Other topics discussed in recent years were; "cultural cooperation between the Community and third countries, the designation of a European City of Culture and the organization of a special European Cultural month event, the preservation of the national heritage, the film industry, . . . the development of the theater in Europe, copyright, European cultural networks, archives, the promotion of theatrical events in 1993, and the possibility of including a Title on Culture in the EEC Treaty. Id. The Title on Culture was eventually added to the EEC Treaty by the Maastricht Treaty. See EEC Treaty, art. 128.

106 LOMAN ET AL., supra note 82, at 142.

107 Id.

108 Id.

109 Id.

110 Id. at 143. Examples of such undertakings are the Commission's decision to participate in the 1992 World Fair, its recommendation of a "European over-sixty" card entitling the bearer to benefits on cultural activities, the creation of an award for European architecture, and the establishment of a grant for cultural events with a European dimension. Id. at 143, nn. 12-15.
measures in the cultural field. The European Parliament has also gradually entered the cultural arena as well by debating cultural issues, adopting non-binding resolutions that state its position on those issues, and making advisory recommendations thereupon. The Parliament also has a committee to deal with culture which recently dealt with the issue of the circulation of cultural goods in the Single Market and prompted the Parliament to propose measures such as restrictions on the exportation of art works to preserve the national heritages of the Member States.

This gradual evolution of the European Union into a cultural as well as an economic union can be illustrated through an historical glance at some of its legislative enactments. While sporadic statements had been made prior to 1977, it was at that time that the Commission issued its first true Communication (a non-binding policy paper) concerning possible European Union action in the area of culture. This simply stated that "the application of the legal means at the disposal of the Community should in no way lead to interference with cultural expression or to any intervention in culture as such."

The Commission issued a second Communication to the Council in 1982 regarding Community action on culture. This Communication served notice that European Union involvement with culture at this time was still regarded as a complement to action taken with regard to culture at the international level, although conserving European architectural heritage is stipulated as one of the European Union's responsibilities.

By 1987 the European Union had made a major leap forward in its cultural evolution in anticipation of the completion of the internal market in 1992. The Commission recognized that action in the realm of culture had become a necessity to promote European integration in that "the sense of being part of European culture is one of the prerequisites for that solidarity which is vital if the advent of the large market, and the considerable changes it will bring about in living conditions within the Community, is to secure the popular support it needs." The 1987

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11 Id. at 143.
12 Id.
13 Id.
14 Id. at 144. Sporadic statements regarding Community cultural policy such as the Hague Summit Conferences (1969), Paris (1972), Copenhagen (1973), and the Tindemans' Report on European Union (1976) had been made in preceding years. Id.
15 Id.
16 Id.
17 Id. at 144-45.
18 Commission of the European Communities, A Fresh Boost for Culture in the
Communication defined the general cultural policy guidelines and then proceeded to lay out a "priority program" for 1988 through 1992. This included improving access to European cultural resources, creating a "European cultural area," promoting international dialogue on cultural issues, and promotion of the European audiovisual industry. The Television Without Frontiers Directive is a perfect example of just such a promotion by the European Union.

In recent years, the cultural evolution of the European Union has culminated in the Maastricht Treaty, which went into effect November 1, 1993. Although the Maastricht Treaty was not in effect at the time of the implementation of the Directive, it is continuing proof of the evolution of the European Union's power to act in the area of culture rather than just economics. For example, although the term "culture" was never explicitly included in the Treaty of Rome, it is included in the Preamble of the Maastricht Treaty.

The Maastricht Treaty also includes culture as one of the activities set out in Article 3 to realize the general purposes of the European Union as set out in Article 2. Article 3p stipulates that the activities of the European Union shall include: "a contribution to education and training of quality and to the flowering of the cultures of the Member States." By expressly including culture in Article 3 and implicitly including it in Article 2, the European Union has dispelled all doubts that culture is one of the principal concerns of the European Union and unequivocally brought culture under the domain of Article 235 even if European integration is not threatened as it was when the Directive was issued. Moreover, the express recognition of cultural objectives as a European Union concern "provides the Court of Justice with a point of reference for taking cultural interests into account in the context of its teleological interpretations of provisions of Community law."

The Maastricht Treaty revisions also added the Title on Culture to

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European Community, COM(87)603 final.

