

EUROPEAN UNIFICATION—BROADCASTING LAW—EASTERN  
EUROPE AND THE “TELEVISION WITHOUT FRONTIERS”  
DIRECTIVE: RADIO FREED EUROPE—CAN TELEVISION UNIFY  
IT?

[It is desired to] . . . substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic Community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.

- *Preamble*, TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY].

I. FACTS

In order to create a common framework for the coordination of the various broadcasting laws of the European Community's (EC) Member States, the European Council passed the *Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*,<sup>1</sup> otherwise known as the “Television Without Frontiers” directive. This Directive entered into force on October 3, 1991,<sup>2</sup> and provides, in part, that “Member States shall ensure freedom of reception and shall not restrict re-transmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.”<sup>3</sup> This document essentially harmonizes the divergent national laws relating to broadcasting within the Member States.

Complementing “Television Without Frontiers” are two proposals for additional EC directives: one coordinates certain rules concerning copyright and neighboring rights applicable to satellite broadcasting and cable retransmissions within the EC, and would enter into force

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<sup>1</sup> Council Directive 89/552, 1989 O.J. (L 298) 23 [hereinafter “Television Without Frontiers” or Directive].

<sup>2</sup> *Id.*, art. 25, at 30.

<sup>3</sup> *Id.*, art. 2, at 26.

January 1, 1995;<sup>4</sup> the other establishes a uniform television broadcasting transmission standard to be used by every television set for sale within the EC after January 1, 1993, the date it would enter into force.<sup>5</sup>

With the entrance of Poland, Hungary, and Czechoslovakia into the EC under the new status of associated states,<sup>6</sup> the EC's unified broadcasting market crafted by "Television Without Frontiers" and its filial directive proposals promises to inundate the impressionable broadcasting laws of these East European states and any others that wish to become members of the European Community.

## II. LAW

### A. *Rumors of a Unified Europe*

The impetus for "Television Without Frontiers" resulted from movements toward European unification, which began in 1961 amid discussion before the European Parliament concerning a draft treaty for a European union.<sup>7</sup> After the quiet death of the draft,<sup>8</sup> various

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<sup>4</sup> Commission Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Neighbouring Rights Applicable to Satellite Broadcasting and Cable Retransmission, 1991 O.J. (C 255) 3 [hereinafter Copyright Proposal].

<sup>5</sup> Commission Proposal for a Council Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals, 1991 O.J. (C 194) 20 [hereinafter Broadcasting Standard Proposal].

<sup>6</sup> 1992: *What is at Stake?*, Eur. Rep., Jan. 8, 1992, available in LEXIS, World Library, Allwld File.

<sup>7</sup> See TIMOTHY M. DEVINNEY & WILLIAM C. HIGHTOWER, EUROPEAN MARKETS AFTER 1992 at 37 (1991). The European Parliament is one of the four principal institutions of the European Community which works together with the European Commission, the Council of Ministers, and the Court of Justice to make the Community function.

The European Parliament is the EC's only directly elected body and scrutinizes draft EC legislation, questions the Commission and the Council of Ministers on their conduct of EC affairs, and debates topical issues. Most draft legislation cannot be formally adopted by the Council until it has received the Parliament's opinion.

The European Commission is the only one of the four branches of the EC that can initiate EC policy. It is responsible for implementing decisions taken by the Council and it also has the power to enforce the EC treaties and legislation derived from them, giving it the informal title of "guardian of the treaties."

The Council of Ministers is the final EC decision making body. Ministers comprising the Council represent and defend the interests of their home countries while framing agreements that promote EC goals.

The Court of Justice is the EC equivalent of the United States Supreme Court. It interprets Community law for national courts and rules on legal questions pertaining

plans emerged in the 1970's for more complete European market integration.<sup>9</sup> None fully succeeded in this endeavor, but the proposals led the way for the passage of the Single European Act<sup>10</sup> in 1986, whose success will be measured after the activation of the single market on December 31, 1992. The Act states that the "Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured."<sup>11</sup> Integral to the Act's success in completing the "internal market" by 1992 is the removal of the internal legal obstacles to trans-boundary broadcasting between EC Member States.<sup>12</sup> The "Television Without Frontiers" directive was drafted to fill this niche by creating a uniform legal framework covering all broadcasting activities.

### *B. Broadening the Broadcasting Horizon: The Green Paper*

While drafting "Television Without Frontiers," the Directive's creators considered many of the purposes, concerns, and proposals regarding trans-border broadcasting enumerated in the European Commission's 1984 *Green Paper On the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*.<sup>13</sup> The *Green Paper* cited many reasons for extending cross-border broadcasting rights within the European Community, such as the promotion

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to EC treaties that are raised by Community institutions, Member States, companies, or individuals. Its rulings are binding. JERRY M. ROSENBERG, *THE NEW EUROPE: AN A TO Z COMPENDIUM ON THE EUROPEAN COMMUNITY* at xiii-xv (1991).

<sup>8</sup> The draft referred to is the Fuchet Plan of 1961 which proposed a joint European foreign policy. The plan failed because many EC members construed it as an excessively direct attempt to compromise their individual sovereignty. 1992, *After the Fireworks*, *ECONOMIST*, July 9, 1988, at 1 (U.K. ed.).

