

# 'Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT

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“‘[N]obody ever called it show art; it’s show business.’”

—Samuel Goldwyn<sup>1</sup>

## INTRODUCTION

Negotiators from the United States and France recently ended a bitter feud by “agreeing to disagree” on whether to bring movies and television programs under free trade rules.<sup>2</sup> More precisely, the recently concluded Uruguay Round of the General Agreement on Tariffs and Trade (the “GATT”)<sup>3</sup> multilateral trade negotiations excluded the audiovisual service sector from its General Agreement on Trade in Services (“GATS”) subsection.<sup>4</sup> The term “audiovisual” refers to cultural products within the GATS, including motion pictures, television, home video, and musical recordings.<sup>5</sup> The Uruguay Round of trade talks, which began in 1986 in Punta del Este, Uruguay,<sup>6</sup>

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1. Bruce Stokes, *Tinseltown Trade War*, NAT’L J., Feb. 23, 1991, at 432, 434.

2. ‘Agreed to Disagree’ GATT Goes Forward by Dropping TV and Film Issues, COMM. DAILY, Dec. 15, 1993, at 2 [hereinafter ‘Agreed to Disagree’].

3. General Agreement on Tariffs and Trade, *opened for signature* Jan. 1, 1948, 61 Stat. (5), (6), 55 U.N.T.S. 188 [hereinafter GATT]. The GATT was never entered into force, but instead has been applied by means of a provisional application protocol. LOUIS HENKIN ET AL., INTERNATIONAL LAW 1165 (2d ed. 1987). For background information on the GATT, see generally THE EUROPEAN COMMUNITY AND GATT (Meinhard Hilf et al. eds., 1986); HENKIN ET AL., *supra*, at 1164-79; ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

4. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, art. XXIX(2)(b), Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter GATT—Uruguay Round]; see also Peter Behr, *U.S., Europe Reach Trade Agreement*, WASH. POST, Dec. 15, 1993, at A1. The GATT’s broad rules, including dispute settlement procedures, now apply to this sector. See Hilary Clarke, *Seeking ‘New Accommodation’*, HOLLYWOOD REP., Jan. 28, 1994, at 1. These dispute resolution methods are beyond the scope of this Comment. For more information on dispute resolution under the GATT, see generally PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991). Financial services was another major sector that proved too difficult to resolve; it was left out of the trade pact, as was the sticky issue of agricultural subsidies. See Hobart Rowen, *GATT Accord: A Massive, but Maybe Moot, Success*, WASH. POST, Dec. 19, 1993, at H1.

5. See John Huey & Tricia Welsh, *America’s Hottest Export: Pop Culture*, FORTUNE, Dec. 31, 1990, at 50, 50; David R. Sands, *Clash of Cultures Creates Latest Block to World Trade Pact*, WASH. TIMES, Nov. 24, 1993, at B7; Jack Valenti, *Trade Bomb Scores a Direct Hit on Hollywood*, L.A. TIMES, Dec. 16, 1993, at A11 (Mr. Valenti is the President and CEO of the Motion Picture Association of America (“MPAA”)). The music industry’s concerns were subordinated to those of the film and television industries during the negotiations. Michael Leahy & Dominic Pride, *IFPI Issues a Call to Action*, BILLBOARD, Apr. 23, 1994, at 43.

6. Marc Levinson, *And You Thought NAFTA Was Nasty*, NEWSWEEK, Nov. 29, 1993, at 54, 54. The GATT began under the leadership of the United States in 1947 with 23 industrialized nations that united to reduce high post-World War II tariffs. Later, it expanded to target other protectionist measures. Karen Rothmyer, *Q&A on Trade-Offs in the Trade Pact*, NEWSDAY, Dec. 15, 1993, at 3. The GATT’s

concluded December 15, 1993.<sup>7</sup> Although the agreement was, by most accounts, an overall success, Hollywood was a "big loser."<sup>8</sup> The entertainment industry's cultural products will not be subject to free trade rules, which would guarantee access to foreign markets.<sup>9</sup>

The GATT's<sup>10</sup> goal is to reduce barriers to free trade, which will result in "more money and more goods and services constantly flow[ing] through the world economy, prompting job creation."<sup>11</sup> Judged by this criterion, the Uruguay Round appears to be a success, with an estimated positive effect on world trade ranging from \$25 billion<sup>12</sup> to "at least \$200 billion a year"<sup>13</sup> to \$300 billion a year.<sup>14</sup> According to United States Trade Representative ("USTR") and chief U.S. negotiator Mickey Kantor, the new GATT will pump approximately \$1 trillion into the U.S. economy and create up to two million jobs over the next decade.<sup>15</sup>

The 1993 GATT agreement is also significant because it covers trade in services, including telecommunications, for the first time,<sup>16</sup> under the GATS.<sup>17</sup> This is crucial for the United States, which is the world's largest exporter of services.<sup>18</sup> Because an estimated seventy-five percent of U.S. workers are employed in service industries (compared to about sixty percent

eight Rounds have led to tariff reductions from a global average of 40% to an average of 5% of the value of the goods in trade. Marc Sandalow & Carolyn Lochhead, *Historic Global Trade Pact*, S.F. CHRON., Dec. 15, 1993, at A1. The Uruguay Round, with 117 nations participating, is perhaps "the last of its kind." Rowen, *supra* note 4, at H5. Future multinational trade negotiations will likely be difficult because they will delve deeper into domestic policy issues; bilateral agreements may be the wave of the future. *Getting Used to GATT*, WASH. TIMES, Dec. 19, 1993, at A13.

7. See Bernard Weinraub, *Clinton Spared Blame by Hollywood Officials*, N.Y. TIMES, Dec. 16, 1993, at D1. It was crucial to complete the Round by December 15, 1993, so that President Clinton could submit the GATT to the U.S. Congress under fast-track authority, under which legislators were allowed to vote "yes" or "no" but were not able to alter the Agreement. *Morning Edition: Marathon GATT Talks Unable to Resolve Film, TV Issues* (NPR radio broadcast, Dec. 7, 1993), available in LEXIS, News Library, CURNWS File. Obviously, this approach would facilitate passage of the GATT.

8. Weinraub, *supra* note 7, at D1. The Round was not a total loss for Hollywood, however. The GATT includes measures designed to protect intellectual property rights. For this, the MPAA's Jack Valenti said, the accord should be "lauded." Brooks Boliek, *Industry's Glad It Got GATT*, HOLLYWOOD REP., Dec. 2-4, 1994, at 1, 48.

9. Weinraub, *supra* note 7, at D1.

10. The GATT is not only a treaty but is also the name for the bureaucratic organization based in Geneva; hence, references to it both as law and as an entity are appropriate. This GATT body will soon be replaced by the World Trading Organization. Rowen, *supra* note 4, at H5. See generally HENKIN ET AL., *supra* note 3, at 1164-66 (discussing the history and structure of the GATT agreement and providing a brief overview of the GATT organization).

11. Rothmyer, *supra* note 6, at 3.

12. See Helene Cooper, *Studies Find the White House Too Rosy on GATT Pact, but Disagree on Data*, WALL ST. J., Nov. 2, 1994, at A2 (discussing estimates of the Economic Strategies Institute).

13. Rothmyer, *supra* note 6, at 3.

14. Sandalow & Lochhead, *supra* note 6, at A1; *All Things Considered: Compromise Needed as GATT Talks Approach Deadline* (NPR radio broadcast, Dec. 13, 1993), available in LEXIS, News Library, CURNWS File [hereinafter *All Things Considered: Compromise Needed*].

15. Louis S. Richman & Rajiv Rao, *What's Next After GATT's Victory?*, FORTUNE, Jan. 10, 1994, at 66, 66.

16. Rothmyer, *supra* note 6, at 3.

17. *Audiovisual Sector Deemed "Too Sensitive" for New GATS Draft*, SCREEN FIN., Oct. 6, 1993, available in LEXIS, News Library, CURNWS File.

18. Rothmyer, *supra* note 6, at 3.

in the European Union("EU")), the importance of the service sector to the U.S. and world economies is apparent.<sup>19</sup> Trade in services is becoming increasingly important to the United States' economic well-being,<sup>20</sup> and one of the healthiest service sector industries in the U.S. is the entertainment industry. U.S. entertainment exports generate an annual trade surplus of \$8 billion—exceeded only by the aerospace industry.<sup>21</sup> In an era of U.S. trade deficits, Hollywood is a self-described trade "prize."<sup>22</sup>

For these reasons, President Clinton had hoped to see the audiovisual sector included in the trade pact. Clinton was disappointed when this did not occur, yet he seemed satisfied with the Uruguay Round in general. The President claimed that the GATT was a more significant trade victory than 1993's hard-fought passage of the North American Free Trade Agreement ("NAFTA"),<sup>23</sup> calling it "an historic victory in our efforts to open foreign markets to American products."<sup>24</sup> USTR Kantor concurred, adding, "I couldn't be prouder of what happened. We walked away with a victory."<sup>25</sup> European Union<sup>26</sup>—formerly European Community ("EC")<sup>27</sup>—Trade Negotiator Sir Leon Brittan described it this way: "I believe that today has been a milestone in the history of world trade."<sup>28</sup>

The EU, led by France, successfully sought to keep the audiovisual sector out of the GATT. Believing that their way of life is being overrun by U.S. culture, the countries of the EU charged the United States with "cultural

19. See Linda F. Powers, *EC 92: A Challenge to U.S. Service Sectors*, BUS. AM., Jan. 15, 1990, at 20.

20. Stokes, *supra* note 1, at 434.

21. The aerospace industry produces "aircraft and related equipment," including defense products. Huey & Welsh, *supra* note 5, at 50., see also *Buddy, Can You Spare a Reel?*, ECONOMIST, Aug. 19, 1989, at 56 [hereinafter *Reel*]. Audiovisual products are the United States' second largest export to the EU. *Taking Cultural Exception*, ECONOMIST, Sept. 25, 1993, at 61, 61.

22. See Jack Valenti, *The Unique, Matchless Non-Clonable U.S. Trade Prize: The American Movie*, Address to the American Film Marketing Association (Feb. 25, 1993) (transcript available from the Motion Picture Association of America, Washington, D.C.).

23. Sandalow & Lochhead, *supra* note 6, at A1.

24. *Id.* But cf. A. Gary Shilling, *The Last Straw?*, FORBES, Jan. 3, 1994, at 262 (arguing that the side deals President Clinton entered into to ensure passage of the NAFTA will weaken the GATT).

25. Steve Doughty, *Gentlemen, We Have a Deal; GATT Breakthrough*, DAILY MAIL (London), Dec. 15, 1993, at 10.

26. The 12 members of the EU are the United Kingdom ("UK"), Germany, Italy, Belgium, the Netherlands, Luxembourg, Denmark, Ireland, Spain, Portugal, Greece, and France. Single European Act 1987 O.J. (L 169) 1, 9, 13. Finland and Sweden have agreed to join, pending voter approval, and Norway may do so soon. *EU Candidates Face Opposition*, WALL ST. J., Mar. 3, 1994, at A11.

27. See *Europe Wrestles with Burgeoning Film Definitions*, SCREEN FIN., Nov. 3, 1993, at 19, available in LEXIS, News Library, CURNWS File. The name change became official on November 1, 1993, when the Maastricht Treaty went into effect. *Id.* This Comment will use EU throughout, inclusive of references to EU actions before November 3, 1993.

28. Sandalow & Lochhead, *supra* note 6, at A1. For less positive views of the Round and of the GATT in general, see John B. Judis, *Rougher Trade: Clinton, Tyson, Kantor—and a Problem*, NEW REPUBLIC, May 31, 1993, at 24 (arguing that the GATT is "largely irrelevant" to the important trade issues facing the major trading superpowers); Shilling, *supra* note 24, at 262 (arguing that "[d]espite the half-baked compromise cobbled together, GATT is dead[]" because negotiations were not concluded before the global economic slow-down set in and because generally "free trade is almost an aberration").

imperialism."<sup>29</sup> To protect themselves from a "flood" of U.S. movies and television, the EU hoped to keep its television content quota and subsidies free from the anti-protectionist GATT rules.<sup>30</sup> The EU also may have had financial motives for protecting its film industry.<sup>31</sup>

Given these factors, it is perhaps not surprising that the audiovisual sector proved to be the Round's "toughest area"<sup>32</sup> for the world's largest trade players—the United States and the EU.<sup>33</sup> In October, 1993, President Clinton stated that "audiovisual services must be included in any GATT accord. This is a vital jobs issue as well as a fairness issue for America."<sup>34</sup> Meanwhile, French Culture Minister Jacques Toubon said his country would not sign a GATT that included the audiovisual industry.<sup>35</sup> Whether France would have let the GATT slip away in such a situation is lost to history. Had it done so, it is doubtful that the rest of the EU would have followed suit. In the end, the United States was unwilling to sacrifice the entire Uruguay Round for the sake of the entertainment industry.<sup>36</sup> U.S. officials claimed that it was President Clinton himself who decided late in the game to sacrifice the entertainment industry's interest for the broader interests of the United States.<sup>37</sup> On the wisdom of President Clinton's move, one commentator opined, "[T]he accord is a huge achievement. To have allowed it to fail would have been unthinkable."<sup>38</sup>

This Comment will examine the U.S., French, and EU positions on the audiovisual issue, as well as the stakes behind these positions. To understand the issue, a brief background on the EU's "Television Without Frontiers" Directive ("Directive")<sup>39</sup> is provided in Part I. Part II analyzes the various Uruguay Round arguments and the underlying interests of the parties. Part III considers possible solutions to the problem for the U.S. entertainment industry and the Federal Government. Part IV concludes that further informal and

29. See, e.g., Justin Burke, *'European Values' at Core of US-EU Debate on Movies*, CHRISTIAN SCI. MONITOR, Dec. 14, 1993, at 4.

