"Television Without Frontiers": The Continuing Tension Between Liberal Free Trade and European Cultural Integrity

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Abstract

This Article discusses the Directive and the dispute between the United States and the Community with respect to the effect of the Directive on the free trade of television programming.
"TELEVISION WITHOUT FRONTIERS": THE CONTINUING TENSION BETWEEN LIBERAL FREE TRADE AND EUROPEAN CULTURAL INTEGRITY

John David Donaldson*

"We’re going to ruin your culture just like we ruined our own."1

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I. INTRODUCTION

On October 3, 1989, the European Community ("Community") adopted the so-called "Television Without Frontiers" Directive ("Directive"), which was intended to facilitate the integration and harmonization of the various broadcasting laws already in place in the individual Member States of the Community. The Directive's ultimate goal was to achieve a single Community broadcasting market. However, the Directive also included a highly controversial provision, the local content requirement, which requires Community broadcasters, subject to certain exceptions, to allocate no less than fifty percent of their airtime to "European works," as that term is defined in the


3. Council Directive No. 89/552, supra note 2, art 6(1)(a), O.J. L. 298/23 at 27 (1989). European works include "works originating from Member States of the Community" as well as: "works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe," provided that:

(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.

Id. art. 6, O.J. L. 298/23, at 27 (1989).

Article Six further provides that "works originating from other European third countries" may also be considered "European works," provided they are "made exclusively or in co-production with producers established in one or more Member State 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 and workers residing in one or more European States." Id. art. 6(4), O.J. L. 298/23, at 27 (1989). Additionally, Article Six provides that works "made mainly with authors and workers residing in one or more Member States, [may] be considered . . . European works [but only] to an extent corresponding to the proportion of the contribution of Community co-producers to the total production costs." Id. Perhaps the best way to understand this provision is by way of example: Assume that a co-produced one-hour work is "mainly made" with British authors and workers. If the production is financed 25% by a British company and 75% by a U.S. company, only 25% of the work, fifteen minutes, would be considered a European work. By contrast, if the work was financed 75% by the British company and 25% by the U.S. company, the entire work would be considered a European work, provided that production of the work was not controlled by the U.S. company. See id. art. 6(2)(c), O.J. L 298/23, at 27 (1989); Jon Filipek, "Culture Quotas": The Trade Controversy Over the European Community's Broadcasting Directive, 28 STAN. J. INT'L L. 323, 394 (1992).

One potentially important area with regard to co-productions that the Directive
Directive. This requirement has been, and continues to be, a thorn in the side of U.S. - Community relations.

While there was some hope that the issues surrounding the Directive might be resolved during the recent General Agreement on Tariffs and Trade ("GATT") Uruguay Round negotiations, such an agreement proved elusive. 4 Given the parties' historically antagonistic positions regarding the Directive, it should come as little surprise that no resolution was reached during the Uruguay Round. 5 The stage has thus been set again for a confrontation between the parties over the Directive and its local content requirement — a confrontation that may take place in a variety of possible fora and that may have a number of potentially serious consequences on the future of free trade generally or with regard to trade in certain specific items.

This Article discusses the Directive and the dispute between the United States and the Community with respect to the effect of the Directive on the free trade of television programming. Part II of this Article traces the background of the Directive. Part III discusses U.S. objections to the Directive under the GATT and the Community's responses. Part III also discusses the potential application of U.S. trade law to the instant dispute. Part IV assesses the parties' respective arguments and positions and provides a recommendation for how the parties might seek to resolve their differences. This Article concludes that offering non-export subsidies to domestic European producers will fur-

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ther the interests of all parties while preserving respect for free trade and the international institutions which govern international trade.

II. THE COMMUNITY'S "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

A. Historical Overview: Trade Patterns in Audiovisuals

Sometimes world events have the effect of changing the nature of international trade in certain items. World War I had this impact on international trade in films and full-length motion pictures. Prior to the war, Europe had been the preeminent producer of films and full-length motion pictures. The war, however, devastated the European film industry, allowing the U.S. film industry to fill the newly-created void. Thus, in the period following World War I, U.S. film producers first began large-scale penetration into the European film market. Between 1913, the last year before the war, and 1925, U.S. film exports to Europe grew five hundred percent. By the end of the 1920's, U.S. films accounted for four-fifths of all screenings in the world. As a consequence, the mobile inputs of film production, namely creative personnel and film financing, began to gravitate across national boundaries to Hollywood.

Despite the various defensive maneuvers utilized by countries against U.S. film and television exports over the past seventy years, the U.S. film and television industry continued its growth and is now, as it has been since the 1920's, the dominant producer and provider of audiovisual programming to the various international broadcasters and other media service provid-

8. See SKLAR, supra note 6, at 73.
10. See SKLAR, supra note 6, at 95.
11. Film and television trade will be referred to in various portions of this Article under the more general descriptive term of "trade in audiovisuals."
12. U.S. film and television industries will be referred to in various portions of this Article under the more general descriptive term "the U.S. entertainment industry."
ers. Recent data confirm the strength of the U.S. entertainment industry's position. In 1987, the industry provided US$2.5 billion in trade surpluses to the U.S. economy, with approximately half of those revenues derived from the European market. In 1988, the year before the Community adopted the Directive, U.S. producers sold US$844 million worth of television programming to Western Europe, a five-fold increase over 1980. By 1989, U.S. exports of television programming to Western Europe surpassed US$1 billion. By 1992, the U.S. entertainment industry produced a trade surplus US$4 billion, with the European Union purchasing approximately US$3.7 billion worth of U.S. films, videotapes, and television programs. From all indications, the trend appears likely to continue in the absence of Community protectionist measures. The U.S. entertainment industry argues that the Directive is a protectionist response by the Community to the economic consequences of the large U.S. share of the European market and that the actual effects of the Directive should be assessed from this economic vantage point, as opposed to the proffered political and cultural justifications.

B. The Green Paper

Many of the Directive's provisions have their origins in the European Commission's ("Commission") 1984 "Television Without Frontiers" Green Paper ("Green Paper"). The Green Pa-

15. Presburger & Tyler, supra note 14, at 502.
20. Commission of the European Communities, Television Without Frontiers:
per sets forth a framework for integrating and harmonizing the Member States' broadcasting laws\(^{21}\) in order to facilitate the development of a single market for broadcasting within the Community. This single market was designed to replace the then-existing patchwork of disparate national broadcasting laws covering each individual Member State.\(^{22}\)

The Green Paper observes that television in the Community could be "a source of cultural enrichment"\(^{23}\) and that "[t]he dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny...

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\(^{22}\) The Green Paper sets forth various proposed standards for advertising, the protection of minors, and limited rights of reply. See Filipek, supra note 3, at 328-31 (providing an overview of these standards). These standards, while important to the creation of a single market, do not bear on the local content requirement which is the subject of the instant dispute. Thus, this Article will not discuss these standards.

The claimed legal basis set forth in the Green Paper for Community regulation of Member State broadcasting was the Treaty Establishing the European Community's ("EC Treaty") provisions regarding the free movement of goods and the freedom to provide services, particularly Article 60, as interpreted by the European Court of Justice ("Court of Justice"). See Green Paper, supra note 20, COM (84) 300 Final at 105 (citing Ex parte Giuseppe Sacchi, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177); see also Filipek, supra note 3, at 327 & n.18. For an interesting discussion of the Community's competence to regulate Member State broadcasting under the EC Treaty; Wolfgang Hoffman-Riem, The Broadcasting Activities of the European Community and Their Implications for National Broadcasting Systems in Europe, 16 HASTINGS INT'L & COMP. L. REV. 599, 604-05 (1993); cf. Matthias Herdegen, After the TV Judgment of the German Constitutional Court: Decision-Making Within the EU Council and the German Länder, 92 COMMON MKT. L. REV. 1369, 1379 (1995).

they share in many areas." The Green Paper elaborates on the role a single broadcasting market might have on further European integration, stating:

[B]roadcasting is a powerful medium for the communication of all kinds of information, ideas and opinion. It thereby influences the attitudes of almost all Community citizens . . . (in the areas of, inter alia,) political, social, educational and cultural affairs which are associated with some of our societies' most fundamental values. Broadcasting’s role in these areas makes it an especially important factor in the development of the European Community as an association of democratic States seeking to develop as an increasingly integrated economic, social and political entity.  

The Green Paper further notes that a single broadcasting market allowing cross-border transmissions mandated by a directive could help educate voters in deciding who should represent them in the European Parliament and might “help create a ‘European consciousness’ that would weaken individuals’ allegiances to single Member States and facilitate the political integration of the European Community.” The Green Paper also observes that the creation of a single broadcasting market would provide impetus for increased technological innovation in Europe in transmission media, which would help limit the power the dominant American media corporations wield. Interestingly, the Green Paper did not discuss any need for a local content requirement, which was eventually included in the Directive and which has generated the present controversy.

C. The Directive

The late 1980’s was a busy time for Community lawmakers. Due to the generally slow progress being made with regard to
harmonizing Member States' laws, in 1985, the Commission published its "White Paper on Completing the Internal Market" ("White Paper")\(^\text{30}\) in an attempt to advance certain harmonization efforts that had been stagnating in the legislative process.\(^\text{31}\) In total, the White Paper proposed 279 legislative measures that the Commission hoped would be resolved by 1992, including the proposals advanced in the Green Paper.\(^\text{32}\) The push the White Paper generated was largely successful, with many of the proposed pieces of legislation being approved, including, in substantial part, the proposals made in the Green Paper. The Council approved the final draft of the Directive on October 3, 1989. Substantively, the Directive follows the proposals made in the Green Paper adding, however, a significant and highly controversial provision, the local content requirement contained in Article Four of the Directive.\(^\text{33}\)

Before discussing the local content requirement's operative terms and provisions, it should be noted that the various Member States were far from unanimous in supporting the idea of reserving a certain minimum percentage of Community airtime for "European works." This controversy became readily apparent during the early debates on the local content proposal.\(^\text{34}\) The French Government,\(^\text{35}\) for example, encouraged by the French television and film industry, including famous actors and directors, originally proposed a sixty percent European content requirement.\(^\text{36}\) Smaller Member States, such as Belgium and Denmark, initially opposed any local content requirement, presumably because the small size of their national audiences made it difficult for television stations to recover the cost of locally-

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\(^{31}\) See BERMANN, supra note 22, at 432-36.

\(^{32}\) See White Paper, supra note 30, COM (85) 310 Final. For a more detailed discussion of the Community's recent harmonization efforts, see BERMANN, supra note 22, at 428-36.


\(^{34}\) See, e.g., Smith, supra note 14, at 105-06.

\(^{35}\) As evidenced below, France has been the strongest and most outspoken proponent for limiting the export of U.S. audiovisuals to the Community. See Rone Tempest, France Wants to Slam Europe's Open Door to U.S. TV, L.A. TIMES, Apr. 12, 1989, pt. VI, at 1.

\(^{36}\) See Smith, supra note 14, at 105 (citing Tempest, supra note 35, at 1); Presburger & Tyler, supra note 14, at 499.
produced programs.\textsuperscript{37} Portugal, because of its low television capacity, also initially opposed the proposal,\textsuperscript{38} as did Germany, perhaps due to its general interest in free trade and its desire to maintain smooth U.S. - Community relations.\textsuperscript{39} The United Kingdom, for a variety of reasons, also opposed the French proposal.\textsuperscript{40} Due to the strong opposition, France eventually backed down from its original demand that Community broadcasters devote at least sixty percent of their airtime to European programming. In March of 1989, the Member States were finally able to agree on a compromise, the flexibly worded Article Four, which the European Council passed on October 3, 1989, by a vote of ten to two, with Belgium and Denmark voting against it.\textsuperscript{41}

1. Article Four: The Local Content Requirement

In its final form, Article 4(1) provides, in pertinent part, “Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services.”\textsuperscript{42} Article 4(1) further states that the transmission of a majority of European works is to be “achieved progressively, on the basis of suitable criteria,” “having regard to the broadcaster’s informational, educational, cul-


\textsuperscript{38} See id. (citing \textit{Buddy, Can You Spare a Reel?}, \textit{THE ECONOMIST}, Aug. 19, 1989, at 57).


\textsuperscript{40} See Presburger & Tyler, \textit{supra} note 14, at 499 (citing Tempest, \textit{supra} note 35, at 1).

\textsuperscript{41} See Smith, \textit{supra} note 14, at 105; Presburger & Tyler, \textit{supra} note 14, at 499.

\textsuperscript{42} Council Directive No. 89/552, \textit{supra} note 2, art. 4(1), O.J. L 298/23, at 26 (1989). As such, the local content requirement “applies only to hours of entertainment series and feature films, the programming most commonly imported into Europe from the United States.” Smith, \textit{supra} note 14, at 105; cf. Presburger & Tyler, \textit{supra} note 14, at 500 (observing that, on average, more than 70% of fiction programs shown in Community are made outside Community). News, sporting events, and games are the programs most commonly produced locally. Smith, \textit{supra} note 14, at 105-06. A local content requirement covering total airtime obviously would have been less offensive to the U.S. entertainment industry. \textit{Id.} at 106.
tural and entertainment responsibilities to its viewing public."

Article 4(2) provides that if broadcasters in a given Member State are not able to air a majority of European works, the proportion of European works that the broadcasters actually air "must not be lower than the average for 1988 in the Member State concerned."

Although the Directive does not explain the meaning of the phrase "where practicable and by appropriate means," several Member States have interpreted the phrase to mean that the majority proportion requirement is only politically binding and not juridically binding. Therefore, it is possible that a Member State might be excused from the majority proportion requirement based upon a liberally interpreted finding of "impracticability," stemming from, for example, the Member State's television production capabilities. Additionally, given the sender state principle established in the Directive, the phrase may function to mitigate the exclusionary effect of the local content requirement on imported programming. The "sender state principle" requires the Member States to guarantee, within the framework of their national laws, the freedom of their citizens to receive television broadcasts originating in other Member States, subject to certain limited exceptions involving the protection of minors.

The Directive also does not specify whether the majority proportion requirement applies on an individual broadcaster ba-

45. This obscure and somewhat cryptic language was included in order to gain qualified majority support for the Directive. See Filipek, supra note 3, at 333, 368.
47. See, e.g., Filipek, supra note 3, at 368 (stating that "flexible administration" of Directive might be grounded in this qualifying language ["impracticability"], and suggesting that qualifying language might be liberally interpreted to allow, e.g., pay-TV channel to air majority of non-European programming on ground that majority proportion requirement was "not practicable" because majority of popular entertainment films are made in the United States). As discussed below, however, Member States and Community authorities generally have not adopted such a liberal interpretation of the potentially flexible language.
sis or on an overall nationwide basis.\textsuperscript{50} Notwithstanding the merits of an overall nationwide basis,\textsuperscript{51} the Commission has stated that the local content requirement should be applied on an individual broadcaster basis and "[w]here an organization has several different channels, these will be considered individually."\textsuperscript{52} This is "the most stringent and potentially trade-restrictive interpretation" of the local content requirement.\textsuperscript{53}

As mentioned above, the overarching goal of the Directive is the creation of a common Community market in television broadcasting which allows television broadcasting, as that term is defined in the Directive,\textsuperscript{54} to move freely across national bor-

\textsuperscript{50} Some Member States require their national broadcasters to satisfy the mandatory European works proportion during specified time slots. France, for example, requires that its broadcasters air at least sixty percent European works during the most commercially desirable time slot — prime time. See Smith, supra note 14, at 107.

\textsuperscript{51} The U.S. Federal Communications Commission ("FCC") has adopted such an approach in several recent opinions. For example, in\textit{In re Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634, 647 (1984)}, the FCC stated, "the adequacy of the programming to which children have access must be based on a consideration of the whole of the video distribution system," and that this system must be viewed "broadly and on an overall national basis." More recent examples of such an approach are discussed in\textsc{Douglas H. Ginsburg} et al., \textit{Regulation of the Electronic Mass Media: Law and Policy for Radio, Television, Cable and the New Video Technologies} 489 (1991) (discussing e.g., FCC's \textit{sua sponte} consideration of marketwide approach with regard to coverage of controversial issues). See generally Glen O. Robinson, \textit{The FCC and the First Amendment}, 63 Minn. L. Rev. 67 (1987) (arguing that constitutional considerations require FCC to consider all sources presenting views to public). \textit{Cf. In re The Revision of Programming and Commercialization Policies, 98 F.C.C. 2d 1076, 1087 (1984)} (arguing that even though individual stations are not presenting required amounts in all program categories, overall performance is sufficient).

\textsuperscript{52} See Filipek, supra note 3, at 382 (quoting Reply to Questions Put Forward by the American Delegation on the Television Without Frontiers Directive and on the Convention of the Council of Europe, at 4 (undated) (on file at the Directorate General for External Relations of the EC Commission) [hereinafter Reply]. It should be noted, however, that the Directive does not empower the Commission to "adopt binding acts relating to the interpretation of the Directive." Reply, supra, at 2.

\textsuperscript{53} See Filipek, supra note 3, at 382-83.

\textsuperscript{54} The Preamble states that "this Directive, [is] confined specifically to television broadcasting rules . . . ." Council Directive No. 89/552, supra note 2, O.J. L. 298/23, at 23. Television broadcasting, however, is defined in Article 1(a) to include "the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public." Id. art. 1(a), O.J. L. 298/23, at 25. Thus, the Directive, by its terms, applies not only to traditional broadcast media such as VHF and UHF transmissions, but also to cable television, direct broadcasting by satellite, and other means of transmission. Council Directive No. 89/552, supra note 2, O.J. L. 298/23, at 25 (1989). The Directive, however, does not impact other broadcast media, such as radio. See Hoffman-Riem, supra note 21, at 607.
To achieve this goal, the Directive establishes the following framework. First, it imposes an obligation on Member States to enact national legislation that meets or exceeds the minimum standards set out in the Directive (e.g., local content requirements, advertising restrictions, protection of minors, etc.). Thus, a Member State is required to ensure that all broadcasters within its jurisdiction comply with its harmonized national laws. Second, Member States must comply with the sender state principle, thus providing their citizens with the freedom to receive television broadcasts originating in other Member States, subject to certain limited exceptions involving the protection of minors. The sender state principle makes it much easier for Community broadcasters to broadcast into several other Member States, and is consistent with the principles the Court of Justice has expressed regarding the free movement of goods. Thus, under the Directive, a television program created and broadcast in accordance with the laws of one Member State may be broadcast in any other Member State without restriction.

55. See Filipek, supra note 3, at 328.
56. See Council Directive No. 89/552, supra note 2, arts. 2-3, O.J. L 298/23, at 26 (1989). Directives, which are binding only as to their overall objectives, allow for variation among Member States’ laws. See EC Treaty, supra note 22, art. 189, [1992] 1 C.M.L.R. at 693; see also Smith, supra note 14, at 122. See generally BERGMANN, supra note 22, at 74-79 (discussing various forms of legal acts taken by Community). Therefore, Member States may impose more detailed or stricter national rules for their broadcasters, conceivably even requiring a one hundred percent local content requirement, provided the national laws meet the floor requirements outlined in the Directive and do not otherwise offend Community law. See Council Directive No. 89/552, supra note 2, art. 3, O.J. L 298/23, at 26 (1989); see also Hoffman-Riem, supra note 21, at 609; Filipek, supra note 3, at 339; Shao, supra note 5, at 111.
60. See Hoffman-Riem, supra note 21, at 607.
61. See, e.g., Rewe-Zentral AG v. Bundesmonopolverwaltung Für Branntwein (Cassis de Dijon), Case 120/78, [1979] E.C.R. 649, 664, ¶14, [1979] 3 C.M.L.R. 494, at 510 (stating “[t]here is . . . no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State . . . .”); Commission v. France (Woodworking machines), Case 188/84, [1986] E.C.R. 419, ¶16 (discussing duty of mutual recognition and reciprocity).
2. Enforcing Article Four

The EC Treaty empowers the Commission to enforce the Directive. Furthermore, individual private parties, under proper circumstances, may rely on a harmonization directive even when a Member State has failed to implement the directive, and thus may have standing to bring a cause of action. Article 25(1) of the Directive requires Member States to comply with the Directive's terms by enacting appropriate national legislation no later than October 3, 1991. Predictably, Member States have enacted a wide variety of national laws and regulations designed to satisfy the Directive's requirements. To ensure Member State compliance with the Directive's terms, Article 63. Article 155 of the EC Treaty authorizes the Commission to supervise the application of Community law and Article 169 authorizes the Commission to bring suit before the Court of Justice if a Member State fails to comply with Community law. EC Treaty, supra note 22, arts. 155, 169, [1992] 1 C.M.L.R. at 682, 686. See Filipek, supra note 3, at 334 & n.67; cf. Hoffman-Riem, supra note 21, at 607.

For a more detailed discussion of when, and under what conditions, including the "direct effect" requirement and the requirement that the directive contain clear, unconditional, and concrete terms, individuals may rely upon an unimplemented harmonization directive, see BERMANN, supra note 22, at 166-92, 430-31.


France, for example, implemented a 60% Community content requirement for all programs broadcast during prime time, between six p.m. and eleven p.m. Smith, supra note 14, at 107. France also has made it very clear that it takes its national Community content requirement seriously. Within a couple of months after the Directive was passed and harmonized national laws were passed, and the French Ministry of Culture and Communication fined a station $10 million for broadcasting too many foreign programs. See id. The French Government has further indicated that it will fine broadcasters who violate the national Community content requirement US$10,000 for each hour of non-Community programming aired in excess of the stated maximum. See Filipek, supra note 3, at 362. As a result of this penalty, several contracts for U.S.-produced programming have been terminated. See Television Broadcasting and the European Community: Hearing Before the Subcomm. on Telecommunications and Fin. of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 112 (1989) (statement of Richard Frank, President, Walt Disney Studios) (discussing cancellation of two multi-million dollar agreements between U.S. producers and French media stations as result of content requirement penalty). For a more detailed discussion of the French national laws, see Filipek, supra note 3, at 362.

