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NO PLACE FOR MELROSE: CHANNELSURFING, HUMAN RIGHTS, AND THE EUROPEAN UNION’S “TELEVISION WITHOUT FRONTIERS” DIRECTIVE

Lucien J. Dhooge*

“[Television brings us] a light of the mind that comes into almost every home in the world, during these last years of the twentieth century. It is the light that new knowledge brings.”

“57 channels, nothin’s on.”

I. INTRODUCTION

“Boob tube,” “idiot box,” a “vast wasteland,” messenger of the global telecommunications village, or harbinger of the coming planetary culture. All of these terms have been used, at one time or another, to characterize the omnipresent medium of modern television. There can be no doubt that network television and its more recent cousin, cable

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* Assistant Professor of Business Law, University of the Pacific; B.A., 1980, University of Colorado; J.D., 1983, University of Denver; LL.M., International and Comparative Law, 1995, Georgetown University Law Center; Member, Colorado and District of Columbia Bars. The author wishes to thank his family and friends for their constant encouragement and inspiration. This article is dedicated to Professor Markus Puder of the Georgetown University Law Center and Professor Wolfgang G. Mincke of the University of Maastricht.


2. BRUCE SPRINGSTEEN, 57 Channels (Nothin’s On), on HUMAN TOUCH (Columbia Records 1992).


television, are wondrous sciences. In the twenty-five odd years since its birth, cable television and its high-tech children, satellite and pay-per-view television, are alive and thriving. A multitude of viewing options are often but a flick of the remote control away.

Love it or loathe it, defenders and critics of television both agree on one thing: television’s presence and ability to communicate events are extremely powerful and virtually limitless. Recent surveys indicate that there are over 800 million television sets worldwide. The average viewer’s daily consumption of television is measured in vast blocks of time, hours not minutes. In many homes, the television projects its images continuously, providing a running commentary of the day’s “electronic events” as a backdrop to the mundane routine of daily existence. Surveys also reveal what every parent who has ever attempted to pry his or her children away from the latest episode of *Barney and Friends* or *Melrose Place* already knows, modern children spend more time every year in front of the television than in their classrooms at school. The living room couch has become their desk and the television’s flickering light their surrogate teacher. The issue of whether the mesmerizing influence television has over its viewers is truly an addiction is best left to sociologists. What is obvious is that, worldwide and irrespective of geographic or political boundaries, television is a pervasive presence.

More controversial is the issue of television’s influence over its viewers and its ability to shape events. Undoubtedly, television is a powerful medium that, if used masterfully, may result in great success, and, if underestimated, may lead to abysmal failure. To see this principle in action one need only recall the 1960 presidential debate between a youthful-appearing John F. Kennedy and an apparently unshaven Richard M. Nixon, the United States’ military experiences in Vietnam and the Gulf War, or the election of Ronald Reagan, “The Great Communicator,” to the nation’s highest post. On a global scale, television has brought the tragedy of the Ethiopian and Somalian famines and the triumph of democracy over the shackles of communism in Eastern Europe, and its converse in Tienanmen Square, into our homes. These examples, and innumerable others, remind us of television’s important role as a


messenger of events and information and portrayer of the human condition.

It may be stated that one of television's greatest achievements is allowing millions of viewers to share common experiences and information on a global and almost instantaneous basis. It is a cliché to state that as a result of television's global reach the world is a smaller place, but it is no less true. The advent of global channels, such as the Cable News Network, allows citizens of the United States, Switzerland, and Japan to view the same images, if they so choose, and to share their thoughts with other members of the global telecommunications village. Information which formerly took days or weeks to arrive at distant locations is beamed daily, on a twenty-four hour basis, to remote corners of the globe. Diverse viewers from all over the world and having disparate backgrounds may share a single image or piece of information garnered from television as their sole element of commonality. Furthermore, images and information shared through global television leads to greater transparency in the arena of national affairs as well as international relations. Indeed, television, along with the other accoutrements of the so-called "information superhighway," has fostered an era of instantaneous global communication and information-sharing. As a result, "a global culture shuffles together the everyday lives of different continents, weaving around the planet a network of electronic information that offers a continuous world-wide show hooked up to life itself."  

8. The author is here referring to shared experiences and information relating to political, social, economic, scientific, and cultural events and phenomena. The author would distinguish this from the spontaneous viewing of an episode of Gilligan's Island or Star Trek, which may be experienced on a global basis through syndication. This distinction is important as shared global access to quality television programming also includes access to considerable "video trash." The author acknowledges that there are those television critics who would conclude that most, if not all, television programming consists of such "video trash." While conceding the existence of poor quality programming, the author would prefer not to take such a cynical outlook on the content of all television programming.

9. Matтеларт, supra note 4, at 7. However, some commentators are not convinced of the desirability of this "continous world-wide show." For example, Clifford Orwin, in his article Compassion and the Globalization of the Spectacle of Suffering, condemns the globalization of television broadcasting, the so-called "CNN Factor," as serving to desensitize viewers and turn them into "voyeurs of the global village." Clifford Orwin, Compassion and the Globalization of the Spectacle of Suffering, quoted in George F. Will, An End to Compassion, WASH. POST, Nov. 19, 1995, at C9. Will agreed with Orwin's characterization and deemed the globalization of television broadcasting as providing a "window on the distress of fellow human beings." Id. United Nations Secretary-General Boutros Boutros-Ghali has characterized the globalization of television news broadcasting
The importance of the technological possibilities of television has not been lost upon members of the international community. Politicians intent upon opening the doors of closed societies or keeping them tightly shut to the outside world have utilized the medium of television to suit their purposes. The importance of this medium was not lost upon the framers of the numerous international human rights instruments that arose in the years subsequent to World War II. The Universal Declaration of Human Rights ("Universal Declaration"), enacted by the United Nations General Assembly in 1948, was the first international instrument to recognize the right of all persons to "seek, receive and impart information and ideas through any media and regardless of frontiers."10

Eighteen years later, the United Nations General Assembly reaffirmed its commitment to the principle of free access to information and ideas through the media by enacting the International Covenant on Economic, Social and Cultural Rights ("ESC Covenant")11 and the International Covenant on Civil and Political Rights ("CP Covenant").12 Article 15 of the ESC Covenant urges contracting states to take all necessary steps to achieve the development and diffusion of science and culture through international contacts and cooperation.13 More specifically, Article 19 of the CP Covenant guarantees the right of all persons to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice."14 Any doubts that existed in the late 1940s

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13. ESC Covenant, supra note 11, at art. 15.

14. CP Covenant, supra note 12, at art. 19(2).
as to the applicability of the Universal Declaration to the relatively new technology of television were most certainly resolved by the protections set forth in the ESC and CP Covenants. Free access to programming and the impartation of ideas through television thus achieved the status of universally protected human rights.

Regional human rights organizations created after the end of World War II also recognized free access to the media, including television, as a human right subject to protection. This right was recognized and protected to the greatest degree by European states and, in particular, by member countries of the European Community. Access to the media and the freedom to receive and impart information therein was first recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all present members of the European Union are parties. Article 10 of the European Convention grants every individual the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. Television


16. The author uses the terms “European Community” and “European Union” interchangeably depending on the time to which the author is referring. For all periods of time prior to January 1, 1993, the effective date of the Treaty of European Union, the author will use the term “European Community.” See Treaty of European Union. The Treaty on European Union, often referred to as the Maastricht Treaty, amends the Treaty Establishing the European Community. See infra note 129. For all subsequent periods of time, the author will use the term “European Union.”


18. As of the time of the writing of this article, the European Union consists of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

19. European Convention, supra note 17, art. 10(1) at 230.
is expressly mentioned as one of the avenues of expression within the parameters of the European Convention.  

Numerous other international agreements concerning free access to the mass media have been endorsed by members of the European Union. For example, all member countries of the European Union are parties to the Helsinki Accords, which arose from the Conference on Security and Cooperation in Europe. The Helsinki Accords, in part, recognize the importance of the dissemination of information between participating states and encourage a wider exchange and showing of audiovisual materials between states. Participating states pledged to facilitate the import of audiovisual materials from other participating states. Participating states also agreed to act in conformity with the principles embodied in the Universal Declaration, the ESC Covenant, and the CP Covenant in the field of human rights and fundamental freedoms. Television is clearly within the definition of "filmed and broadcast information" as utilized throughout the Helsinki Accords.  

Other examples of international agreements relating to free access to the mass media to which members of the European Union have subscribed include the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe ("Copenhagen Document") and the Charter of Paris for a New Europe and a New Era of Democracy, Peace and Unity ("Charter of

20. Id.

21. With the exception of Greece, which is not a party to the CP Covenant, all members of the European Union are also parties to the ESC and CP Covenants. See United States Department of State, Treaties in Force: A List of Treaties and International Agreements of the United States in Force on January 1, 1994 350 (1994).


23. Id. § 2(a)(iii) at 1316 (Co-operation in Humanitarian and Other Fields (Basket II), Information).

24. Id.

25. Id. § 1(a)(VII) at 1295 (Questions Relating to Security in Europe, Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief).

26. Id. § 2(a)(iii) at 1316.

In the Copenhagen Document, participating states reaffirmed their commitment to the principles set forth in the Universal Declaration, the ESC Covenant, and the CP Covenant. These states also expressed their commitment to respect the right of every individual to seek, receive, and impart information and ideas without interference by public authorities and regardless of frontiers. In the Charter of Paris, participating states affirmed the principle that every individual has the right to freedom of thought and expression. Furthermore, participating states reaffirmed their commitment to the principles expressed in the Helsinki Accords.

Despite the free access to the mass media guaranteed in these instruments, efforts to regulate television were made in the 1970s amid growing concern about the pervasiveness of the medium and its content. Early efforts, such as the Reports of the Committee on the Mass Media Material for a European Media Concept ("CAHMM Reports"), declined to place limitations upon access to television programming. CAHMM concluded that the state's proper role did not include content regulation, but, rather, the encouragement of a plurality of information sources to serve the general public.

The conclusions reached by CAHMM were short-lived. Less than six years after the publication of the CAHMM Reports, the Commission of the European Communities issued its report on the audiovisual industry for the Community, entitled Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable ("Green Paper"). The Green Paper included many recommendations for harmonizing Community broadcasting regulation.

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30. Id. art. I, § 9.1 at 1311.
32. Id. at 204.
33. Committee on the Mass Media, Material for a European Media Concept: Reports Submitted to the Committee of Ministers (1980) [hereinafter CAHMM Reports].
34. Id. § 1 at 6.
35. Id. § 3 at 6.
One of the methods of implementing the Green Paper proposed by the Council of Ministers was the imposition of a quota upon television programming originating within the Community. The proposed quota was to commence at thirty percent of broadcasting time for programming originating in the Community and be increased to sixty percent by December, 1992. News, sporting events, game shows, advertising, and teletext services were excluded from the proposed quota.

Two further developments occurred on the heels of the publication of the Green Paper that hastened the Community's enactment of a programming quota. In March 1989, numerous European states, including members of the Community, ratified the European Convention on Transfrontier Television ("Television Convention"). Article 10(1) of the Television Convention obligated signatory states to "ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority portion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services." This allocation of transmission time was to be reached progressively through the application of appropriate criteria.

In September 1989, the application of programming quotas also received support in a less formal and binding fashion in the Charter of Delphes, a document cooperatively produced by the European artistic, scientific, and academic communities. The Charter of Delphes declared television to be the dominant form of mass media and the most influential element of modern culture. Furthermore, the Charter of Delphes' drafters declared the television program to be "an essential expression of living culture" and a reflection of the social and cultural values and

38. Id. art. 2 at 4.
39. Id.
41. Id. art. 10(1) at 247.
42. Id.
44. Id. pmbl. at 53.
45. Id. art. 1 at 53.
characteristics of the broadcasting nation. The Charter of Delphes imposes on every European state the duty of protecting this expression of European culture through all available means, including subsidies and programming quotas.

