

# **PRIOR CONSENT OR THE FREE FLOW OF INFORMATION OVER INTERNATIONAL SATELLITE RADIO AND TELEVISION: A COMPARISON AND CRITIQUE OF U.S. DOMESTIC AND INTERNATIONAL BROADCAST POLICY**

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## *I. INTRODUCTION*

This paper is concerned with U.S. international policy regarding direct broadcast satellites (DBS). DBS satellites broadcast radio and television signals from 22,300 miles above the equator directly to homes equipped with small receiver dishes. Present U.S. DBS policy is at odds with the great majority of the nations of the world, including countries having relatively open and closed mass communication systems. The U.S. position insists upon the absolute right of every state and person to engage in transborder communications by DBS and upon the free flow of information among countries of the world without regard to borders or frontiers. This paper analyzes U.S. DBS free flow policy and its practical implications by drawing upon and comparing domestic broadcast policy and practice.

Part I sets forth the three main policy proposals for DBS thus far advanced and their supporting rationales. Part II describes the structural decisions made and being made regarding DBS technology, the accretion of influence which early decisions regarding new communications technology tend to have, and the significance of threshold structural decisions for development of international DBS service. Parts III and IV explore the alternative operational models available for international DBS service, the relationship of

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This paper is published with the hopes that it might advance domestic discussion of U.S. international DBS policy and further inform foreign readers of U.S. broadcast law and practice.

I need not disclaim the views presented as those of any domestic or international decisional body, since I am affiliated with none.

these models to the three major policy proposals, and the type of programming likely to result under these models.

Part V explores the potential economic, administrative and political costs of U.S. DBS policy and the practical implications of the free flow position.

Part VI distinguishes U.S. DBS policy from its policy on international human rights and press freedom, and then compares U.S. international and domestic broadcast policy. The affirmative theory of the first amendment is developed as an alternative to the U.S. absolutist free flow position. Part VII considers the affirmative first amendment theory as it contrasts with the three main policy proposals for DBS, and discusses the opportunity for congruity between U.S. domestic and international broadcast policy under the affirmative theory.

Part VIII considers more particularly the ways in which accommodation might be reached on the actual operation of an international DBS system by comparing the rules and practices of the Federal Communications Commission (FCC), operating under the Communications Act of 1934, with general and specific recommendations of the MacBride Commission Report on international communication problems. The possibilities of harmony between the Communications Act and the MacBride Report and the responsiveness of various domestic initiatives to specific concerns raised by the MacBride Commission are also developed.

The paper concludes that present U.S. international DBS policy (i) is fundamentally inconsistent with domestic broadcast law and practice; (ii) may ultimately undermine the U.S. objective of encouraging communication in the international community; and (iii) may threaten U.S. economic interests at home and abroad. The conclusion further suggests that advancement by the U.S. of a free flow position may do a disservice to its own rich experience in reconciling communication values with new communication technology, may deprive other nations of the benefits of this applied knowledge, and could delay realization of the great cross-cultural communication potential of DBS technology.<sup>1</sup>

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1. The complex and many-faceted questions surrounding DBS technology and use have attracted much scholarly attention. For background on the subject, *see generally*, C. ALEXANDROWICZ, *THE LAW OF GLOBAL COMMUNICATIONS* (1971); ASPEN INSTITUTE PROGRAM ON COMMUNICATIONS AND SOCIETY, *CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT* (1974); A. CHAYES, J. FAWCETT, M. ITO & A. KISS, *SATELLITE BROADCASTING* (1973); I. DE SOLA POOL, *THE SATELLITE BROADCAST CONTROVERSY* (1974); T. EMERSON, *THE*

## II. PRESENT POLICY PROPOSALS FOR INTERNATIONAL DBS SERVICE

Since the advent of the satellite technology in the early 1960s, international concern has focused upon the potential use of satellites to broadcast radio and television signals directly into homes across national borders. Unlike the mails and point-to-point telecommunication services passing through national gateways, direct broadcast satellites allow a transmitting state or private entity to reach citizens of another state without the receiving state's cooperation or consent. And unlike terrestrial broadcasting, which is limited in its penetration of foreign borders,<sup>2</sup> a single DBS signal