The United Kingdom responded to the Directive by enacting the 1990 Broadcasting Act ("Act"), which requires U.K. broadcasters to air a "proper proportion" of European programming. Smith, supra note 14, at 107-08. While the Act does not define what constitutes a "proper proportion," the guidelines issued by the regional television licensing body define the term as meaning not less than 75% of all programming, a percentage which has caused considerable alarm in the U.S. entertainment industry. Id. The Act, however, only applies to British broadcasters, and may not apply to cable
4(3) imposes a reporting requirement on Member States that allows the Community to monitor Member State compliance. The Commission, which is obligated to monitor and foster compliance with the Directive, compiles the results of these reports and, in turn, reports them to the other Member States and the European Parliament, along with a Commission opinion, if appropriate.

While the binding nature of the local content requirement is part of the ongoing dispute between the Community and the United States, the observation of one commentator is particularly noteworthy: "Although Article Four does not bestow any new powers upon the Commission, the monitoring program ensures regular scrutiny of Member State compliance and increases the likelihood that the European works quota will be enforced."

D. The European Convention on Transfrontier Broadcasting

At the same time the Directive was moving through the Community’s legislative process, members of the Council of Europe were negotiating an essentially identical piece of regulatory
text, the European Convention on Transfrontier Broadcasting ("Convention"). The similarity between the Convention and the Directive was the result of a conscious dovetailing effort that resulted in close parallels between the two texts' substantive regulatory provisions. Indeed, many provisions use the same language, while other provisions express the same requirements in similar language. Most important, however, both texts set forth the same fundamental objectives for transfrontier broadcasts, viz., the creation, harmonization, and enforcement of national legislation, including the majority European works requirement, to ensure that broadcasts within a given member nation meet certain minimum standards and to provide that broadcasts meeting these standards may be freely broadcast to other member nations. Although this Article focuses on the Directive, the analyses of the substantive issues surrounding the Directive applies equally to the Convention due to the essentially identical substantive provisions contained in the two texts.

The only substantial differences between the Convention and the Directive relate to the respective structures of the two institutions, the Council of Europe as compared with the Community. Because the Council of Europe is an intergovernmental organization, the Convention provides for dispute resolution. On the other hand, because the Community is a supranational organization, there is no need for such a provision in the Directive. Furthermore, the Convention, a multilateral agreement, lacks the strong enforcement mechanisms available to the Community.

72. Convention, supra note 3, at 242.
73. See Filipek, supra note 3, at 335-36.
74. See id. at 336.
77. See Filipek, supra note 3, at 336.
78. See Convention, supra note 3, arts. 25-26, at 255.
79. See Filipek, supra note 3, at 336.
80. Id.
III. LEGAL CHALLENGES AND DEFENSES

A. The GATT

1. Historical Overview

The fundamental principles behind the GATT have their origin in the various trade arrangements that were introduced in the 1930's, particularly the 1934 Reciprocal Trade Agreement, and the 1940's, exemplified by the Bretton Woods discussions. These arrangements grew out of recognition that protectionist "beggar-thy-neighbor" trade policies had substantially restricted international trade, which in turn contributed to the world economic system's collapse in the 1920's and 1930's. This collapse, in turn, is widely believed to have contributed to increased military tensions which, of course, eventually led to war. The resulting, albeit belated, widespread recognition of the importance of international trade led the major commercial nations to meet in Havana in 1946 to draft a charter for the International Trade Organization ("ITO"). Although the assembled nations were unable to initially agree upon a charter, they did agree upon and ultimately signed the GATT as a temporary expression of the free trade principles that they intended to be absorbed into the ITO upon its establishment. Although a draft charter eventually was created, the United States decided...
not to ratify it, and international support for the ITO quickly waned thereafter.\footnote{90} Nonetheless, the GATT, however procedurally ill-equipped, continued to live on as the primary multilateral instrument governing international trade.

The basic premises behind the GATT may be summarized as follows: (1) based on the principle of comparative advantage, liberal trade practices are beneficial to the global society in that they facilitate the efficient use of global resources;\footnote{90} (2) restrict-treatment in international commerce.” GATT, supra note 87, at A11, 55 U.N.T.S. 196; Smith, supra note 14, at 111.

\footnote{89. See Hudec, supra note 82, at 53.}

\footnote{90. The basic economic benefits of free trade, based on the principle of comparative advantage, are simply stated. Free trade allows consumers to purchase efficiently produced, inexpensive goods locally or from around the world. Because there are no import restrictions or similar restraints, consumers are not forced to purchase inefficiently produced, expensive local goods that they might otherwise be forced to purchase if there were import restrictions or other restraints; see, e.g., Robert B. Ekelund, Jr. & Robert D. Tollison, Microeconomics 465-71 (1986); see generally David Ricardo, The Principles of Political Economy and Taxation (1817) (outlining principles of economics and benefits of free trade). Two major arguments are commonly voiced regarding the perceived injurious effect of free trade.

Perhaps the most widely contended and most visible complaint is that free trade will result in unemployment among the local, presumably inefficient, work force. See, e.g., Andreas F. Lowenfeld, Public Controls on International Trade §§ 6.11, 6.32 (1983). It should therefore come as no surprise that local television producers, actors, and directors who feared for their jobs and livelihoods were among the primary supporters of the Directive. Free trade advocates respond by arguing that any injury to the inefficient local industry, including unemployment, will be short lived, and that resources, including labor, will be reassigned to more efficient industries which in turn will benefit the local economy. See, e.g., Richard Blackhurst et al., Trade Liberalization, Protectionism and Interdependence 25 (1977). Free trade advocates state that this result is not only consistent, but also desirable under the principle of comparative advantage. Furthermore, free trade advocates argue, often quite convincingly in light of empirical evidence, that protecting local industry in order to protect jobs often results in an incentive for industry to remain inefficient. See id.; Smith, supra note 14, at 110-11.

The other major argument against free trade is that a nation may become so dependent on imported goods that it loses its domestic capacity to produce important goods. See Blackhurst, supra, at 38-40. The standard response is that this concern is only valid if the goods in question are that are “necessary” or “essential” during a time of crisis, such as food staples, products necessary for national defense, and perhaps general industrial inputs such as oil and steel. See id. These few exceptional products aside and in light of the fact that the threat of major military conflict seems relatively remote in the near future, free trade advocates argue that nations should resist protecting nonessential local industries in favor of free trade practices based on comparative advantage. See Smith, supra note 14, at 111.

While it is beyond the scope of this Article to discuss in detail the economics of television production, it is important to note that the United States holds a large competitive advantage in television programming production over many, if not all, other
tive and protectionist national economic trade policies are harmful in that they often result in instability, misunderstandings, rifts, and conflicts in international relations which, as discussed above, may ultimately lead to war; and (3) multilateral consensus on trade policies is needed to prevent nations from adopting restrictive trade policies that are designed to thwart or have the effect of thwarting actions taken by other nations.91 As the continued longevity of the GATT and its important role in international trade evidence, these principles continue to be widely held today.92 Several specific GATT Articles embody these fundamental, nondiscriminatory free trade principles which the United States claims the Directive violates.

2. Application of the GATT to the Directive

a. Overview: The Parties' Position

While the United States was generally supportive of the Community's efforts to eliminate restrictions on intra-Community commerce, including those involving transfrontier broadcasting, it was at the same time beginning to express concerns over a "Fortress Europe."93 With these concerns in mind, the nations. The U.S. competitive advantage includes such things as a large domestic audience over which to defray costs, a single language, existing production facilities, and creative production financing. See, e.g., Shao, supra note 5, at 133-36; Kessler, supra note 17, at 565-66; Presburger & Tyler, supra note 14, at 504 (citing Marcom, Jr., Empty Threat?, FORBES, Nov. 13, 1989, International, at 43). Due to this significant and seemingly insurmountable competitive advantage and, especially, in light of the considerations raised in the following paragraph, it should come as little surprise that many nations are not willing to essentially surrender their television production capabilities to the United States by adopting a pure free trade policy for television programming.

A corollary to the second argument, which is implicated in the Community's position, is that the dependency discussed above can eventually destroy a nation's culture and way of life. See Blackhurst, supra, at 40. When values such as culture, heritage, and national identity are factored into the equation, it may be that the traditional laissez-faire market price mechanism fails to capture these values. See id. In response to this market failure, governments may act to protect local industries. In adopting the Directive, the Community is acting to do just this. The Community seeks to prevent imported programming from crowding out presumably more expensive and culturally desirable local programming by raising artificial import restraints. "Some culturally desirable economic activities are economically inefficient." Smith, supra note 14, at 111.

91. See Jackson, supra note 85, at 9-10; see also Hudec, supra note 82, at 5-6.
92. See Jackson, supra note 83, at 10.
93. See Filipek, supra note 3, at 324 (citing U.S. Gov't Interagency Task Force on the EEC Internal Market, Completion of the European Community Internal Market: An Initial Assessment of Certain Economic Policy Issues Raised by Aspects of the EC's Program (1988)) (outlining U.S. trade concerns); cf. The Shape of Europe's
United States responded quickly to the Community’s decision, on October 3, 1989, to adopt the Directive, complete with its majority broadcasting requirement.94 One week after the Directive’s passage, Ambassador Carla Hills, the U.S. Trade Representative, issued a press release calling the Directive “an obviously protectionist initiative,” and claimed that the local content requirement is “inconsistent with the Community’s obligations not to discriminate against foreign products . . . under the GATT.”95 Ambassador Hills claimed that the Directive, which she called “blatantly protectionist[,] unjustifiable, and discriminat[ory] against U.S. and other non-[Community] film goods,” was particularly onerous because it “conflicts with international efforts to increase the free flow of information and ideas to all peoples around the world, so that individuals can choose what they wish to read and view and think from a wide range of sources.”96 Things were starting to get ugly.

On October 23, 1989, the U.S. House of Representatives passed a resolution by a vote of 342 to 0 denouncing the Directive as “trade restrictive and in violation of the GATT . . . .”97 The resolution called Article Four “a local content requirement in the form of both a quota and a minimum floor.”98 The resolution also strongly urged “the President and the United States Trade Representative to take all appropriate and feasible action under its authority, including possible action under section 301 of the Trade Act of 1974,99 to protect and maintain United States access to the Community broadcasting market.”100

Initially, the United States responded to the Directive by for-
mally challenging the local content requirement before the ruling council of the GATT.\textsuperscript{101} The U.S. complaint alleged that the local content requirement violates: (1) the most favored nation ("MFN") provision in GATT Article I; (2) the National Treatment requirement in GATT Article III; and (3) the Ban on Quantitative Restrictions provided in GATT Article XI. Following the dispute resolution procedure then in place in Article XXII of the GATT, the United States sought bilateral consultations with the Community,\textsuperscript{102} which the Community initially refused to engage in, claiming, \textit{inter alia}, that television programming was a service rather than a good, and, thus, it was not covered under the GATT.\textsuperscript{103} Furthermore, the Community claimed that the GATT was not the proper forum to resolve the dispute, and that, in any event, any action by the United States should await the outcome of the negotiations over services taking place in the Uruguay Round.\textsuperscript{104} Despite protracted negotiations on the matter during the Uruguay Round, the Community and United States were unable to resolve the issue.\textsuperscript{105}

In time, however, the Community agreed to engage in bilateral discussions with the United States and to respond to questions from the United States regarding implementation of the Directive.\textsuperscript{106} In these discussions, the Community took the position that the Directive is fully compatible with international trading rules and the GATT.\textsuperscript{107} The Community contended, \textit{inter alia}, that: (1) television programming is a service, and, thus, is not covered under the GATT; (2) the local content requirement is not legally binding; (3) television programming falls within

\begin{itemize}
  \item \textsuperscript{102} See Filipek, supra note 3, at 345-46. A month earlier, the United States requested consultations under the same Article with regard to the Television Convention. \textit{Id.}
  \item \textsuperscript{103} See, \textit{e.g.}, \textit{U.S. Requests}, supra note 101, at 3.
  \item \textsuperscript{104} See Filipek, supra note 3, at 345.
  \item \textsuperscript{105} See supra notes 4-5 and accompanying text; see also Shao, supra note 5, at 106.
  \item \textsuperscript{106} See Reply, supra note 52.
  \item \textsuperscript{107} Presburger & Tyler, supra note 14, at 507.
\end{itemize}
the existing "Cinema Exception" in the GATT or, alternatively, falls within the ambit of other provisions in the GATT, such as the Public Morals Clause or the National Security Exception, which afford importing countries an exception from their regular GATT obligations; and (4) that the local content requirement is justified under a general "culture exception" implicit in the GATT.

Predictably, the consultation between the Community and United States failed to settle the dispute. Thereafter, the United States, with an endorsement from the House of Representatives, threatened to impose sanctions against the Community under section 301 of the Trade Act of 1974. In 1991 and again in 1994, the United States placed the Community on the "watch list" for potential action under section 301. To date, however, the United States has not begun formal adversarial proceedings against the Community. The U.S. complaint, which has been dormant since the bilateral consultation, may, however, be reactivated at any time, at which point the United States may request the formation of a World Trade Organization ("WTO") panel to resolve the dispute. Alternatively, the GATT allows the United States or the Community to request a second consultation to help resolve the dispute. To date, no further formal actions have been initiated, though the parties apparently are still informally negotiating.

111. Kessler, supra note 17, at 572.
112. See Filipek, supra note 3, at 346; Kessler, supra note 17, at 586-87. During the Uruguay Round, the Contracting Parties agreed to a new, strengthened dispute resolution procedure that provides for binding WTO panel decisions and eliminates the ability of a party to "block" the implementation of a panel decision it does not agree with. For a more detailed discussion on the new dispute resolution mechanism, see ANDREAS LOWENFELD ET AL., INTERNATIONAL ECONOMIC TRANSACTIONS 308-19 (Supp. Spring 1996).
113. See Filipek, supra note 3, at 346 (stating United States may reactivate at any time complaint and request formulation of dispute panel).
b. Specific Arguments

i. The U.S. Complaint

(A). MFN Treatment

The first substantive claim the United States makes under the GATT is that the local content requirement violates the MFN provision contained in Article I. Article I(1), in pertinent part, provides:

"The equal treatment requirement applies to 'customs duties and charges of any kind,' 'all rules and formalities in connection with importation or exportation,' and 'all matters referred to in paragraphs 2 and 4 of Article III,' [i.e., internal taxation and regulation]." Simply stated, under the MFN provision any Contracting Party that grants an advantage to any other country must grant multilaterally that same advantage to all other Contracting Parties. Thus, for example, if a Contracting Party reduces its tariff rates for one country, even if the reduction is the result of bilateral negotiations, the agreed-upon reduction must be extended to all Contracting Parties.

It is important to note that there are certain exceptions to MFN treatment provided in the GATT. With regard to the instant matter, the most significant exception is Article XXIV, which sets forth special provisions for customs unions, such as the Community, and free trade areas. While Article XXIV

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115. Filipek, supra note 3, at 346-47 (citation omitted).
116. See Shao, supra note 5, at 110; Filipek, supra note 3, at 346-47.
117. See GATT, supra note 87, art. XXIV, 55 U.N.T.S. 268.
118. Although the GATT had not formally recognized the Community as a customs union prior to the Uruguay Round, the Community, prior to that time, had largely been treated as a de facto customs union under Article XXIV. See Filipek, supra note 3, at 347 (citing Ernst-Ulrich Petersmann, The EEC as a GATT Member - Legal Conflicts Between GATT Law and European Community Law, reprinted in 4 STUD. IN TRANSNAT'L L., at 32-37 (1986)). The Community itself is a signatory of the WTO and, thus, is covered under Article XXIV.
does not explicitly allow Contracting Parties to suspend their MFN obligations, "it does so implicitly by permitting the elimination of 'duties and other restrictive regulations of commerce' among the members of a customs union or a free trade area." With regard to customs unions, the GATT specifically allows the uniform assertion of the "same duties and other regulations of commerce" in trade with third parties, for example, a common external policy. As such, the GATT allows Member States to eliminate "restrictive regulations of commerce" among themselves, but at the same time allows the Community and individual Member States to maintain greater common external restrictions against imported goods.

In light of Article XXIV's special allowances for customs unions, the U.S. MFN claim focuses on the discriminatory preference the Directive gives to "European works," which includes all European works, including those produced in European nations, which are not Member States of the Community. Basing its argument on this definition, the United States contends that the Directive, on its face, discriminates against non-European programming in that it restricts the quantity of programming produced by non-European nations that may be aired in the Community without similarly restricting the quantity of European programming that may be aired.

(B) National Treatment

The second argument the United States makes under the GATT is that the Directive's local content requirement violates the National Treatment requirement in Article III. Article III(1) provides that Contracting Parties' internal taxes and charges should not be applied to imported or domestic products so as to

120. Filipek, supra note 3, at 347.
121. See GATT, supra note 87, art. XXIV(2)(b), 55 U.N.T.S. 270; see also Filipek, supra note 3, at 347.
122. See Filipek, supra note 3, at 353-54.
123. See supra note 3 and accompanying text (explaining term "European works"); see also Filipek, supra note 3, at 355. It should be noted that the U.S. argument loses practical significance as additional European nations either join the Community or become affiliated with it in other ways, such as by becoming members of the European Free Trade Association ("EFTA"). See Filipek, supra note 3, at 354.
124. See Filipek, supra note 3, at 354-55.
afford protection to domestic production. Article III(2) further provides that products imported from any Contracting Party are entitled to the same “laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use” as domestically produced products. Article III(5) states that no Contracting Party shall establish or maintain any “internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or proportions” that require, directly or indirectly, “that any specified amount or proportion of the product [which is the subject of the regulation] must be supplied from domestic sources.”

Simply stated, the National Treatment requirement prescribes that once imported goods have passed customs and border procedures, those goods are to be accorded the same treatment as locally produced goods. As such, the National Treatment requirement stipulates that if any import restrictions take place, they shall take place at the border, by way of measures such as transparent customs duties, rather than by internal government regulations and measures that may express or implicitly discriminate against the sale of imported goods. National Treatment can thus be readily distinguished from MFN. MFN requires equal treatment for all imported goods, i.e., an importing country must impose the same import restrictions on goods imported from any Contracting Party, but at the same time it allows an importing country to protect local industry by, for example, imposing tariffs on imported products. National Treatment, on the other hand, requires that once imported products have crossed the border and any tariffs or similar charges have been paid the importing country must treat the im-

126. Id. art. III(2), 55 U.N.T.S. 206.
128. See Jackson, supra note 83, at 273; see also Blackhurst, supra note 90, at 24-25. With regard to the Community, “National Treatment” extends to include “Community Treatment,” thus, Community and individual Member State laws must accord imported, non-Community goods the same treatment as that extended to goods produced within the Community. See Filipek, supra note 3, at 348-49.
129. See Filipek, supra note 3, at 348-49.
130. This, of course, assumes that the countries involved do not belong to a customs union or free trade area for which the GATT has special rules. See supra notes 117-22 and accompanying text (discussing special provisions for customs unions in GATT).
ported products as favorably as it treats its own domestically produced products.\footnote{131}{See Jackson, supra note 83, at 273; Edmond McGovern, International Trade Regulation: GATT, the United States, and the European Community 242, 246 (2d ed. 1986).}

The United States contends that the local content requirement violates the National Treatment requirement by denying "Community treatment"\footnote{132}{See Filipek, supra note 3, at 348-49.} to television programming produced outside of Europe.\footnote{133}{Id.} Specifically, the United States argues that the Directive limits the quantity of non-European programming that may be broadcast in the Community without similarly limiting the quantity of "European works" that may be aired. For example, the Directive provides non-European programs "less favorable treatment" than that afforded to European programs "in respect of . . . laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, . . . distribution, or use."\footnote{134}{See GATT, supra note 87, art. III(2), 55 U.N.T.S. 206; see also Smith, supra note 14, at 127-29.}

The United States claims that the Directive, by requiring stations to broadcast a majority of European works, violates the National Treatment requirement in three separate ways. First, the United States claims that the majority broadcasting requirement affects the sale, offering for sale, and purchase of U.S. television programming because European television stations that have already purchased the maximum permissible amount of non-European programming will not purchase more U.S. programs.\footnote{135}{See Smith, supra note 14, at 127-29.} Second, the United States claims that the requirement affects the distribution of U.S. programming because U.S. programming cannot be as widely or easily distributed as European programs due to the limit on non-European programming.\footnote{136}{See id.} Lastly, the United States contends that the requirement affects the use of U.S. programming because Community broadcasters will not be able to use U.S. programming as often as European programming.\footnote{137}{See id.}

In its defense against the various U.S. contentions, the Community has argued that the U.S. entertainment industry has not
demonstrated that the majority broadcasting requirement has in fact had any adverse effect on imports of U.S. programming because U.S. imports account for twenty-eight percent of all television programming shown in the Community. Additionally, the Community has argued that the total amount of U.S. programming sold to the Community is not likely to decrease due to the growing number of stations and demand for programming in the Community.