By late 1989, the stage had been set for the enactment of a binding programming quota within the Community. This quota came to life in the form of a directive adopted by the Council of Ministers on October 3, 1989. The adoption of this directive, popularly coined the “Television Without Frontiers” Directive (“Directive”), culminated a lengthy effort to harmonize broadcasting and media regulation in the member states. After much discussion and amendment, the Directive as adopted provides, in part, that “member states shall ensure, where practicable and by appropriate means, that broadcasters reserve for European Works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services.” This proportion of transmission time is to be achieved progressively, having regard for “the broadcaster’s informational, educational, cultural and entertainment responsibilities.” The Directive requires member states to enact implementing legislation at the national level within five years of the adoption of the Directive. Member States are also free to “require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the area covered by [the Directive].” In any event, the European content of a member state’s television broadcasting is not permitted to fall below its average for the year 1988. The purported purposes of the Directive are to prevent “the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information

46. Id. art. 2 at 53.
47. Id.
49. The moniker “Television Without Frontiers” was first utilized in the Green Paper. See Green Paper, supra note 36.
50. Directive, supra note 48, art. 6(1)-(4) at 27. For a definition of the term “European works,” see infra note 130 and accompanying text.
51. Directive, supra note 48, art. 6(1)-(4) at 27.
52. Id. art. 4(4) at 27.
53. Id. art. 3 at 26.
54. Id. art. 4(2) at 26.
sector as a whole,\textsuperscript{55} and to ensure "the independence of cultural development in the Member States and the preservation of cultural diversity in the Community."\textsuperscript{56}

This article examines the Directive against this background and in light of the prior commitments of the member states to permit free access to the mass media regardless of national boundaries as provided for in various binding and nonbinding international and regional human rights instruments. This article first examines in detail the history of television programming regulation in the European Union leading to the enactment of the Directive, with specific emphasis on the issue of broadcasting quotas. It then analyzes the quota set forth in the Directive in light of the undertakings of member states pursuant to these various human rights instruments. Finally, this article analyzes the alleged primary motive underlying the enactment of the Directive, specifically, the protection and preservation of European culture, and the compatibility of this purpose with the language and operation of the Directive. This article concludes that the real motivation of the Directive is to provide economic protection to the European television and cinematographic industries against vastly stronger foreign competitors and prevent these competitors' further interpenetration of the European Union's audiovisual market.

\section{II. The Historical Background of the "Television Without Frontiers" Directive}

\subsection{A. The Committee on the Mass Media}

Initial Community efforts to regulate television programming commenced in the 1970s amid growing concern about the pervasiveness of the medium and its content. In 1976, the Committee of Ministers of the Council of Europe established a committee of government-appointed experts to examine numerous issues relating to the role of the audiovisual industry in the member states. This committee, the CAHMM, spent four years examining such controversial issues as "the role of the State with regard to the media,"\textsuperscript{57} "international aspects of the free circulation of

\textsuperscript{55} Id. pmbl. at 24.

\textsuperscript{56} Id.

\textsuperscript{57} CAHMM Reports, \emph{supra} note 33, at 1, 4-14. For a thorough summary of the CAHMM Reports, see Laurence G. C. Kaplan, \textit{The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture}, 8 \textit{Emory Int'l L. Rev.} 255, 271-77 (1994).
information," and the “cable distribution of radio and television programmes.”

The conclusions set forth in the CAHMM Reports regarding these issues are surprising given the subsequent history of audiovisual media regulation in the European Union. Specifically, the CAHMM concluded that “[t]he principle of freedom of information entails that the proper role of the State is to take steps to ensure that the media be free to function in accordance with the requirements of a democratic society.” The CAHMM also concluded that the state’s proper role did not include making determinations of what is to be published or broadcast by the media. According to the CAHMM, any media policy formulated at the Community level should not only serve to improve the existing media system but also to “maintain a plurality of information sources, and allowing thereby a plurality of ideas and opinions.”

The CAHMM Reports appear to be consistent with the freedom to seek, receive, and impart information and ideas through any media and regardless of frontiers as set forth in numerous international and European human rights instruments. State content regulation is explicitly rejected. The term “broadcasting quota” does not appear in the CAHMM Reports. Rather, the CAHMM Reports reflect the appropriate role of the government in the regulation of the audiovisual industry in a democratic society. Broadcasters are free to air programming with little actual or potential interference by government regulators with regard to content. This freedom allows broadcasters to provide, and viewers to choose from among, a wide range of information and sources and permits a wide variety of ideas and opinions to circulate within society. Unfortunately, the atmosphere in which the CAHMM rejected governmental content regulation of the broadcast media was to have a short six-year life span.

B. The Green Paper

In 1986, the European Commission completed a two-year study of the audiovisual industry within the Community and published the Green Paper. The Green Paper has been aptly described as “a preparatory

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58. CAHMM Reports, supra note 33, at 15-18.
59. Id. at 91-107.
60. Id. § 1 at 6.
61. Id.
62. Id. § 3 at 6.
63. Green Paper, supra note 36. For a thorough summary of the Green Paper, see
document intended to provide a basis for the harmonization of national laws regulating television broadcasting among the . . . member states."64 The Commission recommendations contained in the Green Paper were made to achieve the primary objectives of fostering of the audiovisual industry within the European Community and promoting greater integration within and without the Community.65 In this regard, the Commission made several recommendations regarding the proposed course of audiovisual media regulation within the Community.

As will be discussed in a later section of this article, among the methods proposed for the implementation of the Green Paper was a proposal to impose a quota on television programming originating within the Community.66 The proposed quota initially required member states to reserve thirty percent of their broadcast time for programming originating in the Community, excluding news, sporting events, game shows, advertising, and teletext services.67 The proposed quota was to increase to sixty percent of programming by December, 1992.68 This proposal represented the first instance of strict content regulation of television through a Community-wide quota and would provide a crucial basis for the inclusion of a programming quota in the Directive three years later.

The quota set forth in the Proposed Directive was not without controversy. West Germany and Denmark opposed the quota requirement on the basis of a right to municipal control over cultural affairs. Specifically, West Germany contended that the regulation and protection of culture was a matter of local concern, and that the Community could therefore not preempt the ability of federal and local governments to act in this field.69 Denmark advanced a similar argument and further contended that the Community was not competent to legislate in the field

Kaplan, supra note 57, at 277-79.


65. Green Paper, supra note 36, at 28. The European Commission noted that the “dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share . . . .” Id. Furthermore, the Commission noted that the free flow of information across national borders would serve as “a source of cultural enrichment” of the European peoples. Id. at 30.


67. Id.

68. Id.

69. Kaplan, supra note 57, at 278.
of cultural affairs. However, other member states wholeheartedly embraced the concept of a Community-wide broadcasting quota.

The adoption of the Green Paper by the European Community and its proposed implementation through a programming quota were truly unfortunate events. On the edge of the information revolution, the European Community took a step backward. The Green Paper implicitly rejected free market principles of consumer choice in favor of governmental control of the marketplace. Gone was any reference to the state’s proper role in encouraging a plurality of information sources to serve the general public. Although it may be contended that the adoption of the Green Paper in fact encouraged greater information exchanges between members of the Community, this encouragement came at the cost of a potential loss of access to non-Community broadcasting materials. Rather than looking within and without the Community, to all sources of intellectual and cultural enrichment in the burgeoning information age, the member states chose to restrict viewers’ access to sources of intellectual and cultural enrichment originating outside of the Community, apparently fearful of the impact of a plethora of informational sources upon the ability of their citizens and cultures to compete in the world marketplace. This narrow-mindedness and short-sightedness ultimately manifested itself in the adoption of the Directive containing the controversial quota provision.

C. The European Convention on Transfrontier Television

In March 1989, representatives of the twenty-four members of the Council of Europe, including the members of the European Community, ratified the European Convention on Transfrontier Television. Article 10 (1) of the Television Convention obligated signatory states to “ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services.” This allocation of transmission time was to be achieved progressively through the application of appropriate criteria, having due regard to the “broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public.”

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70. Id.
71. Television Convention, supra note 40. For a complete summary of the Television Convention, see Kaplan, supra note 57, at 279-80.
72. Television Convention, supra note 40, art. 10(1) at 247.
73. Id.
language utilized in Article 10(1) is noteworthy as it is virtually identical to the language of the quota provision in the Directive the European Community enacted seven months later.\textsuperscript{74}

The programming quota contained within the Television Convention is set forth in the Section entitled "Cultural Objectives."\textsuperscript{75} Like the Proposed Directive implementing the Green Paper, the Television Convention was apparently designed to protect and preserve European culture from foreign contamination, albeit on a continental scale. The Proposed Directive and the Television Convention share other common attributes. For example, both instruments exclude news, sports events, games, advertising, and teletext services from the quota.\textsuperscript{76} Furthermore, both documents recognize the need for progressive implementation of the quota requirement.\textsuperscript{77} However, the Proposed Directive establishes a six year timetable for the complete implementation of the quota,\textsuperscript{78} while the Television Convention simply refers to progressive achievement of the quota requirement without specifying a timetable for complete implementation.\textsuperscript{79}

It is perhaps more important to note the substantive differences between the Proposed Directive and the Television Convention. These differences were to play a crucial role in the ultimate formulation of the quota requirement as set forth in the Directive. The first substantive difference is that the Proposed Directive recommended a initial Community programming quota of thirty percent of transmission time that was to be gradually increased to sixty percent.\textsuperscript{80} The Television Convention set a static European programming quota consisting of the majority of transmission time.\textsuperscript{81} This difference was to prove to be a sore point in the legislative debates leading to the enactment of the Directive.

A second substantive difference is the distinction made between methods of quota implementation in the Proposed Directive and the Television Convention. The Proposed Directive recommended a simple

\textsuperscript{74} Kaplan, \textit{supra} note 57, at 280.

\textsuperscript{75} Television Convention, \textit{supra} note 40, art. 10 at 247-48. \textit{See also} Kaplan, \textit{supra} note 57, at 279.

\textsuperscript{76} Television Convention, \textit{supra} note 40, art. 10 at 247-48.

\textsuperscript{77} \textit{Id}.

\textsuperscript{78} Proposed Directive, \textit{supra} note 37, art. 2 at 14.

\textsuperscript{79} Television Convention, \textit{supra} note 40, art. 10 at 247-48.

\textsuperscript{80} Proposed Directive, \textit{supra} note 37, art. 2 at 4.

\textsuperscript{81} Television Convention, \textit{supra} note 40, art. 10 at 247-48.
across-the-board quota on Community programming.\textsuperscript{82} The quota imposed under the Television Convention was required to be implemented only "where practicable" and "by appropriate means."\textsuperscript{83} This distinction proved to be crucial in the debates leading to the enactment of the Directive. Despite these differences, no method for harmonizing these potentially conflicting Community and European programming quotas was set forth in the Convention itself.\textsuperscript{84}

The Television Convention may be viewed as a further refinement of the Green Paper and the Proposed Directive and the direct precursor to the Directive. The Television Convention attempts to ameliorate the potentially harsh consequences of the quota recommendations of the Proposed Directive by providing for a reduced quota requirement and implementation only if practicable and by appropriate means. The language contained in the Television Convention clearly foreshadowed the debate that was to occur between member states over the exact language of the Directive. The Directive’s imposition of a broadcasting quota clearly owes its ultimate format to the Television Convention.

\textbf{D. The Charter of Delphes}

One other development in European broadcasting regulation predating the Directive is relevant to the discussion of broadcasting quotas. In September 1989, a diverse mix of European writers, artists, academicians,

\begin{itemize}
\item \textsuperscript{82} Proposed Directive, \textit{supra} note 37, art. 2 at 4.
\item \textsuperscript{83} Television Convention, \textit{supra} note 40, art. 10(1) at 247.
\item \textsuperscript{84} For example, could a Community member state meet its Television Convention quota exclusively through Community programming while actively excluding programming from other non-Community European states? Such a result seems to be permissible pursuant to the express language of Article 10 of the Television Convention. However, this result is inconsistent with the spirit of the Convention, which is to foster the free flow of information, including that carried by broadcast media, across not only Community boundaries but European boundaries as well. An additional issue raised is what would the consequences be for a Community member state that meets its Television Convention quota through utilization of non-Community European programming but, as a result, cannot meet its Community quota as established under the Proposed Directive. It may be logically concluded that such a state may be more interested in satisfying its Community quota, due to its closer relationship with its Community counterparts and the consequences that may flow from noncompliance; however, such a conclusion is nothing more than a logical assumption. The Television Convention is conveniently silent on these and other more difficult issues. This potential for conflict was perhaps one of the motivations for the attempted harmonization of the Green Paper, the Proposed Directive, and the Television Convention in the definition of “European works” contained in the Directive. \textit{See infra} note 130 (defining “European works”).
\end{itemize}
scientists, and cinematographers produced the artistic equivalent of the Television Convention in the Charter of Delphes. The Charter of Delphes was the culmination of efforts by the European intellectual community to address the future of the audiovisual industry in Europe and potential problems arising therein. In this regard, the Charter of Delphes’ authors viewed themselves as actors “for the defense of and the future of audiovisual creativity.” The authors of the Charter of Delphes intended to stimulate Europe’s collective political and moral conscience in an effort to draw attention to what they believed to be a cultural crisis in the audiovisual industry. As such, the Charter of Delphes was aimed directly at Community public opinion and institutions.