119 LOMAN ET AL., supra note 82, at 145.
120 Id.
121 See Maastricht Treaty, supra note 82.
122 Maastricht Treaty, supra note 82, Preamble. After the changes wrought by the Maastricht Treaty, the EEC Treaty Preamble now stresses the desire to deepen the solidarity of the citizens of the Member States "while respecting their history, their culture and their traditions." Maastricht Treaty, supra note 82, Preamble.
123 See Maastricht Treaty, supra note 82, arts. 2, 3.
124 Maastricht Treaty, supra note 82, art. 3p.
125 LOMAN ET AL., supra note 82, at 191.
the EEC Treaty.\textsuperscript{126} This provision, embodied in Article 128, allows for the development of a European cultural policy while also allowing the individual Member States their own policies that are also aimed at preserving European cultures.\textsuperscript{127} Article 128 provides for two methods the European Union may use in promulgating cultural legislation: if the measure is aimed at a purely cultural matter it may find legality under Article 128, whereas if the measure's objective is a mix of cultural and economic effects, the old method of utilizing Article 235 is retained.\textsuperscript{128} One important aspect of Article 128 is the fact that audiovisuals are listed under its provisions as one of the areas in which the European Union may take action.\textsuperscript{129} This is further evidence that the European Union has viewed the Directive as protecting a cultural matter rather than economic protectionism.

\section{V. Legality of the Directive Under GATT and GATS}

From the time of the passage of the Directive by the European Union, the United States has claimed that it is in violation of the GATT because television programs are not services, but products, and that, in the absence of a services trade agreement, the General Agreement on Tariffs and Trade (GATT) fills the void.\textsuperscript{130} This misunderstanding seems to have persisted even in the face of the passage of the General Agreement on Trade in Services (GATS) at the conclusion of the Uruguay Round. No acceptable compromise on the issue of audiovisuals could be reached by U.S. and European Union negotiators, and rather than sidetrack the entire trade deal, audiovisuals were excluded from the GATT and GATS trade regime.\textsuperscript{131}

\begin{thebibliography}{9}
\bibitem{footnote126} Maastricht Treaty, supra note 82, art. 128.
\bibitem{footnote127} Id. Article 128 says, in part, that: "1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European Peoples; conservation and safeguarding of cultural heritage of European significance; . . . artistic and literary creation, including in the audiovisual sector . . . . 4. The Community shall take cultural aspects into account in its actions under other provisions of this Treaty." Id.
\bibitem{footnote128} Id.
\bibitem{footnote129} Maastricht Treaty, supra note 82, art. 128 (2).
\bibitem{footnote130} See Administration Urged to Protect U.S. Access to E.C. Broadcast Market, INT'L TRADE DAILY (BNA) 7, at 8 (Oct. 13, 1989).
\bibitem{footnote131} For an overview of the exclusion of audiovisuals, see Jonas M. Grant, 'Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT, 70 IND. L.J.
The GATT has its origins in the desire of those who shaped the international economic system and institutions after the devastation of the Second World War to avoid the mistakes of the pre-war era. The result "is the only multilateral instrument that lays down agreed rules for the conduct of international trade." Its overarching principal objective is the liberalization of international trade through negotiated reductions in both tariff and non-tariff barriers.

After the initial framework was created in the aftermath of the Second World War, subsequent "rounds" of negotiations promoted the evolution of the GATT. For example, the Kennedy Round (1964-1967) of negotiations resulted in a fifty percent tariff cut, while the Tokyo Round (1973-1979) made a step toward creating improved rules regarding non-tariff barriers to trade. However, it was not until the recent Uruguay Round of negotiations that the GATT finally evolved fully. With the completion of the negotiations in late 1994 and subsequent adoption by signatory nations, the GATT was superseded by the World Trade Organization (WTO) as of January 1, 1995.

The Uruguay Round of the GATT negotiations had as its objectives the further liberalization of international trade through the reduction of tariff and other non-tariff barriers, protection of intellectual property rights, a complete overhaul of the GATT dispute-settlement machinery, and a decision on whether or not to include agriculture, an investment code, culture, or services under the GATT provisions. It was on the issue of whether culture and audiovisual services should be included under the GATT that the European Union and United States negotiating sides were diametrically opposed.