The Community's argument is questionable at best, both as a legal proposition such as, if no evidence of actual injury to U.S. audiovisual exports can be shown, there is no actionable violation of Article III, and as an interpretation of what has actually transpired in the form of whether there has been actual injury to U.S. audiovisual exports. The United States contends that: (1) evidence of actual harm is not necessary; and (2) even if it is, evidence of such injury is readily apparent.

The United States gathers support for the first of these contentions from prior GATT panel decisions. In 1958, the United Kingdom challenged an Italian regulation requiring banks to make favorable loans to farmers purchasing Italian-made tractors. The United Kingdom alleged that the regulation violated the GATT's National Treatment requirement because it discriminated against the sale of foreign-made tractors. The GATT panel agreed with the United Kingdom, finding that the Italian policy unfairly and discriminatorily encouraged purchases of Italian tractors while discouraging purchases of foreign tractors. The panel's decision is noteworthy because it demonstrates that GATT panels may view the proper function of the National Treatment requirement broadly with regard to trade in goods; the regulation involved in the Italian tractor financing case was related directly to banking services, yet the panel found a violation of the National Treatment requirement based on the potential discriminatory effect of the banking regu-

138. See id. at 128-29; Presburger & Tyler, supra note 14, at 503.
139. See Smith, supra note 14, at 100-01, 128-29; Kessler, supra note 17, at 564 (stating "[t]he number of European television stations has exploded in the past decade as barriers to private ownership have been lowered throughout the [Community]").
141. Id.; see Smith, supra note 14, at 115.
lation on foreign tractor purchases.142

The United States also may point to a 1979 GATT panel decision.143 The issue in this case involved a Community regulation that, on its face, discriminated against animal feed imports from non-Community nations.144 The United States challenged the regulation under Article III. The Community responded to the U.S. challenge by arguing that there had been no adverse effect on U.S. animal feed exports because U.S. exports had not declined after the Community implemented the regulation. The GATT panel rejected the Community's proffered defense, stating that since the regulation was discriminatory on its face, the United States did not need to establish that an adverse effect had actually occurred.145 The 1979 panel decision, therefore, appears to seriously undermine the Community's current, proffered defense to Article III.146

In support of its second contention, the United States should have little difficulty documenting actual injury to U.S. audiovisual exports. The most obvious starting point is to look at those enforcement actions that have already been brought. France, for example, fined a station US$10 million for violating France's national broadcast proportion requirement.147 Furthermore, France has established a policy of fining non-compliant stations US$10,000 for each hour of non-European programming aired in excess of France's national broadcast proportion requirement, a policy that led two French media providers to cancel multi-million dollar deals with a U.S. audiovisual ex-

142. See id. at 115, 127-29.
145. Id.; See McGovern, supra note 131, at 247.
146. Although the precedential value of prior GATT panel decisions was not entirely clear prior to the Uruguay Round, see Pierre Pescatore et al., Handbook of GATT Dispute Settlement 62 (1998), it now appears that WTO panels will be guided by prior GATT panel decisions. In this regard, Article XVI(1) of the Marrakesh Agreement Establishing the World Trade Organization provides, "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947." Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Dec. 15, 1993 [hereinafter Marrakesh Agreement]; see Lowenfeld, supra note 112, at 271.
147. The station eventually failed. See supra note 66.
porter. Additionally, while the United States may only provide twenty-eight percent of total Community programming, it provides well in excess of fifty percent for certain types of programming, such as fiction programming for which it provides seventy percent. Furthermore, the Directive may have a significant impact on certain thematic channels, e.g., a channel devoted to Westerns. The Commission's recent legal action against a British cartoon station for broadcasting too many U.S. cartoons provides a recent example of such potential injury to thematic channels.

Additionally, the growth of new stations in the Community should actually increase the relative demand for U.S. programming. This is because newer stations typically are lower capitalized than existing, often government-supported, stations. Due to the relatively low cost of U.S. programming and the relatively high cost of local European programming, newer stations are typically the biggest consumers of U.S. programming. Therefore, notwithstanding the increasing number of broadcasters and other media providers such as satellite-system service providers, cable operators, and the like, in the Community, the Directive constrains these new media providers to air and, thus, purchase less than fifty percent U.S. programming. With this

148. See supra note 66 (discussing France's community content requirement).
149. Supra note 139 and accompanying text.
150. See supra note 42 (stating that entertainment series and feature films are most commonly imported by Community).
153. See Shao, supra note 5, at 139-36 (discussing economics of television programming production and resulting trade flows); cf. Smith, supra note 14, at 101 (noting that foreign-produced programming is fastest growing source of European television programming and is expected to double in next decade).
154. See Kessler, supra note 17, at 565 (discussing recent growth of various media sources due to development and implementation of new technologies and services, including cable television, video-on-demand, and direct satellite broadcasting).
155. See id.
156. Recall that the Directive's broad definition of "television broadcasting" includes all of these new media delivery systems. See supra note 54 (discussing Community's broad definition of television broadcasting). In this regard, it should be noted that the Community is currently considering ways to implement the local content requirement on cable, satellite, and video-on-demand channels. See GATT and the Media, Fin. Times, Dec. 15, 1993, at 17. It also bears noting that the Community is contemplating instituting a regulation that would prevent U.S. broadcasters from transmitting pro-
increased demand for programming comes the potential for even greater sales of U.S. programming to the various Community media providers.\textsuperscript{157}

In short, it appears doubtful that a complainant must provide evidence of actual injury resulting from a violation of Article III. Furthermore, even if such a showing is necessary, the United States should have little difficulty showing that injury actually has occurred and is likely to continue in the future, particularly given the GATT's low threshold for finding that government regulations affect foreign trade.\textsuperscript{158}

(C) Ban on Quantitative Restrictions

The third substantive claim raised by the United States under the GATT is that the Directive violates Article XI's Ban on Quantitative Restrictions. Article XI(1) provides that no restrictions, other than tariffs, shall be applied against imported products and it expressly prohibits the use of "quotas, import . . . licenses or other [similar] measures."\textsuperscript{159} The United States argues that the Directive violates the Ban on Quantitative Restrictions by requiring Member States to institute a \textit{de facto} quota for European works. From the U.S. perspective, the Directive, which it considers as only nominally an internal Community broadcasting regulation, in substance functions as an import

\begin{footnotesize}
\begin{enumerate}
\item[157.] See Smith, \textit{supra} note 14, at 199; see also Presburger & Tyler, \textit{supra} note 14, at 503-04 (noting potential that United States could double or triple its sales to Community in light of expanding European demand). See generally Presburger & Tyler, \textit{supra} note 14, at 503-04.

While U.S. programming only accounts for approximately 28\% of all programming shown in the Community, it is well recognized, particularly in light of the tremendous growth of other media, such as cable, direct broadcasting, satellite, video-on-demand, and the like, this percentage is likely to significantly increase in the future. Indeed, the Community has expressly recognized this likelihood, stating that, without the local content requirement, the U.S. share of the Community market could double or even triple. See Piracy and Quotas Impede U.S. Entertainment Exporters, \textit{Bus. Int'l.}, Mar. 29, 1993, available in LEXIS, News Library, Busint File.

\item[158.] See Smith, \textit{supra} note 14, at 129.

\item[159.] GATT, \textit{supra} note 87, art. XI(1), 55 U.N.T.S. 224. Article XI expresses the widely-held view that quantitative restrictions pose a much more serious anti-competitive threat than tariffs, particularly with regard to the ability to discriminate against certain imported products. See \textit{Jackson}, \textit{supra} note 83, at 909-10; see also \textit{Lowenfeld}, \textit{supra} note 90, \S\ 2.48 at 53-55, \S\ 5.11 at 197-99. For an overview of the economic injury caused by tariffs, see \textit{Ekelund & Tollison}, \textit{supra} note 90, at 471-77.
\end{enumerate}
\end{footnotesize}
quota that limits the quantity of non-European programming that may be imported into the Community.\textsuperscript{160} Since Community broadcasters cannot air more non-European programming than the Directive allows, the United States argues that Community broadcasters will reduce their purchases of non-European programming to, at best, the highest permissible limit, forty-nine percent.\textsuperscript{161}

This raises the question of what constitutes an impermissible quantitative restriction within the meaning of Article XI, and further whether a measure that in effect functions as a \textit{de facto} quantitative restriction might be found to violate Article XI. Black's Law Dictionary does not define the term "quantitative restriction"; however, it defines the closely analogous term "quota" as "a limiting number or percentage ...."\textsuperscript{162} Professor John H. Jackson, a leading expert on the GATT and international trade, has defined a quota as "a government decree that in any given period . . . only a specified amount (or value) of a certain product can be imported."\textsuperscript{163} The technical construct contained in the Directive does not entirely meet either of these definitions. The Directive does not limit how much non-European programming may be imported into the Community; rather, it restricts the percentage of non-European broadcasting that may be aired within the Community. Technically, therefore, the Community can argue that the local content requirement is not a quota, but rather an internal Community regulation, subject to National Treatment under Article III.\textsuperscript{164} Such a technical argument, however, seems contrary to the spirit of the GATT since the undeniable functional effect of the requirement is to restrict Community broadcasters' purchases of non-European programming.\textsuperscript{165} As such, the United States could make a compelling argument, looking beyond the mere surface of the issue, that the local content requirement, in practice, has the

\textsuperscript{160} See Filipek, \textit{supra} note 3, at 349.
\textsuperscript{161} See id. Recall that U.S. programming may account for well in excess of 50\% of certain types of programming. See \textit{supra} note 42.
\textsuperscript{162} \textsc{Black's Law Dictionary} 1256 (6th ed. 1990).
\textsuperscript{163} \textsc{Jackson, supra} note 83, at 305.
\textsuperscript{164} See Filipek, \textit{supra} note 3, at 354-55.
\textsuperscript{165} See id. at 355. Certain Member States have been actively enforcing their local content requirements. See \textit{supra} notes 147-58 and accompanying text. These enforcement actions further support the contention that the local content requirement, when utilized, is the functional equivalent of a quantitative restriction.
functional effect of a "prohibition[ ] or restriction[ ] . . . made effective through [a] quota[ ] . . . or other measure[ ]," and, thus, violates Article XI.\textsuperscript{166}

\section*{ii. The Community's Defenses}

Perhaps because of the strength of the U.S. arguments under the specific GATT provisions, the Community has largely focused its defense to the U.S. claims on policy considerations contained both explicitly and implicitly in various sections of the GATT, as well as under fundamental principles of international trade, rather than addressing the merits of the U.S. claims under each of the above GATT Articles. The Community has advanced five primary defenses: (1) television broadcasting is a service rather than a good, and thus is not covered by the GATT; (2) the local content requirement is not "legally" binding, but is only a "political" commitment; (3) the GATT's National Security Exception, Article XXI, Public Morals Clause, Article XX, or, perhaps even, the Escape Clause, Article XIX justify the local content requirement; (4) the Directive falls within the Cinema Exception contained in Article IV of the GATT; and, lastly and most problematically, (5) that an implicit "culture exception" exists for trade in audiovisuals and therefore the regular GATT requirements do not apply to the instant dispute.\textsuperscript{167} Because the Community's arguments are based on policy considerations, it is more difficult to evaluate the Community's position than it is to evaluate the U.S. allegations.\textsuperscript{168}

\subsection*{(A) Goods/Service Distinction}

The first threshold argument advanced by the Community is that television programming is a service rather than a good, and, thus, the GATT does not cover it.\textsuperscript{169} Unfortunately, the GATT does not adequately define a "good" or distinguish goods

\textsuperscript{166} GATT, \textit{supra} note 87, art. XI (1), 55 U.N.T.S. 224.

\textsuperscript{167} Some Community Member States, most notably France, have claimed that U.S. opposition to the Directive must fail because the U.S. market is effectively closed off to the rest of the world. This "unclean hands" argument, however, seems destined to fail because the United States has no legal restrictions against the importation or exhibition of foreign audiovisuals. \textit{See} Presburger & Tyler, \textit{supra} note 14, at 504.

\textsuperscript{168} \textit{See} Filipek, \textit{supra} note 3, at 355.

\textsuperscript{169} While the Contracting Parties agreed to extend the GATT/WTO system to allow the General Agreement on Trade in Services [hereinafter GATS] to cover trade in certain services during the Uruguay Round, the Contracting Parties elected to defer
from services. Thus, the Community’s argument invites a difficult inquiry into what distinguishes a “good” from a “service.”

While obviously not binding upon a WTO panel, it bears noting that the Community has long considered broadcasting a service. Prior Court of Justice decisions evidence this, and it was specifically noted in the Green Paper. The Community also notes, with apparent irony, that the United States has previously considered television broadcasting to be a service, even in its GATT activities. The Community’s focus on television broadcasting as a service, however, is a bit misleading; the U.S. complaint involves the impact the Directive will have on the sale of television programming, a hybrid good/service, not the service provided by broadcasters. Furthermore, as the Italian tractor-financing decision demonstrates, discriminatory national regulations governing services may nonetheless violate the

resolution of the present dispute until later bilateral discussions could take place. See Shao, supra note 5, at 106.

170. See Smith, supra note 14, at 123.
171. See Filipek, supra note 3, at 356.
172. Id. at 350.
174. The Green Paper states that the Community’s authority to regulate Community broadcasting is based on, inter alia, the EC Treaty’s provisions on the freedom to provide services. See Green Paper supra note 20, at 105.
176. Filipek, supra note 3, at 350.
177. One commentator aptly phrased this mischaracterization as follows: The Community’s argument that “broadcasting” is a “service” has an intuitive, seemingly undeniable appeal at first blush. Television signals — the “things” that broadcasters transmit — are intangible: unlike wheat, steel, or computer chips, they can neither be held nor counted. However compelling this image may be, it misses the real focus of the U.S. complaint, which is not “broadcasting” but, more narrowly, imported television programming. Videotape — the media onto which imported programming is recorded — is a tangible commodity. The Community’s services argument clouds the picture by mischaracterizing the subject of the dispute.

Id. at 355-56.
GATT if they impact the importation of goods. Thus, the fundamental threshold question is whether trade in television programming constitutes trade of a good falling within the ambit of the GATT. This is by no means an easy inquiry.

(I) Traditional Economists' Test

Traditionally, economists have distinguished goods from services on three primary grounds, none of which is particularly edifying when applied to television programming. The first, and most obvious, is whether the item in question is tangible or intangible and, therefore, a good or service, respectively. The obvious difficulty with this test is the fact that television programs combine elements of both.

The value of a television program is hardly captured by the value of the medium on which it is contained, yet a videotape, which is essential for trade in audiovisuals to take place, is undoubtedly a good. A live theatrical performance is considered a service performed for the benefit of an audience. Is such a performance transformed into a good when it is recorded? On the other hand, does a video tape cease being a good once a performance has been recorded on it? If one considers the respective values of the individual inputs, i.e., the generally low cost of video tape and the relatively higher costs of producing a performance, one might conclude that television programming is a service. However, this conclusion becomes less appealing when the other two tests are applied.

The second test used to separate goods and services is whether the item in question is storable. Services are usually non-storable and typically consumed as they are produced,

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178. See supra notes 140-42 and accompanying text.
179. See Smith, supra note 14, at 124; Filipek, supra note 3, at 956-57; Shao, supra note 5, at 124-25.
181. See Smith, supra note 14, at 124.
182. See id. The French representative to a 1960's GATT Working Party presented this example. See Filipek, supra note 3, at 950. By the same token, however, it should be noted that, "[a]lthough sporting events or public affairs are often broadcast live, most fiction entertainment — the type of programming covered by the Directive's quota provisions — is aired from video tapes, which are shipped (much like goods) from the program producer to broadcasters." Id. at 956.
whereas goods are usually storable.183 While television programs are storable, is this a characteristic important enough to determine whether trade in television programming should be governed by the GATT?184 Should it matter if a broadcaster only purchases the rights to broadcast a program a limited number of times? Again, there are no clear answers.

The third traditional test deals with the method by which an item is traded. Services usually cannot be traded over long distances and typically require the simultaneous presence of both the producer and consumer, e.g., a haircut.185 Additionally, services “usually do not involve tangible output that can easily be counted, thus limiting a government’s ability to restrict imports by tariffs or other quotas . . .”186 Trade in television programming thus closely resembles trade in goods: it is usually sold on a physical medium, a video tape;187 it is often traded across long distances and stored for later use;188 and has historically been subject to traditional protective measures such as quotas and tariffs.189 As such, the United States can argue that, because trade in television programming conforms more closely to the characteristics associated with trade in goods, it should be treated as a good and, thus, should be covered under the GATT.190 But this argument is not wholly persuasive. The Community argues that the real value of television programming is contained in the content of the program, not the medium in which the content is captured or the method by which that medium is traded.191 As such, the Community would argue that trade in television programming is trade in a service. Furthermore, the Community would argue that treating trade in television programming as trade in a service would be more consistent with the method by which television programming is typically sold. Broadcasters typ-

184. Cf. Smith, supra note 14, at 124 (arguing that although blank videocassette is storable good, its value lies in recorded materials so it contains elements of both goods and services).
185. See Filipek, supra note 3, at 356; see also Smith, supra note 14, at 124.
186. Filipek, supra note 3, at 356.
187. See Shao, supra note 5, at 124-25.
188. See Filipek, supra note 3, at 356.
189. See id., at 356-57.
190. See id.
191. See id.
ically only acquire the right to air programming a limited number of times, thus a sale may be more closely analogized to the leasing of a service rather than to the outright, unconditional sale of a good. But the Community's position is undermined by the close analogy between television programming and books, magazines, newspapers, and audio recordings, all of which have been treated as goods under the GATT. It would appear somewhat arbitrary to draw a distinction between television programming and books, magazines, newspapers, and audio recordings, especially since, for all of the above, their real value is their literary or artistic content, which happens to be stored on an “incidental goods” media, e.g., newsprint, audio tape, or paper. The specific provision in the GATT for trade in cinematographic films further complicates the analogy.

In the end, the traditional tests are largely unhelpful in trying to make a reasoned decision whether trade in audiovisuals is trade in a good or trade in a service. Thus, it is necessary to look elsewhere to try to find a more appropriate criterion to resolve the issue.

(II) Alternative Tests

(a) The U.S. Taxation/OECD “Real Value” Test

One alternative test advanced to answer the goods/services question is the approach used by U.S. courts in tax matters. In such cases, U.S. courts have based their determinations on the real value of the underlying transaction. Thus, when the real object sought by a buyer is a service, U.S. courts generally will characterize the transaction as involving the sale of a service. Using this approach, U.S. courts have, for example, held that magnetic tapes containing mailing lists and other intangible knowledge should properly be considered trade in a service.

192. See Filipek, supra note 3, at 356. Once a good is sold, the purchaser generally may use that good as often as desired. See Kessler, supra note 17, at 573.
193. See Smith, supra note 14, at 124.
This U.S. "real value" taxation test is largely consistent with the Organization for Economic Cooperation and Development's ("OECD") approach. Under that approach, the characterization of an undertaking as a service depends upon the nature of the industry in which the undertaking is a part.\textsuperscript{196} Under the OECD approach, trade in television programming is trade in a service because programming is the valued output of the entertainment industry, a service industry.\textsuperscript{197}

If a WTO panel were to adopt either of the above variations of the real value test, it likely would conclude that trade in television programming constitutes trade in a service.\textsuperscript{198} Although the adoption of some variation of the real value test might appear reasonable and desirable, both the GATT and prior GATT panels have implicitly rejected such approaches.\textsuperscript{199} The GATT implicitly did so when it established Article IV, the "Cinema Exception."\textsuperscript{200} Article IV was adopted at a time when the GATT covered only trade in goods. The creation of Article IV thus implies that the Contracting Parties considered trade in cinematographic films to be trade in goods and, thus, covered by the GATT. Prior GATT panels also implicitly rejected the real value test in deciding disputes involving trade in books,\textsuperscript{201} magazines,\textsuperscript{202} and newspapers.\textsuperscript{203} Despite the fact that the real value of these media is the information they convey rather than the paper on which they are printed, the panels applied the GATT in each of these disputes, implicitly indicating that they considered these items as goods covered by the GATT rather than services. Therefore, it appears that if a WTO panel were to apply the real value test, it would contradict prior, implicit, GATT precedent.\textsuperscript{204}

\textsuperscript{196} See Smith, supra note 14, at 125 ("The valued output of service industries is considered a service.").
\textsuperscript{197} See id.
\textsuperscript{198} See id.
\textsuperscript{199} See id.
\textsuperscript{200} GATT, supra note 87, art. IV, 55 U.N.T.S. 208. Article IV permits Contracting Parties to establish national quotas to ensure that films of national origin receive a guaranteed proportion of screen time in national movie theaters. Id.
\textsuperscript{202} See Smith, supra note 14, at 125 (citing GATT Doc. L/5359 (1982)).
\textsuperscript{203} See id.
\textsuperscript{204} See id.
Indeed, the United States could argue that this precedent would require, or should be considered persuasive authority for, a WTO panel to treat television programming as a good, particularly in light of Article XVI of the Marrakesh Agreement Establishing the World Trade Organization, which states: "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947."\(^{205}\) In light of the above, it appears that the real value test is ill-suited to resolve the issue. Therefore, it is again necessary to look elsewhere for a meaningful method for making a reasoned decision.