<sup>9</sup> A notable unification attempt was the Werner Plan of 1970, which called for greater harmonization of economic, fiscal, and monetary policies between Member States and ultimately led to the formation of the European currency unit (ECU) and the European monetary system (EMS). Later unification efforts included the Vedel report of 1972, which proposed an increase in the authority of the European Parliament, and Tindeman's Report of 1976, which called for a European union within four years. Both reports were discussed by the European Council but were never formally implemented. See DEVINNEY & HIGHTOWER, *supra* note 7, at 38.

<sup>10</sup> Single European Act, 1987 O.J. (L 169) 1 [hereinafter *The Act*].

<sup>11</sup> *Id.* at art. 13.

<sup>12</sup> See *Audiovisual Communications*, Euroscope, Mar. 5, 1992, at 3.1, available in LEXIS, Intlaw Library, Eurscp File.

<sup>13</sup> COM(84)300 final [hereinafter *Green Paper*].

of European integration through dissemination of information,<sup>14</sup> the utilization of the airwaves as a source of cultural enrichment,<sup>15</sup> the creation of an incentive for increased European technical innovation in transmission media,<sup>16</sup> and the prevention of dominance by the big American media corporations.<sup>17</sup>

Additionally, the *Green Paper* pointed out many of the trouble areas that any future broadcasting directive would have to surmount in order to be a successful integration measure. Among these concerns were the widely divergent advertising regulations in the Member States which then restricted transnational transmissions,<sup>18</sup> the national laws on an individual's right to reply to broadcasts that might "impeach his honor or damage his reputation,"<sup>19</sup> the laws concerning performers' rights,<sup>20</sup> the copyright laws on broadcasted material,<sup>21</sup> and the laws protecting minors from the display of sexual or violent acts.<sup>22</sup>

The *Green Paper* set out a number of reform proposals derived from the core broadcasting rules of the Member States.<sup>23</sup> It proposed the setting of minimum broadcasting standards in order to give the individual states the flexibility to provide more stringent regulation for broadcasts originating in their own territory if they so desired.<sup>24</sup> The *Green Paper* recommended a total ban on tobacco advertisements<sup>25</sup> and strict regulation of advertisements for alcohol.<sup>26</sup> Among its other notable recommendations were minimum standards for the protection

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<sup>14</sup> *Id.* at 28.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 53.

<sup>17</sup> *Id.* at 33.

<sup>18</sup> *See id.* at 213-58. To say the Member States widely differed in advertising regulation would be a gross understatement. Some states, like Denmark, totally banned advertising. Others, like the Federal Republic of Germany, allowed it, but only with strict limitations over certain aspects of the ads, such as their timing and content. Many states either restricted or completely prohibited advertisements for certain products such as alcohol and tobacco. Some states also prohibited advertisements containing elements that were likely to offend the moral, religious, philosophical, or political convictions of viewers. Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495, 497 (1990).

<sup>19</sup> *Green Paper*, *supra* note 13, at 294-98.

<sup>20</sup> *Id.* at 310.

<sup>21</sup> *Id.* at 306.

<sup>22</sup> *Id.* at 288-91.

<sup>23</sup> *See* Presburger & Tyler, *supra* note 18, at 497.

<sup>24</sup> *Id.* at 497-98.

<sup>25</sup> *Green Paper*, *supra* note 13, at 282.

<sup>26</sup> *Id.* at 285.

of minors<sup>27</sup> and uniformity with respect to the right to reply to television broadcasts.<sup>28</sup>

### C. *A Plan Emerges*

The "Television Without Frontiers" directive was transposed into national law by the EC Member States in October of 1991. The Directive states that no Member State can restrict television broadcasts from other Member States if the broadcasts adhere to the list of regulations contained in the Directive.<sup>29</sup> The guiding principle of the Directive is that all broadcasts will have to comply with the law of the country from which the broadcast originated, irrespective of whether their content is intended for reception by the public in that Member State or in other Member States.<sup>30</sup> Thus, an individual state can formulate regulations on broadcasts originating within its national boundaries that are more stringent than the minimum standards set in "Television Without Frontiers." However, the state must accept broadcasts from other Member States as long as they comply with the minimum requirements provided in the Directive.

A Member State is permitted to interrupt broadcasts from other Member States in only one situation. If the broadcast gravely infringes Article 22 regarding the protection of minors<sup>31</sup> and the broadcaster has disobeyed the same provision at least twice in the last year, the concerned Member State must notify the broadcaster and the Commission in writing of the alleged infringement and of the State's intention to restrict the transmission on the next violation.<sup>32</sup> If the following consultations with the transmitting State and the Commission do not result in an amicable agreement within fifteen days of the notification of the present infringement, only then will the broadcast interruption be allowed.<sup>33</sup>

The most significant provisions of "Television Without Frontiers" concern the promotion of European audiovisual production and television advertising and sponsorship. Article 4 of the Directive states that "Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within

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<sup>27</sup> *Id.* at 293.

<sup>28</sup> *Id.* at 298-99.

<sup>29</sup> "Television Without Frontiers," *supra* note 1, art. 2, at 26.

<sup>30</sup> *Id.*

<sup>31</sup> For the provisions of Article 22, see *infra* text accompanying note 48.

<sup>32</sup> "Television Without Frontiers," *supra* note 1, art. 2, at 26.