The United States argued that no cultural exemption should be

133 Id.
137 THE URUGUAY ROUND, supra note 134.
138 Michael Williams & Chris Fuller, Protectionist Stance Thwarts E.C. Deadline Push; France adamant on GATT, VARIETY EUROPE, Oct. 18, 1993, at 41.
allowed in the GATT or the GATS, either as part of the general framework of the agreement or in any annex concerning audiovisuals. The basis for this argument was the contention that cultural identities were very difficult to define, and therefore the possibility for abuse would be great. Furthermore, according to the United States, the European Union could not possibly qualify for any "cultural exemption" regardless, because there was no such thing as a European culture. This misunderstanding of the European Union's goal of European integration would serve to hinder all negotiation on the subject.

The misunderstanding of the European Union's cultural objective in promulgating the Directive was further evidenced when the United States called the Directive "blatant protectionism unmasked" and accused the European Union of using the issue of culture "as a smokescreen for monetary concerns." The United States subsequently entered into mandatory GATT consultations with the European Union in an unsuccessful effort to resolve their differences.

When no agreement was reached in the GATT consultations, the United States regarded the matter as solved. According to United States negotiators, the GATT applied to culture and audiovisual services, and therefore the Directive was in direct violation of several GATT provisions and was "inconsistent with the Community's obligations."

The United States first argued that the Directive was in violation of the Most Favored Nation (MFN) requirement of Article I of the GATT which requires that any advantages granted to one contracting party by another contracting party have to be extended to all other contracting parties. Simply put, MFN requires a nation to treat all foreign goods equally, while allowing domestic products to be favored. The United

139 Filipek, supra note 54, at 343.
140 Services-Audio-Video Sector Working Group, 75 GATT FOCUS 10 (1990).
141 Kaplan, supra note 14, at 315.
142 Id.
143 Valenti Charges, supra note 6.
States recognized that the European Union may accord preferential treatment among the Member States through Article XXIV's implicit exemption of MFN among members of a customs union. However, according to the United States, the European works quota of the Directive violated the MFN principle because it extended non-European Union European nations more favorable treatment than other contracting parties.

The United States also argued that the European Union breached the national treatment requirement of Article III of the GATT. The national treatment requirement stipulates that imported goods will be accorded the same treatment as domestic goods with respect to most matters under government control, such as trade, commercial regulation, and taxation. The United States argued that the Directive was in violation of Article III because by restricting the number of foreign-produced programs that may be broadcast without a corresponding restriction on European works, the Directive grants imported programs less favorable treatment than that given to European programs with respect to regulations and laws concerning their sale, purchase, distribution, or use.

The final GATT argument of the United States against the Directive was based on Article XI's prohibition of quotas, or quantitative restrictions. This Article forbids the use of any trade restrictions other than tariffs placed on the exportation or importation of products. According to the United States, by requiring the Member States to institute a quota for European television programs, the Directive violated Article XI. In the eyes of the United States this is because the European works quota acts as a de facto quota on imports due to the fact that it limits the number of foreign television programs that may be imported into the European Union. Because European Union broadcasters may not

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143 JACKSON, supra note 146, at 576-77. See also Filipek, supra note 54, at 347.
149 Filipek, supra note 54, at 347. For example, those non-Member States like Switzerland, that are party to the European Convention on Transfrontier Television of the Council of Europe are considered originators of “European works” within the meaning of Article VI of the Directive. Directive, supra note 3, art. 6(1)(a),(b).
150 Filipek, supra note 54, at 347-48. See also GATT, supra note 147, art. III.
151 JACKSON, supra note 146, at 273.
152 Filipek, supra note 54, at 348-49.
153 Id. at 349. See also GATT, supra note 150, art. XI.
154 Filipek, supra note 54, at 349.
155 Id.
156 Id.
broadcast more foreign programs than allowed by the Directive, the theory is that they will necessarily reduce their purchases of U.S. television programs.\textsuperscript{157}

