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Restricting Foreign Television Programming In Europe: The European Community's Television Quota Reappraised

Michael L. Landsman

RESTRICTING FOREIGN TELEVISION PROGRAMMING IN EUROPE: The European Community's Television Quota Reappraised

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I. Introduction

This article examines the conflict between the European Community ("EC") and the United States ("US") over the regulation of television programming. It will argue that, in order for members of the EC ("member-states") to preserve their culture, the EC must impose some restrictions on the amount of foreign television programming broadcast in Europe.

At first glance, the issues presented in the debate over the EC's decision to limit the amount of foreign broadcasting in Europe appear rather straightforward. Member-states argue that they need to protect and promote their culture,¹ while the US argues that it should be able to sell its audiovisual wares in an open market and that European culture will not be damaged by foreign television programming.²

The approach taken by this article is uncommon among US scholars and law students. The major reason for this departure from the prevailing point of view is that this author examines the problem from a theoretical perspective not commonly found in American law and business schools: namely, critical theory.³ These articles offer nothing more than a superficial discussion about either the historical or the theoretical aspects of the debate over the television broadcasts and culture. Failure to discuss anything beyond the most obvious aspects of the debate prevents these commentators from sufficiently recognizing the role the mass media plays in society, and leads most of them to the same predictable conclusion: that the EC should eliminate limitations on foreign television

* Assistant to Edward I. Koch at Robinson, Silverman, Pearce, Aronsohn & Berman LLP, New York, New York. J.D. 1998, New York Law School; B.A. 1994, New York University.

¹ See generally John David Donaldson, "Television Without Frontiers": *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 Fordham Int'l J. 90, fn. 131-32 (1996); Jon Filipek, "Cultural Quotas": *The Trade Controversy Over the European Community's Broadcast Directive*, 28 STAN. J. INT'L L. 323, 327 (1992).

² See Jon Filipek, *supra* note 1, at fn. 11. Here, the author cites the U.S. INT'L TRADE COMM'N, 1992: THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIRST FOLLOW-UP REPORT 6-114 (1990) ("USITC REPORT").

³ See generally, DOUGLAS KELLNER, TELEVISION AND THE CRISIS OF DEMOCRACY, (Westview Press 1990). (Critical theory is based on the idea that the complexities of modern society must be recognized in order to understand the functions of society. Most commentators rely on economic theory.)

programming.⁴

II. Mass Media and Modernity

A. Brief History of the Mass Media

A mass medium is a means of public communication reaching a large audience. Prior to the turn of the twentieth Century, mass media was confined to print technology, including books, journals, newspapers and photographs.⁵

The first major technological advance was radio.⁶ As radio began to increase in popularity, it transformed the ease with which people transmitted and received information. Furthermore, radio facilitated the live transmission of information over long distances and to broad audiences.⁷ For these and other reasons, radio represented a significant departure from earlier print-based media.

The second major technological advance was the motion picture.⁸ Unlike radio, motion pictures were incapable of instantaneously disseminating information over long distances and to broad audiences. Motion pictures did, however, have the ability to transmit images as well as sound.⁹ Although it may be difficult for most people in the western world today to completely understand the significance of the role played by these technologies in history, the fact remains that radio and motion pictures made it possible to record and transmit audio and visual images on a global scale.

Before World War I, Europe dominated the production of films and feature films.¹⁰ At the end of World War I, however, European film industry was crippled. The American film industry capitalized on this weakness and quickly became the western world's largest producer of film.¹¹ Between 1913 and 1925, the US film exports to Europe grew by 500%.¹² America's dominance in the film industry ultimately carried

⁴ See e.g. Kirsten L. Kessler, *Protecting Free Trade in Audiovisual Entertainment: A Proposal for Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports*, 26 LAW & POL'Y INT'L BUS. 563, (1995); Herbert Ungerer, *EC Competition Law in the Telecommunications, Media, and Information Technology Sectors*, 19 Fordham Int'l L.J. 1111, (1996).

⁵ See generally, Kellner, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Donaldson, *supra* note 1, at 94.

¹¹ *Id.*

¹² *Id.*

over into the television production industry.¹³ This domination was significant because, by the outbreak of World War II, motion pictures and radio broadcasts were available to a significant portion of the industrialized world's population.¹⁴

B. Mass Media Reviewed

As the popularity of mass media continued to grow, scholars began to examine the role it played in society. Based on their experiences during World War II, these scholars explored the purpose of mass media, as well as its power to influence people and change culture.¹⁵ There are several important themes explored by these scholars.¹⁶ The first of these concerned the relationship between the mass media and politics.¹⁷ These scholars understood how important it was to control the media. The second major theme was the relationship between mass media and thought.¹⁸ There was a growing concern that new technologies employed by the mass media would discourage rather than encourage thought.¹⁹

C. The Function of Mass Media

The first function of mass media is a most obvious and innocuous function: to disseminate information among people. A by-product of this function is the formulation of public opinion. Public opinion, in turn, affects what the media industry produces and has an effect on political decisions. One of the most important theoretical works on the relationship between the media and public opinion is *The Structural Transformation of the Public Sphere*, by the German philosopher Jürgen Habermas.²⁰ Habermas discusses the history of the public sphere and how the exchange of information and ideas through mass media effects public opinion.