<sup>33</sup> *Id.*

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."<sup>34</sup> European works are defined in Article 6 of the Directive as works originating in Community Member States; works originating in third countries that are parties to the Council of Europe's European Convention on Transfrontier Television;<sup>35</sup> and works—including programs made either exclusively or in co-production with producers established within the Community or made with the assistance of authors or workers resident in the Community—from other third countries with which the Community Member States or their competent authorities have concluded agreements.<sup>36</sup> If a Member State cannot achieve the requisite proportion of European work broadcasts, then the proportion must not be lower than the average proportion for 1988 in the Member State concerned.<sup>37</sup> It is important to note that all of the articles of "Television Without Frontiers" are politically, but not legally, binding. Thus, the Commission will not instigate proceedings before the European Court of Justice if a Member State fails to adhere to the quotas.<sup>38</sup>

Because the EC wants to encourage the establishment of new, independently-owned audiovisual production companies, "Television Without Frontiers" further states that television broadcasters should try, where feasible, to allocate at least ten percent of their broadcasting time or, alternatively, at least ten percent of their budget for European works created by independent producers.<sup>39</sup>

"Television Without Frontiers" also sets out minimum requirements for broadcast advertising.<sup>40</sup> It mandates a recognizable separation of

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<sup>34</sup> *Id.*, art. 4, at 26.

<sup>35</sup> For a listing of the parties to the Convention, see *European Convention on Transfrontier Television*, Council of Europe, Doc. No. 132 (May 5, 1989). The provisions of "Television Without Frontiers" complement a Council of Europe Convention on Transfrontier Broadcasting. The Council is a twenty-two member international organization comprising all Community Member States and ten other European countries. The Convention's main provisions are quite similar to those of "Television Without Frontiers." Adopted in 1989, the Convention will not enter into force until it is ratified by seven states. By early 1992 twenty countries had signed the Convention, but only St. Martin, Poland, Cyprus, Switzerland, and the United Kingdom had ratified it. *Audiovisual Communications*, *supra* note 12, at 4.1.

<sup>36</sup> "Television Without Frontiers," *supra* note 1, art. 6, at 27.

<sup>37</sup> *Id.*, art. 4, at 26.

<sup>38</sup> *Audiovisual Communications*, *supra* note 12, at 3.2.

<sup>39</sup> "Television Without Frontiers," *supra* note 1, art. 5, at 27.

<sup>40</sup> *See id.*, arts. 10-21, at 28-29.

advertising from programming, regulates the length of advertisements, and sets general standards regarding the interruption of programs by advertising breaks.<sup>41</sup> Some of its stipulations are as follows: a maximum of fifteen percent of daily broadcasting time may be devoted to advertising, although this rate may be raised to twenty percent for telemarketing<sup>42</sup> provided the amount of spot advertising<sup>43</sup> does not exceed fifteen percent; spot advertising breaks must not exceed twenty percent of any one-hour period; advertising breaks during a feature film may occur only once every forty-five minutes during the first ninety minutes and subsequently every twenty minutes; and if a news broadcast, documentary, or children's program is at least thirty minutes long, it may be interrupted by an advertising break.<sup>44</sup>

The Directive regulates advertisements of specific products such as tobacco and alcohol as well. Television advertising for cigarettes and other tobacco products is completely banned throughout the Community.<sup>45</sup> The television advertising of alcoholic beverages is not totally disallowed, but is strictly regulated. Alcohol advertisements may not encourage children and young persons to consume alcohol, link the alcohol consumption to enhanced physical performance or to driving, create the impression that the consumption of alcohol contributes to social or sexual success, proclaim that alcohol has therapeutic qualities or that it helps resolve personal problems, present abstinence or moderate consumption in a negative light, and may not unduly emphasize high alcoholic content as a positive quality of the beverages.<sup>46</sup>

Two other notable provisions of "Television Without Frontiers" enumerate rules on the right of response and the protection of minors. Article 23 of the Directive grants a right of response to any person whose legitimate rights have been injured following an incorrect allegation made during the course of a television program.<sup>47</sup> Regarding

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<sup>41</sup> *Id.*

<sup>42</sup> Telemarketing allows for the direct sale of products or services to the public through use of television or telecommunication media.

<sup>43</sup> Television advertising is generally purchased by an agreement that the television station will play a certain advertisement a set number of times within a certain time period, *i.e.* the prime-time hours of eight o'clock to eleven o'clock. Spot advertisements are different because the advertiser specifies the exact time the ad will run. An example of spot advertising would be buying the lead-off advertising spot during the eight-thirty advertising break.

<sup>44</sup> "Television Without Frontiers," *supra* note 1, art. 11, at 28.

<sup>45</sup> *See id.*, art. 13, at 28.

<sup>46</sup> *See id.*, art. 15, at 28.

<sup>47</sup> *See id.*, art. 23, at 29-30.

the protection of minors, Article 22 states that broadcasts which may be potentially harmful to the physical, mental, and moral development of children and young people—specifically, those that involve pornography or gratuitous violence—must not be shown during hours in which minors usually watch television.<sup>48</sup> In addition, Article 16 sets forth regulations for advertising that is specifically directed at minors. These rules do not allow advertisements to directly encourage minors to buy a product or a service by exploiting their immaturity of judgment and inexperience; to encourage minors to persuade their parents or other persons to purchase the goods or services advertised; to exploit the trust that minors place in their parents, teachers, or other persons; or to unreasonably show minors in dangerous situations.<sup>49</sup>

#### *D. Copyrights to Television Broadcasts: A Push for Uniformity*

One and a half years after the initial adoption of "Television Without Frontiers" in October 1989, the European Commission asked the Council of Ministers to establish a clear legal framework that would guarantee authors' royalties for the retransmission of their programs televised by cable or satellite.<sup>50</sup> The proposed directive, if passed, will remove those obstructions to cross-border broadcasting created by the differences between national copyright laws which "Television Without Frontiers" did not address.<sup>51</sup> This Copyright Proposal is laid out in two sections, one regarding satellite broadcasting and the other addressing cable retransmissions.