30. See Adam Dawtrey, *GATT Gets France's Goat*, VARIETY, Sept. 27, 1993, at 31; Stokes, *supra* note 1, at 436.

31. See Lance Gay, *Europe Eating Up U.S. Films*, STAR TRIB. (Minneapolis), Jan. 25, 1994, at A11; see also *infra* notes 105-10 and accompanying text.

32. *All Things Considered: Compromise Needed*, *supra* note 14.

33. Peter Behr, *U.S., EC Negotiators Reach Last-Minute Accord on Trade*, GAZETTE (Montreal), Dec. 15, 1993, at A9.

34. Dennis Wharton, *Clinton Pledges GATT Support to Hollywood*, VARIETY, Oct. 25, 1993, at 69, 149. The promise followed a meeting with industry leaders at the White House. *Id.*

35. David Buchan, *Lights, Camera—Reaction!*, FIN. TIMES (London), Sept. 18, 1993, at 7.

36. Valenti, *supra* note 5, at A11. In a speech at the National Press Club in the United States, former British Prime Minister Margaret Thatcher suggested, "If necessary, the European Community should simply be ready to go ahead in the GATT without France." *Thatcher Says GATT Should Be Signed Without France if Need Be*, Agence France Presse, Nov. 5, 1993, at 1, available in LEXIS, News Library, AFP File. Any country that failed to sign the Uruguay Round would be governed by its prior GATT agreement. See Rothmyer, *supra* note 6, at 3. A two-tiered GATT system is thus a possibility, with those countries that sign the Uruguay Round treaty in one tier, and any countries that do not sign it, in a second tier, governed by earlier GATT provisions.

37. Behr, *supra* note 33, at A9.

38. Rowen, *supra* note 4, at H1.

39. Council Directive 89/552, 1989 O.J. EUR. COMM. (L 298) 23 [hereinafter Directive].

formal negotiations working toward bilateral treaties—while continuing with strong joint venture and co-production vehicles—is the approach most likely to have positive results for U.S. interests.

## I. THE EUROPEAN UNION'S BROADCASTING DIRECTIVE

### A. *The Directive and the U.S. Response*

On October 3, 1989, the European Council<sup>40</sup> passed the controversial 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—or, as it is more commonly known, the “Television Without Frontiers” Directive.<sup>41</sup> This may seem an ironic name for protectionist measures, but “Television Without Frontiers” refers to the Directive’s goal of reducing barriers preventing the free flow of information and entertainment between EU Member States.<sup>42</sup> To accomplish this goal, the Directive attempts to coordinate the various laws of the EU member states by regulating “the placement, content and amount of advertising, regulating the content of programming to protect minors and assure moral suitability . . . guaranteeing a right of reply to persons injured by the broadcasting of incorrect facts [and] *ensur[ing] that a majority of broadcast programming is of European origin.*”<sup>43</sup> Article 4 of the Directive provides, in pertinent part, “Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works[<sup>44</sup>] .

40. Ministers from each Member State—which are represented according to nation size—comprise the Council. Fred H. Cate, *The European Broadcasting Directive* (American Bar Ass’n Sec. Int’l L. & Prac., Communications Comm.) Apr. 1990, at 1 n.5.

41. *Id.* For an extensive discussion of the Directive, see Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the European Community Directive*, 13 HASTINGS INT’L & COMP. L. REV. 495 (1990); Brian L. Ross, “*I Love Lucy,*” *but the European Community Doesn’t: Apparent Protectionism in the European Community’s Broadcast Market*, 16 BROOK. J. INT’L L. 529 (1990); Cate, *supra* note 40. For an argument that the quotas limiting the broadcast of imported TV programs violate the GATT’s national treatment clause, but that the subsidies to film and TV producers do not, see Clint N. Smith, Note, *International Trade in Television Programming and GATT. An Analysis of Why the European Community’s Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT’L TAX & BUS. LAW. 97 (1993). On the other hand, European officials argued—before the completion of the Uruguay Round—that the GATT applies only to goods and not to services. See Cate, *supra* note 40, at 5-6.

42. Presburger & Tyler, *supra* note 41, at 496.

43. Cate, *supra* note 40, at 2 (emphasis added). See generally Directive, *supra* note 39.

44. Article 6(2) of the Directive defines European works as programming produced in the EU that also meets one of the following conditions:

- (a) they are made by one or more producers established in one or more of those states; or
- (b) production of the works is supervised and actually controlled by one or more producers established in one or more of those states; or
- (c) the contribution of co-producers of those states to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those states.

Directive, *supra* note 39, art. 6(2), at 27. For a more detailed discussion of the rules of origin, see Harold O. Beauty, *The EEC Rules-of-Origin “Game” Can Non-Members Play?*, 14 SUFFOLK TRANSNAT’L L.J. 81 (1990).

a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services.<sup>45</sup> Clearly, the local content rule is aimed at entertainment-oriented television programming. It does not apply to movie screenings at theaters or to videotape rentals.<sup>46</sup>

The Directive had its genesis in the European Commission's<sup>47</sup> Television Without Frontiers: Green Paper on the Establishment of The Common Market for Broadcasting, Especially By Satellite and Cable ("Green Paper"),<sup>48</sup> which recommended harmonizing the broadcasting laws of the Member States of the EU. The EU television market can never be a truly unified market, in that language differences divide the nations.<sup>49</sup> The Green Paper averred that trans-European broadcasting could serve to promote cultural enrichment<sup>50</sup> and prevent U.S. dominance of the European television market.<sup>51</sup> At that time, more than seventy percent of European television fiction programming was U.S.-made.<sup>52</sup> The Directive adopted the proposals of the Green Paper

45. Directive, *supra* note 39, art. 4(1), at 26-27.

46. *Id.* at 26; see also Jerome Champagne, *Film Restrictions Under GATT*, L.A. TIMES, Nov. 4, 1993, at B6. Film promoters claim, however, that "TV quotas can even affect theatrical distribution, such as how much advance or [prints and advertising] they can put up." Patricia Saperstein, *Quake Can't Quell Market*, VARIETY, Feb. 21, 1994, at A1, A2 (alteration in original). Jonas Rosenfield, president of the American Film Marketing Association ("AFMA"), which represents independent film producers, agrees with this contention. Rosenfield claims that when his companies license film rights to distributors in France, the French distributors

use the quotas as a tool to drive down licensing fees, saying their ability to recoup costs is questionable because they don't know if they will be able to sell the films to television as well as to theatres. "This is a real problem that our members are facing in France."

Leslie Adler, *GATT Accord Angers Hollywood, but Wrath is Muted*, REUTER'S CORP. & INDUS. NEWS, Dec. 16, 1993 (quoting Jonas Rosenfield), available in LEXIS, News Library, CURNWS File. France imposes a mandatory twelve-month window between theatrical and video/pay television release to protect theater operations. Waivers are available for films with Paris area admissions of less than 400,000. The rule has been blamed for France's unspectacular video market. See Peter Dean, *French Vid Window Targeted*, BILLBOARD, Apr. 30, 1994, at 74. France has also recently enacted a law dictating that by 1996, at least 40% of all music played by French radio stations must be of French origin. David Buchan, *France Says 'Non' to Creeping Franglais*, FIN. TIMES (London), Feb. 24, 1994, at 1, 26.

Spain recently passed a law dictating that theaters must show one day of European movies for every two days of U.S. films shown. Stephen Chapman, *The Real Enemy in the Battle to Save European Culture*, CHI. TRIB., Jan. 2, 1994, § 4, at 3. Spanish buyers must also obtain a foreign distribution license, which makes it more expensive for them to buy films. Saperstein, *supra*, at A2. Spanish exhibitors are fighting the law, "not because we're against Spanish product, we just want good product." John E. Froom, *'Free Trade' NATO War Cry*, DAILY VARIETY, Mar. 8, 1994, at 1, 54 (quoting Patricia Edeline, director general of Madrid's Multisalas Cine M2 La Vaguada).

47. The Commission is the EU's administrative body. Recommendations made by the Commission are ultimately accepted or rejected by the European Council. Cate, *supra* note 40, at I nn.4-5.

48. COM(84)300 final (June 14, 1984) [hereinafter Green Paper].

49. *All Things Considered: GATT Talks Look at the American Film Industry* (NPR radio broadcast, Oct. 15, 1993), available in LEXIS, News Library, CURNWS File [hereinafter *All Things Considered: GATT Talks*]. Jerome Champagne, Deputy Consul General, French Consul, Los Angeles, claims that there are 25 major languages spoken in Europe. Champagne, *supra* note 46, at B6.

50. Green Paper, *supra* note 48, at 6-7.

51. *Id.* at 33.

52. Presburger & Tyler, *supra* note 41, at 500.

but, in addition, provided for the local content rules discussed above.<sup>53</sup> France had lobbied for a sixty percent quota.<sup>54</sup>

This European origin requirement is obviously the most irritating portion of the Directive to U.S. film and television production companies. Jack Valenti, president and chief executive officer of the Motion Picture Association of America ("MPAA")—the Washington, D.C.-based lobbying group for the United States' seven largest film producers<sup>55</sup>—stated that "[the Directive] is populated by hedge rows which restrict both access and fair treatment of American visual entertainment."<sup>56</sup>

Hollywood was not the only group to immediately criticize the local content rule. The U.S. Congress unanimously passed a resolution condemning the broadcast quota as "restrictive and discriminatory"<sup>57</sup> The Bush administration, speaking through its USTR Carla Hills, called the Directive "blatantly protectionist"<sup>58</sup> and threatened to retaliate unilaterally under Section 301 of the Trade Act of 1988.<sup>59</sup>

### *B. The Directive's Effect on the French and European Cinema Industries*

French quotas and subsidies appear to have had some effect on its film industry. In 1992, U.S. films claimed ninety-three percent of the British box office receipts but "only" fifty-eight percent of the French box office receipts.<sup>60</sup> On average, U.S. films control seventy percent of the box office in other European countries.<sup>61</sup> France has the most profitable film industry in the EU<sup>62</sup>—the last such industry of any real importance remaining in the EU.<sup>63</sup> In fact, apart from the United States, France has the largest film

53. See *supra* text accompanying note 45.

54. Rone Tempest, *France Wants to Slam Europe's Open Door to U.S. TV*, L.A. TIMES, Apr. 12, 1989, § 6, at 1.

55. Columbia-Tristar, Warner Brothers, Buena Vista (Disney), 20th Century Fox, Paramount, MCA/Universal, and MGM/UA are the seven largest U.S.-based film producers. *Reel, supra* note 21, at 57; see also Richard Turner, *Whatta Script! Three Tycoons to Start a Studio*, WALL ST. J., Oct. 13, 1994, at B1 (discussing the 1994 U.S. box-office market share of the seven largest U.S. film producers).

56. Valenti, *supra* note 22, at 3.

57. H.R. Res. 257, 101st Cong., 1st Sess. (1989). It was the opinion of Congress that the Directive violated the GATT and that the Bush administration should retaliate. *Id.*

58. *Congress Lashes Out at European TV Content Restrictions*, COMM. DAILY, Oct. 13, 1989, at 1, 2.

59. *Television Broadcasting and the European Community: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 9 (1989) (statement of Julius Katz, deputy USTR, conveying the main points of a letter from USTR Hills to key members of the European Parliament). For a more detailed discussion of Section 301, see *infra* Part V.D.

60. Sharon Waxman, *GATT-astrophe Averted: French Filmmakers Say Accord Saves Them*, WASH. POST, Dec. 15, 1993, at B2. The U.S. share of France's box office has risen from 31% in 1979. *Id.*

61. See Fernando Trueba, *Oscar Epoch*, GUARDIAN (London), Feb. 24, 1994, at 9.

62. Clarke, *supra* note 4, at 1.

63. See Guy de Lusignan, *The World Bank, External Forces Influencing European Integration* (Feb. 24, 1994) (discussion Paper prepared for the Conference on European Identities, organized by the Russian and East European Institute and West European Studies Center, Indiana University, Bloomington, Indiana, copy on file with the *Indiana Law Journal*).

industry in the world.<sup>64</sup> The Italian and British film industries have all but disappeared.<sup>65</sup> Most other European countries primarily produce television programming.<sup>66</sup> Not coincidentally, while most countries other than the United States underwrite their moviemakers to some extent,<sup>67</sup> only France has subsidized its industry for decades.<sup>68</sup>

On the other hand, despite ever-increasing levels of subsidization, the French share of its own film market is declining.<sup>69</sup> A decade ago, domestic films captured fifty-four percent of the French market; in 1992, such films claimed only thirty-five percent.<sup>70</sup> Simultaneously, French film attendance has decreased from 183 million in 1983 to 120 million in 1992.<sup>71</sup> One French citizen commented, "The (French) films are so boring. The millions who go see the dinosaurs [Steven Spielberg's *Jurassic Park*<sup>72</sup>] are sending a message to French filmmakers who just don't understand the message. They're living at state expense, caught up in their own narrow idiosyncrasies."<sup>73</sup> Some critics, who would likely be seconded by economists, charge that the subsidies encourage filmmakers to ignore what the public wants to see.<sup>74</sup>

## II. THE EUROPEAN UNION DEFENDS ITS DIRECTIVE

### A. *The Legal Status of the Directive*

The EU defended its Directive with three main arguments, the first of which urged that the Directive is legally nonbinding on Member States: "[I]t's not a legal obligation, it's a political commitment."<sup>75</sup> Each Member State was to pass its own implementing legislation and was given fairly wide discretion for doing so.<sup>76</sup> Because the Directive set a minimum goal,<sup>77</sup> EU nations were free to set higher quotas, if their governments thought doing so was appropriate.

64. Alix Christie, *Cinema in Europe: Reeling Under the Onslaught of a Blockbuster*, GUARDIAN, Feb. 19, 1994, at 99.

65. Waxman, *supra* note 60, at B2.

66. Russell Smith, *Europe: French Are Fuming, While Russia Rebuilds*, DALLAS MORNING NEWS, Dec. 12, 1993, at C8.

67. *Culture and Trade: Cola v. Zola*, ECONOMIST, Oct. 16, 1993, at 78 [hereinafter *Culture & Trade*].