(b) The "Necessary Form of the Transaction" Test

The "necessary form of the transaction" test dictates that an item's characterization as a good or service depends upon the form of the property in the underlying transaction.\(^{206}\) For trade in television programming, the sale of programming necessarily involves the sale of a tangible good, a video tape, to the purchaser.\(^{207}\) Thus, under this test, television programming is a good. One obvious criticism of this test is that it appears to be inherently arbitrary;\(^{208}\) different transactions involving the same intangible property may receive different characterizations based on whether the transaction is captured on tape.\(^{209}\) Yet, despite the apparent arbitrariness of the test, it has been argued that the necessary form test best comports with the standards adopted by the GATT, GATT panels, Community case law, and international customs and trade practices.\(^{210}\) With regard to the GATT, it is argued that the Contracting Parties implicitly

\(^{205}\) Marrakesh Agreement, supra note 146; see Lowenfeld, supra note 112, at 271.

\(^{206}\) See Smith, supra note 14, at 125.

\(^{207}\) See id. at 126.

\(^{208}\) Cf supra note 183 and accompanying text.

\(^{209}\) For example, if the transaction in question involves a television station's broadcasts to a viewer's home, the transaction would be considered an intangible service. If the transaction in question is the sale of a program by a producer to a station, the transaction would be considered a good because the transaction could not take place without the property being passed by the producer to the station on a physical medium such as video tape, which is a good. See Smith, supra note 14, at 126.

\(^{210}\) See id. at 126-27.
adopted such an approach in enacting the Cinema Exception and that GATT panels have likewise implicitly, sub silentio, adopted such an approach by applying the GATT to disputes involving trade in books, magazines, and newspapers.

With regard to Community case law, it is argued that the necessary form test is consistent with prior statements by the Court of Justice. Although the Court of Justice has not explicitly decided whether trade in television programming constitutes trade in a good or service, it has stated in dicta that “trade in material, sound recordings, films, apparatus, and other products used for the diffusion of television signals is subject to the rules relating to [the] free . . . movement [of] goods.” Therefore, it has been argued that the Court of Justice has likewise implicitly adopted the necessary form test.

It has also been claimed that international customs practices, although perhaps only marginally, support the necessary form of the transaction test. Under contemporary international customs practices, countries list items that are subject to national tariffs. Services, however, are not subject to tariffs, and, thus, are not included on national tariff schedules. Both the Community and the United States apply tariffs to videotapes containing recorded programs at a rate slightly higher than the rate applied to blank videotapes. Thus, it is argued, television programs should be considered goods; “[f]or customs purposes, a video-

211. See GATT, supra note 87, art. IV, 55 U.N.T.S. 208. Television programming and cinematographic films are closely analogous. Both involve filmed performances that are recorded on a physical medium, such as a video tape, and ultimately are shown to a mass audience. Smith, supra note 14 at 126. Based on the existence of Article IV, the United States can argue that the GATT implicitly considers exposed cinematograph film a good. Thus, a WTO panel should likewise consider television programming a good. See Smith, supra note 14 at 126.

212. See supra notes 201-03 and accompanying text (discussing application of GATT to books, magazines, and newspapers).

213. See supra note 173 and accompanying text. As discussed above, the Court of Justice has ruled that the regulation of television broadcasting is a service, but this does not mean that trade in television programming should not be considered trade in goods. Cf. supra note 177 and accompanying text (discussing Community's possible mischaracterization of television broadcasting as service).


215. See Smith, supra note 14, at 127.

216. See id. at 126.

217. See id.
tape containing intangible intellectual property is distinct from a blank videotape, but still considered a good and not a service.\textsuperscript{218} Additionally, it is argued that international trade practices support application of the necessary form test. To illustrate, under U.S. international trade practices, the U.S. Commerce Department has determined that once information has been stored on a floppy disk, the programmer’s ideas are converted into a good.\textsuperscript{219} By analogy, the United States can argue that once a performance has been captured on film, it is a good.

In light of all of the above, it has been argued that the necessary form of the transaction test best captures the approach actually applied by the Contracting Parties and prior GATT panels.\textsuperscript{220} Furthermore, it has been argued that the test also comports with prior statements by the Court of Justice\textsuperscript{221} and is consistent with both international trade\textsuperscript{222} and, perhaps less convincingly, international customs practices.\textsuperscript{223} As such, it appears that a WTO panel might well conclude that the necessary form of the transaction test is the most appropriate, albeit not entirely satisfying, approach to adopt and apply in the instant dispute. As a result, it seems likely that a WTO panel would treat trade in television programming as trade in a good covered by the GATT.\textsuperscript{224}

(B) Article Four Is Not Legally Binding

Martin Bangemann, the Community Vice President responsible for internal market and industrial affairs, summarized the Community’s position on the binding nature of Article Four when he stated that the requirement is “not a legal obligation,
it's a political commitment." Both the Community and individual Member States have expressly adopted Bangemann's position as a defense to the U.S. complaint. The Community takes the position that, while the Directive imposes a legal obligation on Member States to pass within two years national legislation consistent with the Directive, it only requires Member States to do so "where practicable and by appropriate means." This conditional language, the Community maintains, allows Member States considerable flexibility in drafting, enacting, and enforcing compliant national legislation. The Community claims that it further interprets the "where practicable" clause as indicating that the local content requirement is only a goal, not a legally enforceable commitment under Community law. Therefore, the Community argues that the local content requirement is merely exhortatory in nature, not mandatory, and, thus, does not violate the GATT.

Finally, the Community argues that the Directive lacks an enforcement provision. Thus, the Community contends that the United States should not be concerned that Community broadcasters will curtail imports of U.S. programming out of fear.

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225. Steven Greenhouse, Europe Reaches TV Compromise; U.S. Officials Fear Protectionism, N.Y. TIMES, Oct. 4, 1989, at A1. Bangemann's statement, as reflected in the Council minutes, is consistent with the position the German delegation advanced during negotiations over the local content requirement. See MAGGIORE, supra note 46, at 55.

226. See, e.g., Presburger & Tyler, supra note 14, at 502 (discussing comments of British Foreign Secretary John King); Greenhouse, supra note 225; Filipek, supra note 3, at 352-53 (discussing Community's position) (citing USITC REPORT, supra note 101, at 6-114).

227. See Presburger & Tyler, supra note 14, at 502 (discussing "deliberately porous" language of Article Four, including "where practicable and by appropriate means" provision).

228. Id.

229. See Roy Denman, Television Without Frontiers, WASH. POST, Nov. 24, 1989, at A23; see also Filipek, supra note 3, at 352-53. The Community also points to statements by Bangemann and others that the Community and the European entertainment industry will not rigidly enforce the Directive except in "very extreme cases." See id. at 353. As discussed above, however, it is clear that at least one Member State, France, is very serious about enforcing its national legislation enacted pursuant to the Directive. See supra note 66 (discussing US$10 million fine against non-compliant station eventually leading to that station's failure). Despite its soothing words, the Community also appears quite serious about enforcing the legally binding Directive. See also supra notes 66, 147-57, 165 and accompanying text (discussing enforcement measures taken by various Community members).

230. See Filipek, supra note 3, at 352. The GATT only prohibits legally binding obligations that restrict international trade. Id.

231. See Denman, supra note 229, at A23.
of an enforcement action brought under Community law.\textsuperscript{232} U.S. concerns, however, have not been assuaged.\textsuperscript{233} The United States maintains that the Directive empowers the Commission with "the authority, the capacity, [and] the legal framework to . . . create a quota that will exclude American works in favor, in a discriminatory fashion, of European works."\textsuperscript{234} Notwithstanding the position of Germany and other Member States that the local content requirement is only politically binding,\textsuperscript{235} the United States remains concerned about the interpretation other Member States have of the requirement.\textsuperscript{236} Furthermore, the United States points out that the Commission, notwithstanding its prior soothing comments,\textsuperscript{237} has announced "[t]he flexibility of the wording [of the local content requirement] does not . . . in any way affect the legal nature of the obligation," and "[t]he Directive shall be legally binding in its entirety upon the Member States."\textsuperscript{238}

As discussed above,\textsuperscript{239} Article Four of the Directive provides, "[t]he Commission shall ensure the application of this Article . . . in accordance with the provisions of the Treaty."\textsuperscript{240} Furthermore, Article 155 of the EC Treaty\textsuperscript{241} empowers the Commission

\begin{thebibliography}{99}
\footnotesize
\bibitem{232} Filipek, \textit{supra} note 3, at 352-53.
\bibitem{233} See, e.g., Presburger & Tyler, \textit{supra} note 14, at 503; Filipek, \textit{supra} note 3, at 360.
\bibitem{235} See \textit{supra} notes 225-33 and accompanying text (delineating view that Directive is politically and not legally binding).
\bibitem{236} See Filipek, \textit{supra} note 3, at 360.
\bibitem{237} See \textit{supra} notes 225-33 and accompanying text (expressing idea that Directive is politically and not legally binding).
\bibitem{239} See \textit{supra} notes 69-68 and accompanying text (outlining enforcement requirements set up by Directive).
\bibitem{240} Council Directive No. 89/552, \textit{supra} note 2, art. 4, O.J. L 298/23, at 27 (1989). As one commentator has noted:
\begin{quote}
[D]irectives by definition are binding in nature even though they may be flexible in allowing variation among the laws of Member States. The obligatory nature of [the Directive] is also evidenced in its third paragraph which requires that "[f]rom 3 October 1991, the Member States shall provide the Commission every two years with a report on the application of this Article . . . ."
\end{quote}
\textit{Id.} Kessler, \textit{supra} note 17, at 573-74 (citing \textsc{Barry E. Carter} \& \textsc{Philip R. Trimble}, \textit{International Law} 513 (3rd ed. 1991)).
\end{thebibliography}
to supervise the application of Community law and to bring suit, pursuant to Article 169, before the Court of Justice in order to compel Member State compliance with Community law.\textsuperscript{242} Additionally, Member States and private parties may challenge a Member State’s laws on the ground that the laws do not comply with a concrete\textsuperscript{243} Community directive.\textsuperscript{244} Thus, a Community television producer or other interested party could sue a Member State in either a national court or the Court of Justice\textsuperscript{245} for that Member State’s failure to comply with the Directive.\textsuperscript{246} Furthermore, as one commentator has noted, the Community has recently taken actions that place the Community’s claim that the local content requirement is only “politically binding” in doubt:

The intent that this Directive be binding on the Member States is most concretely indicated by the [Community]'s actual attempts to enforce it. In 1992 the European Commission sent “pre-litigation” letters to all twelve Member States requesting reports on implementation and warning that deficiencies in some Members' implementation had been noticed. In the most recent Green Paper on Audiovisual Policy, the [Community] also censured those Member States that had been delinquent in implementing the Directive. In addition, the intent that the provisions of the Directive be respected is ultimately manifested by the [Community]'s rigorous defense of it from attacks by the United States.\textsuperscript{247}

\textsuperscript{242} See EC Treaty, supra note 22, art. 169, [1992] 1 C.M.L.R. at 686; see also Kessler, supra note 17, at 574. While the EC Treaty endows the Community with some discretion in enforcing compliance with the Directive, the review mandated by the Directive is not discretionary; it requires the Commission to review compliance with the Directive every two years and to report its findings to other Member States and to the European Council. See supra note 68 and accompanying text. This mandatory reporting requirement implies that compliance with the local content requirement “will be scrutinized on a regular basis, thereby providing parties dissatisfied with its operation a mechanism for effecting change.” Filip, supra note 3, at 361; cf supra notes 63-68 and accompanying text (discussing enforcement of Directive by Community members).

\textsuperscript{243} A directive is “concrete” if it sets forth a complete and precise legal obligation. See SACE v. Italian Ministry of Finance, Case 33/70, [1970] E.C.R. 1218; see also supra notes 63-64 and accompanying text.

\textsuperscript{244} See Public Prosecutor v. Ratti, [1979] E.C.R. 1629; see also supra note 64 and accompanying text.

\textsuperscript{245} In the final instance, the Court of Justice will resolve any issues regarding Member State implementation of the Directive. See EC Treaty, supra note 22, art. 164, [1992] 1 C.M.L.R. at 684 (stating “[t]he Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.”).

\textsuperscript{246} Smith, supra note 14, at 109, 122.

\textsuperscript{247} Kessler, supra note 17, at 574; cf. Hoffman-Riem, supra note 21, at 610.
As further indicia of the *de facto* binding nature of the Directive, the Commission recently began legal proceedings against the United Kingdom for allowing certain thematic channels to air more than fifty percent non-European programming.\(^{248}\) One such case was brought against a British channel dedicated to airing predominantly U.S. cartoons.\(^{249}\) Further evidence that the Community is taking the enforcement of the Directive seriously is provided in the 1994 Green Paper on Audiovisual Policy, which proposes tightening restrictions on the broadcast of non-European television programming.\(^{250}\)

In the alternative, the United States argues that even if the local content requirement is found not to be legally binding, the requirement nonetheless violates the GATT because it has a discriminatory effect on the import of non-European programming.\(^{251}\) This argument is based on a 1984 GATT panel decision\(^{252}\) holding that measures taken by a Contracting Party may violate the National Treatment requirement if they have a discriminatory effect on imported products.\(^{253}\) In the 1984 panel decision, the panel held that a complaining party need not provide evidence of actual injury to an export industry; rather, the complainant need only show that its product received different treatment from that accorded to local products.\(^{254}\) Thus, the United States argues that since Member States have enacted local content requirements that local broadcasters will apparently view as legally binding,\(^{255}\) discrimination is likely to be found. The United States, therefore, maintains that the National Treat-

\(^{248}\) See *E.U. Plans to Tighten TV Laws, Says Pinheiro*, supra note 152.

\(^{249}\) Id.


\(^{251}\) See Smith, supra note 14, at 122-23.

\(^{252}\) Id. at 122 (citing Canada: *Administration of the Foreign Investment Review Act*, at ¶ 5.5, GATT Panel Report 30S/140 (1984) [hereinafter 1984 GATT Panel Decision]).

\(^{253}\) See supra notes 125-58 and accompanying text (outlining U.S. argument that Directive violates National Treatment requirement of GATT).

\(^{254}\) See *1984 GATT Panel Decision*, supra note 252, at ¶ 5.5; cf supra notes 141-46 and accompanying text.

\(^{255}\) See Smith, supra note 14, at 122-23 (citing 1984 GATT Panel Decision, supra note 252, at ¶ 5.9). Whether or not the discrimination affected a specific transaction is not an issue; the issue is whether the treatment was different. Cf. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. III(8), in *Marrakesh Agreement*, supra note 146; Kessler, supra note 17, at 587.

\(^{256}\) See supra notes 66, 152, and 248-49 (discussing French fines and Community legal action against British cartoon channel).
ment requirement has been violated.257

(C) The Cinema Exception

(I) Overview

While the GATT Contracting Parties were primarily concerned with establishing fundamental free trade principles in the GATT, they nonetheless recognized that certain specific exceptions to regular GATT treatment might be desirable or necessary to help smooth over some potential trouble spots between the Contracting Parties.258 One such specific exception is contained in Article IV of the GATT, the "Cinema Exception."259 The Cinema Exception expressly permits contracting parties to establish national screen quotas to assure that a guaranteed proportion of total motion picture screen time in local movie theaters is dedicated to exhibiting films of national origin.260

257. Smith, supra note 14, at 123. According to one commentator:
Quite apart from its concern that the Directive will provide the Commission a legal basis for enforcing a hard, discriminatory quota, the United States also fears that the Directive will both lead Member States to tighten existing restrictions on foreign programming and encourage Member States that now maintain no quotas to institute them. In the words of one Hollywood executive, "[w]e have seen the future and it is France."
Filipek, supra note 3, at 362 (citation omitted).

258. See Filipek, supra note 3, at 337-38. Most of the concerns had more to do with political and cultural identity than with economics. See Jackson, supra note 83, at 293; Smith, supra note 9, at 26, 41-43, 175-76. Political and cultural concerns were based upon the commonly held belief that films changed peoples' political attitudes and influenced individual behavior. Garth S. Jowett & Victoria O'Donnell, Propaganda and Persuasion 102 (1986); Smith, supra note 9, at 41-42 (discussing use of propaganda films during wartime and belief that Western feature films encouraged viewers to engage in reckless behavior). As such, national governments were believed to have an interest in screening what their citizens watched in movie theaters. Frank J. Coppa, The Explosion of the Eye? An Introduction to the Promise and Problems of Television, in Screen and Society: The Impact of Television Upon Aspects of Contemporary Civilization ix, xiv-xv (Frank J. Coppa ed., 1979). Consequently, movie theaters, though primarily privately owned, were often subject to strict government regulation. Id. However, several Contracting Parties were concerned that tariffs would not adequately protect their domestic film industries from foreign competition, particularly from the United States, and thus insisted upon the use of screen quotas to protect their respective domestic film industries. See Shao, supra note 5, at 111; Filipek, supra note 3, at 338-39.

259. See GATT, supra note 87, art. IV, 55 U.N.T.S. 208.

260. Id.; See Shao, supra note 5, at 111; Smith, supra note 14, at 114; Kessler, supra note 17, at 572 & n.52. The National Treatment requirement expressly states that it does not prevent a Contracting Party from establishing or maintaining an "internal quantitative regulation relating to exposed cinematograph films and meeting the requirements of Article IV." GATT, supra note 87, art. III(4)(b), 55 U.N.T.S. 206. See Presburger & Tyler, supra note 14, at 507.
The Cinema Exception further provides, "[I]f any [Contracting Party] establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas . . . ."261 The Cinema Exception then goes on to set forth requirements that national screen quotas must satisfy. Most importantly, it provides that a Contracting Party may only require the exhibition of films of national origin.262 Second, Contracting Parties' screen quotas "must be transparent and quantifiable."263 Lastly, the Cinema Exception states that "[s]creen quotas shall be subject to negotiation for their limitation, liberalization, or elimination."264

Significantly, Article IV does not address trade in television programming.265 Furthermore, a GATT panel has never decided whether Article IV applies mutatis mutandis to television programming.266 However, a GATT working party, largely at the insistence of the United States, has declined to adopt a proposed resolution that the Cinema Exception be extended to cover trade in television programming.267

261. GATT, supra note 87, art. IV, 55 U.N.T.S. 208. It is important to note that this provision prohibits Contracting Parties from utilizing other methods of discrimination against foreign-produced works. See Honore M. Catudal, The General Agreement on Tariffs and Trade: An Article in Layman's Language, 44 U.S. DEP'T OF STATE BULL. 1010, 1015 (June 26, 1961). It is also significant to note that the Cinema Exception does not set an upper limit on screen quotas, and, thus, theoretically, a Contracting Party could set a one hundred percent screen quota for films of national origin. See Shao, supra note 5, at 111. The GATT does not provide an aggrieved party any avenue of redress from such a potentially draconian screen quota, apart from the provision that screen quotas shall be subject to future negotiations. See Filipek, supra note 3, at 339; Shao, supra note 5, at 111.

262. GATT, supra note 87, art. IV(a), 55 U.N.T.S. 208. The Article expressly prohibits the granting of special preferences to the films of other Contracting Parties. Id. art. IV(b) (stating that screen time "shall not be allocated formally or in effect among sources of supply"); see also Filipek, supra note 3, at 338. This prohibition is consistent with the GATT's MFN provision and Ban on Quantitative Restrictions. See Filipek, supra note 3, at 338; see also Shao, supra note 5, at 111. The Cinema Exception, however, also contains a grandfather clause which allows a Contracting Party to reserve for other Contracting Parties that proportion of screen time provided on April 10, 1947. GATT, supra note 87, art. IV(c), 55 U.N.T.S. 208. See Filipek, supra note 3, at 338-39.

263. Filipek, supra note 3, at 399.
264. GATT, supra note 87, art. IV(d), 55 U.N.T.S. 208.
265. See Pressburger & Tyler, supra note 14, at 507; Shao, supra note 5, at 111.
266. See Smith, supra note 14, at 99.
267. See Kessler, supra note 17, at 572 n.52 (citing Application of GATT to International Trade in Television Programmes, GATT Doc. L/1741 (Mar. 18, 1962)).
(II) The 1960's Working Group Negotiations

In November 1961, the United States raised the issue of the GATT's applicability to the rising incidence of trade restrictions on television programming.268 Noting that the issue was not terribly pressing at the time,269 the United States requested the formation of a GATT working party to examine the issue and to recommend potential solutions to the Contracting Parties.270 In December 1961, a working party gathered to determine whether the GATT should apply to trade in television programming.271 Three separate positions were advanced during the working party negotiations. Some delegations, led by France, argued that television programming was more akin to a service than a good, and, thus, doubted whether the GATT should apply at all.272 A second position that delegations of various national origins argued was that the Cinema Exception should be applied *mutatis mutandis* to trade in television programming because of the close similarity television programming has to films.273

The third position, led by the United States, argued that television programming is a product covered under the GATT, and therefore national regulations restricting the use of foreign-produced programs violate the National Treatment requirement.274

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268. See Filipek, supra note 3, at 340 (citing Application of GATT to International Trade in Television Programmes, GATT Doc. L/1615 (Nov. 16, 1961)).

269. Id. (citing Application of GATT to International Trade in Television Programmes: Statement Made by the United States Representative on 21 November 1961, GATT Doc. L/1646 (Nov. 24, 1961)).

270. Id. While the United States argued that the Cinema Exception should not be expanded to cover television programs, it nonetheless proposed a resolution that national television stations reserve "a reasonable proportion of favourable viewing time" for foreign programs. Smith, supra note 14, at 117. The ambiguous U.S. proposal was not adopted. See id. at 117.