A license to broadcast copyrighted works over satellite transmissions must only be acquired in the country of the broadcast's origin, even if the broadcast is a transnational one.<sup>52</sup> The proposed directive sets a minimum level of harmonization of the rules in force in the Member States to ensure the protection of copyright and neighboring rights of performers and broadcasters.<sup>53</sup> Hence, the directive would establish a "broadcasting right" which would allow an author to authorize or prohibit the communication of his copyrighted works to the public by satellite.<sup>54</sup> The amount to be paid for the broadcasting right of

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<sup>48</sup> See *id.*, art. 22, at 29.

<sup>49</sup> See *id.*, art. 16, at 29.

<sup>50</sup> Copyright Proposal, *supra* note 4, at 3.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*, art. 7, at 6-7.

<sup>53</sup> See *id.* at 4.

<sup>54</sup> *Intellectual Property*, Euroscope, Jan. 30, 1992, at 8.3, available in LEXIS, Intlaw Library, Eurscp File.



a copyrighted work would be determined by the number of viewers reached or reachable by the satellite broadcast.<sup>55</sup> Another provision in the proposed directive prevents a "country of origin" from deciding to create a copyright haven which would attract all broadcasters and leave authors without protection by providing for a common level of protection for authors, artists, performers, sound producers, and broadcasters throughout the Community.<sup>56</sup>

For cable retransmissions from other Member States, authorization for copyright purposes will have to be obtained from the copyright owners through contracts, and retransmission rights will be negotiated only through a collecting society.<sup>57</sup> An impartial mediator could be called in to help with the negotiations between the copyright owners and cable operators over the acquisition of rights.<sup>58</sup> The regulation of the collecting societies will remain within the competence of the Member States.<sup>59</sup>

#### *E. Receiving Broadcasts: Uniformity in TV Transmissions*

The final goal of the European Commission's cohesive audiovisual policy is to establish a single broadcasting transmission standard to accompany the technological emergence of Europe's high-definition television (HDTV) system.<sup>60</sup> In order to ensure television broadcasting on a uniform transmission signal within the European Community, the European Commission submitted the *Proposal for a Council Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals*.<sup>61</sup> This proposal declares that the television transmission standard HD-MAC<sup>62</sup> will be the European standard for the

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<sup>55</sup> Copyright Proposal, *supra* note 4, at 4.

<sup>56</sup> *Copyright: Commission Proposes a Legal Framework for Cable and Satellite Broadcasting*, Eur. Info. Service, Aug./Sept. 1991, available in LEXIS, World Library, Allwld File.

<sup>57</sup> Copyright Proposal, *supra* note 4, art. 11, at 7.

<sup>58</sup> *Id.* at 7.

<sup>59</sup> *Id.*

<sup>60</sup> HDTVs are new television sets that are comparable, in dimensions and picture clarity, to a movie theater screen. The HDTV screen is much wider than standard televisions, but has the same height. The advantage of HDTV, aside from the uniqueness in dimensions, is that it offers more lines-per-picture than ordinary televisions, resulting in a much clearer picture than ever before offered by broadcasters. The dilemma posed by HDTV is that normal TVs cannot receive the signals broadcast for HDTVs. Hence, in order to accommodate the step-up in technology, states will be forced to phase out the old TVs and sell the new HDTVs.

<sup>61</sup> Broadcasting Standard Proposal, *supra* note 5.

<sup>62</sup> *Id.*, art. 2, at 21. MAC is an acronym for multiplexed analogue components

reception of HDTV signals when HDTV systems are ready for consumer purchase in the upcoming years. In order to gradually change the EC transmission standards from the ones currently used that provide a 625-line television image<sup>63</sup> to the HD-MAC standard created for the 1,250-line image provided by HDTV, the proposal would use D2-MAC<sup>64</sup> as a "training wheels" standard in order to make the shift to advanced television less abrupt.<sup>65</sup> The D2-MAC standard renders a 625-line picture, as do the current standards, but offers somewhat better images.<sup>66</sup> After a few years, the standard would be stepped up to the HD-MAC standard. Consumers who bought setups allowing for D2-MAC signals during this interim phase could then see high-definition pictures when HD-MAC becomes the standard—though with the resolution of D2-MAC. Later, they could buy an additional decoder for their television allowing for a full, high-definition picture.<sup>67</sup>

One of the reasons the proposal states for following a path to HDTV is "based on the criteria of compatibility and evolution, in order to avoid discontinuities and duplication of investments."<sup>68</sup> The proposal would have every Member State take the necessary measures to ensure that new television sets and satellite receivers for sale within the Community include the means necessary to receive the D2-MAC signals.<sup>69</sup>

The "Television Without Frontiers" directive, combined with the proposed directives for Community-wide regulation of broadcasting copyright and transmission standards, creates a unified policy in European Community television broadcasting and aids the Com-

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and is a television transmission standard developed by a coalition of European countries under the name EUREKA [the acronym for an intense industrial research effort established to create a homegrown HDTV system]. It includes in its transmission standard "family" HD-MAC, a high-definition television signal that delivers 1,250-line pictures as opposed to the current European standard of 625-line pictures; and D2-MAC, an enhanced standard offering better images than conventional television, but below the quality of the HD-MAC picture. Elizabeth Corcoran, *Trends in Consumer Electronics: Picture Perfect*, Sci. Am., Feb. 1992, at 95, 96.