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SYSTEM OF FREEDOM OF EXPRESSION (1970); E. GALLOWAY, *THE POLITICS AND TECHNOLOGY OF SATELLITE COMMUNICATION* (1972); P. LASKIN & A. CHAYES, *DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS* (1975); D. LEIVE, *INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM* (1970); *THE INTERNATIONAL LAW OF COMMUNICATIONS* (E. McWhinney ed. 1971); UNESCO, *INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, MANY VOICES, ONE WORLD: COMMUNICATIONS AND SOCIETY TODAY AND TOMORROW* (1980). See also Chayes & Chazen, *Policy Problems in Direct Broadcasting from Satellites*, 5 STAN. J. INT'L STUDIES 4 (1970); *The Control of Program Content in International Telecommunications (The Friedmann Series in International Law)*, 13 COLUM. J. TRANSNAT'L L. 1-81 (1974); Daus, *Direct Television Broadcasting by Satellites and the Freedom of Information*, 3 J. SPACE L. 59 (1975); Special Project, *Direct Broadcast Satellites and Space Law Symposium*, 3 J. SPACE L. 107 (1975); Grad & Goldfarb, *Government Regulation of International Telecommunications*, 15 COLUM. J. TRANSNAT'L L. 386 (1976); LeDuc, *Transforming Principles into Policy* 30/2 J. COM. 196 (1980); Powell, *Direct Broadcast Satellites: The Conceptual Convergence of the Free Flow of Information and National Sovereignty*, 6 CAL. W. INT'L L.J. 1 (1975); Price, *The First Amendment and Television Broadcasting by Satellite*, 23 U.C.L.A. L. REV. 879 (1976); Rice, *Regulation of DBS: International Constraints and Domestic Options*, 25 N.Y.L. SCH. L. REV. 813 (1980); Robinson, *Regulating International Airwaves: the 1979 WARC*, 21 VA. J. INT'L L. 1 (1980); Ruddy, *American Constitutional Law and Restrictions on the Content of Private International Broadcasting*, 5 INT'L LAW 102 (1971); Rutkowski, *The 1979 World Administrative Radio Conference: The ITU in a Changing World*, 13 INT'L LAW 289 (1979); Rutkowski, *United States Policy Making for the International Forums on Communication*, 8 SYR. J. INT'L L. & COM. 95 (1980); Snow, *INTELSAT: An International Example*, 30/2 J. COM. 147 (1980). See also, Comment, *Direct Satellite Broadcasting and the First Amendment*, 15 HARV. INT'L L.J. 514 (1974); Note, *Direct Broadcast Satellites and Freedom of Speech*, 4 CAL. W. INT'L L.J. 374 (1974); Note, *Radio Propaganda in the Contexts of International Regulation and the Free Flow of Information as a Human Right*, 5 BROOKLYN J. INT'L L. 154 (1979); Note, *Toward the Free Flow of Information: Direct Television Broadcasting Via Satellite*, 13 J. INT'L L. & ECON. 329 (1979).

2. Until recently, terrestrial broadcast stations could expect to serve an area with a radius no greater than about 100 miles. Class I stations, operating on clear channels at not less than 10 kw power (and usually operating at 50 kw) could serve such an area. More recently, "superstations" operating at up to 500 kws have been proposed; these stations could serve an area with a radius over 400 miles. Although such a proposed service area is much larger than conventional broadcast coverage, it is still infinitesimal compared to the

can cover forty percent of the earth's surface, encompassing many countries and cultures.<sup>3</sup> The unique communication potential of DBS has spawned major international debate reflecting the hopes and fears of diverse societies for this new technology.<sup>4</sup> Although the issues of DBS have been deliberated extensively for nearly two decades in a multiplicity of international public and private forums, unfortunately, little agreement has been achieved.<sup>5</sup>

The countries of the world have been aligned in three groups over the question of DBS. The largest group, led by the U.S.S.R., has argued for the absolute sovereign right of every state to control communications coming within its borders in order to protect the integrity of its domestic communication system and cultural values. This group has also sought the adoption of an international

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area of service possible from a satellite in geostationary orbit. Shortwave radio is capable of covering greater distances, but is technologically inferior as a medium of communication to AM, FM and TV spectrum frequencies.