The Charter of Delphes consists of five basic principles recognized by the authors and a demand for action. First and foremost among these principles is that television is the dominant form of mass media and the most influential element of modern culture. In this regard, the television program was deemed to be “an essential expression of living culture” and a reflection of the social and cultural values and characteristics of the broadcasting nation. Given the dominant position of television and its reflection of the modern cultural heritage of the broadcasting states, the authors of the Charter of Delphes called upon the Community’s legal institutions to enact safeguards to prevent corruption and deterioration of Community culture. These safeguards were to include financial support for the audiovisual industry in the Community and the imposition of a programming quota.

Although the Charter of Delphes lacked legal force and effect, proposed no specific quota upon Community broadcasting, and was drafted subsequent to the adoption of the Green Paper and the Television Convention, its effect cannot be underestimated. Basically, the Charter of Delphes constituted an appeal from the Community’s audiovisual industry for assistance. Furthermore, in return for this assistance, the European artistic community expressed its willingness to accept content regulation.

85. Charter of Delphes, supra note 43. For a complete summary of the Charter, see Kaplan, supra note 57, at 280-84.
86. Charter of Delphes, supra note 43, pmbl. at 53.
87. Kaplan, supra note 57, at 281.
89. Id.
90. Id. art. 1 at 53.
91. Id. art. 2 at 53.
92. Id.
of broadcasting through the imposition of a quota. The strong language contained within the Charter of Delphes and its blunt challenge to the Community's governing institutions to take appropriate and effective action no doubt aided proponents of programming quotas in the passage of the Directive.

It is also worth noting that the Charter of Delphes represented an attempt to elevate television to a status above ordinary goods and services subject to special and comprehensive regulation by the Community. This intent is clearly evident from the language of the Charter of Delphes, which concludes that the television program "is not a simple product, and it must not be exploited as a simple service." Relying on, as basic principles, television's special cultural status, its inordinate impact upon the populace, and its dominant position among differing types of media, the Charter of Delphes concluded that television should be subjected to more comprehensive control, including content regulation, and that such control could exist without violating the restraints placed upon governmental action in this area in traditionally democratic societies.

E. The "Television Without Frontiers" Directive

The programming quota came to life in Community legislation in the form of a directive adopted by the Council of Ministers on October 3, 1989. Despite the lengthy history and approval of programming quotas that existed—in the Television Convention and the Charter—the road

93. Kaplan, supra note 57, at 282.


95. Kaplan, supra note 57, at 282.

leading to the enactment of the Directive and the harmonization of television broadcasting and regulation in the Community was far from smooth. As previously noted, the initial draft of the Directive was proposed by the Council of Ministers in April, 1986.97 The Proposed Directive created a preference for Community-produced television through the imposition of a quota98 reserving thirty percent of programming time for Community works, not including news, sporting events, game shows, advertising, or teletext services.99 The Community broadcasting quota was to increase to sixty percent of total transmission time by December, 1992.100

France, historically a strong supporter of European programming, was the chief proponent of the sixty percent Community-based programming quota contained within the Proposed Directive.101 The Proposed Directive proved to be unpopular and was opposed by numerous member as well as nonmember states, including the United States. As a result of this opposition, the Community encountered serious delays in the amendment and enactment of the Proposed Directive. It did not receive serious legislative attention until January, 1988, when the European Parliament voted in favor of the Proposed Directive.102

Despite the European Parliament’s adoption of the Proposed Directive, it continued to receive substantial opposition from the Council of Ministers, with six of the twelve member states rejecting it outright.103 The member states’ objections were many and varied. For example, the

98. Id. art. 2 at 4.
99. Id.
100. Id. The quota provision of the Council’s proposal provided, in part, that
1. Member States shall ensure that internal broadcasters of television reserve at least 30% of their programming time not consisting of news, sporting events and game shows, advertising or teletext services for broadcasts of Community works within the meaning of Article 4 . . . .
2. This percentage shall be progressively increased to reach 60% after the expiry of three years from the date specified [by the European Commission].

Id.
United Kingdom and West Germany objected to the proposal as an impermissible encroachment upon national sovereignty, and upon the further ground that the Community was incompetent to regulate cultural affairs. West Germany and the United Kingdom were joined in the latter objection by the Netherlands, which opposed the proposal based upon principles of freedom of expression. Denmark, Ireland, and Portugal objected to the proposal on the basis of their underdeveloped audiovisual industries, which they believed would be overwhelmed by an influx of programming from member states with highly developed audiovisual industries. Conversely, France and Belgium strongly supported the proposal and the need for a strict Community broadcasting quota. Other member states argued that amendments purporting to weaken the proposal by making compliance mandatory only where practicable and omitting enforcement measures should be rejected.

It was only after considerable legislative bloodletting and the exertion of pressure on France to moderate its views that the Directive received the final approval of the Council. The Directive, as adopted, differed from the initial draft in several respects. Most significantly, the Community programming quota had been changed to a European programming quota and had been reduced to a majority of programming time. Additionally, compliance with the quota was now only required "where practicable."

Despite these compromise provisions, the vote of the member states upon the Directive was not unanimous. Belgium and Denmark held their respective ground and, as a result, the Directive was approved by a vote of ten to two.

The Directive is a truly enigmatic piece of legislation. Despite the imposition of explicit content regulation, the Directive purports to have as one of its purposes the protection of freedom of expression from abusive

104. Transatlantic Television; Buddy, can you spare a reel?, ECONOMIST, Aug. 19, 1989, at 56 [hereinafter Buddy, can you spare a reel?].
106. Id.
107. Feher, supra note 96, at 75.
111. Greenhouse, supra note 109; see also Bruce Alderman, Quid Pro Quota?, VARIETY, Oct. 11-17, 1989, at 51, 63.
and restrictive practices resulting from the creation of dominant positions within the television industry. Additionally, the Directive purports to ensure "the independence of cultural development in the member states and the preservation of cultural diversity in the Community." The chief means by which these purposes are to be achieved is the imposition of a quota upon Community television broadcasts.

The quota placed upon Community television broadcasts requires member states to ensure that "where practicable and by appropriate means, . . . 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." The quota is to be achieved progressively, state-by-state, having due regard for "the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public." A member state that is unable to achieve the transmission time allocation required by the Directive must ensure that the European content of its television broadcasting does not fall below its average for 1988. Considerable controversy exists as to whether the 1988 minimum content requirement is based upon standards established by each individual television channel or upon broadcasting, as a whole, throughout the member state. Conversely, member states are also permitted under the Directive to enact quotas requiring higher percentages of European broadcasting within their jurisdictions.

In addition to requiring the imposition of the programming quota, the Directive also contains substantial reporting requirements. Every two years, each member state is required to report its progress toward achievement of the complete implementation of the quota. Each member state's report must include a statistical analysis of its television

113. Id.
114. Id. art. 4(1) at 26.
115. Id.
116. Id. art. 4(2) at 26.
117. See Schwarz, supra note 96, at 355. As Schwarz notes, the drafters of the Directive intended this section to mean that a channel which is unable to comply with the quota requirement of the Directive cannot fall below its 1988 average; however, the Directive as drafted may require such channels to meet the 1988 European content average throughout the entire member state. Id. See also Bruce Alderman, EC Quota Vote Oct. 3; Yank Fallout Minimal, VARIETY, Sept. 27-Oct. 3, 1989, at 4.
118. Directive, supra note 48, art. 3(1) at 26.
119. Id. art. 4(3) at 27.
programming for purposes of determining compliance with the quota, as well as an explanation of any reason for failure to achieve the required European content level. Furthermore, the report must contain a proposed course of action by the state to fully enforce the Directive. These reports are to be submitted to the European Commission, which is responsible for circulating reports to member states and the European Parliament and formulating any opinions or recommendations it deems appropriate.

Controversy arose over whether the Directive was legally binding on the member states. Some commentators viewed the Directive as simply a statement of political goals with no legal force or effect. These commentators pointed to an interpretive declaration issued by the Council of Ministers at the time the Directive was enacted. In the interpretive declaration, made at the request of West Germany, the Council held that the quota was purely a political obligation. These commentators were also quick to point out that the Directive simply required the imposition of quotas “where practicable.” As such, the assumption was made that where it was not practicable to impose the quota required under the Directive, a member state was free to ignore the Directive’s mandates regarding the quota. Additionally, because the quota is to be achieved progressively, member states have considerable discretion as to the timetable for its complete implementation. Finally, these commentators noted that the Directive itself contained no penalty provisions.

Other commentators viewed the Directive as a legally binding obligation. This belief was primarily based upon the reporting requirement that allowed the European Commission to monitor compliance and to exert pressure upon member states reluctant to comply with the Directive’s obligations. Pressure could also be exerted on noncomplying member states by other member states and the European Parliament, which

120. Id.
121. Id.
124. Id.; see Directive, supra note 48, art. 4(1) at 26.
125. Id.
126. Kaplan, supra note 57, at 289.
127. Directive, supra note 48, art. 4(3) at 27.
are required under the Directive to receive a copy of each state's report.\(^{128}\)

Commentators who view the Directive as creating a binding obligation upon the member states also pointed to Article 189 of the European Economic Community Treaty, which provides, in part, that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed."\(^{129}\)

Finally, controversy also arose over the definition of what constituted a "European Work" for purposes of implementation of the quota. The extremely cumbersome definition of a European Work contained within Article 6 of the Directive\(^ {130}\) creates the possibility of substantial confusion.

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128. *Id.*
130. Directive, *supra* note 48, art. 6 at 27. Article 6 defines European works as follows:

1. Within the meaning of this chapter, 'European works' means the following:

   (a) works originating from Member States of the Community and, as regards television broadcasters falling within the jurisdiction of the Federal Republic of Germany, works from German territories where the Basic Law does not apply and fulfilling the conditions of paragraph 2;
   (b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling conditions of paragraph 2;
   (c) works originating from other European third countries and fulfilling the conditions of paragraph 3.

2. The works referred to in paragraph 1(a) and (b) are works mainly made with authors and workers residing in one or more States referred to in paragraph 1(a) and (b) provided that they comply with one of the three following conditions:

   (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.

3. The works referred to in paragraph 1(c) are works made exclusively or in co-production with producers established in one or more Member State
in its application. The definition does not focus on the content of the work but on the identity and nationality of the producer and the cast, and the location of the production.\textsuperscript{131} As a result, a fictional story set in Japan but produced by a German national would qualify as a European work. Likewise, a production about life in America that features Community nationals as cast members could also qualify as a European work. Finally, an episode of an American television program with an American producer and featuring American actors could qualify as a European work if it was filmed on location in Europe. The anomalous possibilities that may result from the literal application of the Directive to works such as those described would do little to further the purported purpose of the Directive to protect and preserve European culture.

Unfortunately, seemingly lost in the controversy surrounding the enactment and implementation of the Directive was the issue of its compatibility with the member states’ obligations existing under various international and regional human rights instruments. Any discussion of this issue at the member state level appeared as only incidental or tangential to far deeper discussions concerning the economic and cultural motivations behind the Directive. If consideration of this issue occurred in any great detail, it appears that the majority of member states weighed the options and decided to forego raising issues of freedom of expression and access to information in order to address more immediate economic and cultural considerations. This apparent lack of consideration for human rights standards is clearly a setback for European television viewers at the dawning of an era in which the exchange of information on a global basis and exposure to differing cultural viewpoints is crucial.

\textsuperscript{sic} by producers established in one or more European third countries with which the Community will conclude agreements in accordance with the procedures of the Treaty, if those works are mainly made with authors or workers residing in one or more European States.

4. Works which are not European works within the meaning of paragraph 1, but made mainly with authors and workers residing in one or more Member States, shall be considered to be European works to an extent corresponding to the proportion of the contribution of Community coproducers to the total production costs.

\textit{ld.}

131. Feher, \textit{supra} note 96, at 69.
III. The Application of International and Regional Human Rights Instruments

The Directive violates several international and regional human rights instruments. These human rights instruments can be placed in three separate classifications. The first classification consists of the three instruments constituting the International Bill of Rights, specifically, the Universal Declaration, the CP Covenant, and the ESC Covenant. The second classification consists of the European Convention, the principal regional human rights instrument applicable in Europe and binding upon all member states. The third classification consists of human rights instruments arising from the Conference on Security and Cooperation in Europe, specifically, the Helsinki Accords, the Copenhagen Document, and the Charter of Paris. This section analyzes the Directive pursuant to each of these human rights instruments in greater detail.

A. The International Bill of Rights

The International Bill of Rights’ founding document is the Universal Declaration. It consists of a “laundry list” of basic human rights that the founding members of the United Nations deemed fundamental in the immediate post-World War II era. The civil and political rights set forth in the Universal Declaration are given greater expression in the CP Covenant. More controversial and less subject to governmental protection, the economic, social, and cultural rights set forth in the Universal Declaration receive their specific description and implementation in the ESC Covenant. The restraints placed upon Community television programming in the Directive violate all three of these human rights instruments.