In contrast, the European Union advanced its own arguments regarding the legality of the Directive under the GATT, should it be deemed to apply to television broadcasting. According to the European Union, general principles of international trade law recognize a “cultural exemption” for products that have a “cultural” character, and therefore, a cultural exemption allowing measures such as the Directive should be added to the GATT.\textsuperscript{158} This argument for a cultural exemption to the GATT for measures like the Directive is based on Article IV of the GATT which allows screen quotas for films of national origin.\textsuperscript{159} In the aftermath of the Second World War and its many propaganda films, the great importance that motion pictures had in the cultural influence of societies was clearly recognized.\textsuperscript{160} Furthermore, other nations recognized the dominance of the U.S. film industry, and responded with quotas on foreign films.\textsuperscript{161} During various negotiations such as the International Trade Organization and Havana Charter prior to the original GATT agreement, protection and discrimination in the film arena was vigorously advocated by many nations due to the importance film had for a nation's cultural survival.\textsuperscript{162} This eventually resulted in the Article IV cultural exemption for film from the GATT obligations.\textsuperscript{163}

The original GATT negotiations took place before the advent of large scale television broadcasting. However, it is conceivable that television programs would have been considered a product and therefore would have been included in the Article IV cultural exemption had the original drafters foreseen the immense growth in the industry and its corresponding impact on cultures of the world.\textsuperscript{164} In fact, the United States itself

\textsuperscript{157} Id.
\textsuperscript{158} Kaplan, supra note 14, at 334.
\textsuperscript{159} JACKSON, supra note 146, at 293. “The objections of nations that had domestic film quotas led the GATT draftsmen to except this product . . . because its regulation was more related to domestic cultural policies than to economics and trade.” Id. See also GATT, supra note 147, art. IV.
\textsuperscript{160} GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 102 (1986). See also GARTH S. JOWETT & JAMES M. LINTON, MOVIES AS MASS COMMUNICATION (1980).
\textsuperscript{161} Smith, supra note 144, at 118.
\textsuperscript{162} Id. at 118-19. The ITO was the ill-fated predecessor of the WTO that was doomed by the failure of the United States Congress to ratify its charter in 1949. JACKSON, supra note 146, at 50. The Havana Charter was the main conference for drafting the ITO charter. Id. at 45.
\textsuperscript{163} JACKSON, supra note 146, at 293.
\textsuperscript{164} Since the time of the original GATT negotiations “television has taken over from
did just that during GATT negotiations in the 1960s. While noting that restrictions against foreign television programs were technically discrimination, and therefore a violation of Article III of the GATT, the United States recognized that some of the principles of Article IV regarding the cultural influence of films might indeed apply to television programs as well. Moreover, in contrast to its position during the Uruguay Round, in 1961 the United States proposed a resolution that foreign television programs be restricted to a “reasonable proportion” of a nation’s domestic television stations’ broadcast time.

In exactly the same fashion as those concerned nations in the days of the original GATT negotiations regarded film, the European Union claims that the protection and promotion of indigenous languages, history, and heritage depends heavily on national television programming output. The Directive will accomplish this protection and promotion for the Member States and European integration through its European works requirement in a subtle fashion. Logically, aspects of television programs created by European producers or co-productions are more likely to project a more European plot, style, and language than U.S. programs.

Further argument that the United States should recognize a cultural exemption for the European Union may be found in the relations between the United States and Canada. In the same way as the European Union in the 1980s, during the 1970s, Canada became aware of the cultural implications of U.S. television shows crossing its border and soon implemented a tax incentive to promote Canadian television programs. After much negotiation, the United States recognized the cultural importance of television programs and acquiesced to Canada’s position. In 1989 this cultural exemption for Canada was recognized explicitly in the United States-Canada Free Trade Agreement, whereby the United States agreed to respect very strict quotas on its television programming. This right of Canada to protect its cultural identity was explicitly stated

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the cinema, and cinema films have been replaced by television film series, but the effect is the same as far as cultural influence is concerned.” Augustin Girard, Cultural Industries: A Handicap or a New Opportunity for General Development?, in CULTURAL INDUSTRIES: A CHALLENGE FOR THE FUTURE OF CULTURE 24, 26 (UNESCO, 1982).

165 JACKSON, supra note 146, at 294. But see Smith, supra note 144, at 116-17.

166 JACKSON, supra note 146, at 294. See also GATT Docs. L/1615; L/1646; L/1686

167 (1961)


169 Kaplan, supra note 14, at 323.

169 Id.

170 Id.

171 Id.
in Article 2005 of the Free Trade Agreement. Moreover, the North American Free Trade Agreement between Canada, Mexico, and the United States specifically exempts Canadian cultural industries such as television broadcasting.