3. Coverage possible from a single satellite under ideal conditions would be one-third to 40% of the earth. "Broadcasting from Satellites," Working Paper of Canada and Sweden, U.N. Doc. A/AC. 105/49, Appendix 7, at 90 (1979).

The concept of resource scarcity is a familiar one in communications law; it underlies, along with the obvious need for careful coordination and cooperation, the domestic government's right to regulate, and is the tacit assumption upon which international *a priori* - *a posteriori* discussions are grounded. Mr. Justice White noted in 1969 that scarcity of usable spectrum space might not remain a dispositive consideration, since technological developments would tend to make more spectrum, and more efficient methods of its use, available. The latter, at least, has proved true, and progress continues. It is remarkable, however, that such extensions of the limits of this natural resource do not in fact cure the problem of scarcity, since use and demand also continue to grow. One can assume from past developments and reasonable probabilities that demand will continue to exceed supply.

Direct broadcasting from satellites entails the use of the geostationary orbit, a band of outer space roughly 36,000 km. from the earth and located over the equator. It is practicable within this band to maintain a satellite in geosynchronous orbit, that is, in a virtually constant position relative to the earth; such a satellite offers obvious advantages over the original "tracking" satellites, which are in constant motion around the earth. Because this geostationary orbit band has physical boundaries, the resource is clearly limited. Early stages of geostationary orbit development, some fifteen years ago, offered roughly 180 satellite "slots"; although advanced technology has served, by decreasing interference and "stacking" satellites, to triple that number, it is clear that the band is finite and that concerns of scarcity continue to be valid.

4. Major forums of debate have included the International Telecommunications Union (ITU), *infra* note 11; the United Nations Educational, Scientific and Cultural Organization (UNESCO), *infra* section IX; and the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), whose Scientific and Technical Subcommittee recommended in 1964 that intensive study of DBS be undertaken; the UNCOPUOS Working Group on DBS was formed in 1968 as a direct response to this suggestion.

5. A summary report of the remarks of representatives to the Working Group on DBS, of COPUOS, found at U.N. Doc. A/AC.105/C.2/SR.310 (1979), makes clear just how little agreement there is.

code governing the content of all DBS programs; the code would prohibit broadcast of material which (i) threatened international peace; (ii) interfered with the internal affairs of another state; (iii) encroached on fundamental freedoms, specifically the right to be free from discrimination based on race, sex, language or religion; (iv) propagandized or promoted violence, horrors, pornography, and the use of narcotics; (v) misinformed the public on local culture and traditions; or (vi) misinformed the public on these matters.<sup>6</sup>

The second group of states, led by Canada and Sweden, has also accepted the sovereign right of a state to control the content of DBS programs broadcast into its territory, but has resisted adoption of an international DBS programming code. Instead, this group has proposed regional and bilateral arrangements for international DBS service which insure that all recipient states participate in the production of imported programming.<sup>7</sup>

The U.S., sometimes standing alone, has steadfastly rejected the sovereign right to prior consent to transborder communication and has argued for a free flow of information in the international community. The U.S. has urged a close relationship between the free flow of information and the realization of the individual right to form tastes, opinions and beliefs freely through access to a suitable array of ideas and values. The U.S. has feared that this fundamental right would be seriously compromised, domestically and internationally, by either the adoption of an international code of DBS programming content or the establishment of international institutional arrangements to govern the conduct of DBS operations.<sup>8</sup> Although the U.S. has acknowledged the generalized duty of every state to respect the cultural traditions and sensibilities of other states, it has asserted that this would best be achieved through decentralized, private arrangements, without the involvement of public international authorities.<sup>9</sup>

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6. U.S.S.R. Working Papers, U.N. Doc. A/AC.105/117, Annex III (1972) and U.N. Doc. A/AC.105/127 Annex II (1974).