The second function of mass media is to earn revenue for the people who are in media business.²¹ This function creates a conflict of interest within the media industry.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See generally, THE FRANKFURT SCHOOL READER, (Andrew Arato & Eike Gebhardt eds. 1982).

¹⁶ *Id.* Max Horkheimer, *The Authoritarian State*, in THE FRANKFURT SCHOOL READER, (Andrew Arato & Eike Gebhardt eds. 1982).

¹⁷ See generally, THEODOR W. ADORNO, THE JARGON OF AUTHENTICITY, (Knut Tarnowski trans., Northwestern University Press 3d. ed. 1989)(1964).

¹⁸ *Id.*

¹⁹ See ADORNO, *supra* note 17, at 124.

²⁰ JURGEN HABERMAS, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (Thomas Berger trans., MIT Press 1991)(1962).

²¹ *Id.*

On the one hand, journalists have a duty to present the news in a fair and unbiased manner. On the other, media companies are controlled by corporations looking to make a profit. The situation is further complicated by the concentration of ownership in the mass media.²² Due to the growing control of large corporations over the mass media, the diversity of voices has recently decreased.

D. The Power of Mass Media

History demonstrates that it is dangerous for the mass media to be closely controlled by a single group. First, the mass media has the power to influence thought and behavior.²³ This power, of course, can be used for good or evil. The rise of the Third Reich provides several examples of the power of mass media.²⁴ Hitler quickly realized the potential of the mass media and skillfully indoctrinated the majority of the German populace by abusing mass media's power of persuasion. This is evidenced by his remark that he could never have conquered Germany without the loudspeaker.²⁵

In addition to using the radio, Hitler employed the services of various film directors.²⁶ For example, Hitler hired Leni Reifenstahl to create "The Triumph of the Will".²⁷ This was a film that Hitler made of the Nazi Party congress held in Nuremberg in 1934. The rally scenes offer a potent example of the camera's capability to propagandize.²⁸ This power to influence large groups of people could, of course, also be used toward the public good. The reality is that the power of the mass media to do either good or evil lies in the hands of the people who control it.

Second, those who control the mass media can control the masses.²⁹ This viewpoint holds that the mass media can be viewed as a "culture industry", with the power to systematically indoctrinate individuals with the ideological values and ways of life of established society.³⁰ If one accepts this viewpoint, then the media can also be said

²² See generally, EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA*, (Pantheon Books 1988).

²³ Jamie F. Metzl, *Information Intervention: When Switching Channels Isn't Enough*, 76 *FOREIGN AFFAIRS* 6 (1997).

²⁴ WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH*, 189 (Simon & Schuster 1981)(1959).

²⁵ See generally, JACQUES ATTILI, *Noise: The Political Economy of Music*, (Brian Massumi trans., University of Minnesota Press 3d ed. 1989)(1977).

²⁶ See SHIRER *supra* note 24, at 189.

²⁷ *Id.*

²⁸ LESLIE HALLIWELL, *HALLIWELL'S FILM GUIDE*, (Harper Perennial, 1995).

²⁹ See generally, HERMAN, *supra* note 22.

³⁰ See Kellner, *supra* 3, at 10.

to be an instrument of social control and mass deception. The power to manipulate the public increased dramatically through the advent of electronic media, especially television and film.

III. Television Today

A. The Popularity of Television in Europe

The percentage of European households containing television sets has increased dramatically in the past few years, and the number of television stations is expected to double by the year 2000.³¹ Programming is also expected to increase from 250,000 hours in the late 80's to approximately 400,000 hours in the late 1990's.³² Recent surveys also demonstrate that there are over 800 million television sets worldwide.³³ Even more impressive is the fact that the average viewer's daily consumption of television is measured in hours rather than minutes.³⁴ Indeed, in many American households, the television is on all day, providing a continuous flow of images and information. There is no question that television has a powerful and pervasive influence over people and how they view the world. Based on its overwhelming popularity, television has replaced print and radio as the central storyteller of culture.³⁵ The EC understands how popular television has become in the past twenty years and is concerned with maintaining some control over its expansion.

B. The Controversy Continues

The magnitude of television's influence and effect on culture continues to be the source of tremendous debate. Conservatives argue that the media is controlled by a liberal elite who produce television programs that subvert traditional values and promote alternative (i.e. degenerate) lifestyles.³⁶ Former Vice-President Dan Quayle's well publicized criticisms of the television character, Murphy Brown, for conceiving a child out of wedlock, is just one expression of this conservative fear.³⁷ Moderates argue that

³¹ See Kessler, *supra* note 4, at 565.

³² *Id.*

³³ Lucien J. Dhooze, *No Place for Melrose: Channelsurfing, Human Rights, and the European Union's "Television Without Frontiers" Directive*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 279, 280 (1996).

³⁴ *Id.*

³⁵ Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L. J. 667, 704 (1994).