This action on the part of the United States did not go unnoticed. The European Union recognized that the United States agreed to the cultural exemptions for Canada because if the issue were pushed, it "knew very well that this type of good or product would not fall under the regimentation of the GATT." In its relations with its neighbors the United States had recognized their rights to cultural exemptions for their television broadcasting industries. Why not do the same for the European Union? Strong indications point to money. The European Union's television market provides Hollywood with seventy-five percent of its foreign television sales. Understandably, such a lucrative market simply will not be relinquished by the United States without a fight. However, it is quite possible that in its cultural exemption argument the European Union is correct, and television programs should be accorded the same treatment and cultural exemption as film under Article IV of the GATT.

Regardless of these arguments, the aim of the European Union during the Uruguay Round was to have cultural industries such as audio-visuals declared as having no legal substance under the GATT, thereby giving the GATT no jurisdiction over the Directive at all. While a cultural exemption was not explicitly agreed upon in the Uruguay Round, the European Union did win a mixed victory. Although "cultural goods" were included under the GATT, the European Union was granted an exemption from its MFN obligations with regard to cultural protection agreements among the Member States. However, the United States still claimed that the Directive was subject to the GATT because television programming constituted a good rather than a service.

In direct contrast to the United States' position, the European Union

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174 EUR. PARL. DEB. (No. 3-381) 123 (Oct. 11, 1989).
175 Guider, supra note 48.
177 Filipek, supra note 54, at 344.
178 Kaplan, supra note 14, at 343.
179 135 CONG. REC., at H7327 (1989).
maintained that television broadcasting was a service, and therefore not covered by the GATT. 180 This view was supported by the European Court of Justice decisions in Sacchi, which held that television broadcasts are services, 181 and Bond van Adverteerders v. Netherlands, which further solidified the European Union notion that a television broadcast is a service to those who receive it, even in another Member State. 182

In reality, the United States has already recognized that television broadcasting is a service rather than a good. As recently as 1991, the United States identified restrictions on television broadcasts of foreign television programs by Australia, Brazil, Canada, and various Pacific Rim nations as “service barriers.” 183 Even in past GATT negotiations themselves, the United States has recognized that television broadcasting is a service. 184

The most powerful argument confirming the European Union’s view that television broadcasts are services rather than goods comes from a look at television broadcasts themselves. When the GATT negotiations regarding services were first begun, the difficulty of defining services was apparent; one exasperated speaker arguing that they are “anything you can’t drop on your foot.” 185 Simply put, goods are tangible products while services are intangible. 186 Moreover, goods may be stored, while services must be consumed concurrently with their production. 187 The important distinction between cultural goods of a durable nature and the services that flow out of them is essential for understanding the issue of

181 Sacchi, 1974 E.C.R. 409, 426-427. See also Procureur du Roi v. Debayvve, 1980 E.C.R. 833 (extending the Sacchi ruling to include cable and satellite broadcasts).
186 Michael Cohen & Thomas Morante, Elimination of Non-tariff Barriers to Trade: Recommendations for Future Negotiations, 13 LAW & POL’Y INT’L BUS. 495, 498 (1981). See also Augustin Girard, supra note 164, at 37 (holding that television programs are services).
television broadcasting as a service instead of a good. For example, the distinction between a tangible good, such as a videotape of a television program, and a service, such as the broadcast of a television program is very subtle, yet the former is tangible and may be stored and is therefore a good, while the latter is intangible and can is consumed upon production and is a service (unless it is recorded on a videotape, whereupon it becomes a good). This is the view that ultimately prevailed in the Uruguay Round.

To this end, the issue of services became a hotly debated topic during the Uruguay Round. The United States argued that audiovisuals were not a service, and the European Union maintained the opposite position. The Group of Negotiations on Services (GNS) was subsequently created in an effort to clarify the services issues regarding audiovisuals, banking, insurance, etc. The GNS soon assembled the Audiovisual Sector Working Group to examine trade issues concerning audiovisuals, especially those involving television broadcasting. In 1987 the United States proposed that the GATS be created as a mirror image of the GATT framework applied to services. At the same time, developing nations resisted this proposal on the grounds that the GATT was not yet a fully established framework, and was not applicable to trade in services.