<sup>63</sup> Corcoran, *supra* note 62, at 98.

<sup>64</sup> For a definition of D2-MAC, see *supra* note 62.

<sup>65</sup> Broadcasting Standard Proposal, *supra* note 5, at 21.

<sup>66</sup> Corcoran, *supra* note 62, at 99.

<sup>67</sup> *Id.*

<sup>68</sup> Broadcasting Standard Proposal, *supra* note 5, at 21.

<sup>69</sup> *Id.*, art. 4, at 22. This requirement applies to new television sets with a screen larger than 52 centimeters. *Id.*

munity in its efforts to complete the "internal market" by the end of 1992.

#### *F. East European Broadcasting Regulation*

Traditionally, television broadcasting in Eastern Europe has been defined by the firm control of all broadcasts by the government, and its consistent use for the support of Communist ideology and government policies.<sup>70</sup> However, the political changes sweeping across Eastern Europe have left many of the former Communist countries struggling with their new-found broadcasting freedoms in their attempts to change from state-controlled systems to Western models of television broadcasting.

For all East European countries, broadcasting has been a state-controlled broadcasting monopoly.<sup>71</sup> Assignment of programming responsibility was usually granted to broadcasting committees of actual or near ministerial status, following the Soviet example.<sup>72</sup> The content of television broadcasts in East European countries was normally governed by those countries' constitutions' freedom of expression clauses which contained limiting provisions. One example of such a provision is found in the Hungarian Constitution, which instructs its people that "[i]n accordance with the interests of the workers the Hungarian People's Republic insures for its citizens freedom of speech, freedom of the press, and freedom of assembly."<sup>73</sup> Freedom of expression clauses such as Hungary's made it easy for states to justify their censorship of certain broadcasts by proclaiming the message broadcast as not in the interests of the state's workers. The law of Poland, for example, did not allow transmission of broadcasts containing criticisms of the government, disclosure of state secrets, information potentially damaging to the international relations of Poland, inducements of violations of law and order, or inaccuracies of information.<sup>74</sup>

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<sup>70</sup> See generally BURTON PAULU, *RADIO AND TELEVISION BROADCASTING IN EASTERN EUROPE* (1974) (citing many East European examples of government's dominance over broadcasting).

<sup>71</sup> *Id.* at 11. Almost all East European countries with a Communist government followed the example set by the Soviets; that is, delegating all broadcasting authority to a state controlled enterprise. This policy allowed the government to keep a tight reign on broadcasts and prevented any anti-Communist material from reaching the people via television or radio. See generally *id.*

<sup>72</sup> *Id.*

<sup>73</sup> A MAGYAR KOZTARSASAG ALKETMANYA [Constitution] art. 55.

<sup>74</sup> See PAULU, *supra* note 70, at 273.

Despite the rigid state control measures, Czechoslovakian broadcasters, at one time, were allowed more freedom of expression than any other country in Eastern Europe, which resulted in a reduction in propagandist information and the rise of contemporary, popular programming.<sup>75</sup> The liberal broadcasting policy ended in 1968 when Czechoslovakia was occupied by the Soviet Union.<sup>76</sup> Upon Soviet occupation, Party Secretary Dubcek announced restrictions on freedom of expression and restored censorship of television broadcasts.<sup>77</sup>

Financial support for television broadcasting throughout the once-Communist bloc was derived primarily from license fees paid by each household that received the television signals.<sup>78</sup> Most of the countries' broadcasting systems obtained some revenue from advertising, but, except for Yugoslavia, the amount was not a significant part of the total budget.<sup>79</sup>

With the recent fall of Communism, regulation of television broadcasts in Eastern Europe has been chaotic and haphazard; however, a few countries appear to be close to establishing cohesive broadcasting standards. In Poland, the removal of the Communist Party from its leading role in state affairs has not immediately affected the status of its broadcasting laws (as of last year the "Polskie Radio I Telewizja" state enterprise still held the broadcasting monopoly),<sup>80</sup> but the Polish government has been redrafting provisions in its constitution<sup>81</sup> and an amended communications law has recently been voted in by the Polish Parliament,<sup>82</sup> signifying that changes in broadcasting law are likely to follow.

Hungarian broadcasting law is, not surprisingly, in a state of flux. A new constitution is being drafted that is certain to contain radical changes. One of the new constitution's drafters stated, with tongue-in-cheek, that the Hungarians plan to incorporate only one provision of the old constitution of 1949 into the new one: the capital of the country will remain in Budapest.<sup>83</sup> Hungary is also formulating leg-

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<sup>75</sup> *Id.* at 319-20.

<sup>76</sup> *Id.* at 313.

<sup>77</sup> *Id.* at 323.

<sup>78</sup> *See id.* at 11.

<sup>79</sup> *Id.*

<sup>80</sup> *Sejm Examines Amendments to Economic Laws*, PAP News Wire, June 28, 1991, available in LEXIS, World Library, Allwld File.

<sup>81</sup> *See Poland*, KCWD/Kaleidoscope, Jan. 20, 1992, available in LEXIS, World Library, Allwld File.