³⁶ See generally Kellner, *supra* note 3; Lisa L. Garrett, *Commerce Verses Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT'L L. & COM. REG. 553, 561 (1994).

³⁷ See Price, *supra* note 35, at 691.

television shows can offer a source of inspiration as well as help promote tolerance. For example, Vice President Gore praised Ellen Degeneres for her bravery in portraying a lesbian character on national television.³⁸ Liberals argue that television is dominated by business imperatives which seek to promote consumerism rather than culture.³⁹ The debate over the influence of television in Europe has recently intensified due to the proliferation of channels and the increasing popularity of foreign broadcasting.⁴⁰

C. Television and Knowledge

Broadcasting is a powerful medium for the communication of information, ideas and opinions.⁴¹ After recognizing the role television plays in the dissemination of images and ideas, it is easy to see why Europeans are so wary of entrusting their television programming to the free market.⁴² Knowledge comes to us through a network of prejudices, opinions, self-corrections, presuppositions and exaggerations -- a medium of experience that is often filtered by the media companies who produce the images people consume.⁴³ If television is a large part of people's experiences, and people's experience is how they come about knowledge, then what people experience on television affects what they know. Europeans are concerned with preserving what the Europeans experience and learn about their culture because much of their culture is experienced through television.⁴⁴

Television is tremendously popular and controversial. Member-states cannot agree about the effect television has on culture. Some politicians argue that television has no effect on culture and that the market should decide. Other politicians argue that television does have an effect on culture, and therefore should be regulated.⁴⁵ Because there is no consensus on the effects of television, Europeans believe that television should not go unregulated.⁴⁶

³⁸ See KELLNER, *supra* note 3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Donaldson, *supra* note 1, at 97.

⁴² *Id.*

⁴³ THEODOR ADORNO, *MINIMA MORALIA*, (E.F.N. Jephcott trans., Verso 6th ed. 1991)(1951) at 80.

⁴⁴ *Id.*

⁴⁵ See Kellner, *supra* note 3, at 10.

⁴⁶ See Donaldson, *supra* note 1, at 97.

IV. The Regulation of Television in Europe

A. The Decision to Regulate Television

Until the last few years, most Europeans had access to only a few channels.⁴⁷ Recent technological developments created the need to find new methods of regulation, including the proliferation of inter-European services such as cable and direct broadcast satellite television.⁴⁸ These recent developments called for an EC-wide approach.⁴⁹ Privatization of television stations and liberalization of private ownership laws have also contributed to this need for new laws.⁵⁰

As the popularity of television in the EC increased, so did the level of concern about its influence.⁵¹ The EC therefore decided to restrict the amount of foreign (i.e. non-European) broadcasting.⁵² Because television is such a powerful force in people's lives and the way they receive and transmit culture, the European Council believes it should restrict the quantity of foreign television programming broadcast in Europe.⁵³ The Europeans fear that, as Jay Leno joked during the inauguration of NBC's European Super Channel, "[the Americans are] going to ruin [European] culture just like [they] ruined [their] own."⁵⁴

B. The Green Paper

The first step towards harmonizing the television broadcasting laws came in 1984, when the European Council decided to commence a two-year study of the audio-visual industry within the EC. In 1986, the European Council issued the "Television Without Frontiers" Green Paper ("Green Paper"). The Green Paper set forth a framework for harmonizing and integrating the member states' broadcasting laws in order to facilitate the development of a single market within the EC.⁵⁵ The single market was designed to replace the then-existing patchwork of national broadcasting laws by each

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Filipek, *supra* note 1, at 327.

⁵⁰ See Kessler, *supra* note 4, at 564.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, Com (84) 300 final/2 at 3 ["Green Paper"]. The Green Paper discusses the different public policy issues raised by the Directive.

⁵⁴ See Price, *supra* note 35, at 694.

⁵⁵ See Donaldson, *supra* note 1, at 96.

member state.⁵⁶ The Green Paper also recognized that broadcasting is a powerful medium for the communication of information, ideas and opinions.⁵⁷ Furthermore, broadcasting influences the attitudes of all EC citizens in the areas of political, social, educational and cultural affairs which are associated with some of society's most fundamental values.⁵⁸ Broadcasting's role in these areas makes it an especially important factor in the development of the EC as an association of democratic states seeking to develop an increasingly integrated economic, social and political entity.⁵⁹

C. The "Television Without Frontiers" Directive

In October 1989, the European Council adopted the "Television Without Frontiers" Directive ("Directive").⁶⁰ The goal of the Directive was to harmonize the broadcasting laws of the member-states. The EC further was asked to create a common market in television broadcasting, allowing television programming to flow across national borders.⁶¹ In order to achieve these goals, the Directive imposes two central obligations upon the member-states. The first obligation is to insure that all television broadcasts originating within the jurisdiction of each member-state comply with national law. The second obligation is that the member-states must guarantee the freedom of reception of television broadcasts originating in other member-states, and may only restrict retransmission of such broadcasts in their territory under limited circumstances.⁶²

D. The Quota on Foreign Television Programming

The most controversial section of the Directive is Article Four.⁶³ Article Four provides that "[M]ember-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."⁶⁴ The Directive also states that the majority requirement is to be achieved progressively, taking into account the broadcasters' various responsibilities to its viewing public.⁶⁵ The language of Article Four raises four important

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Council Directive No. 89/552, O.J. L 298/23 ["Directive"].