At the very recent conclusion of the Uruguay Round, the GATS was sanctioned, and services thereby became covered by a GATT-like international trade agreement regulating trade in services. As a legal framework, the GATS is the first multilateral, legally enforceable agreement to cover investment and trade in services. Predictably, the GATS

189 Id.
190 See supra note 179.
191 Filipek, *supra* note 54, at 343.
192 Id.
193 See 1 Law and Practice Under the GATT 1 (K. Simonds & B. Hill eds. 1990). See also GOLT, supra note 132, at 44.
194 GOLT, supra note 132, at 45.
195 The Uruguay Round, supra note 134. Services are broken down into “sectors” which signatory nations then make market access commitments to. Annex 1B, *General Agreement on Trade in Services*, in 1995 Documents Supplement to Legal Problems of International Economic Relations, art. XVII [hereinafter Annex 1B].
196 John Siegmund, *Services: U.S. Objectives in International Trade in Services*, *Business America*, Jan. 1994, at 8. Part I of the GATS gives the general scope of the agreement; Part II lays out the general obligations of signatories; Part III deals with making commitments in the specific service sectors; and Part IV commits the signato-
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reiterates the MFN, national treatment, and market access principles of the GATT; however exceptions are far easier to obtain. Signatory nations must make "offers" of what their commitments are to the open market in services sectors, and this binds the nation to its offer. As a result of the exclusion of audiovisuals from the GATS, the European Union made no commitment to open its audiovisual market to foreign competition, and no national treatment commitment. Furthermore, the European Union was granted a MFN exemption with respect to audiovisuals, and therefore is not bound in any way to give equal treatment to third nations with regard to trade in television programming for the next ten years. In effect, the Directive is now fully legal under the GATT and GATS trade regimes. Furthermore, the United States has no basis for recourse against the European Union with respect to audiovisuals through the WTO dispute mechanisms as was thought possible prior to the GATT.

VI. RECENT EVENTS

During the Uruguay Round, it became obvious to the European Union that its goals were in danger due to the failure of several Member States to implement the Directive properly. With the exclusion of audiovisuals from the GATT and the resulting GATS agreement the European Union is free to expand upon the Directive and even bring in new protective measures without fear of retaliation by the United States through the implementation of the WTO dispute mechanisms. As a result, the European Union has moved to tighten the ambiguous "European works" language of Article 6, and impose even stricter quotas that the 50.1% currently advocated by the Directive.

Jack Valenti, president of the Motion Picture Association of America (MPA), and the man "regarded as the bete noire" of the European
audiovisual industry, subsequently offered the olive branch to the European Union at the conclusion of the Uruguay Round. \(^{204}\) In recognition of the fact that if the United States film industry wishes to continue to profit in the European Union, it now has little choice but to work within the confines of the Directive, this olive branch has recently been replaced with an offer by Valenti and the MPA to provide money to the European Union audiovisual industry for training and more co-production cooperation. \(^{205}\)

As examined earlier, this current state of cooperation and co-production blossoming between the European Union and the United States is a foreshadowing of the best possible method for the European Union to continue to protect its culture, and the United States to profit economically. This method is a continuation and expansion of co-production between the two sides in a mutually beneficial manner. For the Americans, it offers the advantage of getting into the European market with minimal risk and the possibility of simultaneously evaluating the reliability and efficiency of potential partners for possible future joint ventures. \(^{206}\) For the Europeans, co-production allows the retention of artistic control with an added bonus in the possibility of gaining access to the American market for their own productions and keeping their costs low. \(^{207}\)

CONCLUSION

Seven years after it was first unveiled amidst much attack from the United States, the Television Without Frontiers Directive has finally come into its own. Because of the recent GATS victory for the European Union in the Uruguay Round, the Directive’s restrictions may be safely increased if deemed necessary, bringing the Member States into even greater unity. Today, the European Union may continue to evolve into a “United States of Europe” without fear of becoming a mirror image of the United States of America.

Shaun P. O’Connell*

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\(^{207}\) Id. See also supra text accompanying note 67.

* J.D. Candidate, Case Western Reserve University School of Law, 1996.