<sup>82</sup> *Sejm Examines Amendments to Economic Laws*, *supra* note 80.

<sup>83</sup> *See* Géza Kilényi, *A Plan for the New Hungarian Constitution*, in UPHEAVAL

islation to break up the big and powerful state enterprises, including the ones controlling television broadcasting, in order to make Hungary more inviting to foreign investment.<sup>84</sup>

The Czechoslovakian government is also making progress towards the democratization of its broadcasting policy. Currently, a Czech and Slovak commission is preparing a draft law on mass media which includes a provision addressing the problem of privatizing media ownership.<sup>85</sup> Other East European countries such as Yugoslavia, Romania, Bulgaria, and Albania have begun to look at reforming their own broadcasting laws, but unlike Poland, Hungary, and Czechoslovakia, the drafts of new laws in these countries are at an "embryonic stage."<sup>86</sup>

### III. ANALYSIS

#### A. Background

In Brussels on December 16, 1991, the European Community and Poland, Czechoslovakia, and Hungary signed agreements granting the three Eastern European countries the status of associated states of the European Community.<sup>87</sup> These association agreements provide for trading advantages and financial aid for the East European countries and differ from the existing association agreements that the European Community has concluded with other countries.<sup>88</sup> The agreements create an Associated Council that is comprised of high-level representatives of the EC Commission and Member States and of the associated states.<sup>89</sup> The Council will meet periodically and make formal decisions in its own right.<sup>90</sup> The association agreements dem-

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AGAINST THE PLAN: EASTERN EUROPE ON THE EVE OF THE STORM 80, 81 (Peter R. Weilemann et al. eds., 1991).

<sup>84</sup> See generally Franz-Löthar Altmann, Reforms in Hungary, Poland and Czechoslovakia: A Comparison, in UPHEAVAL AGAINST THE PLAN: EASTERN EUROPE ON THE EVE OF THE STORM 40, 45-53 (Peter R. Weilemann et al. eds., 1991).

<sup>85</sup> See *Federal Panel Prepares Draft Law on Mass Media*, Int'l Bus. Daily (BNA), (Jan. 10, 1992).

<sup>86</sup> See 1992: *What is at Stake?*, supra note 6.

<sup>87</sup> See *EEC/Eastern Europe: Europe Enters New Era With Association Accords*, Eur. Rept., Dec. 17, 1991, available in LEXIS, World Library, Allwld File [hereinafter *New Era*].

<sup>88</sup> *Trade Relations With Eastern Europe*, Euroscope, Jan. 23, 1992, available in LEXIS, Intlaw Library, Eurscp File.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

onstrate the intent of these East European countries to ultimately gain full membership in the European Community.<sup>91</sup> During the accords for the association agreements, the Hungarian Prime Minister, Jozsef Antall, stressed the fundamental importance of solidarity on a European scale and further confirmed his country's commitment to European integration.<sup>92</sup> Acting Polish Prime Minister Balcerowitz expressed a similar sentiment, pointing out that during the last two years, Poland had remained faithful to the European values of encouraging democracy, freedom of law, and a multi-party system.<sup>93</sup>

Negotiations between the European Community and other East European countries are currently underway. Association accords with Bulgaria and Romania are likely to be concluded within the year, the initial path having been mapped out during the talks with Poland, Czechoslovakia, and Hungary.<sup>94</sup> Upon their conclusion, the European Community will have established privileged and quasi-permanent links with five of the emerging Eastern European states. A crucial part of each association accord provides for ultimate membership in the European Community.<sup>95</sup>

#### *B. Compliance with Article 4 of "Television Without Frontiers"*

With the ties between the Community and Eastern Europe strengthening, and likely to become stronger, the entrance into force of "Television Without Frontiers" will profoundly impact the future of television broadcasting in Eastern Europe. The Romanian Ambassador to the United Nations, Aurel Dragols Mutenau, summed up Eastern Europe's broadcasting woes by saying there can be no freedom of information without powerful private stations, but because of Romania's ruined economy, there is no money to support the privatization of broadcasting.<sup>96</sup> Thus, any immediate turnarounds from state controlled television to broadcasting by private stations will depend on broadcasting investments—the most likely source of such

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<sup>91</sup> See *New Era*, *supra* note 87. The European Commission President, Jacques Delors, stated that Poland, Hungary, and Czechoslovakia could be ready for full membership in the European Community by the year 2000. *1992: What is at Stake?*, *supra* note 6.

<sup>92</sup> *New Era*, *supra* note 87.

<sup>93</sup> *Id.*

<sup>94</sup> *1992: What is at Stake?*, *supra* note 6.

<sup>95</sup> *Id.*

<sup>96</sup> See *Eastern Europe Struggles With Broadcasting Freedom*, BROADCASTING, Nov. 5, 1990, at 34.

investments being foreign (i.e. from the European Community and the United States).

The "Television Without Frontiers" directive could very well mean television without Americans because of the controversial Article 4. Article 4's mandate that broadcasters reserve a majority of their broadcasting time for European works<sup>97</sup> will significantly deter investment by the United States in any of the broadcasting states adhering to the "Television Without Frontiers" directive. While Eastern European countries are not bound by this Directive, they have demonstrated a clear intent to join the European Community. To gain admission as a Member State, the applying states will want to show their eagerness to follow the guidelines and directives established by the Community; hence, they will have to show their intent to follow the quota for European works set forth in Article 4 of "Television Without Frontiers."