7. Canadian-Swedish proposal, U.N. Doc. A/AC.105/117, Annex IV (1973) and U.N. Doc. A/AC.105/127, Annex IV (1979).

8. U.S. proposal, U.N. Doc. A/AC.105/127, Annex IV (1979); see also remarks of U.S. representative in summary, *supra* note 5.

9. See Chayes & Laskin, *A Report of the Panel on International Telecommunications Policy*, in AMERICAN SOCIETY OF INTERNATIONAL LAW, DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS 1 (1975). One of the most scholarly considerations to date of U.S. international DBS policy, the Report suggested that three principles had to be balanced to formulate an international framework for direct satellite broadcasting: the free

The failure to reach accommodation on international DBS service has reached an important point. Development of DBS technology is progressing rapidly, and critical structural and operational decisions have been and are being made on its implementation, scheduled to begin around 1985.<sup>10</sup> The International Telecommunications Union (ITU),<sup>11</sup> an independent United Nations (U.N.)

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flow of information, the value of cultural diversity, and the right of every nation to determine for itself the scope and character of the television services available to its people.

The Report criticized the Soviet proposals for DBS programming codes as impractical in concept and scope and as an unwarranted sacrifice of the principle of the free flow of information and ideas. The Panel doubted that precise meanings could be attached to the language of the proposed code sufficient to form a consensus, which is rare even within a single society. It believed that amendment of the code in response to accumulated experience would be exceedingly difficult, resulting in excessive rigidity at a time when DBS needed flexibility to develop regional and national programming acceptable to the vast new audiences.

Two weaknesses were cited in the Canada-Sweden proposal of prior consent coupled with recipient state participation in program production. First, the Panel found no limitation on the right of a state to withhold consent in disregard of international standards, principles or obligations. It believed the latitude thus implied in the Canada-Sweden position was too broad and that states should be bound by the developing norms of the international community in exercising control over transborder DBS television. The second major deficiency in the proposal cited was that it seemed to allow for program-by-program refusal by states. The Panel was concerned that should the right to prior consent be exercised on a per-program basis, it would allow a type of prior review and restraint offensive to free speech tradition, or would, at best, result in overwhelming administrative backlogs, inhibiting the free flow of ideas. Finally, the Panel feared that program-by-program approval would disserve DBS development by rendering audience access too uncertain to justify the heavy initial investment in satellite hardware and programming necessary to start up a system. Long-term, assured access to the intended audience was seen as critical to public and private investment in international DBS services.

The Panel Report was also critical of the U.S. position, finding that it failed to give proper weight to the interest in diversity and the desire of states to determine for themselves their national television services. The Panel found the U.S. to be in a unique position in the DBS field, unthreatened by foreign program service because of the cultural and linguistic isolation, a highly viable domestic television system, and superiority in satellite technology.

The Report of the Panel concluded that there is a widespread unwillingness among nations to accept a laissez-faire attitude toward transborder direct broadcasting, but that there is little agreement as to the scope and character of the necessary regulation.

10. This estimate was made by the Satellite Television Corporation (STC), a division of the Communications Satellite Corporation (COMSAT), in its April 1981 application to the FCC for authority to build and launch one or more direct broadcast satellites. BROADCASTING, July 6, 1981, at 30.