⁶¹ *See* Filipek, *supra* note 1, at 323.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See* The Directive, *supra* note 60 at Article Four and Filipek *supra* note 1, at 332.

⁶⁵ *Id.*

issues concerning the administration of the quota.⁶⁶

The first issue is whether the “majority proportion” requirement establishes a floor or a ceiling for the amount of time European broadcasters may require broadcasters to reserve for European works.⁶⁷ The second issue is whether the Directive permits a member state to enforce the quota on an overall, nationwide basis or if a member-state must require each broadcaster within its jurisdiction to reserve a majority of air time for European works.⁶⁸ The third issue concerns the meaning of the qualifying language, “where practicable and by appropriate means.”⁶⁹

E. European Works Defined

The fourth and most controversial issue concerns the definition of a “European Work.” Pursuant to the Directive, a “European Work” is a program “originating from” a member-state, a member state that is a party to the television convention, or a foreign country with which the EC has concluded a special arrangement.⁷⁰ To qualify as a work originating from one of the member-states, it must be made primarily by authors and workers residing in one or more of these states, and the production must be controlled by producers established in one or more of these states.⁷¹

Based on this language, it is clear that the defining characteristic of a “European Work” is European control.⁷² Critics argue that this section should be eliminated because it concentrates more on procedure than substance.⁷³ According to the Directive, a work may qualify as “European” if it is created, produced, or funded by Europeans or if European labor is used.⁷⁴ Even though a television program may qualify as a “European work,” it does not necessarily mean that it will be any more “European.”

V. The United States Reaction to the Directive

A. The United States Complaint

Shortly after the EC adopted the Directive, the United States filed a complaint

⁶⁶ *Id.*

⁶⁷ See Filipek, *supra* note 1, at 332.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Dhooge, *supra* note 33, at 327.

⁷⁴ See The Directive, *supra* note 60.

under the General Agreement on Tariffs and Trade⁷⁵ ("GATT") Article XXII, which provides for bilateral consultations on trade matters.⁷⁶ Consultations under the GATT Articles XXII are usually confidential.⁷⁷ The substance of the U.S. complaint can be derived from several sources.⁷⁸ The U.S. complaint alleged that GATT covers trade in television programming, and that the Directive's quota for European works violated three principles under GATT.⁷⁹

1. The Most Favored Nation Argument

The U.S.'s first argument is that the Directive violates GATT's requirement of Most Favored Nation ("MFN") treatment.⁸⁰ Article I generally requires that "any advantage, favor, or immunity" granted by one contracting party to another must be extended to all contracting parties.⁸¹ The equal treatment requirement applies to customs duties and charges of any kind, as well as all rules and formalities in connection with importation and exportation, and all matters referred to in paragraphs two and four of Article III.

2. The National Treatment Argument

The U.S.'s second argument is that the Directive violates the national treatment requirement of Article III.⁸² Whereas the MFN principle requires that imports from different nations be treated equally, national treatment requires that foreign goods be given the same treatment as domestically-produced goods with regard to internal taxation and regulation.⁸³ The national treatment principle expresses GATT's preference that import protection be through customs duties, not through internal taxes or government regulations that discriminate against the sale of foreign goods.⁸⁴

⁷⁵ General Agreement on Tariffs and Trade ["GATT"], Oct. 30, 1947, 55 U.N.T.S. 187.

⁷⁶ See Filipek *supra* note 1, at 345; Article XXII, one of GATT's dispute settlement provision, requires that GATT contracting parties afford each other "sympathetic consideration" and "adequate opportunity for consultation" regarding matters within the scope of the General Agreement.

⁷⁷ *Id.*

⁷⁸ See USITC REPORT, *supra* note 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See GATT, *supra* note 75, art.I(1).

⁸² *Id.*

⁸³ See Filipek, *supra* note 1, at 348.

⁸⁴ *Id.*

3. The Quota Argument

The U.S.'s third argument addresses GATT's prohibition of quantitative restrictions, or quotas.⁸⁵ Article XI of GATT bans the use of all prohibitions or restrictions other than tariffs on the importation or exportation of products.⁸⁶ The ban on quota expresses the predominant view of GATT's drafters that quantitative restrictions, unlike protective tariffs, severely impede the expansion of trade and inevitably invite discrimination, since the quantity of permissible imports must be allocated among foreign producers.⁸⁷

B. The European Community's Rebuttal

1. The Service Argument

The EC's response to the allegations made by the U.S. in this dispute is composed of three main counter-arguments.⁸⁸ The first counter-argument is that broadcasting is a service and hence does not fall within GATT jurisdiction.⁸⁹ Because GATT only governs transactions of "goods" or "products", trade in the service of entertainment does not fall under GATT.⁹⁰ It should also be noted that the characterization of broadcasting as a service has deep roots in EC law. The European Courts of Justice have consistently ruled that "the transmission of television signals...comes as such within the EEC treaty relating to services."⁹¹ The 1984 Green Paper on broadcasting also cites GATT's service provisions as the legal basis for harmonizing its laws.⁹²

2. The Cultural Exception

The EC's second counter-argument claims that even if television programming was construed as a "good" under GATT, both GATT and the general principles of international trade law still recognize the cultural exception that exempts television

⁸⁵ *Id.*

⁸⁶ See GATT, *supra* note 75, art.XI.1.