The East Europeans are faced with a dilemma. Eastern Europe wants American investors to lend both their money and expertise to their broadcasting systems. The United States has built an outstanding reputation in Europe for the production of television programs; as of 1989, nearly seventy percent of the fiction programs shown in European Community Member States were imported—chiefly from the United States.<sup>98</sup> Driven by strong economic interests, the United States film and television industry contributes a \$2.5 billion annual trade surplus to the United States' economy, with approximately half its worldwide revenue coming from European sales.<sup>99</sup> In 1987, the United States sold \$675 million worth of television programs to Western Europe, and in 1988 that number drastically increased to \$844 million.<sup>100</sup> The market researchers Frost & Sullivan have estimated that the amount of American television sales to Western Europe will be \$2.691 billion in 1992.<sup>101</sup> Because of the great demand in Western Europe for television programs made in the United States, Eastern Europe wants American investments in their private broadcasting systems to help them learn the various aspects of Western television broadcasting such as station management, programming,

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<sup>97</sup> See "Television Without Frontiers," *supra* note 1, art. 4, at 26-27.

<sup>98</sup> See generally Presburger & Tyler, *supra* note 18, at 500.

<sup>99</sup> *Id.* at 501.

<sup>100</sup> *Id.* at 501-02.

<sup>101</sup> *Id.* at 502.

advertising, market research, engineering and operations, and news production.<sup>102</sup>

However, with the movement of East European countries to join the European Community, United States aid for East European broadcasting will be small. The United States would be eager to assist in the development of broadcasting systems that promise to eventually become a profitable new marketplace for American programs; but, as East European states align themselves with the European Community cause, the United States realizes that the market will likely be significantly limited by the "Television Without Frontiers" quota. The United States' response to the passage of this Directive has been hostile. The House of Representatives denounced the Directive in a 342 to 0 vote calling it a protectionist and unjustifiable trade restriction that violates the General Agreement on Tariffs and Trade.<sup>103</sup> Carla Hills, the United States Trade Representative, accuses the Directive of "conflicting 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 about from a wide range of sources."<sup>104</sup>

Despite the European Community's response to the United States' condemnation of "Television Without Frontiers," which pointed out that Article 4 is only politically, not legally, binding,<sup>105</sup> the reservations expressed by the United States might not be altogether misplaced. As East European states attempt to gain entry into the European Community, they surely will want to show their good faith by following all EC directives to the letter, irrespective of their legally or politically binding effect.

Although the East Europeans want to encourage investments from the United States, the European Community offers what the United States cannot, both broadcasting modernization and the retention of their European culture. The quota provision in Article 4 of "Television Without Frontiers" was drafted as a legitimate method of preserving national and regional identities.<sup>106</sup> According to the *Green*

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<sup>102</sup> See Gene Mater, *Broadcasting in Eastern Europe*, BROADCASTING, June 24, 1991, at 17.

<sup>103</sup> 135 CONG. REC. H7326-27 (daily ed. Oct. 23, 1989).

<sup>104</sup> Office of the U.S. Trade Representative, Press Release No. 56, at 1 (Oct. 10, 1989).

<sup>105</sup> Presburger & Tyler, *supra* note 18, at 502.

<sup>106</sup> *Id.* at 505.



*Paper*, "television will play an important role in developing and nurturing awareness of the rich variety of Europe's common destiny they share in many areas."<sup>107</sup> In this way, European works will promote European integration. By adhering to the set quotas for broadcasting European works, it will be easier for the East European nations to retain their European heritage.

The European Parliament has recognized the Eastern European need for assistance in remodelling their broadcasting structure along lines conducive to European heritage. Mrs. Maibaum, member of the European Parliament, issued a proposal to the European Parliament emphasizing the need to "form cultural cooperation and thereby help boost the process of democratization in Poland, Hungary, the Czech and Slovak Federal Republic, and, subsequently, in Yugoslavia, Bulgaria, Romania, and Albania as well as the European Republics of the former Soviet Union."<sup>108</sup> Mrs. Maibaum's proposal was supported by Parliamentary Member Oostlander who suggested that "cooperation in the field of radio and TV, an action plan of the European Community in that area, could make a substantial contribution in cultural respects to political stability in Europe."<sup>109</sup>

In addition, by following the "Television Without Frontiers" quota, the East European states would be able to reap the benefits ensured by the Copyright Proposal, upon its enactment. By adhering to the Article 4 quota, creative efforts by East European authors could be broadcast Community-wide without being threatened by the exploitation of their works without payment or without the option to block the exploitation outright.<sup>110</sup> This incentive will lead to increased production of creative programming within the private sector of the East European countries and, in turn, aid the ailing states' economies.

While East European broadcasting could gain considerably in non-compliance with Article 4 of "Television Without Frontiers" by reaping uninhibited economic and technical broadcasting investments from the United States, the East Europeans will probably choose to adhere to Article 4 in order to further their bid for full membership with the European Community and to enjoy a Community-wide copyright structure along with the retention of their cultural heritage.

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<sup>107</sup> *Green Paper*, *supra* note 13, at 28.

<sup>108</sup> EUR. PARL. DEB. (9) 28 (Sept. 9, 1991).

<sup>109</sup> EUR. PARL. DEB. (9) 30 (Sept. 9, 1991).

<sup>110</sup> Copyright Proposal, *supra* note 4, at 3.