68. *Id.*

69. Huey & Welsh, *supra* note 5, at 50.

70. Christie, *supra* note 64, at 99.

71. Waxman, *supra* note 60, at B2.

72. JURASSIC PARK (Universal Pictures 1993).

73. Smith, *supra* note 66, at C8.

74. Christie, *supra* note 64, at 99.

75. Steven Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1, D20 (quoting Martin Bangemann, the EC official in charge of carrying out the Directive).

76. *Id.* at D20.

77. See *supra* notes 44-45 and accompanying text.



France, in fact, did enact a stricter quota of sixty percent minimum European works and forty percent minimum francophone productions.<sup>78</sup> Additionally, France enacted fines of \$10,000 for each hour of broadcasting exceeding its self-imposed limit<sup>79</sup> and has not hesitated to apply this penalty.<sup>80</sup> In stark contrast are the British, who were against the local content quotas from the beginning,<sup>81</sup> and do not enforce this portion of the Directive.<sup>82</sup> As a result, both Ted Turner and Rupert Murdoch operate satellite channels broadcasting to all of Europe from Britain.<sup>83</sup> The day after Turner Broadcasting International began transmitting its TNT and new Cartoon Network channels, France decreed that its cable operators could not carry them.<sup>84</sup> Belgium, whose government is sympathetic to the French position on this issue, followed suit.<sup>85</sup> Interestingly, 100,000 French homes are not affected by the prohibition because they have satellite dishes, "which respect no borders."<sup>86</sup>

France is concerned that Turner's networks do not meet the minimum European content requirements.<sup>87</sup> Turner, for his part, has claimed that at least thirty percent of the networks' content was filmed or co-produced in the EU, and he plans to attempt to negotiate a solution with France.<sup>88</sup> Turner's conciliatory approach shows the pragmatism of a businessman: "The French have their own way of doing things and they are entitled to it."<sup>89</sup> Despite potential ramifications from within the EU, Britain plans no further action regarding Turner's broadcasting activities.<sup>90</sup>

78. Christie, *supra* note 64, at 99; Daniel Singer, *GATT & the Shape of Our Dreams*, NATION, Jan. 17, 1994, at 54. The French apply these rules stringently to total schedule time and separately to prime time viewing hours and movies. Valenti, *supra* note 5, at A11.

79. Diana L. Dougan, 'Fortress Europe' of the Airways, L.A. TIMES, Oct. 11, 1989, at B7.

80. France's former Minister of Culture and Communication, Jack Lang, fined two French TV stations the equivalent of a total of \$10 million for exceeding the quota. Reel, *supra* note 21, at 57.

81. Presburger & Tyler, *supra* note 41, at 499. West Germany also opposed the quota. *Id.*

82. *All Things Considered: GATT Talks*, *supra* note 49.

83. *Id.*, see also Richard L. Hudson & S. Karene Witcher, *Murdoch's British Satellite-TV Venture, Long a Loser, Posts Huge Jump in Profit*, WALL ST. J., Feb. 4, 1994, at A4 (noting that 17.5% of Murdoch's venture, British Sky Broadcasting, Ltd., is owned by the French company, Chargeurs SA).

84. *U.S. Satellite Programming Could Be Barred from Entering European Market*, SATELLITE WK., Sept. 20, 1993, available in LEXIS, News Library, CURNWS File [hereinafter *U.S. Satellite Programming*] ("[C]able operators have been warned that they risk being fined if they carry [Turner's] network."). Turner began broadcasting in Europe on September 17, 1993. *All Things Considered: GATT Talks*, *supra* note 49.

85. *All Things Considered: GATT Talks*, *supra* note 49.

86. Richard W. Stevenson, *Lights! Camera! Europe!*, N.Y. TIMES, Feb. 6, 1994, § 3, at 1, 6. Governmental attempts to prohibit reception of satellite signals by citizens are not unknown. Iran recently banned satellite dishes and ordered seizure of existing equipment, seeking to prevent reception of material infringing on its national and religious cultures. *Iran Bans Satellite Dishes*, WALL ST. J., Apr. 6, 1994, at A8. China has made a similar decree. *International Correspondents* (CNN television broadcast, Nov. 28, 1993), available in LEXIS, News Library, CURNWS File.

87. *U.S. Satellite Programming*, *supra* note 84.

88. *Id.*

89. *Id.* (quoting Ted Turner).

90. *Id.* This is true despite a threat from French Communications Minister Alan Carignon to take the British government to the European Court of Justice over the matter. European Commissioner for Audiovisual Policy Joao de Deus Pinheiro has also complained to the UK and is looking into the matter for possible further proceedings. *Id.*

All twelve Member States have been warned by the EU Commission for improperly implementing the Directive, "although in the case of France this was because they were applying the quotas too rigorously"<sup>91</sup> The editors of one newspaper declared, "[O]nly France takes the [local content] rule seriously"<sup>92</sup> Some EU officials concede privately that the Directive is very difficult to enforce.<sup>93</sup>

### *B. Economic Harm to the United States*

The EU also defended its quota by maintaining that the United States would not be economically harmed by the Directive.<sup>94</sup> It reasoned that because non-European programming across Europe accounted for an average of twenty-five percent before the quota<sup>95</sup> and because "hardly any network programs more than forty-two percent [U.S.] shows,"<sup>96</sup> the quota would not reduce the quantity of programming imported.<sup>97</sup> However, one representative of the U.S. entertainment establishment claimed, "[T]his means job loss in America."<sup>98</sup> "The magnitude of danger posed by the Directive to U.S. programming interests is impossible to assess with precision," said one commentator.<sup>99</sup> At the very least, a two-level market was created, in which the prices of U.S. television programs were suppressed in relation to programs meeting the "made in Europe" criteria.<sup>100</sup> As Joe Shapiro of the Walt Disney Company explained, "We will still be trying to move the same amount of product through a smaller hole. So our bargaining position will be less and we will be able to charge less for it"<sup>101</sup>

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91. Doughty, *supra* note 25, at 31.

92. *Hamburgers Are More to the World's Taste*, INDEPENDENT (London), Oct. 6, 1993, at 23.

93. Doughty, *supra* note 25, at 31.

94. Presburger & Tyler, *supra* note 41, at 503.

95. Cate, *supra* note 40, at 8. Another estimate pegged the average at closer to 12%. *Reel*, *supra* note 21, at 56.

96. Fred Hift, *TV Trade War Heats Up*, CHRISTIAN SCI. MONITOR, Nov. 2, 1989, (Arts), at 10.

97. Presburger & Tyler, *supra* note 41, at 503.

98. Valenti, *supra* note 22, at 3.

99. Cate, *supra* note 40, at 8.

100. See Presburger & Tyler, *supra* note 41, at 503-04; *Europe Wrestles with Burgeoning Film Definitions*, *supra* note 27; Stokes, *supra* note 1, at 436. Sales of U.S. television programming to France, Italy, and the UK declined in 1989, the year the Directive was enacted. *Id.* "Our TV sales to France are down," claimed the MPAA. Motion Picture Association of America, *Why GATT is Crucial to the Future of America's Most Wanted Export 3* (1993) (unpublished statement available from MPAA, Washington, D.C.) [hereinafter MPAA, *America's Most Wanted*]. *But see* Weinraub, *supra* note 7, at D1 ("[Entertainment industry] executives said the use of quotas to limit the amount of American films and programming had not hurt the American industry.")

101. Stokes, *supra* note 1, at 436.

### C. Cultural Imperialism

A third argument advanced by the EU in defense of its Directive—and the crucial argument for this Comment—was U.S. cultural imperialism.<sup>102</sup> The EU wanted to protect European culture from the “flood” of U.S. cultural product imports, from “dubbed versions of *Miami Vice* to the soap opera *Santa Barbara* to a French version of *Wheel of Fortune* called *La Roue de la Fortune*.”<sup>103</sup> “Have we the right to exist?” asked EU Commission President Jacques Delors immediately before the final vote on the Directive.<sup>104</sup> This objection was renewed by the EU and in particular by France during the Uruguay Round.

Because France has the second largest and second most profitable film industry in the world, some on the U.S. side of the GATT dispute claim France’s protests about culture are nothing but a cover for what the debate is really about: money.<sup>105</sup> “This [debate] has nothing to do with culture unless European soap operas and game shows are the equivalent of Moliere. This is all about the hard business of money,” insists Jack Valenti.<sup>106</sup> While both the United States and France undoubtedly care deeply about the substantial pecuniary aspects of the controversy, French cultural arguments seem to be honestly held and made in good faith.

### III. THE STATUS OF THE DIRECTIVE AS THE URUGUAY ROUND DREW TO A CLOSE

As the Uruguay Round approached completion (having begun in 1986), no unilateral action had been taken against the EU for the Directive.<sup>107</sup> The United States hoped to dispose of the Directive’s quotas by bringing the audiovisual sector under the purview of the GATS subsection of the GATT. Believing that bringing the sector under the auspices of the GATT would

102. *Id.*

103. Daniel Pedersen, *A ‘Grenade’ Aimed at Hollywood*, NEWSWEEK, Oct. 16, 1989, at 58.

104. *Id.*

105. Gay, *supra* note 31, at A11 (“[S]trip away the rhetoric, and this debate is about money and failed efforts by European governments to dictate tastes.”); *Hollywood Is Left on the Cutting Room Floor*, DAILY MAIL (London), Dec. 15, 1993, at 10 (reporting that George Vradenburg, Fox executive vice president, thinks that money is the real issue); Suzanne Lowry, *Why They Were So Right to Fight*, DAILY TELEGRAPH (London), Dec. 15, 1993, at 21 (arguing that the debate is “in the end only about money”); Daniel Talbot, *Use Junk to Bankroll Art*, N.Y. TIMES, Jan. 17, 1994, at A17 (“[C]ash is the force, not cultural imperialism”).

106. Statement of Jack Valenti, president & ceo, Motion Picture Association of America I (Dec. 14, 1993) (unpublished statement, available from MPAA, Washington, D.C.).

107. Although the Directive is up for review this year by the EU, it seems highly unlikely that it will be repealed, since the EU fought hard to keep it in the GATT negotiations. Aside from U.S. interests, there are two other sources of pressure that might cause the EU to rethink its stance. First, consumers may lobby their governments to vote against the continuation of the quota. So far, there is no indication that this has occurred. Second, AFMA President Jonas Rosenfield sees it this way: “I think the television channels are going to be very severely inhibited from these restrictions and are going to put pressure on their governments.” Adler, *supra* note 46.

jeopardize the Directive's quotas and the state subsidies that each Member State provides to its film industry, the EU sought to ensure what it perceived to be the very survival of its cultural industries by avoiding the application of the GATT's free trade rules.<sup>108</sup>

As usual, France was at the forefront of the issue. With its more stringent quotas in place and \$250 million per year in subsidies to its filmmakers at stake, the French Government was understandably concerned.<sup>109</sup> In addition to a \$35 million grant from the Ministry of Culture, French subsidies are derived from an eleven percent tax on all cinema ticket sales, a five and one-half percent levy on all proceeds from television, and a two percent tax on pre-recorded videotape sales.<sup>110</sup>

While the Director General of GATT, Peter Sutherland, eventually issued an informal opinion that the Directive would be allowed to remain under the GATT,<sup>111</sup> France was convinced that nothing short of total exclusion from the GATT would do.<sup>112</sup> The quota could not survive under the GATT because of the National Treatment obligation, which dictates that each GATT signatory nation must treat other nations' products and services falling within the GATT framework in the same manner that it treats its own products and services.<sup>113</sup> Domestic subsidies to film producers would survive; these have traditionally been allowed under GATT rules.<sup>114</sup> From a U.S. viewpoint, the issue was simple: free trade and open markets versus protectionism in the form of subsidies and import quotas.<sup>115</sup>

#### IV URUGUAY ROUND ARGUMENTS

Approaching the conclusion of the Uruguay Round, the audiovisual sector remained as a sticking point threatening to prevent consummation of the trade pact.<sup>116</sup> The EU's Leon Brittan and GATT Director General Peter

108. Stanley Kauffmann, *Truth and Consequences*, NEW REPUBLIC, Nov. 22, 1993, at 26.

109. William Echikson, *Sacre Bleu! American Dinosaurs*, FORTUNE, Nov. 29, 1993, at 16 (estimating subsidies of \$250 million); Kauffmann, *supra* note 108, at 26 (estimating subsidies of \$220 million). The MPAA puts the figure at \$293.5 million. MPAA, *America's Most Wanted*, *supra* note 100, at 2. The MPAA estimates that the total subsidies provided by EU countries in 1992 amounted to \$493.1 million. *Id.* In contrast, the entire U.S. National Endowment for the Arts budget is \$175 million annually. Talbot, *supra* note 105, at A17.

Approximately one-third of French films receive government subsidy money in the form of an advance against future earnings. Singer, *supra* note 78, at 54.

Ironically, notes one U.S. commentator with some hyperbole, "[s]ince tax[es are collected] on tickets for mindless American trash as well as French artistic classics, this results in French moviemakers living off the profits from work they profess to despise." Gay, *supra* note 31, at A11.

110. *Culture & Trade*, *supra* note 67, at 78.

111. Sands, *supra* note 5, at B7.

112. *Culture & Trade*, *supra* note 67, at 78.

113. See Valenti, *supra* note 22, at 4-5. See generally HENKIN ET AL., *supra* note 3, at 1171 (discussing national treatment).

114. See Smith, *supra* note 41, at 135 (citing GATT, art. 6, 55 U.N.T.S. at 212).

115. At one point, the MPAA argued for a share of the proceeds from taxes on videotape rentals and box office admissions, but later backed away from this demand. Lowry, *supra* note 105, at 21.

116. CNN Business News: *One GATT Track Stalled, Another Surging Ahead* (CNN television broadcast, Dec. 13, 1993), available in LEXIS, News Library, CURNWS File.