⁸⁷ JOHN JACKSON, WORLD TRADE AND THE LAW OF GATT 42-48 (1969); See Filipek, *supra* note 1, at 348.

⁸⁸ *Id.*

⁸⁹ See Reply to questions put forth by the American delegation on the Directive and on the convention of the Council of Europe at 4 (undated)(on file at the Directorate General for External Relations of the EC Commission) ("EC Reply").

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Green Paper, *supra* note 53, at 105-25.

programming and other audio-visual works from GATT's tight restrictions.⁹³ The so-called cultural exception is based on the idea that certain "cultural products" reinforce and mold a nation's values, traditions and culture.⁹⁴

The EC maintains that given the pervasive influence of television on peoples' lives, the unchecked importation of foreign produced programs risks foreign acculturation and the erosion of national identity, values and languages.⁹⁵ Without protection through regulation, European culture as well as the European audio-visual industry that "supports" it would be seriously threatened by the extremely powerful, experienced and well-organized U.S. entertainment industry.⁹⁶

3. Not Legally Binding

The EC's third counter-argument states that the quota is not legally, but rather politically binding.⁹⁷ That is to say, the quota merely seeks to establish a community-wide goal to harmonize the broadcasting laws.⁹⁸ Because the quota is merely a suggestion and not legally binding, it does not violate GATT's prohibition on legally binding obligations that restrict international trade.⁹⁹

The EC also mentioned Canada's "cultural industries" exception,¹⁰⁰ as well as the foreign ownership provisions of American Broadcasting regulations.¹⁰¹ The U.S. restrictions on foreign ownership of broadcasting companies will be discussed further below. It is important to note that as of the present time, there has been no resolution to this conflict. Both parties are unwilling to compromise, but this conflict has not lead to the formation of a GATT dispute panel or unilateral retaliation by the United States.¹⁰²

⁹³ See EC Reply, *supra* note 89.

⁹⁴ See generally EUR. CULTURAL FOUND. & EUR. INS. FOR MEDIA, EUROPE 2000: WHAT KIND OF TELEVISION, A REPORT OF THE EUROPEAN TELEVISION TASK FORCE 1-25 (1988) ("T.V. Task Force Reports").

⁹⁵ *Id.*

⁹⁶ See T.V. Task Force Report, *supra* note 94, at 1-8.

⁹⁷ See USTIC Report, *supra* note 2, at 6-114

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Section 1, Article 2005 of the Canada-United States Free-Trade Agreement states that "Cultural industries are exempt from the provision of this Agreement, except as officially provided..." Canada-United States Free-Trade Agreement opened for signature on Dec. 22, 1987, 27 I.L.M. 281 ("Canada-U.S. Free-Trade Agreement").

¹⁰¹ 47 U.S.C. § 310.

¹⁰² See Filipek, *supra* note 1, at 370.

VI. Arguments In Support of Limiting Foreign Television Broadcasting

A. The Economic Argument

The EC claims that they need to protect the cultures of the member-states from the threat posed by foreign - especially American - television productions.¹⁰³ There are three major reasons why the EC decided that the U.S. has an unfair economic advantage over its European competitors.¹⁰⁴

The first reason is that the U.S. entertainment industry holds a large competitive advantage in television production.¹⁰⁵ American television producers can offer television programs at lower prices because, in contrast to their European competitors, they have a large domestic market, and can recoup most of their costs through domestic sales.¹⁰⁶ Based on this analysis, the EC needs to protect European television producers.¹⁰⁷

The second reason why the U.S. has an unfair economic advantage is that the American productions generally appeal to the masses. This "mass appeal" makes these productions more marketable to all European countries.¹⁰⁸ In contrast, most European productions tend to have a country-specific appeal.¹⁰⁹ This is largely due to the fact that most European productions, with the obvious exception of the works being produced in the United Kingdom and Ireland, are created in languages other than English.¹¹⁰

The third reason why the U.S. has an unfair advantage is that it is cheaper to make television programs in the U.S. than in Europe. If there are no restrictions placed on the amount of foreign television productions broadcast in Europe, then the Americans could flood the European market with cheaper programs, thereby destroying any demand for local content.¹¹¹ The Europeans' fear that this will also result in job reduction within the local work force.¹¹²

¹⁰³ See EC Reply, *supra* note 89.

¹⁰⁴ *Id.*

¹⁰⁵ See Donaldson, *supra* note 1, at fn.108

¹⁰⁶ See Kessler, *supra* note 4, at 565

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Donaldson, *supra* note 1, at fn.90.