### C. *Tuned in to the Right Signal?*

The forthcoming adoption by the European Community of the Commission's proposal establishing D2-MAC<sup>111</sup> as a interim transmission standard to lead the way for the high-definition transmission standard of HD-MAC<sup>112</sup> sets the course for television's future in Eastern Europe. In order to comply with the intentions of "Television Without Frontiers" and allow for cross-boundary television, there must be an assurance that the signals broadcast by one state can be received by the next. Reception will be stifled if several different and incompatible transmission standards crop up throughout the Community. Thus, the Commission has proposed a directive that will ensure that the European Community's movement into new television technologies will be uniform, staying tuned to the same signal. East European states, bidding for full EC membership and needing a marketplace to distribute their television signals, are almost sure to follow suit and adopt D2-MAC.<sup>113</sup>

The East Europeans would be wise to give the standards a second thought before adopting them as their own future standard for television transmissions. Understandably, Eastern Europe wants involvement in HDTV development. Industry predictions state that HDTV equipment will be a \$100 billion per year worldwide industry by the year 2000.<sup>114</sup> The problem with jumping at the opportunities offered by the MAC standard for HDTV is that such a jump is short-sighted. European industrialists are already worried that their work on HDTV may be swept aside for "digital television."<sup>115</sup> The superiority of "digital television" is obvious; by transmitting television signals embodied in digital form, television will be able to directly tie in with other technologies such as telecommunications and multimedia com-

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<sup>111</sup> For a definition of D2-MAC, see *supra* note 62.

<sup>112</sup> For a definition of HD-MAC, see *supra* note 62.

<sup>113</sup> The countries of Eastern Europe, although they will not be legally bound to adopt D2-MAC as their standard if the proposal becomes a directive, will almost certainly adopt D2-MAC as their standard because of the EUREKA initiative (see *supra* note 62). States participating in EUREKA include Bulgaria, Czechoslovakia, Hungary, Poland, and Yugoslavia along with all of the EC Member States. EUREKA is credited for the formulation of D2-MAC and HD-MAC. See Corcoran, *supra* note 62, at 95-96.

<sup>114</sup> *Id.* at 96.

<sup>115</sup> *Id.* at 103. Digital television simply means that in the interval between the camera's recordation of a live image and the screen's display of the final picture, the video and audio information is expressed in digital form instead of the analog form used in the MAC standards. *Id.*

puting.<sup>116</sup> The United States is the leader in this field, with the Federal Communications Commission considering four proposals to establish digital signals in its selection of a new standard for television broadcasting in mid-1993.<sup>117</sup> Maurizio Ardito, a senior researcher at the research center of Radiotelevisione Italiana commented that “[w]e are supporting the EUREKA strategy on HDTV, but from a technical standpoint, we are very sure that the future is digital.”<sup>118</sup>

MAC may offer Eastern Europe a great edge in building hardware for domestic consumers, but because the standard will be exclusively used in Europe, it also cuts the East Europeans out of competing markets outside of Europe.<sup>119</sup> Additionally, because MAC is an analog transmission system, it provides no new technological directions, in contrast to digital technologies which promise to tie together a diverse collection of technologies.

With Eastern Europe in such poor economic condition, perhaps such long range speculation over the wisdom of choosing the European MAC system over “digital television” is irrelevant. Eastern European broadcasting needs help now, and following the proposal of the European Community seems to be the only way Eastern Europe can baby-step its way from backwards Communist broadcasting technologies to become even slightly competitive in the broadcasting field by the end of the century. Working with financial and technical aid from the EC, East European countries should strive toward establishing their competency to develop enormous, high-profile projects focused on technologies such as “digital television,” deemed key to the international competitiveness of European industry as a whole. In the meantime, allying themselves with the European Community’s broadcasting standard seems the best promise for their future.

#### IV. CONCLUSION

When the European Community developed “Television Without Frontiers,” the opening of Eastern Europe to democratic reforms was only a dream for the future. Today, the dream is a reality, and the swiftness of events east of the Elbe have astonished the world. The changes in Eastern Europe create a sense of chaos and confusion

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<sup>116</sup> *See id.*

<sup>117</sup> *Id.* at 100.

<sup>118</sup> *Id.* at 103.

<sup>119</sup> *See generally id.* (explaining how MAC may technologically sequester the East Europeans from the rest of the world).

that is certain to trouble those who would like to see a rapid integration of European television broadcasting policy. However, these events are not necessarily contrary to the opening of Europe and may actually further the broadcasting liberalization of Western, as well as Eastern, Europe. What is required of the Community is a broadening of its vision of Europe and, perhaps, a greater willingness to listen to Margaret Thatcher's prophetic call for a true European Community encompassing the continent from Moscow to Lisbon and Spitsbergen to Malta.<sup>120</sup>

It is certain that Eastern Europe's destiny lies with the European Community's "Television Without Frontiers" directive. As it is so aptly put by Géza Kilényi, "Eastern Europe is an organic and inseparable part of Europe. Its way of thinking, in spite of the differences in social institutions, is linked by a thousand threads to the universal values of Europe's political and legal development."<sup>121</sup> If "Television Without Frontiers" operates as it should, it will provide East European countries with a magnificent opportunity to serve their societies and enhance their European character by their participation in a free system of broadcasting where television truly has no frontiers.

*Christopher B. Scott*

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<sup>120</sup> DÉVINNEY & HIGHTOWER, *supra* note 7, at 173.

<sup>121</sup> Kilényi, *supra* note 83, at 89.