Sutherland, who said that France's fears were overblown, favored a cultural specificity approach. Such an approach would permit an exemption from the GATT's rules on market access and national treatment<sup>117</sup> for the audiovisual sector, allowing EU countries to maintain their subsidies and the Directive's quotas.<sup>118</sup> The European Parliament, EU audiovisual ministers, the European film industry, and France, Spain, and Belgium in particular, favored exclusion of the audiovisual sector from the GATT.<sup>119</sup> Hollywood and the U.S. trade negotiators decried protectionism and demanded inclusion of the sector in the GATS. In the end, France was able to set the agenda and cultural exemption—the exclusion of the audiovisual sector from the GATT—won out.<sup>120</sup> In order to understand what each party finds important in the debate, it is worth examining the arguments made by each side.

### A. Not Seeing Eye-to-Eye: Cultural Goods

Many in the United States do not view entertainment products as substantially different from other products and services.<sup>121</sup> Automobiles, telecommunications equipment, and Hollywood movies, in this analysis, are all objects of international trade, and there is no reason why any of them should be singled out for unusual treatment.

117. See GATT, *supra* note 3, arts. 16, 17, 55 U.N.T.S. 224, 250; GATT/Audiovisual: Update on an Increasingly Controversial Dossier, TECH. EUR., Nov. 4, 1993, § 87 [hereinafter GATT/Audiovisual]. GATT Article 19 (gradual deregulation) also recognizes that unconditional trade liberalization may have adverse cultural consequences. *Id.* For an overview of the legal advisability and implications of such an approach, see generally *id.*

118. GATT/Audiovisual, *supra* note 117, § 87; Sands, *supra* note 5, at B7. The advantage of this approach is that in any cultural context, GATT's major principles—article 1's most favored nation trade status, and article 2's national treatment and market access obligations—do not apply. GATT/Audiovisual, *supra* note 117, § 87.

119. GATT/Audiovisual, *supra* note 117, § 87. France, Spain, and Belgium took the position that only cultural exemption would adequately protect their interests, while the United Kingdom, Germany, the Netherlands, Denmark, and Luxembourg showed more flexibility. At the 1993 international summit meeting of francophone countries, the 47 countries in attendance followed France, Belgium, and Canada's lead in unanimously approving a resolution hailing NAFTA's cultural exemption for the United States, Canada, and Mexico, and vowing to fight for a similar provision during the GATT negotiations. The countries believe that such measures are important in furthering their goal of maintaining a French-speaking presence in the world. *Id.*

France is also fighting the use of the English language in France. The country will soon pass a law establishing fines for those individuals and companies using languages other than French in advertising, labeling, and communicating with employees. Use of other languages in public will not be forbidden. "The government's fear is that if it does not act soon to stem the rising tide of English or its bastard child, *Franglais*, it will be too late. [The law] is designed to ensure that French citizens, employees, and consumers get their information in French." David Buchan, *Balladur Declares War on Franglais*, FIN. TIMES (London), Mar. 9, 1994, at 2; see also Buchan, *supra* note 46, at 1.

Yet another aspect of the francophone movement seeks to teach school children to appreciate French cuisine instead of fast food. Judith Valente, *The Land of Cuisine Sees Taste Besieged by 'Le Big Mac'*, WALL ST. J., May 25, 1994, at A1; see also *infra* note 144.

120. David R. Sands, *France Exerts Influence on Trade but Risks Making World of Enemies*, WASH. TIMES, Dec. 10, 1993, at B8. In return, the United States kept the hugely important aerospace sector in the GATT and received promises of more talks regarding the reduction of subsidies to Airbus, the European producer of airplanes. Doughty, *supra* note 25, at 10.

121. See Sands, *supra* note 120, at B8; Deborah Young, *Sea Change at Venice Fest*, VARIETY, Sept. 20, 1993, at 1.

The French and others see it quite differently. In their view, films and television programs are "cultural products, not merely commercial items,"<sup>122</sup> because they define a nation's identity.<sup>123</sup> They serve to express France's "Frenchness."<sup>124</sup> This helps to explain why the GATT was a consuming political issue in France, with French newspapers such as *Le Monde* running front page stories on the trade deal and anti-United States editorials with references to conspiracies and plots to subvert national identities.<sup>125</sup> Comments such as French Foreign Minister Alain Juppe's charge of "intellectual terrorism" helped stir the country to a "semi-hysterical nationalism."<sup>126</sup>

Some have suggested that the French and U.S. negotiators never really did understand each other fully. "[T]he French do not understand the Americans, as the Americans do not understand the position of the French . . ."<sup>127</sup> In the same vein, it has been said that free trade is a novel idea in France.<sup>128</sup> Indeed, trade and cultural skirmishes between the United States and Europe—especially France—are nothing new.<sup>129</sup> Thus it was perhaps no surprise that the ultimate showdown at the end of the Uruguay Round would be between the United States and France. At any rate, U.S. negotiators admitted that cultural products are not equivalent to other articles of commerce.<sup>130</sup>

122. Chris Fuller et al., *War of Words Rages over UIP Exemption*, VARIETY, Feb. 28, 1994, at 59; see also *Lights, Camera, Quotas!*, L.A. TIMES, Oct. 24, 1993, at M4.

123. Jacques Attali, *Fragile Cease-Fire; Hollywood vs. Europe: Setting the Stage for the Next Round*, PHOENIX GAZETTE, Dec. 23, 1993, at B7, available in LEXIS, News Library, CURNWS File.

124. Andrew Marr, *Don't Mock: The French Have a Point*, INDEPENDENT (London), Oct. 15, 1993, at 19.

125. David Brooks, *Never for GATT*, AM. SPECTATOR, Jan. 1994, at 34; see also Michael Elliott, *Dining on Goose, Talking Turkey*, NEWSWEEK, Dec. 20, 1993, at 40.

126. Marr, *supra* note 124, at 19.

127. de Lusignan, *supra* note 63, at 19.

128. Elliott, *supra* note 125, at 40; see also David Brooks, *France Without Tears*, NAT'L REV., Mar. 21, 1994, at 27 ("There is no French Right that is analogous to the American Right, fervently believing in the essential justice of the free market.").

129. de Lusignan, *supra* note 63, at 4-5, 12. The conditions for a trade dispute were especially favorable in 1993 due to the slow economic growth experienced by industrialized nations, which tends to encourage protectionism. Richman & Rao, *supra* note 15, at 66-67. A number of commentators have observed that the Clinton administration did not help matters. Nine months into his Presidency, President Clinton had yet to visit Europe. Peter W. Rodman, *Bill's World*, NAT'L REV., Nov. 15, 1993, at 34, 35. Secretary of State Warren Christopher won low marks for diplomacy when, in October, 1993, he said, "Western Europe is no longer the dominant area of the world." Elliott, *supra* note 125, at 40. European governments—especially the French—and Japan have expressed reservations about the competency of the Clinton administration in foreign affairs. See Judis, *supra* note 28, at 24-25 (describing Japan's dim view of U.S. trade negotiators); Rodman, *supra*, at 34 (describing France's initial impression of the Clinton administration as "brain-dead"); de Lusignan, *supra* note 63, at 11 (describing Europe's and, in particular, France's negative reaction to the Clinton administration's foreign policy).

130. *Culture & Trade*, *supra* note 67, at 78.

### B. Cultural Imperialism Revisited

“European cultural identity will die” if U.S. imports are not slowed, said French film director Claude Berri.<sup>131</sup> Former French Culture Minister Jack Lang added, “The soul of France cannot be sold for a few pieces of silver.”<sup>132</sup> Perceived cultural imperialism is at the heart of the U.S.-EU trade dispute. EU countries—particularly France—fear they are being overrun with U.S. culture.

There is much evidence of the ubiquity of U.S. popular culture. Coca-Cola earns more money in Japan than it does in the United States.<sup>133</sup> The largest KFC<sup>134</sup> restaurant in the world is located in Tiananmen Square.<sup>135</sup> And by volume of customers, Japan’s top restaurant is McDonald’s.<sup>136</sup> One commentator has suggested that the global “McWorld” is upon us, with a common language of Coke, Pepsi, McDonald’s, Levi’s, and other widely recognized American brand names.<sup>137</sup> Others see more signs that this observation might be correct:

Britain hardly has a film industry left, thanks to the [i]r love for American imports; U.S. movies thoroughly dominate the Top 10 in Italy, Australia, Spain, Germany, Sweden and Denmark. In France, they love Danielle Steele as much as Jerry Lewis. In Mexico, candy-stuffed Simpsons and Ninja Turtles piñatas are replacing [the traditional] bulls at children’s parties. In South Africa, *Who’s the Boss* is the most popular TV show.<sup>138</sup>

In addition, the all-time most popular film in both Sweden and Israel is *Pretty Woman*.<sup>139</sup>

Wim Wenders, German film director and president of the European Film Academy, stated:

People increasingly believe in what they see and they buy what they believe in. If we ever give up the European film industry, then all the other European industries will suffer in the future. People use, drive, wear, eat and buy what they see in the movies. We need to regard our films in the same way as we do our literature. Books would never be included in international trade industry deals.<sup>140</sup>

131. *Id.*

132. *Id.*

133. Huey & Welsh, *supra* note 5, at 50.

134. KFC is the acronym currently used by the Kentucky Fried Chicken enterprise.

135. *International Correspondents, supra* note 86.

136. Benjamin R. Barber, *Global Democracy or Global Law: Which Comes First?* 1 IND. J. GLOBAL LEGAL STUD. 119, 130 (1993).

137. *Id.*

138. Chris Willman, *The Hobgoblins of Pop Culture*, L.A. TIMES, Oct. 31, 1993 (Calendar), at 8.

139. Huey & Welsh, *supra* note 5, at 50. For a fascinating, albeit non-comprehensive, review of U.S. culture abroad, see *id.*

140. David Robinson, *A Case of Hollywood—or Bust?* TIMES (London), Dec. 16, 1993, available in LEXIS, News Library, CURNWS File.

French director Jean-Marie Pore adds another twist, commenting, "I want to see films with Italian cars, British cars, French clothes and European cafes. I want us to draw on our culture."<sup>141</sup>

U.S. studios apparently realize the influence their films wield, and utilize it to their advantage. Major productions such as *Batman* and *Jurassic Park* include extensive marketing campaigns of an array of products related to the film. In addition, if a Hollywood star is seen using a particular product in a movie, it is likely that some money has changed hands. When Tom Cruise drank Red Stripe beer in *The Firm*, domestic sales of the beer increased sixty percent.<sup>142</sup>

As Wenders' remarks suggest, the success of its cultural and culture-related products abroad serves a dual purpose for the United States. It ensures profits for the U.S. parent corporations who market their products overseas, but it also ensures that the United States remains dominant throughout the world due to "soft power."<sup>143</sup> One reporter defines the term:

Soft power has nothing to do with missiles [It is] Levi's jeans. It was the way that, when I was down in Soviet Estonia a lot of my Estonian friends had jury-rigged little satellite receiving systems [so] they could watch MTV; and the hot items down in Moscow's black market were videos of Hollywood movies and above all of hot rock videos from Madonna and so on.<sup>144</sup>

David Brooks, deputy editorial page editor of *The Wall Street Journal-Europe*, observes, "[M]any Americans believe that American influence is waning. The reality is that the influence of American politicians is waning. Anybody who thinks that the influence of America is waning should visit Paris."<sup>145</sup> French director Bertrand Tavernier concurs, but perhaps infers motives that in fact do not exist, or are at least secondary behind the desire to earn profits:

"America takes film seriously not just because it is a big industry, but because it sells a way of life. They know cinema is a vehicle for ideas, and they want to sell those ideas over the world. The Americans take cinema, and the propaganda power of images, very seriously."<sup>146</sup>

Whatever motives exist, U.S. movies and television programs are seen in over 100 countries and on every continent,<sup>147</sup> where they no doubt exert some degree of influence. It is exactly this influence that frightens some Europeans.

Another variation of the culture argument holds that it is crucial to preserve European films because they are art, compared to U.S. fluff. Most admit that

141. Gay, *supra* note 31, at A11 (quoting Jean-Marie Pore).

142. Art Chamberlain, *Tom Cruise Film Gives Red Stripe Happy Ending*, TORONTO STAR, Sept. 8, 1993, at B1.

143. *International Correspondents*, *supra* note 86.

144. *Id.* Among other signs of U.S. culture's influence, visitors will find that 293 McDonald's restaurants have opened in France in the last 20 years. Valente, *supra* note 119, at A1.

145. Brooks, *supra* note 125, at 34, 37.

146. Nigel Andrews, *Identity Crisis in the Euro-movies*, FIN. TIMES (London), Dec. 18, 1993 (Weekend), at XVII (quoting Bertrand Tavernier).

147. Daniel Patrick Moynihan, Chairman, Senate Subcommittee on International Trade, et al., Letter to the President, Sept. 30, 1993 (copy on file with the *Indiana Law Journal*).



there is little hope for reclaiming the majority of European screen time for European films, but they are adamant about their desire to freeze the percentages where they currently are.<sup>148</sup> U.S. films, these critics assert, are “high on hardware, low on human insight [and] like a factory product: fashioned according to public demand by a multiple workforce, including teams of screenwriters, umpteen producers and even the sneak preview audiences whose scorecards can send a film back for last-minute fine-tuning,”<sup>149</sup> whereas European films are “more intellectual”; hence, it is necessary to save the roughly thirty percent of European screens not showing U.S. fare.<sup>150</sup>

The argument has undeniable appeal. U.S. commentators, however, respond almost universally along these lines:

The French are fundamentally agitating against their own people. No one holds pistols to the heads of French filmgoers—or Italian or Finnish or Dutch filmgoers—forcing them to attend Spielberg and Schwarzenegger pictures. Most people want them. Certainly those who want other sorts of films ought to have the chance to get them, but [French Minister of Culture Jacques] Toubon doesn’t mention that he’s safeguarding a minority interest. Art progresses only by that minority, but Toubon and friends talk as if they were protecting a great mass of French virgins from ravishment by drooling American brutes. Toubon should at least realize that he is trying to legislate taste.<sup>151</sup>

U.S. director Martin Scorsese adds, “[C]losing the borders would not guarantee a rise in creativity in the local countries or even a rise of interest on the part of local audiences.”<sup>152</sup> Additionally, Spielberg’s latest movie,

148. See Kauffmann, *supra* note 108, at 26.

149. Andrews, *supra* note 146, at XVII.

150. Trueba, *supra* note 61, at 9.

151. Kauffmann, *supra* note 108, at 26. Seldom noted is that Arnold Schwarzenegger is of Austrian origin.

While it is undeniable that the French are fond of U.S. audiovisual products, the French Government’s stand against the United States during the GATT negotiations was domestically popular. Buchan, *supra* note 46, at 1. It appears that Prime Minister Edouard Balladur is now the favorite to succeed President Francois Mitterrand in 1995. Brooks, *supra* note 128, at 28.