B. The Political Argument

The political arguments set forth by the EC are much more subtle than the economic arguments.¹¹³ Accordingly, the political arguments are much more difficult to define.¹¹⁴ These arguments are based on the belief in the ability of culture to influence politics.¹¹⁵

C. The Cultural Argument

Two major cultural arguments are put forth by the EC.¹¹⁶ The first argument is that restricting the amount of foreign programming broadcast in Europe is necessary to promote European culture.¹¹⁷ Most of the material supporting the cultural preservation argument is found in the Directive and related official commentaries.¹¹⁸

The second argument states that if there are no restrictions on foreign broadcasting, then the market will be flooded with cheap programs produced by foreigners about foreign cultures.¹¹⁹ It continues by stating that if the market is flooded by such programs, there will be no money to support domestic (i.e. European) television programs.¹²⁰ If there is no money available to support programs about European culture, then they will not be produced.¹²¹ If such programs are not produced, then European culture will suffer.¹²² As the former European Commission President Jacques Delors said in defense of the EC's position, "cultural goods are not like other merchandise" and deserve special protection because "culture is there to reassure, it is part of our roots."¹²³

D. The Market for Loyalties Argument

This argument is a synthesis of all of the other arguments.¹²⁴ This argument is

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Lisa L. Garrett, *Commerce Verses Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT'L L. & COM. REG. 553, 564 (1994).

¹¹⁷ *Id.*

¹¹⁸ See Dhooge, *supra* note 33, at 316.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Price, *supra* note 35, at fn.25; and Hillary Clark, *EU vows to "Move Forward"; Consensus on Maintaining the Cultural Identity Sought as AV Confab Opens*, HOLLYWOOD REP., July 1, 1994, available in LEXIS, Entertainment Library, Holrep File.

¹²⁴ See Price, *supra* note 34, at 667.

explained through the Market for Loyalties theory.¹²⁵ The Market for Loyalties,¹²⁶ unlike the marketplace of ideas, looks a lot like an actual market place.¹²⁷ Like the markets for goods and services, the Marketplace for Loyalties reflects monopolistic and oligopolistic practices, including efforts by competitors to exclude new entrants.¹²⁸ The supply side in the Market for Loyalties has a structure that is badly served by reductionist terms like state, government or political party.¹²⁹ The sellers in this market are all those for whom myths, dreams and history can somehow be converted into power and wealth. These sellers are typically entities such as states, governments, interest groups, and businesses.¹³⁰ The buyers are citizens, subjects, nationals, consumers. Consumers are the recipients of the packages of information, propaganda, advertisements, drama, and news.¹³¹ The consumer pays for one set of identities or another in several ways that together, we call "loyalty" or "citizenship."¹³² Payment is not always expressed in the usual terms of the debate. Here, people do not simply pay for loyalty with taxes, but rather with a sense of their identity.¹³³

Another aspect of this argument is that there is a connection between the programming that people watch and the lifestyles they lead.¹³⁴ For example, if someone watches the popular television program "Bay Watch," rather than a show about the myth of Beowulf¹³⁵, this could have an effect on the way they view their culture and the rest of the world.¹³⁶ Another argument favoring the restriction of American programming cites the human cost.¹³⁷ The human cost is the emergence of "homo-consumers," i.e. the "ideal consumer" whose need for consumption is stimulated and controlled largely by U.S. commercial and advertising interests.¹³⁸

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Beowulf is the legendary hero of an anonymous Old English Epic poem believed to have been composed in the early eighth century. Beowulf slays the monster Grendel and its mother becomes king of the Geats, and dies fighting a dragon.

¹³⁶ See Price, *supra* note 35, at 667.

¹³⁷ *Id.*

¹³⁸ Ming Shao, *Is There no Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L. 105, 126 (1995).

VII. The United States Position

A. The Dominance of the U.S. Entertainment Industry

The U.S. entertainment industry collects more revenue from foreign sales than any other industry except for commercial aircraft.¹³⁹ The visual media (movies, television, pay television, and home video rentals) generate approximately USD \$18 billion in foreign revenues annually.¹⁴⁰ In 1992, the entertainment industry produced a trade surplus of USD \$4 billion.¹⁴¹ International revenues have become increasingly important to U.S. companies because their domestic shares of the domestic television programming market and net sales figures have declined in the 1990's.¹⁴² Another important factor to consider is that the entertainment industry contributes significantly to the U.S. job market.¹⁴³ Recently, the number of workers in the film, television, and home video sectors reached close to 500,000.¹⁴⁴ Perhaps even more pertinent are secondary employment figures.¹⁴⁵ For example, for every two jobs created in the motion picture industry, roughly three jobs are created in the timber, construction, costume, and catering industries.¹⁴⁶

B. The Importance of the European Market

The European market is very important for the U.S. entertainment industry for many reasons. First, most of the U.S. entertainment industry's international revenue is derived from sales in the European market.¹⁴⁷ In 1989, sales to the E.C. represented around half of the U.S. television and film industry's USD \$2.5 billion annual trade surplus.¹⁴⁸ Second, the U.S. entertainment industry clearly dominates the European market for films.¹⁴⁹ In addition, American television shows occupy twenty-five to thirty

¹³⁹ Roger Cohen, *With Time Warning, Europeans Reject U.S. Movie Compromise*, N.Y. Times, Dec. 24, 1993 at A1, D6.