1. The Universal Declaration

The Universal Declaration was adopted by the United Nations General Assembly on December 10, 1948. It is clear that the member states of the United Nations, in adopting the Universal Declaration, did not intend to create a binding instrument. Rather, the drafters intended the

132. The three documents commonly referred to as the International Bill of Rights include the Universal Declaration of Human Rights, supra note 10, the ESC Covenant, supra note 11, and the CP Covenant, supra note 12.
133. Universal Declaration, supra note 10.
134. Stephen Raube-Wilson, The New World Information and Communication Order
Universal Declaration to establish a set of common human rights for all peoples that member states were to recognize, observe, and progressively implement in their policies.\textsuperscript{135} Given the political realities necessary to achieve compromise and agreement on a universally recognized list of human rights, and the nonbinding nature of the document, the human rights listed in the Universal Declaration are described in general terms with little substantive elaboration. Nonetheless, one may view the rights set forth in the Universal Declaration as a global benchmark for judging the actions and policies of states that subscribe to its standards.

The Universal Declaration clearly establishes the right of all persons to freedom of opinion and expression.\textsuperscript{136} This right is deemed to include the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”\textsuperscript{137} Although this freedom is not further elaborated upon in the Universal Declaration, it is subject, under Article 29(2), to limited derogation “for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”\textsuperscript{138}

2. The CP Covenant

The Universal Declaration was implemented in a binding fashion in the CP and ESC Covenants. The CP Covenant was adopted as a resolution of the United Nations General Assembly on December 16, 1966.\textsuperscript{139} The Covenant entered into force and effect on March 23,

\textsuperscript{135} Universal Declaration, \textit{supra} note 10, at pmbl.
\textsuperscript{136} \textit{Id.} at art. 19.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at art. 29(2).
\textsuperscript{139} CP Covenant, \textit{supra} note 12.
With the exception of Greece, all current and pending members of the European Union are subscribing parties to the CP Covenant.

The binding nature of the CP Covenant upon signatory parties is beyond dispute. The CP Covenant is clearly a treaty obligation having legal force and effect and has been treated as such by signatory states. Additionally, the CP Covenant has an elaborate enforcement mechanism. It is thus the binding implementation of the civil and political rights contained within the Universal Declaration.

The ancestry of the CP Covenant from the Universal Declaration is clearly apparent in Article 19, relating to freedom of expression, which is almost identical to its counterpart in the Universal Declaration. Specifically, Article 19(2) provides that “[e]veryone shall have the right to freedom of expression.” This right includes, as it does in the Universal Declaration, the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Implicit in this guarantee is that the content or origin of the information or ideas is irrelevant to the creation or exercise of these freedoms. Any doubts as to the applicability of the Universal Declaration to the then relatively new technology of television were resolved in the late 1940s by the reference in the CP Covenant to all forms of media.

The CP Covenant does differ from the Universal Declaration in the derogation clause contained within Article 19(3). While the CP Covenant maintains the exception to freedom of expression for the protection of morals, public order, and the reputation of others, it adds another exception for national security. The CP Covenant also provides a standard of review for any such restrictions. Specifically, it provides that restrictions “shall only be such as are provided by law,” requiring legal action by the state prior to derogation. Furthermore, the restrictions must be “necessary,” implying at least a rational relationship must exist between the restriction and the purported reason for the same.

140. See supra note 21.
141. Id.
142. CP Covenant, supra note 12, at art. 19(2).
143. Id.
144. Id.
145. Id. at art. 19(3).
146. Id.
147. Id.
148. Id.
3. The ESC Covenant

The other covenant implementing the Universal Declaration is the ESC Covenant.\(^{149}\) The ESC Covenant was adopted as a resolution by the United Nations General Assembly on December 16, 1966 and entered into force on January 3, 1976.\(^{150}\) All members of the European Union have ratified the ESC Covenant.\(^{151}\)

The ESC Covenant differs considerably from the CP Covenant. Initially, it must be noted that there is considerable controversy over the definition and very existence of economic, social, and cultural rights. Furthermore, it is unclear whether the ESC Covenant creates binding obligations upon signatory states or only constitutes a statement of aspirations to be achieved in a progressive manner. Finally, unlike the CP Covenant, the ESC Covenant contains no enforcement mechanism. The controversy surrounding these issues has led many states, including the United States, to refuse to ratify the ESC Covenant.

The ESC Covenant also does not directly address the issue of freedom of expression and access to information. Rather, the ESC Covenant addresses the right to cultural development and preservation. Specifically, the Preamble and Article 1 recognize the right of all peoples to cultural development.\(^{152}\) This right receives further elaboration in Article 15. Article 15(1) recognizes the right of all persons to participate in cultural life.\(^{153}\) In order to fully realize this right, signatory states are instructed to take all steps necessary for the "conservation, . . . development and . . . diffusion of . . . culture."\(^{154}\) Signatory states are also instructed to "respect the freedom indispensable for . . . creative activity."\(^{155}\) Finally, in Article 15(4), signatory states agree to "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields."\(^{156}\)

Article 15 of the ESC Covenant creates considerable tension between the right of a state to preserve its culture and the rights of its citizens to benefit from the exchange of information through international cooperation.

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149. ESC Covenant, supra note 11.
150. Id.
151. See supra note 21.
152. ESC Covenant, supra note 11, at pmbl., art. 1.
153. Id. at art. 15(1)(a).
154. Id. at art. 15(2).
155. Id. at art. 15(3).
156. Id. at art. 15(4).
and contacts. Article 15 protects the right of a signatory state to preserve and develop its culture. However, it also requires the state to respect the right of individuals to engage in creative activities. Finally, Article 15 encourages the development of international cultural contacts. These rights may conceivably conflict in a state seeking to preserve its cultural heritage through the restriction of international contacts with other states and persons which are deemed to be cultural contaminants. The ESC Covenant offers no guidance as to how such a conflict is to be resolved.

This apparent dichotomy of rights contained within Article 15 of the ESC Covenant has led some commentators to abstain from attempting to resolve conflicts between cultural rights and the right to freely impart and receive information. However, the author suggests that this conflict may be resolved through the application of rules of statutory interpretation. In this vein, it may be concluded that the United Nations General Assembly did not intend to create conflicting rights when it adopted the resolution endorsing both the CP and ESC Covenants. This is particularly true as these Covenants were adopted by the General Assembly in the same resolution, on the same day. As such, it is reasonable to conclude that the CP and ESC Covenants must be read and interpreted as consistent with one another.

The CP Covenant clearly creates a right to seek, receive and impart information regardless of frontiers or the media utilized. The ESC Covenant clearly creates a right to the enjoyment and preservation of one's cultural heritage. However, the ESC Covenant also implicitly recognizes the freedom of expression set forth in the CP Covenant by requiring freedom for creative activity and encouraging international contacts and cooperation in the cultural arena. Read and interpreted consistently, Article 19 of the CP Covenant and Article 15 of the ESC Covenant recognize the same right to freedom of expression.

It is important to note, however, that the ESC Covenant contains no specific derogation clause whereas the CP Covenant specifically lists those instances wherein states may limit the exercise of freedom of expression.

157. Id. at art. 15(2).
158. Id. at art. 15(3).
159. Id. at art. 15(4).
160. See Feher, supra note 96, at 113.
161. CP Covenant, supra note 12, at art. 19.
162. ESC Covenant, supra note 11, at art. 15.
163. Id. at art. 15(4).
164. CP Covenant, supra note 12, at art. 19(3).
The specific derogation clause contained in the CP Covenant may be read into the ESC Covenant which contains no such derogation clause. Alternatively, the recognition and protection of cultural rights contained in the ESC Covenant may be included as an additional exception to the right of freedom of expression contained in the CP Covenant. Under the latter approach, states may derogate the right to freedom of expression contained in the CP Covenant for purposes of cultural preservation. However, this exception would be subject to the same standard of review set forth in the CP Covenant (and absent from the ESC Covenant). Any such restriction would have to be necessary and would require a lawful act of the state. In effect, there would have to exist at least a rational relationship between the restriction and the purported reason for the same.¹⁶⁵

Reviewing the Directive in light of the freedoms and derogations contained within the International Bill of Rights, it may be concluded that there is only one potentially valid basis for the derogation created by the Directive’s programming quota. It is clear that all citizens of the member states that have ratified the Bill of Rights’ instruments have a right to freely seek, receive, and impart information and ideas regardless of content or source of origin. Furthermore, it cannot be seriously disputed that television is within the meaning of the term “media” as utilized in the Universal Declaration and the CP Covenant. The quota imposed under the Directive clearly discriminates against television programming from non-European sources. This discrimination is based upon both the allegedly damaging content of non-European programming and its non-European origin. The Directive therefore, on its face, violates the right to freedom of expression as guaranteed in the International Bill of Rights.

Notwithstanding the fact that a violation exists, it must be determined whether any of the derogations upon the exercise of freedom of expression provided for in the International Bill of Rights are applicable. In this regard, several of the bases for derogation may be easily eliminated. For example, it cannot be contended that the Directive is necessitated by the existence of a “public emergency which threatens the life of the nation and the existence of which [has been] officially proclaimed,” and that a derogation is therefore permitted under Article 4 of the CP Covenant.¹⁶⁶ The presence of non-European sources of information certainly do not threaten the very existence of any member state. Furthermore, the Directive is not a derogation necessary to protect national security or

¹⁶⁵. *Id.*

¹⁶⁶. *Id.* at art. 4.
public health as permitted under the Universal Declaration and the CP Covenant. The Directive is also not a permitted derogation under the CP Covenant as necessary to protect the reputation of others.

The Directive cannot be justified on the basis of protection of the general welfare in a democratic society as provided for in the Universal Declaration. The phrase "general welfare in a democratic society" is much too vague to provide a useful basis upon which the specific requirements of the Directive may be judged. Additionally, it can hardly be argued that the imposition of content and geographic restrictions on the free exchange of information comports with the general welfare of a democratic society. Rather, the free exchange of information and ideas is one of the cornerstones of a truly democratic society.

Finally, as has been aptly noted by other commentators, it cannot be seriously argued that "exposure to American culture [or any other culture for that matter] is a threat to fundamental [European] moral precepts or encourages [European viewers] to undertake fatal habits." The only remaining valid justification under the International Bill of Rights for the blatant content and geographic discrimination in the Directive’s programming quota is the preservation of Europe’s cultural heritage. The viability of this justification will be dealt with at length in Section IV of this article.

B. The European Convention

The European Convention is the primary regional human rights instrument in Europe. The European Convention was executed on November 4, 1950 and entered into force on September 3, 1953. All members of the European Union are parties to the European Convention.

Like the instruments of the International Bill of Rights, the European Convention protects freedom of expression. Freedom of expression is

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167. Universal Declaration, supra note 10, at art. 29(2). See also CP Covenant, supra note 12, at art. 19(3)(b).
168. CP Covenant, supra note 12, at art. 19(3)(a).
169. Universal Declaration, supra note 10, at art. 29(2).
170. Feher, supra note 96, at 110.
171. European Convention, supra note 17, at 221-22.
172. See supra note 17.
173. Id.
174. European Convention, supra note 17, art. 10(1) at 230.
defined in Article 10(1) of the European Convention to include the right to "hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Television broadcasts are clearly a means of receiving and imparting information within the parameters of Article 10(1), which further provides that member states may require the licensing of broadcasting, television, or cinema enterprises within their boundaries.

The European Convention, like the instruments of the International Bill of Rights, permits a signatory state to restrict the exercise of freedom of expression within its boundaries. The exercise of freedom of expression may be restricted in order to serve the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Thus, the potential restrictions a state may place on the exercise of the freedom of expression pursuant to the European Convention are broader than those which may be imposed upon this freedom pursuant to the International Bill of Rights. However, such limitations must be prescribed by law and be necessary for the maintenance of a democratic society. These conditions require that at least a rational relationship exist between the restraint placed by the state upon the exercise of the right to freedom of expression and the purported reason justifying such restraint. Furthermore, it is important to note that Article 10 of the European Convention does not contain any reference to derogation from the right of freedom of expression for the purpose of protecting or preserving the cultural heritage of subscribing states.