271. See Filipek, supra note 3, at 340; Smith, supra note 14, at 117. The working party was asked to examine the GATT's provisions and determine if they adequately dealt with the problem of market access for television programs and to recommend what action, if any, should be taken. Filipek, supra note 3, at 340 (citing Application of GATT to International Trade in Television Programmes: Report of the Working Party, GATT Doc. L/1741 (Mar. 18, 1962)). In making its recommendations, the working party was to consider the impact of television, the necessity of domestic production, and the desirability of promoting free trade between Contracting Parties. Smith, supra note 14, at 150.


273. See Smith, supra note 14, at 117; Filipek, supra note 3, at 341-42.

274. Filipek, supra note 3, at 340-41.
The United States argued this conclusion was necessary because the GATT already implicitly treated cinematographic works, a product undeniably similar to television programs, as a product covered under the GATT, albeit as an exception to the usual National Treatment requirement.\textsuperscript{275} At the same time, however, the United States argued that the Cinema Exception should not be extended to cover television programming because the exception was expressly limited to cinema films, while most television programs are recorded on video tape.\textsuperscript{276} Furthermore, the United States argued that the Cinema Exception should not be applied to television programming because, at the time, there were typically only a few television stations in a given country, and these stations were either controlled or regulated by national governments. At the same time, however, there were considerably more commercial movie theaters in these countries that were generally more responsive to consumer demand for films, in the forms of commercial and popular pressure, regardless of a film's origin.\textsuperscript{277} Despite its insistence that the GATT cover trade in television programming, the United States nonetheless conceded during the working group sessions that governments had understandably taken a special interest in television because of its important role as a cultural and informational medium.\textsuperscript{278}

Although the working party was able to prepare a number of draft recommendations on trade in television programming, the working party ultimately was unable to reach a consensus and took no final action.\textsuperscript{279} While the United States raised the issue again in 1962 and 1964, a second working party was not formed, and the issue eventually was dropped, at least for the time being.\textsuperscript{280}

\textsuperscript{275} See id.

\textsuperscript{276} Id. at 941 (citation omitted); see also Shao, supra note 5, at 112. In contrast, one commentator holds: "Article IV applies only to 'cinematograph films,' and its scope should be expanded to television programs only by the Contracting Parties should they choose to amend the [GATT]." Smith, supra note 14, at 190.

\textsuperscript{277} See Filipek, supra note 3, at 941. It should also be noted, however, that many of the theaters were, at the time, subject to some government regulation, albeit generally less than that placed over broadcasters. See id.

\textsuperscript{278} Shao, supra note 5, at 112.

\textsuperscript{279} Filipek, supra note 3, at 342; Smith, supra note 14, at 117.

\textsuperscript{280} See Smith, supra note 14, at 117; Filipek, supra note 3, at 342.
(III) The Uruguay Round Negotiations

The Contracting Parties did not formally address application of the Cinema Exception to trade in television programming until the Uruguay Round began in 1986.\textsuperscript{281} To facilitate negotiation on the establishment of a General Agreement on Trade in Services ("GATS"), a Group of Negotiations on Services ("GNS") was founded.\textsuperscript{282} The GNS in turn created an Audio-Visual Sector Working Group ("A/V Working Group") to examine trade issues in the audiovisual sector, especially those pertaining to broadcasting and films.\textsuperscript{283}

The GATS is comprised of legally binding provisions on cross-border trade and investment in services, including audiovisual services.\textsuperscript{284} While the Contracting Parties were ultimately unable to agree on coverage of television programming within the GATS agreement, it is now clear that any future multilateral negotiations or agreements on television programming will take place under the GATS.\textsuperscript{285} However, because the Contracting Parties were unable to resolve the issues the Directive posed under the GATS, and they eventually agreed to defer resolution of the dispute until later bilateral negotiations could take place, the United States maintains that it may still act unilaterally under its own national trade laws, namely section 301 of the Trade Act of 1974.\textsuperscript{286} The Community, on the other hand, argues that, notwithstanding the fact that the parties agreed to put the issue to the side for the time being, with an eye toward future bilateral negotiations, the United States must now follow the dispute resolution procedure established during the Uruguay Round.\textsuperscript{287} The Community contends that this procedure divests the United

\textsuperscript{281} See Shao, \textit{supra} note 5, at 113.
\textsuperscript{282} See Filipek, \textit{supra} note 3, at 343 (citing Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations (Sept. 20, 1986), \textit{reprinted in} 25 I.L.M. 1623 (1986)).
\textsuperscript{283} See Shao, \textit{supra} note 5, at 113; Filipek, \textit{supra} note 3, at 348 (citing \textit{Trade in Services GATT}, 73 GATT Focus 10, 10-11 (1990)).
\textsuperscript{287} See Kessler, \textit{supra} note 17, at 586.
States of the right to act unilaterally under its trade laws without first attempting to resolve the dispute pursuant to the new, strengthened WTO dispute resolution protocol.\footnote{Id.}

Although the parties were unable to resolve their differences during the Uruguay Round, two particularly noteworthy developments took place during the negotiations. First, the Community clarified its position on the creation of a culture exception under the GATS and, second, the United States offered an interesting compromise that deserves special mention. The Community's primary objective during the Uruguay Round negotiations was to convince the United States and other nations to agree to include within the GATS either a general culture exception clause applicable to trade in "cultural industries," or a limited culture exception for trade in audiovisuals, the clause being included in an annex to the audiovisual sector.\footnote{See Services-Audio-Video Sector Working Group, 75 GATT Focus 10 (1990) [hereinafter Services]; Filipek, supra note 3, at 343-44; Kessler, supra note 17, at 576. In the event that the United States or other nations adopting the U.S. position would not agree to an overall culture exception, the Community insisted upon special treatment or "specificity" for audiovisual trade. Special treatment or "specificity" would enable countries to regulate imports in order to preserve their cultural identity. See EC, U.S. Differences Remain on Audiovisuals; More Talks in GATT Needed, EC Official Says, 10 Int'l Trade Rep. (BNA) No. 41, at 1777 (Oct. 20, 1993). The Community argued that such an exception was necessary because "for many countries, the protection or promotion of indigenous languages, history, and heritage depends heavily on national audiovisual output." See Services, supra, at 10. The United States responded that the Community's "specificity" proposal was impermissibly flawed due to the ambiguous nature of culture, and further noted that "cultural identity was difficult to define given the tendency toward multinational film and TV productions." Id.}

The Community's proposed general culture exception would allow importing nations to invoke a general culture exception for trade in certain, undefined cultural industries.\footnote{See supra note 289. Obviously, such a broad exception, which does not meaningfully delineate those items that might supposedly injure national culture, is inherently open to abuse. This embodies the major U.S. argument against the proposal.} The limited culture exception, which the Community argued was necessary to account for the unique impact that trade in audiovisuals has on culture, would only allow an importing nation to impose import restrictions for trade in audiovisuals.\footnote{GATT/Audiovisual: Commission Wants Specific and Limited Commitments, European Rep., No. 1894, Oct. 16, 1993, at 10; Filipek, supra note 3, at 344; U.S., Japan Block Uruguay Round Effort to Restrict Content of Audiovisual Services, 7 Int'l Trade Rep. (BNA) No. 40, at 1548 (Oct. 10, 1990). French President Francois Mitterand argued that any agreement that did not contain a cultural exemption clause for film and television
Although the complaint the United States initially filed focused on various alleged violations of specific GATT Articles, during the Uruguay Round the U.S. entertainment industry appeared more interested in limiting the Community's restrictions on programs transmitted by satellite and fiber optics, particularly pay-per-view and video-on-demand channels, than in challenging the local content requirement under the specific Articles of the GATT. Indeed, during the negotiations, Jack Valenti, the president of the Motion Pictures Association of America, stated that the United States was willing to forego its objections to the local content requirement under the GATT in exchange for unrestricted access to pay-per-view, video-on-demand, satellite delivery, and digital and optical fiber delivery systems. Additionally, while the United States had strongly objected to the Member States' practice of taxing videotape purchases and placing levies on box-office revenues as a means of subsidizing Member States' domestic film industries, it nevertheless suggested that it might be willing to suffer the taxes and levies if U.S. artists and producers were to receive a portion of the proceeds and was even willing to commit to investing these proceeds back into the European entertainment industry. The Community, led by

292. See supra notes 114-66 and accompanying text.
296. See Kessler, supra note 17, at 577; see also Aircraft Subsidies, Audiovisuals Remain Barriers to U.S.-EC Accord, 10 INT'L TRADE REP. (BNA) No. 48, at 2038 (Dec. 8, 1993).
France, rejected the proposed U.S. compromise.\(^{297}\)

At this point, it was apparent that the two sides were not going to reach a compromise. The United States therefore formally reverted back to its original position that the GATS should not recognize any culture-based exception for trade in any item, other than cinema films, including audiovisuals.\(^{298}\) The Community likewise reverted back to its original position, arguing that, at the very least, a limited culture exception should be created for trade in audiovisuals. Thus, by the end of the negotiations, the two positions were again diametrically opposed: the Community demanding the creation of a culture exception, either as a general exception under the GATS or a specific exception for trade in audiovisuals, and the United States demanding that the fundamental free trade principles of MFN, National Treatment and the Ban on Quantitative Restrictions, govern without exception trade in all items covered by the GATS, including audiovisuals.\(^{299}\)

(D) The Culture Exception

The most compelling and problematic argument advanced by the Community is its contention that an exception must exist within the GATS to account for the adverse impact that trade in certain items may have on culture. Stated as a basic proposition, the Community's argument is intuitively appealing; the problem lies with its application. First, it is extremely difficult to define what exactly constitutes culture.\(^{300}\) Without an agreed-upon and limited definition, the potential parameters for what constitutes culture are poorly delineated, which in turn opens up the very real and significant possibility of abuse by nations seeking simply to protect domestic industries, without regard to actual culture concerns. Second, culture often transcends national boundaries.\(^{301}\) Third, in light of the growing transnational nature of media, any definition of culture along national boundary lines is

\(^{297}\) See Shao, supra note 5, at 114. France maintained that sharing subsidies with U.S. producers would defeat their purpose. See id.

\(^{298}\) See id.; Filipek, supra note 3, at 343-45.

\(^{299}\) See Shao, supra note 5, at 114.

\(^{300}\) See Filipek, supra note 3, at 344.

\(^{301}\) See generally Filipek, supra note 3, at 359 (illustrating multi-national nature of culture).
impermissibly overbroad.\textsuperscript{302}

(1) The Community's Position

The Community's primary contention during the Uruguay Round was that a culture exception enabling nations to protect their cultural identities should exist for trade in items that GATS would otherwise cover.\textsuperscript{303} Initially, the Community proposed a general culture exception for trade in undefined "culture industries," which would excuse a nation from not complying with otherwise applicable GATS provisions such as MFN, National Treatment, and the Ban on Quantitative Restrictions. This general, culture exception proposal obviously raises a very significant possibility of abuse; a country could claim that virtually any imported item poses a threat to its culture. Thus, the exception might be extended to such a point that it could turn what was otherwise a strong basic multilateral understanding of core international free trade principles on its head.\textsuperscript{304} In short, the obvious problem with such a general exception for trade in "cultural industries" is where the slippery slope might end and what boundaries determine what constitutes a "cultural item"? After a brief debate on such concerns, the Community backed off from its general culture exception in favor of a limited culture exception covering only trade in audiovisuals.\textsuperscript{305} The Community contended that such a limited exception was necessary to account for the impact trade in audiovisuals may have on culture that an importing nation seeks to protect and preserve.\textsuperscript{306} However, serious questions exist regarding how the Community has sought

\textsuperscript{302} See generally Shao, supra note 5, at 141 (discussing potentially overbroad definition of culture).

\textsuperscript{303} See supra notes 284-86 and accompanying text; see also Reply, supra note 52, at 5; Presburger & Tyler, supra note 14, at 505; Greenhouse, supra note 225, at A1. Stating the issue somewhat more dramatically, Jacques Delors, the president of the Commission, posed the rhetorical question, "[h]ave we a right to exist, to perpetuate our traditions?" \textit{Id}. In the same vein, France's European Affairs Minister, Edith Cresson, asked, "[w]hat would remain of our cultural identity if audiovisual Europe consisted of European consumers sitting in front of their Japanese television sets showing American programs?" See Jeannine Johnson, \textit{In Search of... the European T.V. Show}, 291 EUROPE 22 (1989).

\textsuperscript{304} See Shao, supra note 5, at 115 ("Interpreted broadly, ... cultural industries could conceivably include the commercial production of anything that affects values.")

\textsuperscript{305} See USTR Press Release, supra note 94, at 2-3.

\textsuperscript{306} See id.
to translate this intuitively appealing objective into a workable trade mechanism.

(a) Broadcasting in Europe

Before discussing the nature of culture and the role of the various media in creating, shaping, and legitimizing culture, a brief word about broadcasting in Europe is necessary. Broadcasting in Europe has evolved much differently from broadcasting in the United States. In the United States, particularly over the past several decades, commercial forces have largely driven broadcasting and the media in general. By contrast, Europe to a large degree still requires broadcasters to fulfill a public task obligation, essentially, an enhanced "public service" requirement for European broadcasters. As such, European broadcasters are essentially often obligated to act as public trustees. See Hoffman-Riem, supra note 21, at 603-04 (citing EUROPE: EUROMEDIA RESEARCH GROUP HANDBOOK OF NATIONAL SYSTEMS, ELECTRONIC MEDIA AND POLITICS IN WESTERN EUROPE (H.J. Kleinsteuber et al. eds., 1986); Broadcasting and Politics in Western Europe, 8 W. EUR. POL. (Special Issue) (R. Kuhn ed., 1985)).

This is because in Europe there is generally less confidence than in the United States that market forces will adequately protect the democratic function of broadcasting. As Professor Hoffman-Riem explains, "the prevalent European philosophy contends that the public interest can only be protected through special structures of the broadcasting system." While certain significant changes in the media in Europe have taken place in recent years, in light of the traditional European concept of the proper role of broadcasting, it is not surprising that the Community has sought to preserve national identities through use of such measures as the local content requirement contained in the Directive. In essence, the Community has used the local content requirement as a cultural

307. As such, European broadcasters are essentially often obligated to act as public trustees. See Hoffman-Riem, supra note 21, at 603-04 (citing EUROPE: EUROMEDIA RESEARCH GROUP HANDBOOK OF NATIONAL SYSTEMS, ELECTRONIC MEDIA AND POLITICS IN WESTERN EUROPE (H.J. Kleinsteuber et al. eds., 1986); Broadcasting and Politics in Western Europe, 8 W. EUR. POL. (Special Issue) (R. Kuhn ed., 1985)).

308. See Hoffman-Riem, supra note 21, at 602.

309. See Id., at 603-04. As a result of this, Professor Hoffman-Riem states that there are "calls for safeguards to ensure programming quality, diversity and impartiality of reporting, and broadcaster independence from agencies of state and social power." Id. at 602. He further states that in "all [Member States], however, broadcasting regulations constitute a separate communications constitution which relates to the individual political and social system." Id. at 604.

310. The sweeping nature of the Directive itself is a good example of these significant changes. In general, the trend in Europe has been toward the adoption of a more market-driven approach to broadcasting. Id. at 617 ("Partial harmonization through the Television Directive has exerted a strong de facto influence towards a market model of broadcasting.").
safety net to help maintain Member State support for the deregulation of the various Member States' broadcasting industries.\footnote{See Presburger & Tyler, supra note 14, at 505.} Such a cultural safety net thus might be envisaged as a mechanism, however crudely constructed, to prevent too much injury to individual Member State or Community cultural identity or its proxy as provided in the Directive, European programming, while U.S. entertainment and media companies scramble to fill the rapidly expanding demand for programming in Europe resulting from deregulation.\footnote{Johnson, supra note 303, at 22.}

(b) The Impact of Trade in Audiovisuals on Culture

Having briefly discussed the Community's primary concerns and the nature of broadcasting in Europe, this section focuses on the widely-held belief that television plays an important role in social, cultural, and political development and identity.\footnote{See Shao, supra note 5, at 142-45.} The basic premise behind the Community's proposed culture exception for trade in audiovisuals is the fundamental belief that certain cultural items, such as movies, television programs, books, and records, reflect, reinforce, and help shape a nation's values, traditions, and identity.\footnote{See Filipek, supra note 3, at 351 (citing EUR. CULTURAL FOUND. & EUR. INST. FOR MEDIA, EUROPE 2000: WHAT KIND OF TELEVISION, A REPORT OF THE EUROPEAN TELEVISION TASK FORCE 1-8 (1988) [hereinafter EUR. CULTURAL FOUND.]); see also Hoffman-Riem, supra note 21, at 599; Smith, supra note 14, at 133.} Social scientists generally accept the fundamental belief that the messages that mass media convey can accelerate social change, promote viewers' adoption of new and different attitudes, and influence viewers' behavior.\footnote{See Smith, supra note 14, at 133 (citing CONRAD P. KOTTK, PRIME-TIME SOCIETY: AN ANTHROPOLOGICAL ANALYSIS OF TELEVISION AND CULTURE 10-12 (1990); NEIL POSTMAN, AMUSING OURSELVES TO DEATH (1985); GEORGE COMSTOCK ET AL., TELEVISION AND HUMAN BEHAVIOR (1978)).} Furthermore, it is also commonly believed that mass media, particularly television, is a generally more important cultural vehicle than traditional media such as books, newspapers, and live entertainment because of mass media's unique pervasiveness and the ability of mass media to reach and influence larger audiences.\footnote{See Smith, supra note 14, at 133; see also Hoffman-Riem, supra note 21, at 601.} Thus, since the Community is concerned about the attitudes and behavior of its citizens, particularly with regard to
European integration, it follows that the Community is interested in the content of the television programs its citizens watch.\textsuperscript{317}

Under the traditional Western concept of basic civil rights and civil liberties, individuals are left to freely develop opinions and attitudes based on the paradigm of free speech, typically conceptualized as the marketplace of ideas.\textsuperscript{318} The importance of free speech in Europe is viewed largely as a means to reach normative objectives, particularly the promotion of democracy.\textsuperscript{319} Control over the mass media is therefore inextricably tied to socio-cultural concerns.\textsuperscript{320} Given the role that European governments, particularly the respective legislatures, have historically played in protecting free speech,\textsuperscript{321} the attempted balance struck in the Directive probably appears to European countries as a logical step forward as the Community heads toward deregulation and eventual adoption of a more market-driven broadcasting paradigm.\textsuperscript{322} In the European mind, the vital role broadcasting has played in the development of informed democratic political discourse and opinion and will likely play in the Community's increased social integration\textsuperscript{323} mandates an affirmative governmental guarantee that broadcasting will continue to

\begin{itemize}
\item \textsuperscript{317} Smith, \textit{supra} note 14, at 133-34.
\item \textsuperscript{318} See Hoffman-Riem, \textit{supra} note 21, at 600 (discussing four reasons for special protection of free speech, including: (1) individual self-fulfillment; (2) advancing knowledge and discovering truth; (3) promoting democracy through process of self-governing society and by checking abuses of power by public officials; and (4) functioning of society, especially assuming proper balance between conflict and consensus, allowing social change, and fostering social integration).
\item \textsuperscript{319} Hoffman-Riem, \textit{supra} note 21, at 600-01 (citing Donald P. Kommers, \textit{The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany}, 53 S. CAL. L. REV. 657, 673-77 (1980)).
\item \textsuperscript{320} Id. at 600.
\item \textsuperscript{321} See, e.g., id. (discussing legislatures' responsibilities of "ensuring that the process of informing the public, of exchanging ideas, and thus of influencing the shaping of values by mass media functions in real freedom, not prejudiced by either the state or by private power holders.").
\item \textsuperscript{322} See \textit{id.} at 601.
\item \textsuperscript{323} Broadcasting may function to enhance European social integration via its coverage of socially and politically relevant events and by reporting on public opinion with minimal state or private party influence and interference. \textit{See id.} at 600-02.
\end{itemize}
function to further the public interest. Therefore, in light of the social impact of the media, Europe feels justified in not allowing market forces, such as price and consumer taste, solely to dictate television content. It has some arrows in its quiver to support its position.

The most obvious support for the Community's position is the Contracting Parties' implicit recognition in Article IV of the GATT that trade in cinematographic films should not be treated like a regular commodity. As discussed above, the Community has argued that this recognition should entitle the Community to recognize a culture exception for trade in television programming. The Community, however, also has more current examples of U.S. recognition that the cultural impact of audiovisuals may warrant special treatment from that given to more traditional articles of international trade. In the United States-Canada Free Trade Agreement, the United States agreed to exempt "cultural industries" from the agreement's liberalized trade regime. As further evidence of this recognition, the Community can point to U.S. laws that limit foreign ownership of U.S. broadcasting properties.

Thus, given the pervasive influence that television plays in the European people's lives and the U.S. recognition of the powerful role that television may play in shaping public opinion and identity, the Community would appear to have a compelling case that some form of protection for European producers is necessary to avoid the claimed risk of foreign acculturation by the powerful U.S. entertainment industry, which maintains an im-

324. See id.
325. Smith, supra note 14, at 134.
326. See supra notes 258-99 and accompanying text; see also Filipek, supra note 3, at 352 (stating that United States recognized distinct cultural character of audiovisual sector, and particularly that United States acknowledged the importance of television "as a cultural and informational medium" in its negotiations in early 1960's).
327. See supra notes 258-99 and accompanying text; see also Smith, supra note 14, at 134 (discussing Cinema Exception); Filipek, supra note 3, at 351-52 (discussing Cinema Exception and OECD Code on Liberalization of Invisible Operations (Annex IV)); Presburger & Tyler, supra note 14, at 506.
328. Canada-United States Free-Trade Agreement, opened for signature Dec. 22, 1987, 27 I.L.M. 281 (1988). It should be noted, however, that the United States only begrudgingly agreed to the exception after reserving the right to retaliate with "measures of equivalent commercial effect" in the event that Canada chooses to restrict imports of U.S. cultural products. Filipek, supra note 3, at 357.
329. See Filipek, supra note 3, at 352.
important competitive advantage, and the erosion of national identity, values, and languages. Having established a compelling case to protect European culture, however, does not mean that the Directive is reasonably tailored to achieve this purported goal.