Of course, not all U.S. nationals disagreed with France, and not all French were against the U.S. position. U.S. actress Jacqueline Bisset said, post-GATT, “French films, French culture are important. You must not let yourselves be gobbled up. I want to congratulate you because you won.” *France Celebrates a Victory Over Hollywood*, Reuters, Feb. 26, 1994, available in LEXIS, News Library, Reuter File. Most U.S. actors, unlike their European counterparts, did not voice their opinion on the audiovisual issue. Weinraub, *supra* note 7, at D1. Others appeared to share Bisset’s views. See Letter to the Editor, *Good for the French*, USA TODAY, Dec. 14, 1993, at A10 (“More power to the French if they want to keep American trash off the French airwaves.”); Brooks, *supra* note 125, at 34 (“France is to be admired for at least trying to chart its own course, rather than taking things passively, like other continental countries.”).

The French youth are outward-looking, and many learn English. *Id.* “The art movie image has been extremely prejudicial to French cinema. There was a time when the public wanted to see that kind of thing, but it became a school, a formula. Now it has nothing to do with the tastes and expectations of the French public,” says Christian Clavier, star of the recent wildly successful—and purposefully goofy and Hollywoodesque—film *Les Visiteurs* (*The Visitors*). Martin Bright, *Le Cinema Sans Verite*, GUARDIAN, Jan. 27, 1994, at 9.

152. *French Film Fight*, WASH. POST, Oct. 24, 1993, at C6.

1993 Best Picture Oscar winner *Schindler's List*,<sup>153</sup> is very different from his previous effort, *Jurassic Park*, and perhaps serves as a one-picture refutation of the assertion that the U.S. does not make personal, artistic films.<sup>154</sup> The works of independents such as Woody Allen, Robert Altman, Martin Scorsese, and Hal Hartley further support this point.<sup>155</sup>

Spielberg's *Jurassic Park* was unwittingly pitted against Berri's *Germinal* during this debate in France.<sup>156</sup> *Jurassic Park* was used by the French Government as a symbol of U.S. dominance to garner support for its position.<sup>157</sup> *Germinal*, starring Gerard Depardieu, is the most expensive film ever made in France (\$30 million) and owes its existence to government-provided subsidies.<sup>158</sup> Director Berri was partly responsible for bringing his film into the fray, after provocative public comments such as the following: "If culture cannot be treated as an exception in GATT negotiations, Europe's cultural identity will die."<sup>159</sup> *Jurassic Park* opened on one-fifth of all French screens and took in two million customers in the first week, shattering the record previously held by *Rambo*.<sup>160</sup> Appalled French commentators went so far as to question the "Frenchness" of those attending.<sup>161</sup> *Jurassic Park* went on to become the top grossing film of all time, with \$860 million in box office receipts worldwide.<sup>162</sup>

Although France emerged from the Uruguay Round negotiations the nominal victor, the underlying cultural imperialism issue remains largely unresolved. With technology such as satellite broadcasting testing the sovereignty of nations, there can be no doubt but that the dispute will soon recur. In addition, the GATT's other clauses make it clear that the cultural exemption

153. SCHINDLER'S LIST (Universal Pictures 1993).

154. *Schindler's List*, not surprisingly, has done very well overseas. The film is doing well even in Germany, and ticket sales will likely top \$125 million internationally. 'Schindler' Global Hit, HOLLYWOOD REP., Apr. 6, 1994, at 1; Don Groves, 'Schindler' Dominates O'seas B.O., VARIETY, Apr. 4, 1994, at 10.

155. Waxman, *supra* note 60, at B2.

156. Francois Raitberger, *Battle of the Dinosaurs as Zola Takes on Spielberg*, HERALD (Glasgow), Sept. 29, 1993, at 4. At the box office, *Germinal* won out in France, but 'Park' prevailed everywhere else in Europe. Marr, *supra* note 124, at 19.

Spielberg, for his part, supported the French subsidies garnered from taxes on his and other U.S. productions but came out against the quotas. See *Culture & Trade*, *supra* note 67, at 78.

157. See *Spielberg Buries Hatchet in Meeting with Mitterrand*, Reuters, Mar. 1, 1994, available in LEXIS, News Library, Reuter File.

158. See *Culture & Trade*, *supra* note 67, at 78; Judy Stone, *French Stake Out Turf at Film Festival*, S.F. CHRON., Nov. 20, 1993, at E2 (noting that French Minister of Culture Jacques Toubon stated that "*Jurassic Park* [is] a threat to French identity"). *Germinal*, which was made when the Socialists were in power, is a gloomy epic about what socialism has done for working people. Lowry, *supra* note 105, at 21. France entered the film for 1993 Oscar consideration, but it was rejected by Hollywood, perhaps due in part to the GATT controversy. See *France Celebrates a Victory Over Hollywood*, *supra* note 151.

159. Raitberger, *supra* note 156, at 4. French director Bertrand Tavernier of *Round Midnight* fame echoed Berri's sentiment: "We cannot allow the Americans to treat us in the way they dealt with the redskins." Echikson, *supra* note 109, at 16.

160. Echikson, *supra* note 109, at 16.

161. *French Film Fight*, *supra* note 152, at C6.

162. Jonathan Alter, *Spielberg's Obsession*, NEWSWEEK, Dec. 20, 1993, at 112, 116.

must be reconsidered in the coming years.<sup>163</sup> This pressing question must be resolved, or it will continue to flare up in the future.<sup>164</sup>

### *C. David Versus Goliath: Cultural Dumping*<sup>165</sup>

France's leaders aver that it is not fair trade when European screens are being overrun by U.S. products: they say that they are fighting against monopoly and for freedom of choice.<sup>166</sup> French Minister of Culture Jacques Toubon claims, "All the principles of GATT are for freedom, not for the rule of the jungle."<sup>167</sup> He further states, "We are really, in this affair, in favor of free trade against monopoly"<sup>168</sup>

U.S. films and television programs have a huge advantage in their ability to cover their costs at home, the French argue.<sup>169</sup> Thereafter, these films can earn more profits from the European market or, in the case of television shows, can be sold for a fraction of the cost of producing them; hence, the accusation of cultural dumping by French elites.<sup>170</sup>

While U.S. observers see the problem in a different light—"Make films as good as your cheeses and you will sell them!"<sup>171</sup> remarked Carla Hills, Bush administration USTR and GATT negotiator—the French maintain that, with their smaller population and distinct language, it is virtually impossible for them to compete with the United States. Thus, they claim, they are not against U.S. movies or free trade, but rather are against monopoly. In their view, it is the United States that is not playing fair. Thus, avoiding U.S. hegemony justifies protectionist measures.

The United States responds that its markets are wide open to imports. One commentator observed:

American pop culture is vigorous mainly because it is so open to new influences and so clever at incorporating them. When the Beatles launched the British invasion, Americans didn't pass laws to keep the foreigners from seducing our young, and yet American rock music somehow survived and flourished. Today, pop records from the U.S. make money even in countries where a lot of people can't understand the lyrics.<sup>172</sup>

163. Attali, *supra* note 123, at B7.

164. *See id.* at B7 ("[The audiovisual clash] is just the tip of the iceberg. It presages the larger questions that will arise as culture and commerce are being melded with the arrival of the information age."); Richman & Rao, *supra* note 15, at 66.

165. *See Culture & Trade, supra* note 67, at 78 (employing the term "cultural dumping").

166. Stone, *supra* note 158, at E2.

167. *Id.*; *see also supra* text accompanying notes 122-30.

168. *Showbiz Today: Will GATT Agreement Kill Foreign Film Industry?* (CNN television broadcast, Nov. 12, 1993), available in LEXIS, News Library, CURNWS File [hereinafter *Showbiz Today: Foreign Film Industry*].

169. At least one director contends that the high wages of U.S. stars are the driving force behind Hollywood's need to recoup these costs from an ever-larger market. Trueba, *supra* note 61, at 9.

170. *Culture & Trade, supra* note 67, at 78.

171. *Taking Cultural Exception, supra* note 21, at 61.

172. Chapman, *supra* note 46, at 3. The United States, however, has sought to limit foreign ownership of radio and television broadcasters. *See* 47 U.S.C. § 310(a), (b) (1988) (setting forth the Federal Communications Commission license ownership restrictions).

“[T]he European industry has only a symbolic access to the American market,” says Daniel Toscan de Plantier of France’s film export organization, Unifrance.<sup>173</sup> Total EU film imports account for only about six percent of the U.S. market.<sup>174</sup> U.S. film exports to the EU are approximately thirteen times greater than EU exports to the United States.<sup>175</sup> The few imports that make it into the United States are mostly of British origin.<sup>176</sup> In other areas of entertainment—notably music—imports are more significant, though again Britain is preeminent.<sup>177</sup>

Of the movies made in France, only about one percent are ever shown in the United States.<sup>178</sup> Because U.S. consumers dislike subtitles and dubbing, the French complain, it is difficult for French films to be successful in the U.S. market.<sup>179</sup> “In the United States, a subtitled foreign film is very rarely acceptable; dubbing is unpopular and costly; thus, all that non-English-language films can sell is their remake rights.”<sup>180</sup>

Meanwhile, some critics of the EU’s policies see attempts to stem the free flow of information and entertainment into the EU as censorship. “From the point of view of the audience quotas are really censorship, and it’s really scary to see this happening in free countries,” observed one American film distributor.<sup>181</sup> “American films are basically what the public wants to see.”<sup>182</sup> Many in the United States note that no one forces the French masses to march down to the cinema to purchase tickets for U.S. productions. Directors such as Steven Spielberg and Martin Scorsese express the opinion that European as well as U.S. consumers should be free to watch whatever they want.<sup>183</sup>

Spielberg echoes the censorship cry, stating, “[W]e cannot lock our borders any more than we can close our minds.”<sup>184</sup> Jack Valenti puts it more bluntly: “There hasn’t been so much blatant demand for censorship in France since the Vichy government 50 years ago.”<sup>185</sup>

173. Waxman, *supra* note 60, at B2.

174. Smith, *supra* note 66, at C8.

175. Chapman, *supra* note 46, at C3. Exports to the EU totaled \$4 billion in 1993, with this amount roughly equally divided between film, television, and videotapes. Imports from the EU in the same categories amounted to \$250 million in 1993. Singer, *supra* note 78, at 54.

176. Chris Fuller, *Audiovisual Gums Up GATT Talks*, VARIETY, Dec. 20, 1993, at 27.

177. British rock captures about 20% of the world market. Huey & Welsh, *supra* note 5, at 50. As for France, “[t]he French rock music industry is insipid and safe. The nation’s leading star, Johnny Hallyday, is a 50-year-old Elvis Presley ripoff who lives and records in the United States.” Brooks, *supra* note 125, at 34.

178. *U.S. Satellite Programming*, *supra* note 84.

179. *Taking Cultural Exception*, *supra* note 21, at 61.

180. Letter to the Editor, *We Must Now Make Good Films*, DAILY TELEGRAPH (London), Dec. 16, 1993, at 16.

181. Saperstem, *supra* note 46, at A2.

182. *Id.*

183. See Waxman, *supra* note 60, at B2.

184. *Culture & Trade*, *supra* note 67, at 78.

185. *Id.* Valenti’s tone changed dramatically after the conclusion of the Uruguay Round, with harsh words replaced by suggestions of U.S.-European cooperation. See also *infra* notes 270-76 and accompanying text. Post-GATT, some questioned Valenti’s tough talk strategy. See Weinraub, *supra* note 7, at D1.

### D 'Jurassic' Industry

Why all this fervor over movies such as *Jurassic Park* and television programs such as *Baywatch*?<sup>186</sup> The reason is clear—behind “Hollywood’s facade of glitz and glamour” lies a “multibillion-dollar industry, now one of America’s largest.”<sup>187</sup> While Europeans see culture at stake, U.S. show business firms see their livelihoods in jeopardy

“[T]his debate [as a whole] is about money and failed efforts by European governments to dictate tastes,” said one U.S. commentator,<sup>188</sup> summing up what many in the United States seem to feel is the real crux of the issue. Writing for one irreverent magazine, another commentator put it this way: “Worried that free trade is making their indolent lifestyle less viable, the French are blaming sinister conspiracies and putting quotas on American movies. . . It is interesting to watch an entire nation have a nervous breakdown.”<sup>189</sup>

U.S. production companies rely more heavily on overseas revenues to pay a portion of production costs than they once did.<sup>190</sup> A major factor is ever-increasing production costs.<sup>191</sup> U.S. moviemakers depend on foreign box office receipts for approximately forty percent of their profits.<sup>192</sup> Furthermore, U.S. demand is stagnant; growth must come from overseas markets.<sup>193</sup> Illustrative of the new realities of the movie market is *Rambo III*, a film seemingly tailor-made for U.S. audiences that nonetheless earned \$55 million in the United States and \$105 million internationally.<sup>194</sup> With music, the story is similar but even more drastic: seventy percent of U.S. music industry revenues are garnered from buyers outside of the United States.<sup>195</sup>

Additionally, U.S. television networks simply will no longer pay the entire cost of producing programs.<sup>196</sup> Production costs for a typical hour of dramatic programming now run upwards of \$1 million per episode,<sup>197</sup> with situation comedies priced at about \$450,000 per episode.<sup>198</sup> To air this programming, networks pay less than the price of production—only about two-thirds the cost in most cases.<sup>199</sup> In order to recover costs and turn a profit, television production companies must look to revenues from sales to foreign television networks.