¹⁴⁰ David J. Fox, *Entertainment Industry Gets Clinton's Free Trade Pledge*, L.A. TIMES, Oct. 15, 1993, at B7.

¹⁴¹ *Id.*

¹⁴² Clint N. Smith, Note, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Programming Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. LAW, 97, 102 (1993).

¹⁴³ *Id.*

¹⁴⁴ Patrick Lee & James Bates, *Hollywood, Its Boffo*, L.A. TIMES, Sept. 11, 1993 at D1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Jacqueline Frank, *European Television Without Borders or Without Americans*, July 26, 1989.

¹⁴⁹ Chris Fuller, *GATT Sez Scat to H'Wood*, DAILY VARIETY, Dec. 15, 1993.

percent of European television program schedules.¹⁵⁰ In contrast, European television shows only appear on public broadcasting, select cable and direct broadcast satellite channels in the U.S.¹⁵¹ European films also perform poorly in the American market.¹⁵² French films, for example, have managed to capture less than one percent of the movie market.¹⁵³ European countries - especially France - believe that their national cultures are being suffocated by the glut of U.S. programming.¹⁵⁴

The Europeans also fear that the percentage of American television programming in Europe will increase because American programs are marketed in Europe at cut-rate prices.¹⁵⁵ U.S. programmers can offer low prices because they enjoy a large domestic market, and can recoup most of their investment costs through U.S. networks.¹⁵⁶ In contrast, European productions are generally only broadcast to small national audiences because the European film industry has been unable to create programs that appeal to audiences outside their respective countries.¹⁵⁷ This limitation in audience size decreases advertising revenues and higher prices for these programs.¹⁵⁸ French films, for example, cost nearly ten times as much as U.S. films. Newer stations in need of programming lack the capital to produce their own programs and are, therefore, attracted to U.S. products.¹⁵⁹

Shortly after the Directive was issued in 1989, the U.S., led by the entertainment industry, attacked the Directive as creating a barrier to American exports of television programming.¹⁶⁰ The U.S. also initiated formal challenges to the Directive under the GATT.¹⁶¹

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Kessler, *supra* note 4.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Filipek, *supra* note 1, at 325; and Laurence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 225, fn. 315 (1994). Here Kaplan quotes Jack Valenti,

One struggles to understand how television programs from one country to another could ever frighten or unhorse myth, legend, truth and triumph riding for so long and so sturdily in the hearts and minds of another country. Does anyone truly believe that an Italian television show of French television is going to fatally affect Gallic (*sic*) culture?... Which is why this Directive has little to do with culture. This is a hard, cold economic issue.

¹⁶¹ See Filipek, *supra* note 1, at 325.

C. The Argument For Free Trade

The U.S. claims that the goal of the Directive is not to protect culture, but rather to protect the European audiovisual production industry from fair and reasonable competition.¹⁶² It further claims that the Directive constitutes an impermissible barrier to free trade and violates, *inter alia*, several key provisions of GATT.¹⁶³ It is clear that the U.S. has substantial financial interests in eliminating the Directive and opening the EC's television programming market.¹⁶⁴ There are no analogous primary sources to the Directive in the U.S. because restrictions placed on broadcasters based on the source of programming broadcast in the U.S. would most certainly be unconstitutional. That does not mean, however, that there are no restrictions placed on foreigners by the U.S.

The arguments for free trade set forth by the U.S. are severely compromised by the restrictions placed by the U.S. government on foreign ownership and control of broadcasting companies which began in 1912 when Congress passed the Radio Act.¹⁶⁵ The Radio Act was ostensibly passed to placate fears that if the country went to war then foreign owned and controlled radio stations could broadcast information to enemies and disrupt U.S. military communications.¹⁶⁶ The Radio Act's provision restricting foreign ownership were subsequently expanded in Section 311(b) of the Communications Act of 1934 to include broadcast television and telephone companies.¹⁶⁷ These provisions have created even more barriers for foreigners who want to enter the U.S. broadcasting and telecommunication markets. For example, these provisions have recently stymied legitimate efforts by people in South and Central America from expanding their Spanish language broadcasting companies into the U.S. as well as presented substantial hurdles for U.S. companies in closing deals with European telephone companies.¹⁶⁸

¹⁶² *Id.*

¹⁶³ See Kessler, *supra* note 4. France has made it clear that it takes the limitations seriously. Indeed, France will fine broadcasters in violation of the national community content requirement USD \$10,000 for each hour of non-community programming aired in excess of the stated maximum. As a result of this penalty, several contracts for US produced programming have been terminated.