Despite the differences that exist between the European Convention and the International Bill of Rights, an analysis of the Directive’s programming quota leads, as it does under the Bill of Rights, to the conclusion that the quota is an impermissible derogation of the freedom of expression. As a general matter, content and geographic discrimination

175. Id.
176. Id.
177. Id. art. 10(2) at 230.
178. Id.
are inconsistent with the principles underlying a democratic society. Even assuming that the member states could satisfy their burden and demonstrate that the quota imposed under the Directive is necessary to maintain a democratic society, the member states would clearly be unable to satisfy the substantive bases under which derogation from the right of freedom of expression is permissible. The Directive is not necessitated by national security, the preservation of the territorial integrity of any state, public safety, the prevention of public disorder or crime, the protection of public health, the protection of the rights and reputation of others, the prevention of the disclosure of confidential information, or for the maintenance of judicial authority and impartiality as set forth in Article 10(2).179

This leaves as the sole basis for justification of the Directive’s quota the protection of public morality. Any connection between the exposure to foreign culture and a decline in fundamental European moral precepts (if, in fact, there is such a decline) is, at best, tenuous and would be difficult to establish. Given that the Directive’s programming quota does not fit within any of the permissible grounds for derogation set forth in Article 10(2), it is reasonable to conclude that the quota and the resulting content and geographic discrimination violate Article 10(1) of the European Convention, guaranteeing the freedom to receive and impart information and ideas without governmental interference and regardless of frontiers.

C. The Conference on Cooperation and Security in Europe

In addition to the European Convention, there are several other human rights instruments guaranteeing freedom of expression and the right to receive and impart information and ideas throughout Europe. These instruments arise from the Conference on Cooperation and Security in Europe, which was concluded in Helsinki, Finland, on August 1, 1975, and consist of the Helsinki Accords,180 the Copenhagen Document,181 and the Charter of Paris.182 The following sections examine the compatibility of the Directive with the content and the protections of each of these documents.

179. Id.
180. Helsinki Accords, supra note 22, at 1292.
1. The Helsinki Accords

The Helsinki Accords were ratified at the conclusion of the Conference on Security and Cooperation in Europe in August, 1975.183 All members of the European Union were parties to the Conference and the Helsinki Accords.184 The Helsinki Accords were designed to reduce tension throughout Europe resulting from the superpower conflict in the Cold War and facilitate the free flow of information and peoples between the free world and those states behind the Iron Curtain. The freedom to receive and impart information thus plays a central role in the Helsinki Accords.

The Helsinki Accords address the freedom of expression in both a general and specific manner. The participating states that ratified the Helsinki Accords first expressed their recognition of "the universal significance of human rights and fundamental freedoms."185 The participating states also pledged to promote universal respect for human rights and fundamental freedoms.186 The participating states further agreed to "act in conformity with the purposes and principles of . . . the Universal Declaration of Human Rights"187 and "fulfill their obligations as set forth in the international declarations and agreements in [the human rights field], including inter alia the international covenants on human rights, by which they may be bound."188 Thus, by implication, the participating states agreed to recognize and respect the right of freedom of expression as contained within the International Bill of Rights.

The Helsinki Accords also address the freedom of expression more specifically. The signatories expressed their recognition of "the need for an ever wider knowledge and understanding of the various aspects of life in other participating states" and "the importance of dissemination of information from other participating states."189 Television was recognized as having a fundamental and essential role in the exchange of information and knowledge and the fostering of understanding between states.190 The participating states pledged to promote the improvement of the

183. See supra note 22.
184. Id.
185. Helsinki Accords, supra note 22, § 1(a)(VII) at 1295.
186. Id.
187. Id.
188. Id.
189. Id. § 2 at 1315.
190. Id. § 2(b) at 1316-17.
dissemination of filmed and broadcast information among themselves.\textsuperscript{191} In order to accomplish these goals, the participating states agreed to “encourage a wider showing of broadcasting of a greater variety of recorded and filmed information from other participating States . . . and facilitate the import by competent organizations . . . of recorded audiovisual material from other participating States.”\textsuperscript{192}

The quota imposed by the Directive flies directly in the face of the commitments made by the participating states to the Helsinki Accords. As previously discussed, the Directive may be viewed as violating all three instruments of the International Bill of Rights. Adoption and implementation of the Directive’s quota therefore contravenes the pledge of the participating states to the Helsinki Accords to conduct themselves in conformance with the International Bill of Rights. The participating states pledged in the Helsinki Accords to improve the dissemination of filmed and broadcast information among themselves. Although the Directive’s content and geographic discrimination may serve to facilitate achievement of this goal among European states, the Directive has the opposite effect with regard to the exchange of information and ideas between European and non-European states. Finally, the restrictions contained in the Directive may discourage the import of audiovisual material from participating states to the Helsinki Accords that are not members of the European Union.

At least one commentator has thoughtfully noted that the European Union could mount a credible defense to the use of the Helsinki Accords to attack the validity of the Directive.\textsuperscript{193} For example, the European Union could argue that the Helsinki Accords were not designed to further ensure or promote freedom of expression but to defuse simmering tension between the free world and the Soviet bloc during the Cold War.\textsuperscript{194} Furthermore, Union member states that are also signatories to the Helsinki Accords could argue that the accords are not binding and only set forth guidelines and goals to achieve greater cooperation and understanding between participating states. The nonbinding nature of the Accords is evidenced by the absence of enforcement mechanisms. Member states could also contend that the Directive facilitates a wider exchange of information by preventing American domination and saturation of the

\textsuperscript{191} Id. § 2(a)(iii) at 1316.

\textsuperscript{192} Id.

\textsuperscript{193} Feher, supra note 96, at 116.

\textsuperscript{194} Id.
Under this view, the programming restrictions contained within the Directive have the effect of facilitating, rather than interrupting, the free flow of information between participating states to the Helsinki Accords. The Directive may very well survive any attack mounted pursuant to the Helsinki Accords. From an absolute legal standpoint, the European Union would probably be correct in its assertion regarding the nonbinding nature of the Helsinki Accords. However, the Accords themselves could be interpreted as restating customary international law, and thereby creating binding obligations upon the participating states. In this regard, the Helsinki Accords may be deemed to have established an "international norm among its signatories that the mutual unfettered exchange of information is necessary to maintain friendly relationships between nations." If such a norm of customary international law has, in fact, been established, the Directive should be viewed as violating this stated norm. At the very least, the Directive violates the spirit underlying the Helsinki Accords and its protection of free expression and transmission of information.

2. The Copenhagen Document and the Charter of Paris

The Copenhagen Document is one of a series of instruments adopted by the Conference on Cooperation and Security in Europe subsequent to its adoption of the Helsinki Accords. The Copenhagen Document was drafted at a time of great turmoil and strife throughout Europe. The Berlin Wall had fallen, leaving Germany united in all but name only. Thoughts of imminent German reunification caused considerable concern throughout the European continent. Additionally, the Communist regimes of Eastern Europe had fallen in rapid succession, and each of these states had begun a slow and tortuous climb to political stability and economic revitalization. Tensions regarding the Soviet Union's attitude over the loss of its empire in Eastern Europe and concerns about whether the winds of change blowing across the Continent would drift as far as the gates of the Kremlin remained high. It was amid this atmosphere of insecurity and uncertainty that the participants in the Conference on the Human

195. Id.
196. Id. at 118.
197. Copenhagen Document, supra note 27.
Dimension of the Conference on Security and Cooperation met in 1990 and drafted the Copenhagen Document.198

Given the events that were occurring in Europe at the time of the Conference, the Copenhagen Document is an extraordinary development. As the participants at the Helsinki Conference had done, the participants at the Copenhagen Conference restated their commitment to human rights and fundamental freedoms, including the freedom of expression, on a general basis by reaffirming their obligations pursuant to the International Bill of Rights.199 However, what makes the Copenhagen Document truly extraordinary is its specificity in setting forth the rights and freedoms to be recognized by the participating states. In this regard, the Copenhagen Document more closely resembles the European Convention than it does its direct ancestor, the Helsinki Accords.

Three sections of the Copenhagen Document are particularly relevant to the issue of freedom of expression through the broadcast media. First, Article II, Section 9.1 establishes that citizens of the participating states have a right to freedom of expression and communication.200 This right is defined to include the “freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers.”201 Article II, Section 9.1 also provides that the exercise of this right may only be restricted through legal measures adopted in conformity with international standards.202

The exact circumstances in which derogation of the freedom of expression is permissible are set forth in greater detail in Article II, Sections 24 and 25. Section 25 is inapplicable to an assessment of the Directive’s programming quota as it relates solely to derogations occurring pursuant to declared public emergencies and no such emergency has occurred in any of the member states of the European Union.203 However, Section 24 does contain circumstances in which derogation is permissible that are relevant to determining the validity or invalidity of the Directive’s programming quota.

Section 24 of Article II first restates the requirement established in Section 9.1 of Article II that any restriction imposed upon the exercise of the human rights and freedoms set forth in the Copenhagen Document be

198. The Copenhagen Document was executed on June 29, 1990. Id.
199. Id. art. I, § 5.20 at 1309.
200. Id. art. II, § 9.1 at 1311.
201. Id.
202. Id.
203. Id. art. II, § 25 at 1316.
based on a legal enactment by the participating state, in conformity with its international obligations.\textsuperscript{204} Specific reference is made to the obligations set forth in the CP Covenant and the Universal Declaration.\textsuperscript{205} The permissible derogations provided for in these documents are not recited; however, it may be reasonably concluded that, given the express language of this section, appropriate reference must be made to these human rights instruments, depending on which right the state seeks to restrict, and that the proposed derogation must be one contained in the applicable instruments.

Closely related to both the Helsinki Accords and the Copenhagen Document is the Charter of Paris.\textsuperscript{206} Like the Copenhagen Document, the Charter of Paris was drafted and adopted under much different circumstances than those that existed at the time the Helsinki Accords were adopted. By the time the Charter of Paris was adopted, the Cold War, which had so preoccupied the drafters of the Helsinki Accords, had ended. The Soviet Union stood on the brink of imminent dissolution, rendered asunder by political, economic, and ethnic forces that the leaders in the Kremlin were either unable or unwilling to contain. As its title indicates, the Charter of Paris was intended to be a blueprint for a truly new Europe, united in its respect for democratic institutions and peaceful coexistence and understanding.

In this regard, the Charter of Paris contained important references to the right of freedom of expression. The participating states specifically reaffirmed the commitments set forth in the Helsinki Accords.\textsuperscript{207} More generally, the participating states restated their recognition and respect for human rights and fundamental freedoms as “essential safeguard[s] against an over-mighty State.”\textsuperscript{208} The renewed observance of human rights and fundamental freedoms by the participating states was deemed to be “the foundation of freedom, justice and peace.”\textsuperscript{209} Included among the rights to be observed was the right of every individual to freedom of thought and expression.\textsuperscript{210}

The issue of whether the Directive violates the Copenhagen Document and the Charter of Paris appears to be clearer than the issue of whether it

\textsuperscript{204} Id. art. II, § 24 at 1316.
\textsuperscript{205} Id.
\textsuperscript{206} Charter of Paris, supra note 28.
\textsuperscript{207} Id. at 193, 196.
\textsuperscript{208} Id. at 193-94.
\textsuperscript{209} Id. at 194.
\textsuperscript{210} Id.
violates the Helsinki Accords. The same arguments supporting the argument that the Directive does not violate the Helsinki Accords may certainly be utilized to avoid application of the Copenhagen Document and the Charter of Paris. However, as previously discussed, the Directive may be found to violate the Universal Declaration and the CP Covenant. The participating states that adopted the Copenhagen Document expressly pledged to conform their conduct to these human rights instruments and refrain from violations in the absence of circumstances permitting derogation. Any violation of the Universal Declaration or the CP Covenant therefore constitutes a breach, by implication, of the violating state's obligations under the Copenhagen Document.

Furthermore, both the Copenhagen Document and the Charter of Paris, like the Helsinki Accords, establish international norms with regard to the free exchange of information between participating states that may be enforceable and binding as customary international law. This argument is more persuasive as applied to the Copenhagen Document and the Charter of Paris as each contain further restatements of generally accepted principles relating to the free exchange of information and ideas across international borders. The issue of how many times a principle must be restated before it may be recognized as customary international law is unclear. However, what is clear is that these rights and freedoms come closer to achieving the status of customary international law with every repetition, restatement, and reaffirmation by the participating states.

IV. THE DIRECTIVE AND THE PRESERVATION OF EUROPEAN CULTURE

As the preceding examination of the Directive has shown, the only permissible basis for derogation from the right to freely receive and impart information, regardless of content and geographic origin, is the preservation of national culture as provided for in Article 15(2) of the ESC Covenant.211 Not coincidentally, the need to protect and preserve European or national culture was the primary argument advanced by proponents of the Directive throughout the debate regarding its enactment. The following section of this article examines the cultural preservation argument, specifically focusing on the issue of whether the Directive's programming quota requirement reasonably relates to its purported purpose of preserving European culture.