11. The International Telecommunications Union (ITU), founded in 1865 as the International Telegraph Union, is the oldest international agency, and the one central to the achievement of international agreement on the use of telecommunications. The dual purposes stated by the ITU are to increase cooperation and to decrease harmful spectrum interference between nations. The Radio Regulations of the ITU provide specific controls over communications; periodic World Administrative Radio Conferences (WARCs) are held

agency, has divided the countries of the world into three regions,<sup>12</sup> and in two of these regions satellite orbital positions and frequencies have already been assigned.<sup>13</sup> Out of the hundreds of DBS assignments made in these two regions, only nine nations made reservations for international service;<sup>14</sup> and the three services so involved are all marked by close cultural and religious transborder identification. The individual nations receiving assignments are already developing operational plans for national DBS systems which may limit future opportunities for international service. U.S. satellite operators have expressed their views to the FCC on the importance of initial decisions regarding allocations of geostationary orbit space.<sup>15</sup> No reservation has thus far

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to update or modify these guidelines. These regulations, like the Convention itself, bind signatory nations (of whom there are presently 154) with the authority of a treaty.

The ITU is organized in three plenary bodies: the Plenipotentiary Conference, which holds supreme authority and deals with the ITU's structure and finances; the Administrative Conference, discussed above; and the International Radio Consultative Committee (CCIR), which makes non-binding recommendations. See, Rice, *Regulation of DBS: International Constraints and Domestic Options*, 25 N.Y.L. SCH. L. REV. 813 (1980), note 4-18 and accompanying text; Jacobson, *International Institutions for Telecommunications: the ITU's Role*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 51 (E. McWhinney ed. 1971).

12. Region I includes Africa, Europe and the Middle East; Region II - the Western Hemisphere, including Greenland, and Region III - Asia (including the USSR), Australia and the South Pacific. Although there was discussion at the 1979 WARC of creating a fourth region, comprised solely of Africa, the representatives of the African nations were unable to achieve the degree of unity necessary to accomplish this. Hart, *A Review of WARC-'79*, 2 COM. & L. 21, 29 n.33 (1980).

13. Regions I and III worked out their frequency allocations at the 1977 WARC; the agreements came into force on Jan. 1, 1979. Final Acts, World Broadcasting-Satellite Administrative Radio Conference, ITU, Geneva, 1977.

14. The reservations for international service were all made within Region I, and were as follows: Denmark, Iceland, Finland, Norway and Sweden made reservation as NORDSAT; Tunisia, Saudi Arabia and Syria reserved for the Islamic Network (still prospective); and the Vatican reserved for broadcast throughout Italy.

15. Major U.S. communications satellite operators have urged the FCC to retain as much flexibility as possible in any geostationary orbit allocations to be made at the Space WARC in 1984. Rigidity in such allocations can result in waste and in poorly developed services. Such operators as COMSAT, AT&T, Southern Pacific Communications and Satellite Business Systems would prefer to keep the present (*a posteriori*) allocation system, but that seems impossible given the new balance of powers in the ITU. Various proposals for allocation are presently under study by the International Radio Consultative Committee of the ITU, and the domestic operators urge the formation of a U.S. government industrial advisory committee. It is also recommended that whatever allocations are made be temporary or time-limited, since predictions about technological developments and service requirements over a span of years are bound to be inaccurate. The operators stress the possibility of irreversible damage which might result from rigid assignments now, and emphasize the need to stimulate and encourage development of communications capacities to the greatest extent possible.

been made for use by the U.N. or its affiliated committees and organizations, nor for the European Economic Community or any of its related agencies. Region II, which includes North, Central and South America and the Caribbean, will determine its DBS service assignments in 1983 at a Regional Administrative Radio Conference (RARC) in Rio de Janeiro. At present, no plans have been developed for international DBS service to the people of the Western Hemisphere.

### III. DURABILITY OF INITIAL STRUCTURAL AND OPERATIONAL DECISIONS

Structural and operational decisions<sup>16</sup> regarding the implementation of new communication technology have had enduring importance, sometimes long surviving their initial rationales and technological advances. Increasingly complex economic, institutional and technical arrangements build and depend upon the threshold decisions of what spectrum resources will be allocated to the new service, what entities will have the opportunity to provide the service, and how the service will be operated and regulated. These initial decisions limit future policy and institutional options.