186. Willman, *supra* note 138, at 8.

187. Stokes, *supra* note 1, at 432.

188. Gay, *supra* note 31, at A11.

189. Brooks, *supra* note 125, at 34.

190. Valenti, *supra* note 22, at 2-3.

191. Stokes, *supra* note 1, at 434.

192. Valenti, *supra* note 22, at 2. Of this international portion, 55% is taken from Western Europe. *Id.* at 2-3.

193. Stokes, *supra* note 1, at 434.

194. *Id.*

195. Huey & Welsh, *supra* note 5, at 50.

196. Stokes, *supra* note 1, at 434.

197. Huey & Welsh, *supra* note 5, at 50.

198. *Id.*

199. Stokes, *supra* note 1, at 434.

Much overlooked by the press in the audiovisual debate is the fact that many U.S. entertainment companies are owned by foreign investors. The Japanese readily admit that they cannot recreate what they call *omizu shobai* (literally, "water business," meaning difficult to capture)<sup>200</sup> and have instead largely chosen to buy into the industry. Of the eight largest Hollywood studios, four are American-owned.<sup>201</sup> Of the five largest global record companies, only Warner is owned by a U.S. corporation.<sup>202</sup> Sony Corporation owns Columbia Pictures and CBS Records, Matsushita Electrical Industrial Company owns MCA, which in turn owns Universal City Studios,<sup>203</sup> and the French state-owned Credit Lyonnais bank owns Metro Goldwyn Mayer.<sup>204</sup>

These foreign ownership interests do not diminish the importance of the industry to the United States. Aside from the gargantuan show business companies that *are* American-owned, the entertainment industry employs over 400,000 U.S. workers.<sup>205</sup> Most U.S. industries have not experienced much growth in recent times, but the entertainment sector is an exception.<sup>206</sup> According to MPAA statistics, for every two jobs created in the motion picture industry, three jobs are created in supporting industries, such as construction, lumber, costume, and catering,<sup>207</sup> and this growth is threatened by the Uruguay Round's cultural exception.<sup>208</sup> Due to the aforementioned stagnant domestic demand, future growth is expected to come from international markets.<sup>209</sup> Whether U.S. leaders should take into account the soft power of U.S. cultural products is open to debate; like the MPAA none have openly declared this a public policy goal.

Politically, Hollywood is well-connected. By lending its star quality to politicians and by raising millions from within, Hollywood has attempted to ensure that the U.S. Government watches out for its interests.<sup>210</sup> Democrats

200. Huey & Welsh, *supra* note 5, at 50. Valenti agrees that the United States possesses "movie magic"

[We have] a unique, matchless, non-clonable prize called the American movie. [It] is dominant in the world, not because of patent or formula or subsidy or artificial enticements. We are dominant because what we create here beguiles and entertains viewers on every continent, with an enchantment no other country in the world has been able to duplicate.

Valenti, *supra* note 22, at 6.

201. Huey & Welsh, *supra* note 5, at 51.

202. *Id.* The other global companies are BMG, CBS, EMI, and Polygram. *Id.*

203. *Id.* The Japanese expect the entertainment industry to be the fastest-growing global industry of this decade. *Id.*

204. Brooks, *supra* note 125, at 34.

205. Motion Picture Association of America, U.S. Film Industry Movies, Television Programming, Home Video: A Worldwide Economic Overview 1 (1993) (unpublished comment, available from MPAA, Washington, D.C.) [hereinafter MPAA, U.S. Film Industry]. More than one-half of these workers reside in California. Jonathan Peterson, *State Looking For Big Gains From GATT*, L.A. TIMES, Dec. 10, 1993, at D1.

206. MPAA, U.S. Film Industry, *supra* note 205, at 1.

207. *Id.*

208. See Valenti, *supra* note 22, at 3.

209. Peterson, *supra* note 205, at D1.

210. Stokes, *supra* note 1, at 432; Weimraub, *supra* note 7, at 3. The MPAA's private screenings of first-run movies for members of Congress and others buys invaluable access. Stokes, *supra* note 1, at 438.

have been especially favored by Hollywood.<sup>211</sup> President Clinton is particularly indebted to Hollywood, not only by virtue of being a member of the Democratic party, but also because of his campaign's close ties to Hollywood.<sup>212</sup> It is very likely that because of these ties, President Clinton pledged going into the audiovisual GATT negotiations that "audiovisual services must be included in any GATT accord."<sup>213</sup> The President further vowed he would not sign the GATT if the entertainment industry was unsatisfied with the deal.<sup>214</sup> Both Clinton and Mickey Kantor, a former Los Angeles lawyer who also has close ties to Hollywood,<sup>215</sup> worked hard to ensure the audiovisual sector's inclusion in the trade pact. Ultimately, however, President Clinton chose to back away from his original promise to the industry

### *E. The Aftermath of the Uruguay Round*

By virtually all public accounts, President Clinton's decision to back away from his "firm" promise to Hollywood was the right thing to do. Industry leaders expressed disappointment, but refused to blame the President for the audiovisual services sector failure.<sup>216</sup> Most blamed the EU instead.<sup>217</sup>

The immediate effect of the Uruguay accord is that movies, television, video, and music productions in any form will fall outside the purview of the GATT.<sup>218</sup> The GATT's basic policy—to minimize barriers to trade such as tariffs, quotas, subsidies, and import restrictions—will not be applicable to the audiovisual sector.<sup>219</sup> The GATT's fair-trade and free-market rules will not apply to U.S. entertainment products.

Although the MPAA sought to remove new technology from the cultural exemption, the GATT excludes new communications technologies as well as existing media.<sup>220</sup> Industry leaders fear that this will hamper efforts to exploit new technologies in Europe such as cable,<sup>221</sup> satellite, and pay-per-view television, and video on demand, digital, and fiber optics.<sup>222</sup> The U.S. entertainment industry also fears that the Uruguay Round will establish a

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211. *Glitz and Giving*, WALL ST. J., Mar. 2, 1994, at A10 ("Our findings show that a majority of contributions from wealthy celebrities went to Democratic campaigns or political committees.")

212. Weinraub, *supra* note 7, at D1.

213. Wharton, *supra* note 34, at 69.

214. *U.S. Wants Share of Box-Office*, COMM. DAILY, Dec. 14, 1993, at 3.

215. Weinraub, *supra* note 7, at D1.

216. *Id.* President Clinton remains popular in Hollywood, and few think the fallout from the Uruguay Round will negatively affect financial support for his 1996 campaign. *Id.* at D9.

217. See Adler, *supra* note 46.

218. See *Showbiz Today: GATT Talks Exempt American Movies, TV and Music* (CNN television broadcast, Dec. 14, 1993), available in LEXIS, News Library, CURNWS File.

219. *Getting Used to GATT*, *supra* note 6, at A13.

220. See GATT—Uruguay Round, art. XXIX(2), *supra* note 4, at 1193; see also James Ulmer, *Valenti to Help Survey Post-GATT Landscape*, HOLLYWOOD REP., Feb. 1, 1994, at 4.

221. Much of Europe remains without cable capacity. Gay, *supra* note 31, at A11. As recently as 1989, only 12% of European homes had cable television. Jacques Neher, *A Revolution Brews in European Television*, WASH. POST, Mar. 5, 1989, at H2.

222. Valenti, *supra* note 5, at A11.

precedent which may encourage other countries—particularly Asian countries—to adopt similar measures to protect their cultures.<sup>223</sup>

Members of Congress and the MPAA originally vowed to fight against passage of the GATT if the audiovisual sector were left out of the agreement.<sup>224</sup> Like President Clinton and Jack Valenti, members of Congress chose not to act on their rhetoric. Instead, Democratic opposition to the trade pact centered around protectionist inclinations and environmental and organized labor concerns.<sup>225</sup> Republican opposition stemmed from sovereignty concerns presented by the new World Trade Organization (“WTO”), which will replace the GATT’s present administrative body and have greater dispute settlement powers.<sup>226</sup> Environmentalists, labor leaders, and some Republicans worried that the WTO would have the power to undermine U.S. laws.<sup>227</sup> A House of Representatives rule mandated that Congress achieve \$12 billion in tax increases or spending cuts to compensate for anticipated revenue losses from lower tariffs required by the GATT, this was done.<sup>228</sup> Senate rules

223. Stokes, *supra* note 1, at 434; Weinraub, *supra* note 7, at D1. Asia has been moving toward deregulation of broadcasting, and satellite channels are coming on-line in the region. Don Groves, *Aussies Brace for Battle with U.S. over TV Quotas*, VARIETY, Dec. 27, 1993, at 49.

224. See Moynihan, *supra* note 147; Stokes, *supra* note 1, at 434. With the subtlety typical of both sides of the debate before December 15, 1993, Valenti said, “If those quotas exist, this is Armageddon time—I’m on the Hill in a New York minute bringing out every Patriot missile, every F-16 in our armory, leading whatever legions we can find opposing [the GATT].” *Id.*

225. Robert Keatley, *Trade Pact Faces Delays, Opposition, Posing Problems for the White House*, WALL ST. J., May 20, 1994, at A8. In the end, some industries that were major opponents of the deal, such as the textile industry, were “paid off” to ensure the GATT’s passage in Congress. See Bob Davis & Albert R. Karr, *Deals Pave the Way for Free-Trade Pact*, WALL ST. J., Dec. 2, 1994, at A6.

226. Paul A. Gigot, *Gore Shakes, Newt Rattles, GATT Unrolls*, WALL ST. J., Apr. 29, 1994, at A12. Trade experts suggest that the danger to sovereignty is overblown, and that it in fact furthers U.S. interests: “Americans have been the main complainers about faulty application of trade rules in past years, so the new World Trade Organization responds largely to their demands. But it can’t impose rules on any of the [124] treaty signers, though the administration hasn’t made this clear.” Keatley, *supra* note 225, at A8; see also Bob Davis, *House Members Ask Clinton for Delay in Vote on GATT*, WALL ST. J., May 3, 1994, at A2 [hereinafter Davis, *House Members*] (stating that some Congressmen are worried that the pact might force a choice between “weakening U.S. laws or defying the WTO”); Bob Davis, *Unexpected Obstacles Are Threatening to Delay or Derail Congressional Approval of GATT Pact*, WALL ST. J., Apr. 8, 1994, at A14 [hereinafter Davis, *Unexpected Obstacles*] (“[O]ponents rail against GATT’s ‘faceless bureaucrats’ in Geneva, who will have greater power under the new accord to challenge U.S. laws.”).

227. Davis, *House Members*, *supra* note 226, at A2 (“[Democrats] worried that the accord . . . would undermine U.S. environmental and consumer-protection laws.”); Gigot, *supra* note 226, at A12 (“I’m for world trade . . . but I’m against world government.”) (quoting Republican leader Newt Gingrich). Interestingly, Gingrich supported GATT at crunch time. Frances Williams & George Graham, *GATT Chief Hails Trade Deal Ratification*, FIN. TIMES (London), Dec. 3, 1994, at 2.

228. Davis & Karr, *supra* note 225, at A6; Bob Davis, *White House Seeks \$12 Billion Package to Pay for Tariff Losses Under GATT*, WALL ST. J., May 10, 1994, at A20. Approximately \$14 billion in tariff revenue will be lost in the first five years of the Uruguay Round’s implementation. *Id.* The rule employs static revenue analysis, under which the assumption is that “taxpayer behavior never changes when taxes do.” *It’s the Policies, Too*, WALL ST. J., May 12, 1994, at A14 (emphasis in original); cf. George F. Will, *Up from Mercantilism*, NEWSWEEK, May 30, 1994, at 76 (claiming that \$14 billion must be found). Former Secretary of the Treasury Lloyd Bentsen admitted that foreign leaders have a difficult time figuring this rule out, lamenting, “The idea that we have a static analysis and don’t reflect the fact that actually we’re going to have ultimately more income, more money coming into the Treasury, we don’t get credit for that. They are surprised at that.” Secretary of Treasury Lloyd Bentsen et al., Press Briefing (May 11, 1994), available in LEXIS News Library, SCRIPT File. Bentsen subsequently resigned his post, effective December 22, 1994. David Wessel, *Rubin Is Named Treasury Chief As Bentsen Quits*, WALL ST. J., Dec. 7, 1994, at A4.



similarly required \$30 billion, but in that case, the Clinton administration successfully sought a waiver to the budgetary rule,<sup>229</sup> and the GATT was overwhelmingly approved by a lame-duck session of Congress.<sup>230</sup> President Clinton signed the trade pact into law on December 8, 1994.<sup>231</sup> Other countries are expected to follow suit "without much trouble,"<sup>232</sup> making the GATT effective as of July, 1995.<sup>233</sup>

House members, including then-Majority Leader Richard Gephardt (D-MO), asked the Clinton administration to delay consideration of the GATT until 1995, but the administration pushed for a 1994 vote.<sup>234</sup> NAFTA was a difficult fight in 1993, largely because of the attention the treaty received when Ross Perot agitating against its passage.<sup>235</sup> Perot's "United We Stand America" lobbied against the GATT, as did commentator Pat Buchanan<sup>236</sup> and consumer advocate Ralph Nader,<sup>237</sup> but the issue never grabbed the public spotlight.<sup>238</sup> Eventual passage is the most likely outcome,<sup>239</sup> although for the audiovisual sector, this will mean little; in either scenario the sector will not be covered by the world trade agreement.

229. Davis & Karr, *supra* note 225, at A6.

230. Helene Cooper & John Harwood, *The Rules Change: Major Shifts in Trade Are Ensured as GATT Wins Key Senate Vote*, WALL ST. J., Dec. 2, 1994, at A1 [hereinafter Cooper & Harwood, *The Rules Change*]; John Harwood & Helene Cooper, *House Clears GATT Accord in 288-146 Vote*, WALL ST. J., Nov. 30, 1994, at A2 [hereinafter Harwood & Cooper, *House Clears GATT*]. The Senate vote was 76-24. Cooper & Harwood, *The Rules Change, supra*.