211. ESC Covenant, supra note 11, at art. 15(2).
As a preliminary matter, it should be noted that this examination assumes that the European Union is, in fact, competent to regulate in the field of cultural affairs. As amply demonstrated in the debates leading to the enactment of the Directive, this assumption is not without controversy. However, this issue may be easily resolved once the quota requirement is recognized as having very little to do with the preservation of European culture and a great deal to do with economics—a matter clearly within the jurisdiction of the European Union.212

A. The Content of the Cultural Preservation Argument

A close review of the Directive and its legislative history reveals two overriding cultural objectives.213 First, the Directive was viewed as an important step in promoting a pan-European culture throughout the member states. The second purported motivation for the Directive was the preservation of European and national culture. This preservation effort was deemed necessary by the Community in light of the perceived flood of foreign broadcasting material, much of which was deemed inappropriate, bourgeois, and culturally regressive. The programming quota was therefore seen as essential to protect the Community viewing public from unsuitable foreign material.

The Community hoped to utilize the quota requirement contained within the Directive to promote European culture, as well as the culture of the various member states.214 The Community believed that television would play "an important part in developing and nurturing [an] awareness

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212. As the European Court of Justice has determined that the transmission of television signals by means of hertzian, cable, and satellite broadcast is a service within the meaning of the EEC Treaty, the European Union is competent to legislate and regulate in this area pursuant to Articles 3(c), 7a(2), and 59-66 of the EEC Treaty. See supra note 94 (ECJ cases); see also EEC TREATY.

213. This of course assumes that one is able to define the term "culture." As noted by one commentator, "it is difficult to maintain and promote, let alone define, something as complex as a 'culture.'" Arthur Dimopoulos, The Television Without Frontiers Directive: Preserving Cultural Integrity or Protectionism?, 13 LOY. L.A. INT'L & COMP. L.J. 273, 287 (1993). For purposes of this discussion, the author will adhere to the definition of culture as "the ideas, customs, skills and arts of a people or group, that are transferred, communicated, or passed along, as in or to succeeding generations." WEBSTER'S NEW WORLD DICTIONARY 337 (3d ed. 1988). However, this definition will be tempered by a recognition that culture is often amorphous and incapable of being defined or conveyed in any adequate fashion. See Kaplan, supra note 56, at 263.

of the rich variety of Europe’s common cultural and historical heritage.”

The Community was of the further belief that the free exchange of information across European borders envisioned by the Directive could impress upon the peoples of Europe their common destiny. It was also clearly recognized that these goals could not be achieved unless the Community had substantial control over broadcasting technology. Upon achieving such control, it was anticipated that inter-European transmissions could serve as vehicles for promoting and enriching the cultures of Europe. This position was perhaps best articulated by European Parliament Representative Petronio. During the course of debate on the Directive in the European Parliament, Representative Petronio stated that the assertion of greater Community control over television through the imposition of a programming quota would foster “a culture, a tradition, a European identity that will, . . . as a result of this progressively increasing European production . . . [,] shine forth as a cultural beacon for the other parts of the world.”

The protection and preservation of European culture, the second cultural objective of the Directive, was deemed necessary in order to stem what was perceived to be “an unregulated flood” of American programming that was alleged to be overwhelming local European programming. Community bureaucrats expressed fear for Europe’s cultural identity “if audiovisual Europe consists of European consumers sitting in front of Japanese TV sets showing American programs.” The continuation of this foreign flood of television programming was equated by commentators to “cultural suicide” and a surrender to American cultural imperialism.

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216. Id.
222. No Gilligan is an Island, NEW REPUBLIC, Apr. 17, 1989, at 10.
223. Western Europe: Europeans Agree Need to Boost TV Programme Production, Reuter Textline, Oct. 2, 1989, available in LEXIS, World Library, TXTNWS File. See also Mary Ellen Bortin, France Launches American-Style Drive to Save European Cinema,
This view was based, in part, upon the belief that much of the foreign programming broadcast within the Community was nothing more than "garbage television."\textsuperscript{224} American television imports were particularly singled out for castigation and were characterized as "wall-to-wall sitcoms and soaps."\textsuperscript{225} This programming was attacked as creating an "ostentatious, fake, parasitic, standardized subculture of poor taste"\textsuperscript{226} and representing "cultural regression."\textsuperscript{227}

Heeding the growing criticism of foreign programming, members of the European Parliament and Council of Ministers concluded that Europe’s cultural heritage was a "victim of increasing Americanization,"\textsuperscript{228} and that immediate action was required to prevent its further deterioration. The programming quota contained within the Directive was designed to prevent further homogenization of European and American cultures and reverse the perceived marginalization of languages and national cultural identities.\textsuperscript{229} It was believed that the quota would accomplish these goals be preserving the "richness and diversity of [the European] cultural heritage."\textsuperscript{230} In this regard, the Directive has been aptly described as an "attempt to inoculate a society inflicted with foreign ideals and values, a society confronted with the danger of experiencing irreversible, deeply rooted changes."\textsuperscript{231}

\textsuperscript{224} By "garbage television," the author is referring to programming with little instructional or cultural value. See supra note 8 (author’s usage of the term “video trash.”)

\textsuperscript{225} Fortress TV: With Practised Perversity, Euro-Regulators are Finding a Way to Stifle Good Television, ECONOMIST, Sept. 10, 1988, at 19.

\textsuperscript{226} SERGE REGOURD, LA TÉLÉVISION DES EUROPÉENS 107-08 (1992).


\textsuperscript{229} Kaplan, supra note 57, at 259.


\textsuperscript{231} Kaplan, supra note 57, at 256. Not everyone was pleased with the Directive as finally drafted and enacted by the Council of Ministers and the European Parliament. For example, in commenting upon the reduction of the European broadcasting quota from sixty percent to a majority of programming time, European Parliament Representative Schinzels stated that "our once fine bird with its proud plumage is now a poor thin little thing whose tatty feathers have been well and truly plucked." Statement of Rep. Schinzels, 1989 O.J. (Annex 2-378) 110, 113-14 (May 24, 1989) (Debates of the European Parliament).
B. The Directive: Serving the Needs of European Culture?

Despite its grandiose purpose of protecting and preserving European culture from further contamination by foreign television broadcasting, the Directive, as drafted and implemented, fails to accomplish its task. First, the Directive makes the incorrect assumption that culture flows from government, rather than the people. In addition, by focusing its attention primarily on fictional works, the Directive fails to take any action with regard to equally powerful "foreign contaminants," such as nonfiction and sports programming, news, and advertising. More generally, the Directive fails to recognize that foreign television shows, in particular, American television shows, are not the most popular shows among European viewers. Most Europeans do not find foreign culture, in particular, American culture, to be a threat to their own distinctive heritage. Problems have arisen in determining compliance with the Directive's quota as a result of the convoluted definition of "European Works." The controversial issue of whether the Directive is binding or nonbinding has also not been fully resolved. The Directive benefits the cultural heritage of larger member states with developed audiovisual industries at the expense of smaller member states without such developed industries. Finally, the Directive impermissibly interferes with each state's own independent perception of its culture.

An examination of these weaknesses in the Directive and the state of the European audiovisual industry at the time of its enactment leads to the inescapable conclusion that the Directive's programming quota is a protectionist measure, designed to foster growth in the European television programming industry and allow it to compete in the European marketplace on a more equal basis with its stronger American and Japanese counterparts. These purposes of the Directive's quota are not recognized exceptions for derogation from the right of freedom of expression set forth in the applicable human rights instruments.

The stated purpose of the Directive is to protect and preserve the national cultures of the member states and European culture as a whole. Despite the difficulties inherent in defining the term "culture," there are clearly identifiable national and regional cultures within the member states.

232. See Michael Tracy, European Viewers: What Will They Really Watch?, COLUM. J. WORLD BUS., Fall 1987, at 77, 82 [hereinafter European Viewers].

What is less clear is whether a "pan-European culture" exists. Critics of the Directive may legitimately ask, what is pan-European culture? Resolution of this issue is crucial as the Directive is designed, in part, to protect such culture.

One of the inherent weaknesses of the Directive is its assumption that a homogenous European culture and one viewing audience exists. Despite the best efforts of many, pan-European culture and its attributes escape definition. Considering the plethora of beliefs, languages, traditions, and customs of European peoples, it may reasonably be concluded that most member states would have a difficult time defining their own national culture let alone "pan-European" culture. Culture differs from one European state to another, and, due to the patchwork of peoples present in each state, varies from region to region and town to town.

When the issue of defining "European culture" was raised during the debate regarding the adoption of the Directive, the European Parliament was itself unable to agree upon a definition. The difficulty inherent in this task was perhaps best summarized by one representative who commented that "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 of several elements." However, this statement does no more than reflect what is obvious—national and regional cultures exist within the Community. The conclusion reached by this representative may be summarized as a belief in the existence of a single unitary culture which is capable of recognition but incapable of definition. This "know it when you see it" approach is an inadequate basis for the restrictions upon the freedom of expression contained within the Directive.

Of course, the inability to define "pan-European" culture does not mean that such a culture does not exist. The criticism is simply that the Community adopted protective measures without first defining the subject matter worthy of such protection. Rather than taking the time necessary

234. See Dimopoulos, supra note 213, at 296, n.139.
236. This novel approach to resolving difficult constitutional issues involving vague terminology was first pronounced by Justice Potter Stewart of the United States Supreme Court in Jacobellis v. Ohio, 378 U.S. 184 (1964). In attempting to define the term "hard core pornography," Justice Stewart stated, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ." Id. at 197.
to define the attributes of European culture and the methods by which this culture could be most efficiently protected and preserved without infringement upon fundamental human rights, the Community, in its rush to reach the merits of the perceived crisis, ignored this task. This oversight, although it would appear to be merely procedural, had a substantive effect on the meaning and application of the Directive. Perhaps there in fact is a unitary "pan-European" culture. Whatever that term may mean and whatever the Directive is in fact attempting to preserve and protect became lost in the heated rhetoric surrounding the debate on the quota issue. Truly, the Directive cart has been placed before the cultural horse.

Assuming pan-European culture exists and can be identified, the Directive makes the erroneous assumption that this or national culture flows from the government rather than the people. By imposing programming quotas, the Directive serves as nothing more than a governmentally-imposed shield designed to "deflect the natural effects of the free market on culture."\textsuperscript{237} Inherent in the Directive is the assumption that the free marketplace of ideas is too dangerous a place for the average European to venture, a place where an individual may lose his or her cultural identity.\textsuperscript{238} To prevent such a loss, members of the Council of Ministers and the European Parliament have chosen to inoculate their constituency with a sturdy dose of the culture they were unable to define. Given the long and tragic history of governmentally-imposed culture in Europe, especially in this last century, attempts to reestablish governmental control over culture are truly surprising and alarming.\textsuperscript{239}

\textsuperscript{237} Roberts, \textit{supra} note 227, at 218.

\textsuperscript{238} Remarks of Rep. Vandemeulebroucke, 1989 O.J. (Annex 2-374) 43 (Feb. 14, 1989) (Debates of the European Parliament). Rep. Vandemeulebroucke stated that, as "motion pictures and television play an essential role in the preservation of the diversity of cultural identity, . . . [i]t [i]s . . . dangerous, when discussing movies and television programming, to focus too much on opening up to the free market." \textit{Id.} Professor Robert D. Putnam of Harvard University has concluded that the introduction of television in the 1950s profoundly undermined civic culture in the United States. \textit{TV Tattered Nation's Social Fabric, supra} note 233. Professor Putnam found a negative correlation between the number of hours an individual watches television and both the number of groups the individual joins and his or her level of social trust. \textit{Id.} Professor Putnam concludes that television is a major factor in the decline of two crucial ingredients of democratic society in the United States, specifically, social trust and group participation. \textit{Id.}

\textsuperscript{239} Of particular relevance are the eloquent comments of Lord Kilbrandon, addressing the issue of governmentally-imposed culture.
Culture flows not from government but from the people themselves—their beliefs, traditions, customs, and languages. Culture cannot be legislated or dictated by governmental decree. It is “a reflection of ideas and choices of [the] citizens [themselves].” Culture does not belong to the government but to the citizenry which shapes it and gives it form and substance. Governmental regulation of culture deprives citizens of free choice and implicitly tells them that the government knows more than the people about their nation’s past, current, and future cultural heritage. Laboring under the yoke of governmentally-imposed culture, the European citizen is not free to choose his or her own cultural destiny. Deprived of free selection in the international marketplace of ideas, “[Eurocitizens] will lose opportunities for choosing the best political and cultural path for themselves.” The Directive clearly expresses governmental mistrust of the European citizenry’s ability to make the correct choices with regard to its cultural destiny. Implicit in the lack of trust European politicians have in their constituencies is the belief that the more Europeans are exposed to foreign culture through the media, “the less motivated they are to defend their national and European cultural identities, and the more defenseless they become.”