¹⁶⁴ *Id.*, at 563. The importance of the EC as a market for American television should be recognized in light of the U.S. entertainment industry, which collects more revenue than any other US industry other than commercial aircraft. Visual media alone generates approximately USD \$18 Billion in foreign revenues annually.

¹⁶⁵ See generally W. Scott Hastings, *Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond*, 29 VAND. J. TRANSNAT'L L. 817 (1996) and see Ian M. Rose, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1194 (1995).

¹⁶⁶ See Hastings, *supra* note 165, at 832.

¹⁶⁷ *Id.* at 833.

¹⁶⁸ *Id.* at 820

Perhaps the most notorious example of a conflict created by these provisions involved the Australian-based News Corporation's ("News Corp.") subsidiary Fox Television ("Fox TV") effort to renew its license for WNYW-TV (Channel 5) in New York City.¹⁶⁹ The FCC ultimately found that Fox TV, which is controlled by the controversial media tycoon Rupert Murdoch, had ownership interest in excess of Section 310(b)'s indirect ownership limits. Nevertheless, the FCC granted a public interest waiver to Fox TV and allowed then to continue broadcasting.¹⁷⁰

Some may argue that this demonstrates that the FCC is willing to accommodate foreign-owned broadcasting companies. This argument, however, is flawed for the following four reasons. First, this was the first and only occasion that the FCC has granted a foreign corporation a waiver under Section 310(b). Second, the FCC did not base its decision on public interests grounds, but rather on the equities of this particular case. Third, this decision concerned the fairness of terminating a broadcasting license held by a foreigner for over a decade, not a new license. Fourth, Rupert Murdoch, although originally from Australia, was granted U.S. citizenship before the application for renewal was filed.¹⁷¹ For these reasons, it is highly improbable that the FCC would ever grant another waiver under Section 310(b).¹⁷²

Recently, the U.S. had the opportunity to relax the restrictions on foreign companies under Section 312(b) when Congress passed the 1996 Telecommunications Act.¹⁷³ Congress refused to reduce these restrictions and Section 310(b) continues to prohibit foreign companies from fully participating in broadcasting and telecommunications market here in the U.S. These primary sources as well as the Fox TV case illustrate how the U.S. restricts free trade in broadcasting.

The U.S.'s argument for free trade in television programming are also compromised by the fact that societies are held together solely by a shared culture.¹⁷⁴ Free trade principles simply do not provide the cultural order necessary to maintain social cohesion. Accordingly, the EC is justified in using some restrictions on foreign broadcasting to address the failure of the free market.¹⁷⁵

¹⁶⁹ In re Application of Fox Television Stations, Inc., 11 F.C.C.R. 5714.

¹⁷⁰ Hastings, *supra* 165, at 834.

¹⁷¹ *Id.*, at 835.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Lisa L. Garret, *Commerce Verses Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C.J. INT'L L. & COM. REG. 553, fn. 72 (1994).

¹⁷⁵ *Id.*

D. The Argument That Culture Reflects the People's Choices

The basis for this argument is that culture does not flow from government, but rather from people's choices.¹⁷⁶ The Directive prohibits European citizens from choosing their cultural destiny.¹⁷⁷ Deprived of free selection, Europeans will be restricted from choosing their cultural destiny.¹⁷⁸

VIII. Proposed Solutions

In this section, the author presents several suggested solutions for the current debate. Each solution seeks to "correct" the potentially disparate and unfair results posed by the EC's approach to limiting foreign broadcasting.

The first solution is to set up a committee to approve foreign programs and if the television stations have any doubt as to the acceptability of the programs, they could then submit the program to the committee for approval. This would allow for American producers, actors, and writers to participate in the European market for audiovisuals based on the content of their programs rather than their nationality. For example, an American producer and crew making a film about Mozart's childhood in Austria would not be precluded from selling it to Europe.

The second solution is for U.S. entertainment officials to collaborate with the EC and offer the EC expert technical assistance in developing trans-European distribution and marketing networks for audiovisual productions.¹⁷⁹ This would help alleviate some of the EC's concerns about the unfair competitive advantage enjoyed by the Americans.

The third solution is for the U.S. to take steps to help open the U.S. television market for European programmers. As mentioned above, there are very few European television shows or movies shown on American television. The U.S. could, for example, encourage direct broadcast satellite and cable television operators to carry European programming. The next generation of cable and digital broadcasting would make this solution even more realistic because of the increased capacity for programming.

IX. Conclusion

Based on the foregoing analysis, the EC's decision to restrict the amount of

¹⁷⁶ See Dhooge, *supra* note 33, at 322.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Kessler, *supra* note 4, at 609.

foreign television programming broadcasted in Europe is necessary to preserve and protect European culture. The mass media has played an extraordinarily powerful role in the history of Europe in the twentieth century. Furthermore, since World War II, television has swiftly and decisively conquered all other forms of media in the competition for people's attention. Indeed, television now plays the dominant role as nations' story teller and transmitter of culture.¹⁸⁰ The power of television, combined with the negative effects that a flood of foreign programming would have on its culture, more than justify the European Council's quota.

¹⁸⁰ See generally Kellner, *supra* note 3.