231. Remarks on Signing the Uruguay Round Agreements Act, 30 WKLY. COMP. PRES. DOC. 2478 (Dec. 8, 1994).

232. Cooper & Harwood, *The Rules Change, supra* note 230, at A1. The ranks of participating countries had grown to 124 as of this writing, and China is considering joining the GATT. *See id.* A handful of countries passed the GATT in their legislatures before the United States took action. *See* Bhushan Bahree, *New World Trade Order Will Take Some Time*, WALL ST. J., Dec. 2, 1994, at A6.

233. Harwood & Cooper, *House Clears GATT, supra* note 230, at A2. "[GATT] will take months, if not years, to implement" Bahree, *supra* note 232, at A6.

234. Davis, *House Members, supra* note 226, at A4; Davis, *Unexpected Obstacles, supra* note 226, at A14.

235. Sands, *supra* note 120, at B8 ("American public opinion seems less focused on GATT than it was on NAFTA, which stayed under the spotlight mainly because of Ross Perot's attacks and pressure from organized labor.").

236. *Washington Wire: Both Sides Gear Up for Next Week's Showdown on the World Trade Pact*, WALL ST. J., Nov. 25, 1994, at A1.

237. *See* Ralph Nader, *WTO Means Rule by Unaccountable Tribunals*, WALL ST. J., Aug. 17, 1994, at A12.

238. *See* Gerald F. Seib, *Debate on GATT Recalls Nafta Battle in Many Ways, but the Passion Is Gone*, WALL ST. J., July 14, 1994, at A12 ("The GATT debate hasn't hit a Nafta-like fever pitch in the public arena largely because of the argument seems remote and complex to many Americans.").

239. Jackie Calmes, *Remarks of Gephardt Suggest Approval of GATT Treaty Won't Be Easy or Fast*, WALL ST. J., May 26, 1994, at A6; Keatley, *supra* note 225, at A8. In the case of a "no" vote, the United States would be governed by prior rounds of the GATT and would be free to negotiate bilateral agreements. *See supra* note 36. Not to ratify the treaty would be an embarrassment to the United States, explained then-Treasury Secretary Lloyd Bentsen:

[The United States is] the major trading nation in the world, the one that led much of the fight in the negotiations to see that we had a successful culmination of the GATT negotiations.

[I]t's very important that we extend that leadership and show it by passing GATT this year

I've had repeated calls from finance ministers in other parts of the world saying, is it possible that you're not going to pass it this year? How can that be?

Bentsen et al., *supra* note 228; *see also* Laura D. Tyson, *U.S. Triumphant in Trade Policy*, WALL ST. J., May 27, 1994, at A10 ("For Congress to fail to implement the agreement would not only deprive U.S. firms and workers of the sizable benefits of the Uruguay Round but would cause a sharp drop in business confidence the world over.").

## V. POSSIBLE SOLUTIONS TO THE PROBLEM FOR THE UNITED STATES

### A. *The Future of Communications in Europe*

Possible courses of action for Hollywood and for U.S. trade negotiators in the wake of the Uruguay Round must take account of the current realities of the audiovisual and telecommunications industries in the EU and the United States. New technology forming the "information superhighway," including satellite, cable, pay-per-view, and digital delivery of entertainment and information over telephone wires, will soon become part of the communications landscape in both areas of the world.<sup>240</sup> Some industry observers feel this technology will render quotas obsolete.<sup>241</sup> In addition, new technology and privatization of the broadcast industry across Europe will increase the number of programming choices available to consumers. Thus, demand for programming will increase,<sup>242</sup> thereby causing the European audiovisual programmers to pressure their governments for relaxation of the quotas.<sup>243</sup>

Europe's quota system is certain to fail. EC broadcasters are currently unable to meet their local-content requirements, and they will have no chance of doing so when there are tens, or even hundreds, of channels to choose from. "Moreover, the [system] wherever practicable does not apply to many new specialist channels where European programming might not be available."<sup>244</sup>

France requires that one-half of all the films aired by Canal Plus, the French pay television channel, be of French origin. To meet this requirement, Canal Plus would have to air nearly 200 French films annually. Unfortunately, the French film industry only produces 130-150 films per year.<sup>245</sup> Already, one bankrupt French television station, La Cinq, has blamed its failure in part on the Directive's quotas.<sup>246</sup>

240. See, e.g., Hilary Clarke, *BT Chair: 'Damage' Likely if AV Not Included in GATT*, HOLLYWOOD REP., Mar. 8, 1994, at 11.

241. See, e.g., *Culture & Trade*, supra note 67, at 78 ("One reason for compromise may be that Europe's quota system is surely doomed."); *EC Film-Makers Risk Being Left Behind, Says Pinheiro*, AGENCE FRANCE PRESSE, Jan. 27, 1994, available in LEXIS, News Library, AFP File [hereinafter *EC Film-Makers*] (warning that the European industry is "ill-equipped" to meet the coming demand); Attali, supra note 123, at B7 ("New technological developments will undermine European mechanisms of protection."); Michael Williams, *Tough Sell in Europe; Valenti, Vendors, Buyers Try to Get Past GATT*, DAILY VARIETY, Feb. 10, 1994, at 26 ("Valenti said he felt new technology and the flood of new satellite-delivered TV services would make quotas obsolete."); cf. *GATT/Audiovisual*, supra note 117, at § 87 (stating that the exception will protect the EU audiovisual industry "reasonably well").

242. Adler, supra note 46; Pedersen, supra note 103, at 58. Even Eastern-European countries such as the Czech Republic, Poland, and Romania now have private broadcasters. *Czechs Get Private TV Network*, WALL ST. J., Feb. 7, 1994, at A13; *Poland Rejects TV Bids from Foreign Companies*, WALL ST. J., Jan. 28, 1994, at A10.

243. See Adler, supra note 46; MPAA, *America's Most Wanted*, supra note 100, at 3.

244. *Culture & Trade*, supra note 67, at 78.

245. Huey & Welsh, supra note 5, at 50; *U.S. Satellite Programming*, supra note 84.

246. MPAA, *America's Most Wanted*, supra note 100, at 3.

France's TF1 television station is working hard to produce more local shows, but executives there admit that "market conditions remain tight."<sup>247</sup> Local production will no doubt increase in the long run, but it has no hope of meeting the new levels of demand that are being created almost overnight: the number of hours of television programming in the EU is expected to increase from 275,000 hours in 1989 to 400,000 by 1998.<sup>248</sup> In 1980, Europe had 28 major commercial television channels,<sup>249</sup> by 1989 it had 56,<sup>250</sup> and it is projected that by 1995, 120 channels will exist.<sup>251</sup> Many in the European audiovisual industry, including theatrical exhibitors and broadcasters, do not believe that protectionism is the key to facing these challenges.<sup>252</sup> A definite split between the views of the film industry and those of the television industry has developed.<sup>253</sup>

The French prefer French television programs and films, which garner higher ratings than U.S. fare,<sup>254</sup> the problem is that it is much cheaper to dub a U.S. program that has already been licensed for the U.S. market than it is to produce a new program.<sup>255</sup>

In the face of this dramatically increased demand, even the leaders of the fight for the cultural exception see their victory as ultimately only a temporary device to provide extra time for Europeans to improve their audiovisual output.<sup>256</sup> After the GATT, Joao de Deus Pinheiro, European Commissioner for Culture and Audiovisual Policy, urged European filmmakers to improve their movies.<sup>257</sup> He views the liberalization of audiovisual trade

247. Williams, *supra* note 241, at 26.

248. *Reel*, *supra* note 21, at 56. For a general discussion of the growth of the European television industry, see Tom Kerver, *European Programming: A Boom. But for Whom?*, 14 SATELLITE COMM. 14A (1990).

249. Pedersen, *supra* note 103, at 58.

250. *Id.*

251. *Reel*, *supra* note 21, at 56.

252. Alex B. Block, *Euro Exhibitors: We're at Mercy of Government*, HOLLYWOOD REP., Mar. 8, 1994, at 8 ("Exhibitors . . . stoutly maintain that they believe in an open market . . .") (quoting John Wilkinson, ceo of the Cinema Exhibitors Association of England); Froom, *supra* note 46, at 54 ("Exhibitors have been ill-served by the Uruguay/GATT round. . .") (quoting John Wilkinson); Joseph Schuman, *Quotas Cited as Key to French TV Success*, DAILY VARIETY, May 11, 1994, at 12 ("Few industryites in France believe that maintaining stringent [regulations] is the answer to developing local production and many argue that the [French Government] will be forced to ease up on quotas."). *But see GATT/Audiovisual*, *supra* note 117, at § 87 (noting that the European Broadcasting Union—composed of 62 stations—supported the filmmakers' stance during the GATT negotiations in favor of a cultural exception clause).

253. *See GATT/Audiovisual*, *supra* note 117, at § 87; *cf. Overpaid, Oversexed, Everywhere*, INDEPENDENT (London), Nov. 5, 1993, at 25 (describing the lobbying efforts of the French film industry against the GATT talks).

254. *See Overpaid, Oversexed, Everywhere*, *supra* note 253.

255. Adler, *supra* note 46 ("[A] one-hour program[] that cost[s] \$1.5 million to produce can be dubbed for less than \$100,000.").

256. *See EC Film-Makers*, *supra* note 241.

257. *Id.* In a speech, Pinheiro criticized European filmmakers for not making films with international appeal, not having adequate distribution systems, rejecting the concept of cinema as an industry, not properly reconciling art and money, not stemming a "brain and capital drain," and being reluctant to compete with the United States. *American Film Market to Open Nine-Day Run on Feb. 24 in Santa Monica*, BUS. WIRE, Feb. 18, 1994, available in LEXIS, Market Library, BWIRE File. Many feel that the success of the U.S. movies in Europe is at least partly due to United International Pictures ("UIP"),

as inevitable.<sup>258</sup> The EU Commission's recently released Green Paper on Audiovisual Policy, on the other hand, recommends subsidies and quotas as the path to saving the European audiovisual industry.<sup>259</sup>

### B. Further Informal Talks

Because the GATT does not include the audiovisual sector, the United States and any of the EU Member States—jointly or severally—are free to pursue a formal or informal bilateral agreement on that issue. Valenti's post-GATT conciliatory comments reflect the current approach to the problem in the United States: "We'll be having gatherings with Europeans and finding common ground . . . because the future should be one in which no one is penalized."<sup>260</sup> These talks are progressing.<sup>261</sup>

EU officials also called for a "détente" after the bitter debate.<sup>262</sup> Antonio-Pedro Vasconcelos, chairman of a new five-member audiovisual policy committee of the European Commission, said, "There should be a debate between the [EU] and the U.S. on how to proceed like the U.S. did with Russia over weapons and disarmament . . . ." <sup>263</sup> France's ambassador to the GATT, Bernard Miyet, met with U.S. film studio representatives in March, 1994.<sup>264</sup>

Valenti continued to attempt to generate goodwill, this time in an interview with a French radio station: "The time is certainly past for what I would call talk of aggression. It is now time for reconciliation . . . . I don't think war is a good thing. It benefits nobody and certainly not the film industry . . . . The

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which distributes films for the major U.S. studios. There is no comparable pan-European film distribution network. Suzanne Perry, *Europe Seeks Ways To Revive Moribund Film Sector*, REUTERS, Apr. 27, 1994, available in LEXIS, News Library, REUAPB File. French Minister of Culture Jacques Toubon blames the U.S. domination of European screens on Europe's inadequate distribution system. Christie, *supra* note 64, at 99. A controversy has arisen around UIP because the organization is exempt from EU antitrust rules. The renewal date for the exemption is fast approaching, and Pinheiro has spoken in favor of letting it expire. Fuller et al., *supra* note 122, at 59.

258. Suzanne Perry, *EU Audiovisual Campaign: How Far Can It Go?*, REUTERS, Apr. 13, 1994, available in LEXIS, News Library, RUEUC File.

259. Perry, *supra* note 257.

260. Ulmcr, *supra* note 220.

261. See *Paris, Hollywood Quietly Resume Film and Television Talks*, AGENCE FRANCE PRESSE, Mar. 11, 1994, available in LEXIS, News Library, CURNWS File [hereinafter *Paris, Hollywood*]; Perry, *supra* note 258 ("Hollywood studios and European films producers have been working quietly behind the scenes to defuse tensions, holding several meetings in recent months to explore possible cooperation . . ."). This cooperative mood was ruffled slightly at the Cannes film festival; only one major Hollywood studio (Paramount) participated, although the others claimed GATT was not the reason for this move. Only 3 of the 24 films in the competition originated in the United States. John Follain, *Film World Hits Cannes, Hollywood Moguls Stay Home*, REUTERS, May 11, 1994, available in LEXIS, News Library, REUWLD File; Susannah Herbert, *Eastwood's GATT Lines Spoil Scene*, DAILY TELEGRAPH (London), May 13, 1994, at 9. American actor Clint Eastwood, in Cannes to serve on a judging panel, ruffled some feathers when he announced, "I would like to see free trade. I don't concur with the GATT agreement . . ." *Id.* It is doubtful, however, that either of these developments will have long-term implications on the continuing industry dialogue.