Let us go forward [to a time] when programmes . . . will be receivable from satellites without relay in every home. No country will make penal laws against the reception of foreign programmes, because they could no more enforce such laws than could Nazi Germany . . . . Let us acknowledge here and now that there is no prospect of international agreement on the intellectual or cultural quality of this, or any other mass medium. Everyone will receive what anyone transmits.


242. See Jack Valenti, The European Community Makes Ominous Sounds About Broadcast Quotas, COMM. LAW., Winter 1990, at 3. Mr. Valenti characterized the quota requirement as “an imperial decree that says to the citizens of each country, ‘We public officials know better than you citizens what you ought to see and you want to see.’” Id.

243. Feher, supra note 96, at 118.

most members of the Council of Ministers and the European Parliament. In order to strengthen European cultural identity and lessen the risk of "mass Americanization," they chose to limit viewer choice and access to the alleged foreign contaminants within the media. This dark view of the average European as a willing participant in the abandonment of hundreds of years of culture at the flick of a remote control is far too cynical and elitist to serve as an adequate basis for the limitations placed by the Directive upon the freedom of expression.

The view of Europeans as victims or potential victims of foreign programming is not supported by the facts surrounding Europeans' television viewing habits or perceptions regarding the threat of foreign programming content. Viewer surveys indicate that the member states and their citizenry do not believe themselves to be threatened by non-European television broadcasting. Furthermore, foreign programming does not garner higher ratings than domestically produced programming. For example, recent surveys indicate that in Germany, France, and the United Kingdom, the vast majority of the top twenty rated television programs were domestically produced. A recent survey conducted by the United States Information Agency in France, Germany, Italy, Spain, and the United Kingdom indicated that the majority of polled citizens did not perceive American culture as a substantial threat to the European cultural heritage. Ironically, substantial minorities in France and the United Kingdom felt that greater European integration substantially threatened their own national cultures. The perceived cultural crisis that served as the primary basis for adopting the Directive appears to have been exaggerated.

246. See European Viewers, supra note 232.
247. Id. at 83.
248. Despite EC Directive, supra note 233. Of the member states surveyed, the United States Information Agency found that the following percentages of the population did not deem American culture to be a threat to their national cultural identity: France, 61%; Germany, 83%; Italy, 72%; Spain, 63%; and the United Kingdom, 60%. Id. The percentage for the United Kingdom is somewhat surprising given its strict domestic broadcasting quotas that require that no more than fourteen percent of domestic programming originate outside of the country. See European Community: Communications Policy Advisory Group Urges Single U.S. Representative to EC on 1992, Int'l Trade Rep. (BNA) No. 6, at 958 (July 19, 1989). But see TV Tattered Nation's Social Fabric, supra note 233.
249. See Dimopoulos, supra note 213, at 296.
The results of the survey conducted by the United States Information Agency, indicating that a substantial minority of Europeans view European integration as a threat to their national culture, merits further discussion. One of the purported purposes of the Directive was to protect and preserve the national cultures of the member states, as well as European culture. At the present time, however, the dominant forces in European television are located in France, Germany, and the United Kingdom. Member states with lesser developed audiovisual industries are fearful that their national cultural identities will be overwhelmed by those of member states with more developed audiovisual industries.

There are valid reasons for smaller member states to fear that their own and European broadcasting markets will be controlled by British, French, and German produced television programs. Given the exorbitant cost of production, smaller member states experience little or no economies of scale in the television programming industry. Because English, French, and German are the predominant languages within the Union, television programs produced in countries with small industries and in secondary languages, such as Danish, Greek, and Portuguese, fare little chance of competing outside of their own national markets with television programming produced in one of Europe's primary languages. States with smaller audiovisual industries may simply find their native cultures and languages cannot compete outside of their national boundaries. The result will be that the television markets of smaller member states will be overrun and dominated by English language programs produced in Britain, French language programs produced in France, and German language programs produced in Germany. This market domination may discourage development of the television programming industry within the smaller member states. Most importantly, national and regional cultures, which the Directive was allegedly designed to protect, may be subordinated to a

250. See Feher, supra note 96, at 112. See also Kaplan, supra note 57, at 331.
254. Id.
255. Id.
256. Id.
"pan-European" culture that, although incapable of definition, bears a striking resemblance to English, French, and German national cultures.

The Directive also impermissibly interferes with local control of national and regional cultures. For example, in Spain, the Communications Law of 1988 requires fifty-five percent of annual television programming be in Spanish.\textsuperscript{257} This requirement may be satisfied through the importation and broadcasting of non-European programming produced primarily in Latin America.\textsuperscript{258} In enacting the Spanish language quota, Spanish lawmakers clearly recognized the common cultural heritage existing between Spain and much of Latin America.\textsuperscript{259} Spanish language programming originating in Latin America and broadcast in Spain may further advance Spanish culture more than Community broadcasting imported from Denmark, Germany, or Greece. However, the Directive's quota requirement may serve to curtail the broadcasting of Latin American programs in Spain and replace them with European material which does little, if anything, to advance or preserve Spanish culture. The possibility of such a result further emphasizes two fundamental notions underlying the Directive: the Union knows more about the definition and preservation of national and regional culture than the member states themselves; and the supremacy of the undefinable pan-European culture over such national and regional cultures. In the battle for the cultural hearts and minds of the citizens of the Union, national and regional cultures may be severely handicapped.

Another shortcoming in the Directive's proposed plan to save European culture is its exclusion of vast areas of television programming from the quota. The Directive excludes nonfiction and news programs, sporting events, game shows, and advertising from the quota.\textsuperscript{260} It is arguable that such programs, especially those from the United States, contain an equal, if not greater, amount of foreign contaminants. For example, despite the quota, the Cable News Network and MTV are free to continue to spew American news, music, and fashion throughout Europe without any limitations whatsoever. The market penetration of these networks cannot be underestimated as any European who has heard too much about O.J. Simpson or Madonna may tell you. American sporting events have also achieved considerable market penetration in

\textsuperscript{257} Communications Law of 1988 (Spain), quoted in REGOURD, supra note 226, at 208.

\textsuperscript{258} Id.

\textsuperscript{259} Id.

\textsuperscript{260} Directive, supra note 48, arts. 6(1)-(4) at 27.
Europe as evidenced by occasional broadcasts of American baseball and football games as well as the wild popularity of the National Basketball Association in Europe.\footnote{19961} Advertising is of lesser concern given the fact that most, if not all, member states strictly regulate television advertising. Game shows are probably also of lesser concern given the fact that popular American game shows are often syndicated overseas and utilize local hosts and languages. In any event, if the Directive's true purpose is to protect European culture from foreign contamination, the quota requirement would have been absolute and included nonfiction, news, and sporting events within its parameters.

The goal of cultural protection also runs aground on the Directive's definition of a "European Work" for purposes of meeting the programming quota.\footnote{19961} As previously discussed, the definition of a "European Work" focuses more on procedure than on substance. A work may qualify as European if it is created, produced, or funded by Europeans or European labor is employed. There is no requirement that the content of the production have any relation with Europe whatsoever. Consequently, a television program set in the United States and concerning American themes that is produced by Europeans or features a European cast could qualify as a European work despite the complete absence of any European cultural content.\footnote{19963} Similarly, a television program set in Europe but featuring an American cast under the production control of a European may qualify as a European work.\footnote{19964} However, a television program featuring a European cast and subject matter may not qualify as a European work if it was financed or produced by non-Europeans.\footnote{19965} These anomalous results demonstrate either a lack of thought in drafting this portion of the Directive or a true purpose other than that of cultural preservation—specifically, economic protectionism for the European television programming industry.\footnote{19966} It is reasonable to conclude that

\footnote{19961} The author notes his own personal experience. While a student at the Georgetown University Law Center, the author encountered numerous European students who knew more about the National Basketball Association than the author. As a lifelong sports fan, the author found his fellow students' knowledge of the only professional sport truly originating in the United States to be testamentary to the global reach of American sports programming.

\footnote{19962} Directive, \textit{supra} note 48, art. 6(2) at 27.

\footnote{19963} See Dimopoulos, \textit{supra} note 213, at 295, n. 138.

\footnote{19964} \textit{Id}.

\footnote{19965} \textit{Id}.

\footnote{19966} United States Trade Representative Carla Hills commented on this apparent economic rather than cultural motivation by noting that the U.S. did
European cultural preservation in television programming requires at least a minimal European content. The complete absence of such a requirement in the Directive leads to the inescapable conclusion that its enactment was motivated by and its purpose is something other than cultural preservation.

Proponents of the Directive take considerable solace in their belief that the quota set forth in the Directive is not binding. Community Vice-President Martin Bangemann has characterized the quota requirement as a political commitment and not a legal obligation. Proponents point to the language of the Directive requiring member states to impose quotas only "where practicable and by appropriate means" as delegating considerable discretion to member states in the Directive's ultimate implementation. Proponents holding the view that the quota requirement is non-binding also point to the absence of enforcement mechanisms within the Directive itself. Finally, proponents refer to the

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

U.S. Trade Representative Carla Hills, quoted in Presburger & Tyler, supra note 101, at 505. See also 135 Cong. Rec. H7328 (daily ed. Oct. 23, 1989). Representative Matsui stated during a United States House of Representatives debate that "the Directive's restrictions were based exclusively on the country of origin of the product, rather than on the cultural content." Id.


270. See Lupinacci, supra note 96, at 123. See also U.S. Distributors Say Quotas Won't Hit Pocketbooks, BROADCASTING, Oct. 23, 1989, at 41. Commissioner Dondelinger stated that the Community "will never take a broadcaster to the European Court if it falls a few decimal points below the target for European content." Id. Of course, implicit in this statement is the threat to institute legal proceedings if the member states substantially fail in their compliance efforts. This leads to the conclusion that the member states have far less discretion with regard to implementation of the Directive than previously believed. This conclusion was further bolstered by Edith Cresson, then Community Minister of European Affairs, who stated that member states who failed to fully comply with the Directive were subject to legal action. See EC Agrees Rules for "TV Without Frontiers," Reuter Lib. Rep., March 13, 1989, available in LEXIS, World
interpretive declaration attached to the Directive in which the Council of Ministers stated that Article 4 (containing the quota requirement) is merely a political obligation. 271

However, the conclusion that the quota requirement is nonbinding cannot be reached automatically. Those who argue that the quota is binding and enforceable against the member states point to the express language of Article 189(3) of the EEC Treaty, which provides that all directives shall be binding upon each member state to which it is addressed as to the result to be achieved. 272 Thus, a legitimate issue may be raised as to whether the Community has the authority to enact nonbinding directives or may designate a portion of a directive as nonbinding. Furthermore, member states that fail to implement directives are clearly subject to compliance actions by the European Commission and other member states pursuant to Articles 169 and 170 of the EEC Treaty. 273 The possibility of compliance actions being brought against member states to enforce the quota was underscored in November, 1992, when the European Commission issued warnings to a number of member states regarding their alleged failure to properly implement the Directive. 274 It is also worth noting that although the Directive permits progressive implementation of the quota, it requires implementation nonetheless. Finally, the extensive state reporting requirements contained within the Directive and the required disclosure of report to members of the European Parliament and other member states may have the result of compelling compliance despite the nonbinding nature of the quota provision. 275

Assuming that the quota provision of the Directive is not binding, its effect upon freedom of expression is still palpable. If the proponents of the nonbinding nature of the quota are to be believed, the quota may have little or no effect upon current Community programming. However, if such is the case, the Community will have apparently expended an excessive amount of time and effort in bringing the quota to life. If the quota is generally viewed by members as a nonbinding, political

Library, TXTNWS File.
271. See supra note 121.
272. EEC TREATY art. 189(3).
273. Id. arts. 169, 170 at 75.
274. See Julian Newman, EC Gets Strict over Frontiers Directive—Television Limits, Reuters Textline, Nov. 20, 1992, available in LEXIS, World Library, TXTNWS File. Singled out for admonition were Denmark, Italy, Spain, and the United Kingdom. Id.
commitment, why did the Community bother to address the issue of television programming quotas? Given the amount of time and effort spent resolving conflicts and negotiating and drafting the Directive, this result lacks credibility.