(II) What Is Culture?

What exactly is culture? Without doubt, culture is one of the most difficult and problematic English terms to define due to its amorphous and inherently subjective nature. The almost metaphysical nature of culture often makes it difficult to properly delineate the issues surrounding cultural integrity claims. In the present context, perhaps the best approach to analyzing the Community’s position is through the use of the concept of externalities borrowed from economic theory. Externality analysis shows that free trade principles may fail to adequately capture and account for important downstream effects audiovisuals may have on their final consumers, the viewing public.

The Community’s position is essentially an externality argument; while a purely economic approach to trade in commodities may be proper, or even required, under the GATT, such a narrow-sighted approach cannot meaningfully be applied to trade in audiovisuals since such an approach may well lead to

330. See supra note 90 (discussing competitive advantage held by U.S. entertainment industry); see also EUR. CULTURAL FOUND., supra note 314, at 82.


333. See Shao, supra note 5, at 187-88.

334. See EKELUND & TOLLISON, supra note 90, at 546.

335. See Shao, supra note 5, at 137 ("Even those who believe on grounds of economic theory that [audiovisuals] should be freely traded cannot deny that trade in [audiovisuals], like trade in other goods and services, may have externalities.").
market failure.\footnote{See id. at 137-38.} French Prime Minister Edouard Balladur captured this sentiment before the National Assembly in October 1993 when proclaiming, "[the French] cannot accept everything related to the fundamental values of our tradition, our culture, our civilization [as] being treated like ordinary traded goods."\footnote{David R. Sands, Clash of Cultures Creates Latest Block to World Trade Pact, WASH. TIMES, Nov. 24, 1993, at B7. Stating the case somewhat more dramatically, French President Francois Mitterrand contended, "[w]hat is at stake, and therefore in peril, in the current negotiations is the right of each country to forge its imagination and to transmit to future generations the representation of its own identity." Port Louis, Mitterrand Denounces U.S. Domination at Francophone Summit, AGENCE FRANCE PRESSE, Oct. 16, 1993, available in LEXIS, News Library, Curnws File.} In essence, Prime Minister Balladur argues that "the French [will] lose certain valuable things — say, French sensibilities — from exposure to American [audiovisuals] that the prices of movie tickets, television advertising, and video rentals do not capture."\footnote{Shao, supra note 5, at 138 (citing Peter Passell, Is France's Cultural Protection a Handy-Dandy Trade Excuse?, N.Y. TIMES, Jan. 6, 1994, at D2).} Since it is commonly believed\footnote{See Shao, supra note 5, at 115 (citing NICHOLAS GARNHAM, CAPITALISM AND COMMUNICATION 154 (1990)). "Films, news and entertainment programs, and video documentaries have already shaped societies and will continue to do so." Id. at 139 (citing CULTURE, SOCIETY AND THE MEDIA (Michael Gurevitch et al. eds., 1982)); JOHN FISKE, TELEVISION CULTURE (1987); CONRAD PHILLIP KOTTAK, PRIME-TIME SOCIETY (1990).} that culture possesses certain essential values\footnote{Certain values are necessary to distinguish one culture from the next. Consequently, these values play an integral role in a given nation's sovereignty, sense of being and national identity.} that commercial forces often threaten,\footnote{For a further discussion of the impact of commercial forces, particularly advertising, and its potentially distorting effects on the media, see Price, supra note 318.} market failure may well result, which in turn might compel a nation to step in and artificially allocate resources according to what it deems an optimal, non-market allocation in order to preserve these essential values.\footnote{See Shao, supra note 5, at 137.} Taken on its face, this argument is intuitively appealing, but to obtain a full perspective it is instructive to look at the actual functioning of the media.

On the surface, the entertainment market appears to be like most markets, consisting of both buyers and sellers. Using a Western model, driven by commercial market forces, the sellers are typically large media companies who sell advertising air time to companies seeking to sell their products and services to viewers. On a deeper level, however, it is a market for ideas, opin-
ions, and, eventually, identity. Media companies, driven by advertisers and, to a lesser extent, by government which approves licensees, sell a package of images, ideas, myths, and narratives to viewers that is intended to encourage viewers, often in their capacity as consumers, to behave in a certain way. The pervasiveness of Western media, coupled with its strong commercial bent, has been said to result in "the propagation and extension of the American business system and its values to all corners of the international community." Obviously, any such expansion may have political consequences. For example, European nations have historically restricted advertising in the media that they view excessive and adverse to the public interest. These nations therefore may be opposed to the widespread viewing of U.S. programming aimed at changing their citizens' behavior by inducing them to, among other things, consume rather than save or seek immediate gratification rather than toil and sacrifice. While the underlying commercial objectives of much U.S. programming may roughly equate with the commercial policies of certain political parties such as the Republican Party in the United States and the Conservative Party in the United Kingdom, governments in other countries that are less receptive to a free market philosophy may see U.S. programming as not only a threat to national culture, but also as a challenge to the established governments' continued hold on power. In this regard, it is widely believed that Western programming, predominantly U.S., extolling the virtues of free markets on Radio Free Europe,
Radio Liberty, and Voice of America helped lead to the destabilization and eventual collapse of the Soviet Union.\textsuperscript{349}

The cross-fertilization of certain societal values and philosophical beliefs that may originate in various locales further complicates the determination of what constitutes European culture. In addition to the conceptual cross-fertilization of culture through the regional and worldwide dissemination of ideas, cross-fertilization may even impact certain products and institutions associated with national identity.\textsuperscript{350} Given the dynamic nature of ideas and values that influence national cultures, it is important to note that this phenomenon is likely to accelerate in the future due to the enhanced rapid exchange of information and ideas through the Internet and other institutions that have been or will be developed as a result of rapidly changing worldwide telecommunications and endeavors such as the information superhighway and other information exchanges.

As a result of the dynamic nature of culture, it may well be difficult to meaningfully distinguish European culture from American culture.\textsuperscript{351} Since most European cultures share a common range of values with the United States and other Western countries, including democratic government, respect for human rights, the rule of law, and a Judeo-Christian religious tradition, it may somewhat convincingly be argued that there might be only a “Western culture” rather than distinct European and American cultures.\textsuperscript{352} Indeed, Great Britain may well share greater cultural affinity with the United States than with Greece or Portugal, and Spain may well be more culturally akin to Argentina than Germany or Sweden.\textsuperscript{353} As one commentator has observed, “[i]f a common culture exists in Europe, it is similar to U.S. culture because the United States has absorbed and assimi-

\textsuperscript{349} See id. (citing U.S. \textsc{State Dep’t, President’s Task Force on U.S. Gov’t Int’l Broadcasting}, Pub. No. 9925, at 5-6 (1991)). The role of propaganda in shaping societal attitudes and behavior is well documented. See, e.g., Shao, supra note 5, at 129 \& nn.148-51 (discussing Bureau of Psychological Warfare’s assessment of use of Leftist media by West to help shape popular opinion in Western Europe after downfall of Nazi Germany).

\textsuperscript{350} See, e.g., Shao, supra note 5, at 140 (noting that many French wine grapes are grown on root stalks imported from California and observing that part of Louvre was designed by I.M. Pei, a Chinese American).

\textsuperscript{351} See Filipek, supra note 3, at 359.

\textsuperscript{352} Id.

\textsuperscript{353} Id.; Shao, supra note 5, at 140-41.
lated many European cultural influences." 354

Furthermore, many cultural values, particularly those held by members of certain social, ethnic, religious, and economic classes and adherents to certain political philosophies, transcend national boundaries. For example, citizens in diverse countries may place paramount importance on imported political theories such as Marxism or Leninism. 355 Moreover, many cultures, e.g., "proletarian culture," "racial culture," "youth culture," "elite culture," and "mass culture," defy delineation by way of national, sovereign boundaries. 356 The elite, for example, in almost any given European country probably share a greater similarity of interests, including a taste for classical music, tuxedos, fine wines, golf, and the like, with the elite in the United States, Japan, Brazil, or Australia, than with the mass or proletarian culture in their own countries. 357 The same is also true, probably even more so, for the economically disadvantaged, members of certain ethnic groups and racial minorities. Thus, for example, blacks in the United Kingdom may well have more common interests and identify more with blacks in the United States than with other races in the United Kingdom. 358 It is not hard to think of additional examples for each of these cultural subgroups.

In short, national borders simply are not a reasonable proxy for cultural boundaries. 359 Thus, the Directive's sweeping assumption, without an articulated reason, that Member States are more culturally akin to each other appears to be based purely on speculation or wishful thinking, which is particularly troubling given the significant impact the Directive may have on Europeans' rights to receive the information they seek, a fundamental freedom in almost every nation's and individual's eyes.

There is one further complicating factor: the increasing globalization of film and television production, particularly in the United States, the nation accused of adulterating European

354. Shao, supra note 5, at 140 (citing Eli Noam, Television in Europe 24 (1991)).
355. Id. (citing Ithiel De Sola Pool, Technologies Without Boundaries 131 (Eli M. Noam ed., 1990) and noting that even popular sports in France, such as soccer and tennis, are imported).
356. Id. (citing Eli Noam, Television in Europe 23 (1991)).
357. Shao, supra note 5, at 140.
358. Cf. id.
359. See id. at 140, 141.
culture. \textsuperscript{360} Sony, for example, owns Columbia; Seagrams, from Canada, now controls MCA, after having purchased eighty percent of MCA's stock from Matsushita; Credit Lyonnais, a state-controlled French bank, owns MGM. \textsuperscript{361} Foreign investors presently control over half of the largest U.S. film production companies. \textsuperscript{362} Additionally, film and television production companies from many different countries increasingly co-produce films and television programs, in addition to otherwise integrating their operations and from all indications, this trend is likely to continue in the future. \textsuperscript{363} As a result of the trend toward international cooperation and integration, it is apparent that the faulty criteria established in the Directive, which defines European productions based purely on the nationality of production companies and the personnel involved as \textit{ipso facto} culturally desirable works, does not serve as a reasonable proxy for audiovisual works deserving national or Community protection. \textsuperscript{364}

(III) The Goal of European Integration

One of the more compelling strains in the Community's argument in favor of a culture exception for trade in audiovisuals is the contention that some degree of Community control over the media is essential to further facilitate European integration, one of the fundamental objectives of the EC Treaty. \textsuperscript{365} Given that Europeans have lived in separate sovereign states, practiced different religions, and spoken several different languages since

\textsuperscript{360} Id. at 141. As one commentator has observed: Increasingly, multinational business entities and individuals of different nationalities produce films with international markets in mind. This fact makes determining the "national origins" of many films somewhat capricious. More importantly, it brings into question the reasonableness of using national origin as a proxy for culture.

\textsuperscript{361} See id. at 141 & n.208; \textit{Matsushita Blames $531-Million Loss on Sale of Stake in MCA}, \textit{L.A. Times}, May 24, 1996, at D4.

\textsuperscript{362} Shao, \textit{supra} note 5, at 141.

\textsuperscript{363} See id. at 141 & nn.209-10.

\textsuperscript{364} See id. at 141.

\textsuperscript{365} The first substantive clause in the Preamble to the EC Treaty states that the Treaty seeks "to lay the foundations of an ever closer union among the peoples of Europe." EC Treaty, \textit{supra} note 22, pmbl., [1992] 1 C.M.L.R. at 587. Furthermore, with agreement having been reached on a Treaty on European Union at Maastricht, Member States have slowly been warming, albeit somewhat haltingly and tentatively, to the idea of European political integration. \textit{See BERMANN, supra} note 22, at 18 & 1995 Supp. at 8-4.
the fall of the Roman Empire, not to mention fighting major wars against one another, the goal of European social integration will no doubt be a challenging task. This difficulty is evidenced by the continuing struggle to delineate the parameters and proper role of the principle of subsidiarity within the Community. In light of the divergent history and development of the individual Member States, it hardly can be said that there is a single European culture demanding Community protection.

Nonetheless, the goal of European integration is inherently an admirable one and one which the Community appears intent on at least attempting to achieve by building upon the European heritage of the various Member States. This intent is evidenced in both the Green Paper and in the legislative history of the Directive. The Green Paper, for example, states:

Television will play an important role in developing and nurturing awareness of the rich variety of Europe's common cultural historical heritage. The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas.

With this integrationist goal in mind, the Community, recognize-
ing that it cannot influence or, at best, has only very limited in-
fluence over the content of imported U.S. programming, seeks
through the Directive to protect its media while at the same time
retaining some control over the programs its citizens view. It
is in this manner that the Community, through the European
works requirement in the Directive, seeks to promote European
integration.

(IV) Overbreadth of the Directive

Having established that trade in audiovisuals may not ac-
count for certain important externalities does not mean, how-
ever, that governments should regulate trade in audiovisuals un-
less, and this is the key point in the instant dispute, the govern-
ments can reasonably identify those values which are necessary
to preserve national or Community culture. This is where the
metaphysical nature of culture substantially undermines the
Community's proffered justification for the local content re-
quirement; the definition of European works, all of which re-
ceive preferential treatment, is not reasonably tailored to meet-
ing the proffered objective of protecting and promoting Euro-
pean culture. By defining all European works as worthy of
protection, the Directive is woefully overbroad. For example,
the Directive does not attempt to limit its protection to Euro-
pean programs that focus on European subjects or themes, nor
does it otherwise attempt to restrict its protection to those
messages and values that are reasonably related to the preserva-
tion and promotion of European heritage and identity. Thus,
the Directive is poorly tailored to protecting European culture.
Rather, by defining European works on the basis of where pro-
duction companies are located and the nationalities of the per-
sonnel involved in a given work, the Directive is undoubtedly
more effective at protecting the economic interests of the Euro-
pean entertainment industry than at protecting and furthering
European culture, a result that obviously contradicts the princi-

371. Smith, supra note 14, at 183.
372. Presburger & Tyler, supra note 14, at 505.
373. See Shao, supra note 5, at 189-40.
374. See supra notes 332-33 and accompanying text (discussing subjective nature of
culture).
375. See Filipek, supra note 3, at 357-59.
376. Id.
ples and objectives set forth in the GATT. This contradictory formulation of policy objectives and operative provisions in the Directive led U.S. Ambassador Carla Hills to contend that the Directive, as it would be applied, would function simply as a smokescreen for economic protectionism. In October 1989, Ambassador Hills, speaking on behalf of the United States, stated:

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

377. See id. at 358.
378. See Jay Arnold, U.S. Complains About European Limits on Imported TV Programs, ASSOCIATED PRESS, Oct. 10, 1989 (PM Cycle). Compare Hill’s assessment with the comments of one commentator:

The almost cynical manner in which the quota has been administered appears to validate Washington’s criticism that the European content requirement is “nothing more than an infant industry protection for the European entertainment industry.” This has been particularly evident in France. For example, since the adoption of the Directive in 1989, European entertainment firms have been reaching across the Atlantic to conclude film deals with high-profile Hollywood producers, directors, and actors, providing financing and “a potential way for American producers to slip their films through the French TV quota system.” There is something dishonest about a quota system putatively designed to protect European culture that would qualify a Sylvester Stallone film as a European work, or would certify an English language soap opera penned by New York writers as an “original French creative work.” The evolving business deals suggest that some of the Directive’s supporters are less interested in preserving national identity than in transferring pieces of the entertainment business from Hollywood to Paris.


379. See Presburger & Tyler, supra note 14, at 505 (quoting USTR Press Release supra note 94, at 2). U.S. Trade Ambassador Diana Lady Dougan echoed Ambassador Hills’s comments, stating, “European cultures won’t be preserved by trying to restrict exposure to non-European cultures, especially when the restrictions target the origin of the programs and not their cultural merit or social acceptability.” Id.
(E) The Public Morals Clause

Article XX, General Exceptions, of the GATT provides, in pertinent part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures;

(a) necessary to protect public morals; or

. . .

(f) imposed for the protection of national treasures of artistic, historic or archaeological value . . .

Article XX thus provides Contracting Parties with the ability to legitimately restrict, for example, the import of pornographic films, if they deem the restriction necessary for the moral protection of their citizens. To date, however, the Public Morals Clause has never been applied to something as broad as the import of all audiovisuals. Intuitively, there appears to be a good reason for this; as Article XX states, any measures taken pursuant to that Article must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." As demonstrated above, the Directive, due to its definition of what constitutes a work worthy of protection, is unacceptably overbroad and its criterial methodology is inherently arbitrary, which results in unjustifiable discrimination against non-European audiovisual exporters. Furthermore, because Article XX does not permit restrictions against countries where similar conditions prevail, one commentator has stated that, because "societies on both sides of the Atlantic generally share the conditions of developed democracies, a GATT panel of impartial experts should rule that European moral standards are not so distinct from American standards as to be threatened by U.S. televi-

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380. GATT, supra note 87, art. XX, 55 U.N.T.S. 262.
382. GATT, supra note 87, art. XX, 55 U.N.T.S. 262.
383. Id.; see Jackson, supra note 83, at 743.
Moreover, even assuming that certain European television actors, directors, or institutions could be considered "national treasures" worthy of protection, the Directive is not reasonably tailored to protect these entities because it does not base its protection on the involvement of such actors, directors, or institutions in a given work. Rather, the Directive protects all programs European companies produce, irrespective of whether amateurs or legendary figures directed, filmed, or acted in them. Consequently, any argument by the Community that certain European television actors, directors, or institutions are "national treasures" that must be preserved and, therefore, deserve protection by the Directive should fail due to the Directive's failure to specify protection for these particular entities.

(F) The National Security Exception

Article XXI, Security Exceptions, of the GATT provides, "[n]othing in this Agreement shall be construed . . . to prevent any [Contracting Party] from taking any action which it considers necessary for the protection of its essential security interests . . . ." While this exception has been used to suspend, the Community's obligations under the GATT to Argentina during the Falklands/Malvinas War and the U.S. reduction of sugar quotas on Sandinista-ruled Nicaragua, it generally has been narrowly interpreted to prevent efforts by Contracting Parties to expand the exemption into tangential areas effecting national security. Thus, for example, Sweden decided against pursuing a measure it had instituted with regard to the domestic production of footwear that it had claimed was necessary for national security purposes. Taking a common-sense approach to this limited exception for measures directly related to national security concerns, an arbiter should "look behind a country's pretext to determine a measure's true purpose." From this perspec-

384. Smith, supra note 14, at 131.
385. See id.
386. Id. at 131-32.
387. See id.
388. GATT, supra note 87, art. XXI, 55 U.N.T.S. 266.
389. See Smith, supra note 14, at 131.
390. See id.
391. Id.
tive, and in light of the absence of any claimed meritorious national security purpose behind the Directive, it is highly doubtful that the Community could successfully justify the Directive under the National Security Exception.

(G) The Escape Clause — Safeguard Measures

Article XIX, Emergency Action on Imports of Particular Products, of the GATT contains the so-called “Escape Clause” which, under certain conditions, allows Contracting Parties to avoid otherwise applicable GATT Articles. The Escape Clause was an area of particular concern during the Uruguay Round due to alleged abuses of its provisions. As a result of these alleged abuses, the Contracting Parties agreed to a new, improved Agreement on Safeguards. Article Two of the new Safeguards Agreement provides:

A Member may apply a safeguard measure to a product only if the Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Article Five of the Safeguards Agreement states that increased tariffs or quotas are the only acceptable safeguard measures an injured importing nation may use to remedy the situation. Thus, the Escape Clause may allow Contracting Parties, upon a proper showing and determination, to provide some protection for injured domestic industries such as audiovisual producers. Before taking any safeguard measures, however, the na-

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392. This is particularly true because most of the Member States in the Community have been, and continue to be, close political and military allies (e.g., through NATO) with the United States.
393. GATT, supra note 87, art. XIX, 55 U.N.T.S. 258.
396. Agreement on Safeguards, art. II-14, in Marrakesh Agreement, supra note 146, at II-14-1 [hereinafter Safeguards Agreement]. A footnote to Article Two provides that in the case of a customs union, such as the Community, the injury determination may be made on the basis of injury to the customs union or on an individual Member State basis.
397. See id. art. 5.
The nation in question must first conduct a formal investigation within the GATT into the cause and extent of injury to the domestic industry. Furthermore, the GATT requires a party charged with injuring the domestic industry to be given the opportunity to present its case before the determination-rendering national body.

Although the parties largely ignored the Escape Clause during the course of the Uruguay Round negotiations on trade in audiovisuals, it presents a potentially viable and desirable method by which the Community could impose quantitative restrictions on imported audiovisuals and still comply with the GATT and the spirit of free trade. Use of the Escape Clause is particularly desirable because it would open up to international scrutiny any determination made by the Community that: (1) imported items were injuring its domestic industry to a degree necessary to constitute actionable injury under Article XIX, and (2) the respective cause or causes of that injury. Furthermore, in the event that interested parties do not agree with the determination, the Escape Clause allows for the possibility of recourse to the new dispute procedure adopted during the Uruguay Round. In the event that bilateral or multilateral consultations prove unsuccessful, the new dispute procedure allows one or both of the parties to appeal to an objective, independent WTO.