262. Clarke, *supra* note 4, at 1.

263. *Id.*

264. *Paris, Hollywood, supra* note 261.

film world is a family . . . We are one fraternity”<sup>265</sup> Valenti went so far as to encourage the French to establish a foothold in the United States by purchasing a theater chain and by concentrating on college campuses, where French films have always enjoyed some popularity.<sup>266</sup>

Both sides have had an opportunity to air their grievances during the GATT negotiations and now, perhaps, a productive dialogue can take place. Both sides appear willing to make an effort. The informal talks may potentially lead to formal agreements or even an eventual reconsideration of the GATT. In any case, GATT rules make it clear that the audiovisual exemption must be opened for reconsideration within five years.<sup>267</sup> President Clinton apparently supports this dialogue, calling for cooperation between the U.S. Government and the private sector to open foreign markets, while recognizing that private industry must bear the brunt of the burden.<sup>268</sup>

### C. Co-Production and U.S. Investment in Europe

Another possible solution is to work within the existing EU quota framework. U.S. film and television companies can co-produce films and TV shows with their European counterparts or invest in European ventures.<sup>269</sup> Both Americans and Europeans stand to benefit from such relationships. The U.S. companies need European origin in order to avoid the quotas. The EU filmmakers need money and assistance in making films with a broader, international—or at least pan-European<sup>270</sup>—appeal, as the United States does,<sup>271</sup> along with help in the areas of marketing and distribution.<sup>272</sup>

Major U.S. studios have already announced “a range of joint initiatives to open up their distribution networks, share dubbing technology, and improve training for scriptwriters and technicians.”<sup>273</sup> Disney announced that, beginning in 1996, it plans to dub and promote French films in the United States, as well as to finance co-productions.<sup>274</sup> “Everyone is looking at the

265. John Follain, *Hollywood Buries Hatchet After Franco-US War*, REUTERS, Feb. 10, 1994, available in LEXIS, News Library, REUEC File.

266. *Id.*, see also *infra* notes 278-79 and accompanying text.

267. GATT—Uruguay Round, art. XXIX, *supra* note 4, at 1187; see also Attali, *supra* note 123, at B7; Boliek, *supra* note 8, at 48.

268. Proclamation No. 6690, 59 Fed. Reg. 26,407 (1994).

269. For a more detailed discussion of what it takes to meet the European origin requirements, see Beauty, *supra* note 44, and Anne Moebes, *Structuring Media Joint Ventures in the European Community*, 14 HASTINGS COMM. & ENT. L.J. 1 (1991).

270. See Andrews, *supra* note 146, at XVII (“I don’t think we can much longer pretend you’re making a “German” or “French” or “Italian” film . . . We’re going to have to believe in a “European” cinema, where local stories can be told under a common roof.”) (quoting German director Wim Wenders).

271. Waxman, *supra* note 60, at B2. Money from co-production with Hollywood will help provide the money needed to make films with such appeal. See Robinson, *supra* note 140.

272. Robinson, *supra* note 140.

273. John Carvel, *European Filmmakers Close to Deal with Hollywood*, GAZETTE (Montreal), Nov. 3, 1994, at C9; see Mavis Clarence, *Plan Would Give Euro Films More Access in U.S.*, HOLLYWOOD REP., Nov. 3, 1994, at 1.

274. *Disney Plans Unit to Finance, Promote French Films in U.S.*, ORLANDO SENTINEL, Oct. 8, 1994, at C1.

European co-production as an alternative to the potential problems due to GATT . . .,” said one entertainment industry leader.<sup>275</sup>

Ultimately, “neither quotas nor tariffs will stop American movies from being seen throughout the world in large numbers. International partnerships will keep the party going. Since the financial stakes are huge, cash is the force, not cultural imperialism, as the French like to think.”<sup>276</sup>

Indeed, most large U.S. media companies were investing in joint ventures and European subsidiaries long before the Uruguay Round drew to a close. For example, as early as 1989, when the Directive came into force, Capital Cities/ABC Video Enterprises saw the European market—and in particular co-production with Europeans—as the opportunity of the future, and began investing.<sup>277</sup> Today, ABC owns one-third of Hamster Productions, one of France’s most successful television production companies.<sup>278</sup>

Also rushing to build cable networks, stations, and production alliances are Time Warner, Turner Broadcasting, TCI, Viacom, Walt Disney, Cox Cable, US West, and NBC.<sup>279</sup> Advertisements for NBC’s *The Tonight Show*, on its SuperChannel, feature host Jay Leno joking, “We’re going to ruin your culture just like we ruined our own.”<sup>280</sup>

With the ever-expanding new communications technologies and the dramatic growth of more traditional forms of communication, it is clear that U.S. film and television companies see more opportunities than roadblocks in Europe. At least until the United States and the EU reach some sort of agreement on audiovisual services, U.S. companies are hedging their bets by investing heavily in joint ventures and co-production. It seems highly likely that they will continue to do so regardless of what happens with the GATT.

275. Rick Sctlowe, *U.S. Pic Makers Seek Ways, Com to Go Int’l*, DAILY VARIETY, July 20, 1994 (quoting Steven Bickel, who is associated with Samuel Goldwyn International).

276. Talbot, *supra* note 105, at A17.

277. Bruce Alderman, *ABC Spells Out Euro Strategy*, VARIETY, Oct. 4-10, 1989, at 1.

278. Stevenson, *supra* note 86, at 1.

279. *Id.*, see also *Comcast Joins Bid for 100 Franchises*, NEW MEDIA MARKETS, Feb. 10, 1994, available in LEXIS, News Library, CURNWS File (describing U.S.-French joint ventures and proposed joint ventures in French cable systems); J. Max Robins, *Pilot Poker Is Now for High Rollers Only*, VARIETY, Apr. 4, 1994, at 1 (describing the use of European partners by U.S. studios to limit the risk of developing television programs); *Time Warner Set for New-Media Expansion in Germany and France*, NEW MEDIA MARKETS, Feb. 10, 1994, available in LEXIS, News Library, CURNWS File (describing Time Warner’s French and German media investments).

280. Stevenson, *supra* note 86, at 1; see also Alderman, *supra* note 277, at 1 (“[The aim] is to produce in Europe for Europe with European partners.”); Ron Holloway, *Main Event in Berlin: Valenti vs. du Plantier*, HOLLYWOOD REP., Feb. 2, 1994 (describing a U.S.-U.K. co-produced film, *The Remains of the Day*); Elizabeth Jensen, *NBC Creates Broad Alliance with TV Azteca*, WALL ST. J., May 16, 1994, at A3 (describing NBC’s “aggressive” international expansion); Michael Williams & J. Max Robins, *Mature Market Shows Signs of Slowing Down*, VARIETY, Oct. 25, 1993, at 75 (referring to an “era of global media marriages”).

*D. Unilateral Action Under Section 301*<sup>281</sup>

United States trade negotiators made it clear that instead of accepting a bad GATT compromise on audiovisual services, they preferred to exclude the sector altogether. Bowman Cutter, deputy assistant to the President for Economic Policy, explained at a recent White House press conference:

“[B]asically what we’ve done is to remove audiovisual in terms of our negotiations with Europe from the GATT specifically so that we can maintain our—so that we can in those capacities directly use [Section] 301 [of the U.S. Omnibus Trade and Competitiveness Act of 1988] and not bind ourselves to a specific set of European rules which we don’t accept.”<sup>282</sup>

Dr. Laura Tyson, former Chair of the Council of Economic Advisors, continued:

“[T]he agreement will allow us to continue the use of our own national trading laws, including Section 301, to address those unfair foreign trading practices that are not going to be covered by GATT rules. We worked very hard to reserve the right to use our national trading laws in those circumstances in which GATT rules will not apply.”<sup>283</sup>

Although a complete discussion of the inner workings of Section 301 is beyond the scope of this Comment,<sup>284</sup> the basic outline of the law is as follows: Section 301 authorizes the USTR to retaliate unilaterally against trade practices of foreign countries which are deemed to be unfair or discriminatory.<sup>285</sup> Once such a determination is made, retaliation is in most cases discretionary.<sup>286</sup> If unilateral action is undertaken against a foreign nation, the USTR may impose tariffs or a host of other protectionist measures designed to offset, as precisely as possible, the unfair or discriminatory trade practice of the target nation.

Unilateral action is not permitted in economic sectors that are included under the GATT. Instead, lengthy GATT dispute resolution procedures must be employed before any nation can take unilateral retaliatory action. The United States maintains that for the audiovisual sector, this is not a problem since the sector was excluded from the GATT.<sup>287</sup> The EU, on the other hand,

281. Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164 (codified as amended at 19 U.S.C. § 2411 (1988 & Supp. 1993)).

282. Exchange with Reporters Following the Malcolm Baldrige National Quality Award Ceremony, 29 WEEKLY COMP. PRES. DOC. 2587 (Dec. 14, 1993).

283. *Id.*

284. For more in-depth description and analysis, see AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990); HENKIN ET AL., *supra* note 3, at 1169; J. Bello & A. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (Winter 1988).

285. 19 U.S.C. § 2411 (1988).

286. *Id.*

287. *But see supra* note 4. Alternatively, if the United States could take its case to a GATT dispute resolution panel and receive a favorable judgment, the USTR could employ Section 301 provided that the EU did not respond to the panel's judgment. *See U.S. Warns That New GATT Rules Will Not Spike Its Trade Guns*, AGENCE FRANCE PRESSE, Dec. 15, 1993, available in LEXIS, News Library, AFP File.

has expressed some doubt that Section 301 can be employed without running afoul of the GATT.<sup>288</sup> According to EU negotiator Hugo Peaman, retaliation under Section 301 requires proof that a foreign nation's trade practices have injured an American industry.<sup>289</sup> This would be difficult to prove, considering that the United States already controls over seventy percent of Europe's audiovisual market.<sup>290</sup> In addition, Section 301 allows industries to lobby the U.S. Government to take action, a tactic Hollywood has used before.<sup>291</sup> Retaliation will not be pursued, however, if the administration thinks such action would be unproductive or inadvisable.<sup>292</sup>

Aside from these technical problems, when unilateral action has been taken, "Section 301 has proved a feeble tool for opening foreign markets—far less effective than multilateral trade negotiations."<sup>293</sup> Also, when unilateral action is taken, there is always a danger of further retaliation by the target nation. Under a worst case scenario, a trade war can result, in part because the rules of ordinary politics apply to trade issues; a foreign nation's government will want to avoid political damage if it appears to its constituents that the government's policies are being dictated by the United States. If a trade war does not result, "bad blood" is still a danger. This can make solving the underlying problem more difficult in the long run. Ominously, the EU—under pressure from France—is considering legislation similar to Section 301.<sup>294</sup>

To date, Section 301 has been used primarily as leverage during bilateral negotiations. Having unilateral action as a credible threat enhances the bargaining position of U.S. negotiators. The United States maintained the strength of its bargaining position by employing Section 301 relatively frequently during the 1980's.

However, it seems unlikely that the Clinton administration will attempt to use unilateral action to resolve the audiovisual dispute.<sup>295</sup> Doing so would spoil the informal talks and conciliatory mood that has begun to develop recently.<sup>296</sup> Nevertheless, the administration may want to act as though it might employ Section 301, in order to keep it in the minds of EU officials

288. *U.S. Warns That New GATT Rules Will Not Spike Its Trade Guns*, *supra* note 287.

289. *'Agreed to Disagree'*, *supra* note 2, at 2.

290. *Id.*

291. Stokes, *supra* note 1, at 432.

292. *Id.*

293. James Bovard, *A U.S. History of Trade Hypocrisy*, WALL ST. J., Mar. 8, 1994, at A14 ("During the period of [the General Accounting Office's 1987] study, relatively few cases resulted in the elimination of specified unfair foreign trade practices.").

294. Stokes, *supra* note 1, at 432. The EU's latest annual "Report of U.S. Barriers to Trade and Investment" criticized the United States' reliance on "unilateral or bilateral trade measures." *U.S. Trade Actions Worry EU*, WALL ST. J., May 6, 1994, at A10.

295. See *U.S. Trade Actions Worry EU*, *supra* note 294, at A10.

296. See, e.g., *Paris, Hollywood*, *supra* note 261 ("France and major Hollywood studios quietly resumed talks [in Los Angeles] this week. The atmosphere was positive").



and to spur serious negotiations.<sup>297</sup> Thus, although the administration will likely not use Section 301, it should pretend as though it might.<sup>298</sup>

### CONCLUSION

Because of the post-GATT conciliatory mood of both the United States and the EU, U.S. trade negotiators and movie moguls should pursue further informal talks regarding the audiovisual services sector. These talks could lead to bilateral or even multilateral agreements. At any rate, the audiovisual sector will be open for renegotiation in five years. Meanwhile, the United States should maintain a credible threat of utilizing Section 301 to facilitate the process. Actual unilateral action should be reserved as a course of last resort, to be used only if talks break down completely. In the meantime, the U.S. entertainment industry should make the best of the situation by continuing to circumvent European origin quotas through joint ventures, co-production, and other cooperative projects.

With effort, and with the help of the expertise garnered from U.S. companies through joint ventures, perhaps the state of European cinema and television production will improve, resulting in a less protectionist attitude from the EU in general, and from France in particular. The U.S. entertainment industry would also benefit in the long-run from healthy competition.<sup>299</sup>

Simultaneously, the United States should continue negotiations in an attempt to achieve bilateral agreements which reduce EU protectionist measures, thereby ensuring that (1) U.S. audiovisual products gain access to the world market; and (2) U.S. media companies have the opportunity to share in the plethora of new possibilities brought about by emerging communications technologies.

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297. It seems as though this is what the administration has been doing recently. See *Kantor Warns EU on Film and Television Market Access*, Agence France Presse, Mar. 9, 1994, available in LEXIS, News Library, AFP File ("[Kantor said his administration] was prepared to use US trade laws to pressure European countries into opening up their film and television markets.").

298. Japan is a more likely target of such action. With Japan in mind, the Clinton administration recently reenacted Super 301, a provision allowing the USTR to "denounce certain lucky foreign nations as the most unfair foreign traders in the world." Bovard, *supra* note 293, at A14.

299. According to one commentator,

Cultural business is not a zero-sum game. Quality products create their own market. The more competition there is in the environment of an expanding market, the more will be produced.

Competition is an incentive to inspiration. As global media become an ever-greater reality, the U.S. film industry will be able to create a richer product if it looks to European or Indian or Chinese talent as sources for its own creative evolution.

Attali, *supra* note 123; see also Robinson, *supra* note 140 ("Hollywood has absorbed a lot of European talent. If European creative talent withers away from lack of finance, Hollywood will ultimately lack the oxygen it needs.").