More importantly, the drafters of the Directive have completely failed to consider the effect of even nonbinding limitations upon the exercise of freedom of expression. The very presence of the quota may chill the free exercise of the right to receive and impart information despite its nonbinding nature or the remote likelihood of an enforcement action. This is especially true given the inherently compulsive nature of the Directive, as created by its extensive reporting and disclosure requirements.276

Furthermore, although nonbinding, the inclusion of a quota in the Directive may, in and of itself, be seen as the first step toward the implementation of stricter mandatory programming quotas.277 This fear is well-founded given the Directive’s allowance for stricter national quotas in excess of fifty percent.278 France immediately seized upon this allowance and imposed sixty percent European and fifty percent French programming quotas upon its television industry.279 France’s actions only served to exacerbate fears of what may lay ahead in the area of Union broadcasting legislation.

The inevitable conclusion which must be reached is that the relation of the quota to cultural preservation is tenuous at best. However, if the motivation was not cultural, it may be legitimately asked why the Community spent several years in the preparation of the Green Paper and the drafting, negotiation, and enactment of the Directive. The answer to this question lies in an area clearly within the Community’s authority. The answer lies in economics.

The single market comprising the European Union consists of over 320 million consumers and produces a combined gross national product of four trillion dollars.280 This market is larger than the United States and Japan combined.281 In this market, it is estimated that there are over 124 million households with television sets282 and 31.5 million households that

276. Id.
277. See Some Support in EC is Seen for TV Quotas, supra note 253.
280. Coopers & Lybrand, Trade Relations EC-USA & EC-Canada, § 1 (Feb. 27, 1992).
281. See Lupinacci, supra note 96, at 117, n.17.
subscribe to cable television.\textsuperscript{283} Forty percent of all European television owners also own a videocassette recorder.\textsuperscript{284} It has been estimated that, by 1998, European broadcasters will import four billion dollars of television programming.\textsuperscript{285}

The United States' audiovisual industry stands to gain or lose much in the European marketplace. The products of the entertainment industry constitute the United States' second largest export.\textsuperscript{286} The United States' television programming exports to Europe increased by three hundred percent in the 1970s and by over six hundred percent in the 1980s.\textsuperscript{287} Between 1983 and 1989, the dollar value of American film and television sales in Europe increased by a multiple of five.\textsuperscript{288} In 1988, the United States sold television programming worth in excess of 844 million dollars to the Community.\textsuperscript{289} In 1989, in excess of one billion dollars worth of American audiovisual material was sold to the Community.\textsuperscript{290} American television programming sales to the Community represented two-thirds of the industry's sales outside of the United States.\textsuperscript{291} Such sales undoubtedly played a large role in the 2.5 billion dollar trade surplus generated by the American audiovisual industry in 1989.\textsuperscript{292}

By contrast, the audiovisual industry in the Community suffered a precipitous decline and resultant inability to compete with the United States.

\begin{footnotes}
\item[283] Maggiore, supra note 217, at 29.
\item[284] Id. at 67.
\item[285] European Community; They Don't Love Lucy, TIME, Oct. 16, 1989, at 47.
\item[286] See Conley, supra note 252, at 105. Defense-related products are the United States' largest export. According to the United States Department of Defense, the market share of the United States in the world arms market has increased from thirteen percent during the Cold War to sixty-five percent in the Post-Cold War era. See U.S. Weapons Sales Booming, DENVER POST, Feb. 18, 1996, at 21A. From 1986 through 1989, the United States exported 34.5 billion dollars in armaments to other states throughout the world. Id. This amount increased to 83.1 billion dollars in the period from 1991 through 1994. Id.
\item[288] Buddy, can you spare a reel?, supra note 104, at 56.
\item[289] See Lupinacci, supra note 96, at 126.
\item[290] See Feher, supra note 96, at 77. See also Buddy can you spare a reel?, supra note 104, at 56.
\item[291] See Feher, supra note 96, at 78. See also Schwarz, supra note 96, at 358; Clyde H. Farnsworth, U.S. Fights Europe TV-Show Quota, N.Y. TIMES, June 9, 1989, at D1.
\item[292] See Kaplan, supra note 57, at 319 n.303. See also Lupinacci, supra note 96, at 126.
\end{footnotes}
and Japan. The output of the European film industry declined from 778 features produced in 1970 to 500 features created in 1990. During that twenty year period, European television programming had captured less than two percent of the United States’ market. The situation had become so desperate that, in September, 1989, the Community approved a 270 million dollar subsidy to the European audiovisual industry to stimulate production of feature films and television programs.

Despite all of the rhetoric about culture leading up to the enactment of the Directive, a substantial amount of time was spent discussing the strengthening American position in the European television market and the disarray existing in the European audiovisual industry. Throughout the debate leading to the adoption of the Directive, reference was made to undertaking steps to prevent the continuation of American dominance of the European television market. Proponents of the Directive also stated that one of its purposes was to increase the competitiveness of the European television programming industry with that of foreign nations, particularly the United States. Proponents hoped to increase this competitiveness through stimulation of industry output. They also hoped to increase the competitiveness of the European television programming industry by creating a larger market for its products in the Community through the imposition of the programming quota. Given such


294. See Maggiore, supra note 217, at 42.


296. See Presburger & Tyler, supra note 101, at 504 n.66. See also Greenhouse, supra note 109.


298. See Presburger & Tyler, supra note 101, at 497. See also Green Paper, supra note 36, at 33. See also Conley, supra note 252, at 91. Conley dubbed the American domination of the European television market which proponents of the Directive hoped to end as “Wall-to-Wall Dallas.” Id.

299. See Lupinacci, supra note 96, at 120 n.35. See also Europe and America Prepare for 1992, supra note 220, at 38. Ulf Bruhann, the head of the European Commission’s media sector, stated that “[t]he European programming industry is weak . . . . [T]he industry [must be put] in a position to increase its output.” Id.

300. See EC Agrees Rules for “TV Without Frontiers,” supra note 270. Edith Cresson,
references, it is safe to conclude that the flagging European television industry was on the minds of members of the Council of Ministers and the European Parliament throughout the period of time leading up to the enactment of the Directive.

Commentators analyzing the Directive have been of two minds in weighing its economic and cultural justifications. While acknowledging the legitimacy of European cultural concerns, some commentators have concluded that the preservation of European culture is only incidental to economic considerations. Other commentators have concluded that the Directive’s quota requirement has little, if anything, to do with cultural preservation or the freer exchange of information between the peoples of Europe. Rather, these commentators conclude that the purpose of the quota is to assist the struggling European television programming industry through production incentives and market protection.

Regardless which point of view one adopts, three conclusions are inescapable. First, there is a legitimate issue as to whether the protection and preservation of European culture from foreign influence is necessary. After all, “European culture has survived alien incursions for centuries... [and] a quota to guard its integrity at this late date [is unnecessary].” Second, even if there is a present need to protect European culture from foreign television broadcasting, the quota contained within the Directive does not bear a rational relationship to its purported cultural purpose. Finally, the sheer size of the industry and the potential market and the amount of revenue at stake inevitably lead one to conclude that economics played a primary, if not an exclusive, role in motivating the Community to enact the programming quota. Although the preservation of culture may justify narrow and temporary derogations from fundamental freedoms guaranteed in international and regional human rights instruments, there is no permissible derogation for economic protectionism. The cultural preservation argument must therefore fail for lack of factual support, while the economic protectionism argument must fail for lack of an adequate legal basis.

then Minister for European Affairs, stated that the purpose of the Directive was “to build up a market for European producers.” *Id.*

301. *See* Kaplan, supra note 57, at 291 n.169.

302. *See* Dimopoulos, supra note 213, at 297; Feher, supra note 96, at 112.

303. *Id.*

The European Union’s television broadcasting policy is a mass of contradictions. The initial policy, as reflected in the CAHMM Reports, published in 1980, was that of a Community on the edge of the global television revolution, eager to impart and receive information with little thought of content regulation and source of programming. This openness changed dramatically during the period from 1980 to 1986, when the first Community broadcast initiative was proposed in the Green Paper. Not coincidentally, this change in attitude occurred at a time when the European television programming industry was declining in competitiveness, which resulted in decreased output and a weakened ability to protect its market share on the Continent.

The changes recommended in the Green Paper gained further strength in early 1989, with the inclusion of quota provision in the European Convention and the Charter of Delphes. The quota contained within the Convention was the immediate ancestor of the quota included in the Directive six months later. In addition to approving the imposition of a programming quota, the Television Convention provided the political foundation necessary for the adoption of the Directive. This same foundational role was played by the Charter, in which the European artistic community lent its support to the imposition of a programming quota.

As a result of this groundwork, the Directive came to fruition shortly thereafter in September, 1989. However, despite the intensive buildup to a programming quota, the Directive demonstrated deep divisions among the member states. Some states that opposed the quota contended that the Community was incompetent to act in the area of cultural affairs. Others objected to the quota as an impermissible intrusion upon areas traditionally reserved for member state action.

Proponents of the Directive argued that the Community was competent to act in this area as television programming constituted a service within the scope of the founding treaties. In this regard, proponents of the quota pointed to a weakened European television industry badly in need of financial support and protection. These same proponents also declared that a cultural crisis existed and resulted from the fact that the Continent was awash in foreign television programming. This programming, no more than forty years-old, purportedly threatened the very foundation of centuries-old European civilization. Proponents concluded that this cultural crisis required the enactment of a strict television programming quota.
The Directive that resulted from this process is highly contradictory and deeply flawed. Politicians clashed over the issue of whether the quota was legally binding or merely a toothless political commitment. The exclusion of nonfiction works, news, and sporting events created a large breach in the wall through which the invasion of European homes by foreign television programming could continue. Finally, the definition of “European works” seems to favor form over substance and procedure over content. Works that bear only the most tangential relation to Europe are labelled European works while other productions more deserving of the designation are denied recognition.

Given this history, it is not surprising that the Directive bears no rational relationship to its most heralded goal of protecting and preserving European culture. Although purporting to preserve “pan-European” culture, the Directive provides no definition of such culture but simply presumes its existence. The Directive arrogantly disregards the will of the people and imposes in its stead governmentally-defined and protected culture. This demonstrates an inherent distrust of the general populace to control their own cultural destiny and is not supported by the viewing habits of a majority of Eurocitizens. The Union should consider surveys indicating that most Eurocitizens do not perceive American culture as a threat to European culture but do express concern over the effect of greater Community integration upon national and regional cultures.

The concern Eurocitizens have expressed regarding the preservation of national and regional cultures will not be allayed by the Directive. The Directive’s programming quota is imposed without regard to the national and regional cultures of smaller member states that cannot compete with the predominant cultures of larger member states with developed audiovisual industries. The Directive implicitly informs citizens of smaller member states that their cultures are less significant and worthy of protection and that, in any event, the Community best knows how to define their cultural destiny.

Despite the inflamed rhetoric concerning the presence of barbaric Americans at the gates of the European cultural fortress, the Directive’s underlying motivation was clearly an economic one. The Directive’s provisions may not rationally relate to cultural protection and preservation; however, they do relate to economic protectionism. The medium of television is pervasive, the financial stakes in the industry are enormous, and the potential for growth seems limitless. Recognizing that the European television industry is unable to compete effectively on an international basis with its more powerful American and Japanese counterparts, the Community has turned inward, intent on capturing and preserving the single largest market in the Western world. The cultural
preservation argument is merely a threadbare cloak tossed over blatant economic protectionism. Europeans have not been culturally wronged but perceive themselves as being economically wronged in one, albeit large, industry in which they are at a substantial comparative disadvantage.

Lost in all of the debate regarding the Directive is the shocking effect of the quota upon the free expression and receipt of information and ideas. It would be an exaggeration and overly elevate the status of the Directive to equate it with a reversal of the European tradition of freedom of expression as exemplified by Voltaire, Montesquieu, and Rousseau. However, the quota requirement set forth in the Directive is clearly inconsistent with this tradition.

This European tradition was clearly expressed in a binding fashion in the European Convention and in a less binding manner in the Helsinki Accords, the Copenhagen Document, and the Charter of Paris. As evidenced by the nearly universal acceptance of the International Bill of Rights, this freedom has or will rapidly attain the status of a norm of international law. The Directive violates all three instruments of the International Bill of Rights by imposing restrictions upon the transmission and receipt of information on the basis of its content and origin. The only possible ground justifying this derogation is cultural preservation, which is neither clearly nor adequately served by the Directive.

In order to eliminate this breach of the member states' human rights obligations, it is necessary to return to the operation of the free market in the European television programming industry. A return to free market principles would restore freedom of choice to European television viewers. It has been correctly noted that "no matter what quotas are set, people will always vote with their remote controls." If programming does not meet a viewer's expectations, he or she may change channels or engage in a more revolutionary act by turning off the television set. In any event, it is time for the Union to return the remote control to its citizens and trust them to make decisions that will preserve Europe's continental, national, and regional cultures and traditions.