398. See Shao, supra note 5, at 148; see also Lowenfeld, supra note 112, at 325-29. The nation in question must regularly report its findings at three separate stages of the determination-making process to the GATT. See Safeguards Agreement, supra note 396, art. 12.

399. See Safeguards Agreement, supra note 396, art. 12.

400. See Shao, supra note 5, at 148.

401. See id. ("If countries want to strengthen or rebuild their cultural industries, they should invoke [the Escape Clause] rather than some general notion of "cultural sovereignty.").

402. See id. (Through use of Article XIX, "[t]he international community could . . . more concretely assess and agree upon the reasonableness of departures from core GATT principles."). Article Twelve of the Safeguards Agreement, Notification and Consultation, provides that consultations take place with interested parties and that any determination be fully explained and publicly disseminated. Safeguards Agreement, supra note 396, art. 12. These determinations take place at three different levels, initiating an investigation, making a finding of serious injury, or taking a decision to apply a safeguard measure. Id.

403. Article Four of the Safeguards Agreement, Determination of Serious Injury or Threat Thereof, sets forth the methodology and method by which an injury determination should be conducted. Safeguards Agreement, supra note 396, art. 4.
The Community, however, has not yet taken formal action to initiate the requisite proceeding under the Escape Clause that could eventually allow it to impose quantitative restrictions as an acceptable safeguard measure under Article XIX.

B. U.S. Trade Law — Section 301

As mentioned above, when the Community first adopted the Directive, the House of Representatives passed a resolution strongly urging the United States Trade Representative ("USTR") to consider bringing an action against the Community under section 301 of the Trade Act of 1974. Section 301(a)(1), requires the USTR to take retaliatory action, subject to any specific directions from the President, if the USTR determines that any of the following events have occurred:

(A) the rights of the United States under any trade agreement are being denied; or
(B) an act, policy or practice of a foreign country—
   (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
   (ii) is unjustifiable and burdens or restricts United States commerce...

If the USTR determines that any of these events have occurred, the USTR may take retaliatory action under a broad grant of authority, including the right to "suspend, withdraw, or prevent the application of trade agreement concessions," and to "impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the [USTR] determines appropriate . . . ."

Due to the dual nature of the violations actionable under section 301, the United States may allege two distinct Commu-

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404. Id. art. 14.
405. See supra notes 97-100 and accompanying text.
408. Again, the USTR may receive specific directions from the President regarding how to retaliate against a country that has violated § 301. See 19 U.S.C. § 2411(a)(1) (1994).
In the event that the United States seeks recourse under section 301, the Community will undoubtedly argue that the United States must first seek resolution of the dispute under the new dispute resolution procedures adopted during the Uruguay Round. Article XXIII of The Understanding on Rules and Procedures Governing the Settlement of Disputes provides, in pertinent part:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:
   (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impaired, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.

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411. See Kessler, supra note 17, at 580. A brief overview of the second potential claim, that the Directive unjustifiably burdens or restricts United States commerce, is in order. Section 301(d)(3)(A) provides that an "act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and equitable." Section 301(d)(3)(B) sets forth a nonexclusive list of what may be considered an unreasonable act, policy or practice. Section 301(d)(3)(5) specifies that "[a]ct, policies, and practices that are discriminatory include . . . any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment." In light of the U.S. allegations that the Directive violates National or MFN Treatment, the United States may therefore have a cognizable claim that the Directive unjustifiably burdens or restricts U.S. commerce within the meaning of 19 U.S.C. § 2411(a)(1)(B)(ii). See Kessler, supra note 17, at 580.

It should be noted that the standard for finding a violation under the second part of section 301 [i.e., 19 U.S.C. § 2411(a)(1)(B)(ii)] is more easily met than the level of trade interference required under the first part. See Kessler, supra note 17, at 580. It also bears mention that retaliation by the USTR, pursuant to the second part of section 301, is discretionary, not mandatory. This discretionary retaliation is the same as under the first part of section 301. See Lowenfeld, supra note 112, at 116-17.

412. See supra notes 287-88 and accompanying text; see also Kessler, supra note 17, at 582.

413. Understanding on Rules and Procedures Governing the Settlement of Disputes, in Marrakesh Agreement, supra note 146, art. XXIII, at IIA2-17.
While the Community may argue that Article XXIII restricts the ability of the United States to use section 301 without prior authorization from the GATT, the United States can argue compellingly that no such procedural restriction should apply because the parties expressly chose to leave the dispute outside of the agreements reached during the Uruguay Round. Thus, the United States should not now be required to follow the new dispute resolution procedure to resolve the dispute. Indeed, the United States currently contends that relief under section 301 is still a fully viable option, and has threatened to use it against the Community. The United States is on solid ground in arguing that the new dispute resolution procedures should not apply to the instant dispute because the parties expressly chose to leave the dispute outside of the purview of the Uruguay Round agreements. The United States should not now be compelled to follow the new procedures it expressly thought it had avoided.

IV. EVALUATION OF THE ARGUMENTS AND RECOMMENDATIONS

The current dispute between the United States and the

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415. See Kessler, supra note 17, at 582, 602. The United States gains support for its argument from the specific language used in the Dispute Settlement Understanding which applies only to "covered agreements." Thus, the United States would argue that the procedure is not relevant to the instant and intentionally unresolved dispute. See id. Even if the United States and the Community were to conduct consultations under the new dispute settlement procedure, the United States maintains that it may resort to section 301 if the Community fails to abide by its GATT obligations. See id. at 582.


417. See Kessler, supra note 17, at 582-83. Furthermore, the United States has shown good faith in its prior negotiations with the Community that were conducted under the (then-existing) GATT dispute settlement procedures. See supra notes 106-13 and accompanying text.
Community poses many complicated, multifaceted issues. Indeed, the dispute may be analogized to peeling an onion; once one layer of issues is removed, another layer, posing different but related issues, is revealed, which in turn must be resolved and removed before moving on to the next layer.

The U.S. claims under the GATT are relatively straightforward. The GATT sets out the basic rules for conducting international trade. It also provides procedures for consultations and, in the event that an agreement cannot be reached, provides for dispute resolution within the WTO, the GATT's successor. The basic premise behind the GATT, articulated in its various articles, is the belief that nations holding a comparative advantage in the production of certain goods and services should be able to produce and sell these goods and services internationally with minimal interference by importing countries. In the aggregate, exploitation of comparative advantage maximizes efficiency and, thus, furthers consumers' economic and presumably political well being. As a general principle, exceptions from these free trade principles which would otherwise violate the basic core trading principles contained in the GATT should be made only upon a showing of compelling need and persuasive evidence that the objective being is sought will be satisfied. Otherwise, poorly tailored restrictive trade practices will unfairly hinder international trade based on comparative advantage.

The threshold issue of whether trade in audiovisuals should be considered trade in goods or services is, at best, problematic. As evidenced above, good arguments exist to support either contention. The respective strengths of these arguments indicate that, due to the very nature of audiovisuals, the decision to classify audiovisuals as one or the other will not be entirely satisfying.

418. See supra notes 81-92 and accompanying text. The Contracting Parties to the GATT conduct the vast majority of all world trade. Smith, supra note 14, at 109. Given its pervasiveness, the GATT, in a certain sense, may be considered the common law of international trade.

419. See Lowenfeld, supra note 112, at 308-20; see also supra note 112 and accompanying text.

420. See supra notes 81-92 and accompanying text.

421. See Shao, supra note 5, at 196; See also supra notes 81-92 and accompanying text.

422. See Shao, supra note 5, at 196.

423. See supra notes 169-224 and accompanying text.
The traditional definitional criteria are largely unhelpful in making this determination, making it necessary to look elsewhere. As discussed above, the United States could make a compelling argument that trade in audiovisuals must be considered trade in goods under the "necessary form of the transaction" test, which, based on the nature of trade in audiovisuals, appears to be the test best suited to aid in making such a determination. This test most accurately captures the actual practice of the GATT and other institutions in determining whether trade in a certain item should be trade in goods covered by the GATT. Moreover, this test leads to a practically desirable result: the same liberalized trade rules that apply to other goods will govern trade in audiovisuals, as well as many services under the GATS. As international trade practices become increasingly liberalized, it makes sense that the same trade rules apply to trade in goods, services, and hybrid items such as audiovisuals.

With regard to the claimed non-binding nature of the Directive, the Community's demonstrated efforts to enforce the Directive's requirements undermined the Community's argument that the Directive is only politically binding. Simply claiming that a requirement is not legally binding, when that requirement is treated as a de facto law is not only an exercise in cognitive dissonance, but also contradicts the fundamental spirit of the GATT, which seeks to ensure transparency and avoid circumvention of the GATT's basic free trade principles by opening Contracting Parties' trade practices up to international scrutiny.

While the goods/service classification of audiovisuals is a problematic threshold issue for the United States, the United States is on solid ground when it argues the Directive violates Articles I (MFN), III (National Treatment) and XI (Ban on Quantitative Restrictions) of the GATT. As discussed above, the Directive, on its face, violates Article I's MFN requirement by defining "European works" as works originating from countries other than those within the Community. Thus, the Directive

424. See supra notes 179-92.
425. See supra notes 206-24 and accompanying text.
426. See supra notes 81-92 and accompanying text.
427. See supra notes 114-24 and accompanying text.
428. See supra notes 125-58 and accompanying text.
429. See supra notes 159-66 and accompanying text.
430. See supra notes 125-24 and accompanying text. Recall that the customs union...
treats European, but non-Community, works more favorably than it treats non-European works, a clear violation of MFN. The Directive also facially violates Article III's National Treatment requirement by impermissibly limiting the percentage of Community airtime that may be devoted to non-European programming. This requirement gives domestic programmers a substantial advantage in the Community at the expense of foreign programmers. The Directive and its mandated national Member State legislation thus clearly violates the National Treatment requirement. Although proof that the Directive violates both Articles I and III should be enough to support the U.S. claims, the United States also could argue convincingly that the local content requirement functions as a violation of Article XI's Ban on Quantitative Restrictions due to its de facto impact as a trade restraint on audiovisual imports.

Perhaps the best indication of the strength of the U.S. claims is the Community's practically nonexistent attempts to justify the Directive under the language operative provisions of the above Articles which form the backbone of the GATT; rather, the Community has focused its defense of the Directive provision in Article XXIV of the GATT does not immunize the Directive's restrictions because the Directive applies to all European works, including non-Community European works. See supra notes 117-22 and accompanying text.

431. See supra notes 123-24 and accompanying text; see also Kessler, supra note 17, at 571; Smith, supra note 14, at 100 ("[T]he Directive discriminates against foreign programs by forcing stations to give preferential treatment to European-produced television programs.").

432. See supra notes 133-66 and accompanying text; see also Kessler, supra note 17, at 571-72. The Directive also violates the National Treatment requirement contained in the GATS which "requires not only that parties treat the service suppliers of other parties no less favorably than they treat domestic service suppliers, but it also demands that parties ensure that their domestic laws and regulations do not create competitive disadvantages for foreign service providers in the domestic market." General Agreement on Trade in Services, in Marrakesh Agreement, supra note 146, art. XVII(1), Annex 1B-18 [hereinafter GATS]; Kessler, supra note 17, at 575. Article XVII(3) of the GATS provides, "[f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." GATS, supra, art. XVII(3), at Annex 1b-18; Kessler, supra note 17, at 575 n.70.

433. See supra note 158 and accompanying text. This is also true for national laws such as those in France that provide subsidies for domestic film industries. See Kessler, supra note 17, at 575; see also supra note 304 and accompanying text.

434. See supra notes 159-66 and accompanying text (describing United States' argument that Directive violates GATT Article XI Ban on Quantitative Restrictions).
on various possible exceptions to these Articles. These exceptions are addressed in ascending order of difficulty. The least compelling argument, apparently only a "throw-in" defense, is the possible application of the National Security Exception. This limited exception has been narrowly construed to apply only to matters impacting directly upon national security. Trade in audiovisuals, as was true for the availability of shoes in Sweden, hardly has direct implications on national security and, thus, this argument should fail.

The Community's Public Morals Clause argument likewise should fail. The Public Morals Clause has never been applied to matters of such a sweeping nature as trade in all audiovisuals. Rather, it has been restricted to items that might have a direct and immediate impact on public morals, such as the import of objectionable pornography. The Directive, however, does not attempt to distinguish between imported programming that might have such a direct and immediate adverse effect on public morals and programming that would not offend, or perhaps even enhance, public morality. Due to the Directive's impermissible overbreadth, the Community's argument should fail.

The third argument the Community could raise, the possible application of Article XIX's Escape Clause, is premature; the Community has put the cart before the horse. Escape Clause safeguard measures may only be invoked after an injured importing country has demonstrated that import competition is injuring or threatening to injure its domestic industry. By adopting the Directive without first complying with the demanding procedural requirements mandated before safeguard measures may be applied, the Community has acted to restrict imports without making the requisite showing of both injury and a causal nexus. Since the Community has failed to conduct

435. See supra notes 167-68 and accompanying text.
436. See supra notes 388-92 and accompanying text (discussing limitation of National Security Exception to issues of national security).
437. See supra notes 380-81 and accompanying text (describing use of Public Morals Clause to restrict importation of pornography).
440. An injured importing country must demonstrate both injury and causation
such an investigation which would be open to international scrutiny, it cannot presently avail itself of Article XIX.

The Community's last two arguments are somewhat intertwined. As mentioned above, the Community has argued that trade in television programming should be governed by the same rules that apply to trade in cinematographic films. This, the Community argues, is necessary to account for the cultural impact of audiovisuals. While the existence of a special provision for trade in cinematographic films might undercut the U.S. position to some extent, it does not mean that a culture exception, general or limited, should be implied or created within the core trading principles of the GATS absent explicit multilateral support and approval. Rather, the proper role of the Cinema Exception must be interpreted in light of the drafters' intent and the Contracting Parties' subsequent interpretation and application of the exception. As the history of the Cinema Exception itself demonstrates, the Contracting Parties specifically limited the exception to apply only to cinematographic films; extension of the exception to trade in television programming was explicitly disapproved. In light of the fact the Contracting Parties expressly decided not to include television programming within the ambit of Article IV and the United States and other audiovisual exporting countries have been consistently and strenuously opposed since the very beginning of the GATT to any proposal to include trade in television programming within the Cinema Exception, the United States and other audiovisual exporting countries should not now have such an exception for trade in television programming forced upon them.

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441. See supra notes 259-99; see also Presburger & Tyler, supra note 14, at 507; Smith, supra note 14, at 129.
442. See supra notes 289-91 and accompanying text; see also Shao, supra note 5, at 141-49; Filipek, supra note 3, at 351-52.
443. See Smith, supra note 14, at 129.
444. Id. at 100, 130.
445. See supra notes 259-99 and accompanying text.
446. See supra notes 268-99 and accompanying text.
447. See Smith, supra note 14, at 129.
Implying such an exception would seriously undermine the fundamental understanding that the GATT’s operative articles and exceptions function on the basis of multilateral consensus. The artificial adoption of such a broad exception obviously would violate to this fundamental principle. Such an unprecedented expansion of the exception would completely undermine the explicit and well documented U.S. understanding of the exception and would effectively deny the United States the benefit of the bargain it struck in 1962. Furthermore, such an expansion would jeopardize the faith that all Contracting Parties have in the GATT.

With these important observations in mind, the proper role of the Cinema Exception should be expressly contained to that purpose it was originally intended to serve, a limited exception on the import of cinematographic films and nothing more. This narrow interpretation is consistent with the GATT’s treatment of other items such as books, magazines, radio programs, and musical recordings that also may impact upon culture. It is also consistent with the general principles of the GATT and its broad prohibition against trade restraints. The position of the United States and other audiovisual exporting countries has been clear since 1962; the Community should not now be able to successfully argue that the Cinema Exception extends to cover trade in audiovisuals when the record plainly demonstrates that no consensus exists on such a sweeping extension of the narrowly tailored GATT exception. Such an extension simply cannot be implied from the mere existence of Article IV.

To say that the Cinema Exception should not apply to the instant dispute is not to say that the Community’s concern over cultural integrity must be entirely disregarded in favor of free

448. See id. (stating “[a]rticle IV reflects a compromise in which the United States accepted a narrow exception for national treatment in an industry it dominated, and, in return, the scope of the exception was limited to one medium, film, and one type of discrimination, screen quotas.”).
449. See id.
450. See id.
451. See supra notes 201-03 and accompanying text; see also Smith, supra note 14, at 129-30.
452. See Smith, supra note 14, at 129.
453. See id. at 130 (stating “[e]xtending the scope of Article IV to television programs would not only allow a restriction on trade the original GATT drafters prohibited, it would also allow a restriction on trade the Contracting Parties refused to allow in 1962.”).
trade. The Community's culture exception argument raises a basic policy issue or whether free trade principles have any desirable limit.\textsuperscript{454} The GATT recognizes as one of its fundamental principles the importance of economic efficiency\textsuperscript{455} and essentially codifies this as the standard against which trade policies should be measured.\textsuperscript{456} At the same time, however, the Contracting Parties to the GATT and, indeed, the GATT itself, to the extent it covers trade in cinematographic films, recognize that other values such as distributive and social justice, including cultural integrity, must also rightly be considered with regard to international trade in goods and services having attendant externalities.\textsuperscript{457} With European cultural integrity pitted against GATT integrity, the present dispute raises important policy issues that strike at the core of the GATT and its newborn successor, the WTO.\textsuperscript{458}

Few will argue that cultural integrity and preservation are not worthy goals, but very serious problems indisputably exist with regard to the method by which the Community seeks to achieve these proclaimed goals, a method which, by its terms, invites protectionism through the use of an arbitrary and poorly tailored definitional criteria.\textsuperscript{459} The creation of a general or industry-specific culture exception presents serious danger to the GATT system and the existing world trade order.\textsuperscript{460} While cultural concerns may be legitimate, any attempt to fashion a cul-

\textsuperscript{454} See Shao, supra note 5, at 107.
\textsuperscript{455} See supra note 90 and accompanying text; see also Shao, supra note 5, at 107.
\textsuperscript{456} See Shao, supra note 5, at 107-08.
\textsuperscript{457} See id. at 107 & n.11, 149. As one commentator phrased the issue, might free trade in audiovisuals "lead to excessive social and political uniformity or somehow unduly restrict the creative freedom of societies to pursue their own goals?" Jackson, supra note 81, at 28-29. Stating the issue somewhat more dramatically, French President Francois Mitterrand asked, "[w]ho can be blind today to the threat of a world gradually invaded by an identical culture, Anglo-Saxon culture, under the cover of economic liberalism? . . . . Are the laws of money and technology about to achieve what the totalitarian regimes failed to do?" See Charles Bremmer, Mitterrand Enlists Old Empire in Linguistic Defence of Gaul, The Times (London), Oct. 19, 1993, at 11. Culture, of course, is not a static entity, and there is a risk that countries strictly enforcing or enhancing the local content requirement may lead to cultural rigidification. Perhaps President Mitterrand overlooks the important role that supply and demand plays in the marketplace of ideas and the resulting impact on the formation of dynamic culture. Cf. Shao, supra note 5, at 136-45.
\textsuperscript{458} See Shao, supra note 5, at 107; Smith, supra note 14, at 98-99.
\textsuperscript{459} Shao, supra note 5, at 145-47.
\textsuperscript{460} See id. at 146-48, 149.
ulture exception must be based on persuasive evidence, reasonably
tailed to achieve that goal in order to be considered a legiti-
mate exception within the GATT. 461 Otherwise, a poorly tai-
lored culture exception could seriously undermine international
understanding of the conduct of economic relations and imperil
international support for free trade based on comparative advan-
tage. 462

As demonstrated above, the Directive, as it currently exists,
is impermissibly overbroad. 463 The Directive’s definition of what
constitutes a European work, its proxy for what constitutes Euro-
pean culture worthy of protection, is based on the nationality of
production companies and the personnel involved in a given
work. 464 Such a broad definition of protected works is inher-
ently arbitrary 465 and invites abuse in favor of protectionist re-
gimes. 466 The GATT seeks, as an underlying principle, to pre-
vent arbitrary and unfair governmental intrusion into free
trade. 467 The artificial delineation of culture on the basis of na-
tionality, given the cross-cultural nature of culture, manifests the
Directive’s arbitrariness; national boundaries are simply poor
proxies for overlapping and amorphous cultural spheres. 468 Fur-

461. See id. at 136, 146-48, 149-50.
462. See id. at 146-48, 149-50.
463. See supra notes 373-79 and accompanying text; see also Shao, supra note 5, at
149-50.
464. See supra note 3 and accompanying text.
465. See supra notes 373-79; see also Shao, supra note 5, at 149-50.
466. One commentator aptly phrased the significant problems associated with the
problems of the Directive’s arbitrariness as:

The arbitrariness of content regulation or regulation based on national origin
is pivotal in the analysis because of the role that governments play in trade
relations. The integrity of the GATT relies implicitly but critically on the idea
that government should not act arbitrarily. Without this idea, none of the
premises behind the GATT could survive. Allowing governments to use [au-
diovisual] import restrictions would thus severely undermine the GATT be-
cause any such government restrictions would clearly be arbitrary and unfair.
Sanctioning them would set a dangerous precedent for the entire trading sys-
tem . . . . Permitting governments to discriminate against particular [audiovi-
sual] imports would undermine the basic premises of an existing world trade
order whose concern goes well beyond the [audiovisual] sector.

Shao, supra note 5, at 147.
467. See, e.g., id.
468. See supra notes 373-79 and accompanying text; see also Shao, supra note 5, at
140, 141, 146, 149 (stating “[p]olitical boundaries and cultural boundaries simply do
not correspond in a way that permits rational and meaningful import discrimination
. . . .”). In fact, cultural affinities may well account for the popularity of U.S. films and
television programs abroad. Shao, supra note 5, at 140.
thermore, the Directive does not account for the quality of a European program receiving preferential treatment simply because European personnel filmed it in Europe. There is something intellectually dishonest about treating an episode of “Dallas” as a European work deserving protection because it supposedly preserves or fosters European culture simply because it was filmed in Paris with European personnel, while a foreign-produced documentary on the French Revolution or on European art, history, architecture, or the like, is treated as potentially corrosive of European cultural integrity.

Rather than being reasonably tailored to further European cultural concerns, the Directive’s local content requirement is more aptly tailored to further the economic interests of European producers and entertainment personnel. The protectionist concerns are amplified by the fact the Directive does not set a limit on the percentage of European works that may receive preferential treatment. Thus, conceptually, a Member State could elect to enact a national law requiring one hundred percent European works, a blatant affront to the concept of comparative advantage and fundamental GATT principles.

At the same time, however, the rejection of a cultural exception for trade in audiovisuals does not mean that trade in audiovisuals should be treated exactly like trade in any regular commodity, good, or service lacking attendant externalities. The unique characteristics of externalities associated with trade in audiovisuals may require some form of special treatment, but whatever form of preferential treatment is actually provided must be based on reasonably tailored criteria and persuasive evidence that such treatment will indeed protect and further European culture. The Directive, as currently formulated, falls well short of these requirements.

Various potential fora exist for resolving the instant dispute. One potential avenue of redress is for the United States to bring unilateral action against the Community under section 301 of the Trade Act of 1974. If the United States were to take such

469. See Filipek, supra note 3, at 358.
470. See id.
471. See supra notes 56, 261.
472. See supra notes 313-31 and accompanying text; see also Shao, supra note 5, at 149.
473. See supra notes 405-417 and accompanying text.
action, however, the Community, due to the highly-contested nature of the dispute and the adversarial positions of the parties, would most likely appeal to the WTO. At the same time, unilateral action under section 301 would create animosity in the international community, particularly among the Contracting Parties. Although the United States maintains otherwise, the international community largely has regarded the new, strengthened dispute resolution procedures adopted during the Uruguay Round as signalling the end to, or at least a reduction of, unilateral action by the United States under section 301. Unilateral action under section 301 may, thus, have significant political consequences by signifying dissent over a major issue within the international trading order. This, in turn, might generate uncertainty and create disillusionment among Contracting Parties about the effectiveness of the entire WTO system at a time when the fledgling organization can least afford it.

With these potential political consequences in mind, the United States may be better advised to bring the dispute before the WTO. Bringing the dispute before the WTO also is beneficial from a legal perspective because the WTO is considered part of the Community's law hierarchy, ranking above secondary regulations such as the Directive and Member States' national legislation. But even bringing a complaint before the WTO may pose delicate political questions. Since the WTO binds both the Community and the individual Member States, the United States could challenge either the Directive or the various Member States' national legislation. Thus, rather than confront the entire Community, the United States might wish to focus its contest on the national laws of a particular Member State, such as

474. Additionally, countries appealing unilateral action by the United States under § 301 have been successful in getting the United States to drop or rescind its retaliatory measures. For example, in 1988, Brazil appealed such unilateral action by the United States under § 301 to the GATT. After negotiations failed, and a GATT panel was finally formed to resolve the dispute, the United States abdicated and dropped the retaliatory measures it had instituted. See Lowenfeld, supra note 112, at 154-39.

475. See id. at 310.


477. Smith, supra note 14, at 120.
France, which has actively enforced its laws. As demonstrated above, France has been the most aggressive and vocal Member State defending the Directive from U.S. attacks. See Kessler, supra note 17, at 563. From the outset, France has actively enforced its restrictions against non-European programming and even fined a station US$10 million, which led to the channel’s failure. Diana L. Dougan, Europe Draws an Electronic Curtain; Barriers to U.S. Films, TV to Protect Culture Cast an Ominous Shadow on the Emerging Global Information Highway, L.A. TIMES, Jan. 14, 1994, at B7.

But more than potential political fallout might be at stake by bringing the dispute before the WTO. The WTO is a new, relatively untried, organization. While it holds tremendous promise in resolving future trade disputes, it may simply be too early to bring a conflict of such significance before the WTO before it has had an opportunity to decide less charged trade disputes and has built up stature as an established and well-respected body for resolving international trade disputes. A finding entirely in favor either of the United States or the Community may well symbolically sound the death knell for the promising young organization.

While efforts to negotiate a resolution to the dispute failed during the Uruguay Round, the difficult issues raised by the Directive, viz., the tension between free trade and cultural integrity, virtually beg for a compromise agreeable to all interested parties. Although the parties were not able to reach a com-

478. As demonstrated above, France has been the most aggressive and vocal Member State defending the Directive from U.S. attacks. See Kessler, supra note 17, at 563. From the outset, France has actively enforced its restrictions against non-European programming and even fined a station US$10 million, which led to the channel’s failure. Diana L. Dougan, Europe Draws an Electronic Curtain; Barriers to U.S. Films, TV to Protect Culture Cast an Ominous Shadow on the Emerging Global Information Highway, L.A. TIMES, Jan. 14, 1994, at B7.  

479. See Smith, supra note 14, at 120.  
480. See supra notes 281-99 and accompanying text.  
481. According to one commentator: For the United States, realism demands a recognition that the Directive, including its quota for European works, is an accomplished fact. Although earlier the debate in the United States centered on whether the Bush Administration should support a "soft" quota or resist the imposition of a quota altogether, attention should now shift towards persuading the Community to administer the new regime in a way that will minimize damage to U.S. exports. Filipke, supra note 3, at 366. This same commentator further observed: The ultimate goal of negotiations should be to ensure that, over time, U.S. access to the [Community] market does not diminish as a result of the European works quota. This aim would be consistent with the spirit of the [GATT] and with its rules permitting a group of Contracting Parties to harmonize national trade rules in order to form a customs union, provided that the degree of restriction on trade outside the union does not, on the whole, increase.

promise during the Uruguay Round, in part because of their strong ideological differences, it is clear that a resolution of the dispute, either via unilateral action under section 301 or under the WTO dispute resolution procedures in favor of one party stands to injure the valuable working relationship between the United States and the Community, as well as possibly undermine the still fledgling WTO. In light of the importance the dispute could have on world trade and the WTO, the parties should take a realistic approach to resolving the dispute, preferably within the existing framework of the GATT.

Notwithstanding the fact that a multilateral consensus does not exist with regard to the creation of an overall or specified cultural exception within the GATT, there is a widely-shared recognition among nations that trade in audiovisuals may create externalities the GATT's general provisions do not adequately capture. At the same time, however, sovereignty concerns must be balanced against the need to maintain free trade, including trade in audiovisuals. Any eventual resolution of the dispute must take these factors into account in formulating an acceptable compromise that furthers the respective goals of each of the parties.

Trade theorists generally agree that the costs of domestic industry protection are minimized when governments narrowly focus their protection on achieving the result sought. From this well-established vantage point, the Community's local content requirement is entirely ineffective at encouraging programs produced in Europe or elsewhere that promote European culture. This is true because the sole criterion for what consti-

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482. *See supra* notes 281-99 and accompanying text.


484. *See supra* note 481.

485. *See supra* notes 258-99 and accompanying text.

486. *See supra* notes 313-31 and accompanying text.


488. *Id.* at 134 (citing PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 220 (2d ed. 1991)). This principle, in conjunction with the parties' GATT obligations, should play an integral role in resolving the dispute on amicable, if somewhat imperfect, terms. *Id.*

489. *See id.*
tutes a "European work" is nationality.\textsuperscript{490} It does not, therefore, guarantee that the European programs actually aired will reflect the aspects of European culture that the Community and Member States value and seek to protect.\textsuperscript{491} As one commentator has phrased the issue, the "Community should retract the Directive's European program requirement and adopt a television policy which promotes programs reflecting European culture, not merely programs with a 'Made in Europe' label."\textsuperscript{492} The question then is how the Community might most efficiently further its interest in protecting and promoting European culture while at the same time not injuring the free trade principles contained in the GATT.\textsuperscript{493}

One avenue to an amicable resolution may exist within the GATT; direct, non-export production subsidies to selected European movie and television producers.\textsuperscript{494} When the Tokyo Round concluded in 1979, the crowning achievement was an agreement on subsidies and countervailing duties.\textsuperscript{495} The impetus on agreements on subsidies carried over into the Uruguay Round, where the Contracting Parties sought to further clarify the agreements reached during the Tokyo Round, particularly with regard to subsidies and countervailing duties.\textsuperscript{496} In these agreements, the Contracting Parties recognized that domestic, i.e., non-export, subsidies may be used to protect and further

\textsuperscript{490} See supra note 3 and accompanying text.

\textsuperscript{491} Smith, \textit{supra} note 14, at 134. It is not hard to think of examples of U.S. programming that may promote European culture more than European programs. For example, a U.S. documentary on European art, history, or architecture may further European culture more and more effectively than Benny Hill or an adventure film that happens to be filmed in Europe with European actors. \textit{Cf.} \textit{id.} at 134 (contrasting Eurocop, police show filmed in Spain with Spanish actors involving many car chases and shoot-outs, with American documentary on Vincent van Gogh).

\textsuperscript{492} \textit{Id.}.

\textsuperscript{493} \textit{Cf.} Shao, \textit{supra} note 5, at 148 (stating "\textit{[t]he GATT offers an attractive framework for ensuring that [audiovisuals] are traded freely and without restrictions. Its principles of MFN and national treatment, among others, have proven extremely helpful in reducing international commercial discrimination, and the international community largely accepts them."}).

\textsuperscript{494} See \textit{Smith}, \textit{supra} note 9, at 135-37 (1980); Smith, \textit{supra} note 14, at 134-36. \textit{Cf.} Shao, \textit{supra} note 5, at 149 (stating, "\textit{[i]f necessary, the [Contracting Parties] could . . . adopt a sector-specific agreement that addresses [the] peculiarities of the [audiovisual] industry but that does not sanction import restrictions."}).

\textsuperscript{495} See \textit{Lowenfeld}, \textit{supra} note 90, § 7; \textit{Lowenfeld}, \textit{supra} note 112, at 275.

\textsuperscript{496} See \textit{Lowenfeld}, \textit{supra} note 112, at 275-79.
certain important societal and cultural interests and goals. For example, one of the general provisions in the Subsidies and Countervailing Duties Code states: “[s]ignatories recognize that subsidies are used by governments to promote important objectives of social and economic policy.” Article XI(1), entitled, “Subsidies Other than Export Subsidies,” provides:

Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable. Signatories note that among such objectives are:

. . . .

. . . .

Thus, based on the changing trade patterns in audiovisuals, targeted non-export production subsidies by the Community to movie and television producers may well fall within the subsidies provided under Article XI. These types of production subsidies are thus consistent with the spirit of the GATT’s substantive provisions regarding subsidies, and because the Community does not export significant quantities of audiovisual programming, it is unlikely that the subsidies would be considered export subsidies in contravention of the GATT. Addi-

497. See Smith, supra note 14, at 135 (explaining that as result of Tokyo Round “the Contracting Parties prohibited government subsidies of export industries, but did not prohibit direct government subsidies of industries producing goods only for local use.”).
499. Id. art. XI(1).
500. See supra notes 6-19 and accompanying text.
501. See Smith, supra note 14, at 135.
502. See id.
503. See id.; cf. Lowenfeld, supra note 112, at 276-79 (discussing distinctions between red, yellow, and green light subsidies). In the event that the Community were to expand its imports, which are currently practically negligible, to the United States, the United States may be able to impose countervailing duties under Article III of the Agreement on Subsidies and Countervailing Measures. See Lowenfeld, supra note 112, at 277.
tionally, these subsidies would allow the Community to more effectively protect its cultural interest in television programming by allowing Member States’ governments to direct subsidies to producers they consider most likely to create works of cultural value.\textsuperscript{504} Thus, such subsidies could accommodate Member States’ divergent degrees of concern for the preservation of their national cultures.\textsuperscript{505}

Furthermore, these limited, targeted subsidies are, on balance, consistent with the U.S. free trade position.\textsuperscript{506} In addition to being the least costly and most effective form of protection for the Community,\textsuperscript{507} direct production subsidies to selected European television producers also would cause less economic harm to U.S. exporters.\textsuperscript{508} This is true because, if the local content requirement were eliminated, U.S. exporters would be free to export more programming to the Community. Since the variable cost of exporting an additional program to the Community is typically small,\textsuperscript{509} U.S. exporters’ profits should increase proportionately with the increased volume of sales made, without suffering much, if any, injury from any disadvantage U.S. exporters may have relative to the selected group of subsidized European producers.\textsuperscript{510}

Thus, it appears that both parties’ goals would be substantially achieved by allowing direct non-export domestic subsidies

\textsuperscript{504} See Smith, supra note 14, at 136.

\textsuperscript{505} Id. Therefore, a country such as France that apparently values culture very highly could provide local producers with generous subsidies whereas a country that emphasizes free trade, such as Germany, would be free to offer limited or no support to local producers, depending upon its cultural preservation concerns. Id. at 192, 196.

\textsuperscript{506} Indeed, they seem perfectly consistent with the Subsidies and Countervailing Duties Code, discussed above. See supra note 498 and accompanying text. The targeted subsidies would allow the Community to “facilitate the restructuring . . . of certain sectors [such as television production and programming] . . . where this has become necessary by reason of changes in trade and economic policies . . . .” GATT, supra note 87, Subsidies and Countervailing Duties Code, art. XI(1).

\textsuperscript{507} See Smith, supra note 14, at 135.

\textsuperscript{508} Subsidies generally distort trade patterns less than quotas. Thus, the targeted subsidies will most likely be less costly to the existing economic system than the current local content requirement. See Warren M. Corden, Trade Policy and Economic Welfare 28-30, 121-22 (1974); see also supra note 163 (discussing economic injury caused by quotas).

\textsuperscript{509} Because U.S. producers generally recover their production costs in the United States, the incremental cost of exporting a program to the Community will only entail the cost of the medium (typically inexpensive video tape) plus transactions costs. See Shao, supra note 5, at 132-36.

\textsuperscript{510} See Smith, supra note 14, at 136.
to Community producers.\(^{511}\) Such a compromise also affords a reasonable and acceptable middle ground that would enable both parties to say they stuck by their respective positions and achieved the goals they sought.\(^{512}\) Furthermore, such a compromise would allow the parties to remain true to the spirit of the GATT and would help preserve international faith in the WTO so that it might flourish in the future.\(^{513}\)

Of course, there is also the possibility that the parties will continue to do nothing, i.e., no formal challenge by the United States\(^{514}\) and little, if any, enforcement of the Directive or corresponding national legislation in the Community, perhaps under a liberal interpretation of the "where practicable" clause.\(^{515}\) U.S. entertainment companies, perhaps in order to hedge their bets on the outcome of the dispute, have been looking with an ever-eager eye to aligning themselves with European entertainment undertakings and have entered into a broad range of interna-

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\(^{511}\) One commentator described the desirability of such a compromise as follows: In recognition of the nexus between international communications and national culture, the GATT Council could adopt a memorandum of understanding concurrent with the adoption of the panel's report which expressly recognizes that government subsidies to producers of films and television programs intended for local broadcast are justifiable under GATT's subsidy regime. \(\text{Id. at 137.}\) Although such a compromise would require the Community to "pick up the bill" by raising the funds to support European producers, any such economic concerns pale in comparison to the harm that might be inflicted if the dispute were to lead to the fall of the WTO. \(\text{See supra notes 476-84 and accompanying text.}\) One can think of various means by which the Community could raise these funds. The Community could, for example, place a general tax on all audiovisuals. Alternatively, it could take the money out of its general fund.

\(^{512}\) Such a compromise is infinitely better for the Community, from a political perspective, than fighting with the United States all the way to a WTO panel, at which point the Community stands a good chance of losing its substantive case and injuring its relations with the United States. If a WTO panel were to decide against it, the Community could still bring an Escape Clause proceeding under Article XIX of the GATT. Regardless of the final resolution of such a proceeding, at least both parties would be acting consistently with the GATT.

\(^{513}\) \(\text{See Smith, supra note 14, at 137.}\)

\(^{514}\) Cf. \(\text{supra notes 112-13 and accompanying text (explaining that U.S. complaint has been dormant).}\)

\(^{515}\) \(\text{See supra notes 43-47 and accompanying text. As discussed above, certain Member States, such as France, have been actively enforcing their national laws. Furthermore, it appears that the Commission is also serious about its role as enforcer of the Directive. See supra notes 147-57, 165, 237-39 and accompanying text. Nonetheless, the logic of inactivity may inevitably appeal to the Community and individual Member States in light of the very serious political concerns and concerns regarding the WTO, particularly if the United States renews its efforts to push its case before the WTO.}\)
tional co-productions involving the efforts of producers and artists from Europe, the United States, and other nations.\footnote{516} As a result, many large U.S. studios have acquired, or acquired interests in, production companies in Europe.\footnote{517} The last few months are indicative of this trend. For example, British Sky Broadcasting ("BSkyB"), which is forty percent owned by Rupert Murdoch's News Corporation, bought a twenty-five percent interest in Premiere, the leading German pay-TV channel; additionally, BSkyB has formed a joint venture with Bertelsmann, one of the world's largest media companies, and Canal Plus, a French company, to expand pay-TV across Europe.\footnote{518} At roughly the same time, Viacom entered into a deal with German media giant Kirch Group to sell Kirch the rights to many of its Paramount film and television shows.\footnote{519} The deal could net Viacom up to US$2 billion in revenues over the next decade. More recently, the Walt Disney Company entered into a ten-year agreement to supply Kirch with exclusive television rights to existing and future live-action Disney, Touchstone, Hollywood, and Miramax films.\footnote{520} These are just a few examples of recent alliances.\footnote{521} From all indications, similar alliances will continue in

\footnote{516}{See Filipek, supra note 3, at 869; see also Presburger & Tyler, supra note 14, at 508; cf. Kessler, supra note 17, at 605.}
\footnote{517}{Presburger & Tyler, supra note 14, at 509 (discussing Paramount's purchase of 49% interest in Britain's largest independent television production company, Disney's establishment and development in France, and NBC's search for acquisition targets in Europe).}
\footnote{518}{See BSkyB Group Invests $270 Million for Stake in German Channel, WALL ST. J., Mar. 7, 1996, at B8; see also Murdoch in European Pact to Provide Satellite Pay TV, L.A. TIMES, Mar. 7, 1996, at D1; Judy Dempsey, Murdoch learns to be a partner — The link with BSkyB means a lot to Bertelsmann, Fin. Times, Mar. 14, 1996, at 29. BSkyB, Bertelsmann, and Canal Plus each hold a 30% stake in the joint venture to explore new pay-TV opportunities while French media and advertising group, Havas SA, has a nonvoting 10% stake. See BSkyB Group Invests $270 Million for Stake in German Channel, supra, at B8.}
\footnote{519}{See Wolfgang Munchau, Viacom Joins Kirch in Five-year Alliance, Fin. Times, Apr. 9, 1996, at 28. Kirch is Germany's second largest media company. See Sallie Hofmeister, Viacom, German Firm Agree to Joint TV Venture, L.A. TIMES, Apr. 9, 1996, at D6.}
\footnote{520}{See Hofmeister, supra note 519, at D6.}
\footnote{521}{See Lisa Bannon, Kirch of Germany Gets Pay-TV Rights to Disney Movies, WALL ST. J., Aug. 30, 1996, at A5A.}

\footnote{522}{Indeed, one need not look any further than the recent activities of Disney and Kirch in Germany to find several further examples. For example, in addition to its recent deal with Kirch, Disney holds a 50% interest in a German broadcast channel (Bertelsmann also holds an interest in the channel), a 50% interest in a German program production and distribution company, as well as a 37.5% interest in a German cable service. See id. In addition to its recent deals with Viacom and Disney, Kirch also struck deals with MCA, Warner Brothers, and Columbia in 1996. See id.}
the future.\textsuperscript{523}

\section*{V. CONCLUSION}

The GATT's free trade principles play an integral role in the world trading system. These principles, however, may not always adequately account for externalities associated with trade in certain items. The Directive attempts to fashion protection for an industry it deems important to the preservation of European culture and future integration, but it does so in a simplistic and unacceptably overbroad manner that is not reasonably tailored to achieving its proclaimed objective. If anything, the Directive appears more aptly suited to protecting European economic interests — an objective clearly at odds with multilaterally agreed-upon trade policies and contrary to the very concept of comparative advantage upon which the GATT is based. Hence, the Directive, as currently drafted and applied, cannot withstand international scrutiny.

The very nature of the tension between European cultural integrity and the integrity of the free trading system begs for a compromise. Such a compromise can be reached in the form of targeted, non-export subsidies to domestic European producers. Such subsidies are economically efficient, consistent with the spirit of the GATT and the Contracting Parties' recognition of the tension between free trade and cultural integrity, and, most importantly, will further the interests of both parties while at the same time preserving international respect for free trade and its institutions, including the WTO, which will govern international trade in the future.