The development of U.S. terrestrial broadcast service and the early allocation of radio frequencies among countries in the Americas illustrate the longevity of formative decisions. The threshold structural decisions made by the 1934 Congress (at a time when only AM radio existed) as to spectrum access, ownership, management and regulation of broadcast stations have survived generations of new mass communications technologies and service.<sup>17</sup> The 1934 Communications Act, only slightly amended, remains the cor-

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16. Structural and operational regulation of communication services is distinguishable from content regulation. Structural regulation seeks to encourage programming service in the public interest indirectly through control of industry composition and firm conduct. Content regulation involves direct review and control of programs and schedules. See *Inquiry and Proposed Rulemaking; Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,662-668 (1979).

17. 47 U.S.C. §§151-607 (1976) (as amended) [hereinafter cited as Communications Act]. Although the Communications Act states clearly that a license to spectrum use carries no property rights or ownership, it is undeniable that broadcasters do feel that they have rights to this resource. This belief is encouraged by the necessity of making sizable initial investments, as well as by the need for continuity of service. While each license bears a clear statement that no property rights attach, the desire for maximum service has necessitated at least tacit assurances of permanence, thus allowing broadcasters to build stable audience bases and to realize return on their investments.



nerstone of domestic broadcast law.<sup>18</sup> Likewise the spectrum allocation decisions made by the Federal Communications Commission in 1952 for VHF television, which provided for at least three stations to every major city in the country,<sup>19</sup> rapidly resulted in the development of the three national commercial networks, which are today unchallenged in their dominance of the U.S. television industry.

An example of the durability of international structural decisions<sup>20</sup> is the recent dispute regarding the FCC proposal to decrease spacing of AM radio frequency allocations in Region II from

18. Although the FCC has recently deregulated domestic radio broadcasters, relieving them of past public interest obligations, the deregulation rules left intact the radio broadcasters' fairness and equal opportunity responsibilities, and were passed on broadcaster assurances that broadcasters would be as, or more, responsive to public needs and interests without regulation as with. Moreover, the Commission has indicated its readiness to reassert regulatory controls should it determine that deregulation is not serving the public interest.

The commercial radio deregulation rules eliminated (i) guidelines requiring the presentation by licensees of specified levels of non-entertainment programming, (ii) formal community ascertainment procedures, (iii) guidelines limiting the air time devoted to commercial advertising, and (iv) rules requiring the maintenance of comprehensive program logs. Report and Order, 46 Fed. Reg. 13,888 (1981). The Commission concluded that with over 8,900 radio stations transmitting in the country, there was sufficient competition within the industry so that market forces would be a better determinant of station conduct than regulation. DBS technology is, obviously, at a very different stage of development.

19. In 1952, the FCC added 70 UHF (470-890 MHz) channels to the twelve existing VHF (54-216 MHz) channels, and made more than 2,000 channel assignments in about 1300 communities. Faced with the alternatives of creating clear channels, where broadcasting would be regional or even nationwide, or local service, where broadcasting would serve small locales, the FCC opted for the latter. Clear channel service would have provided six or seven stations to each receiver regardless of location, but would have afforded fewer broadcasters the opportunity to participate; programming would have been on a national or large-region scale. The allocation method chosen provided an average of three stations per receiver (more in densely populated areas), but was designed to allow reflection of local needs and interests, and to afford many broadcasters the opportunity to participate. Programming was foreseen as specific to the locale.

The inefficiencies which resulted (*e.g.*, service assignments in unpopulated areas, or areas so sparsely populated as to preclude development of local service, and allocation shortages in densely populated areas) have often been complained of. In addition, one of the major reasons for choosing the local-oriented formula, *i.e.* the fear of "homogenization" of the nation through national, lowest-common-denominator programming for clear channels, seems to have been as fully realized through networking - at least this is a charge often levied by critics of contemporary television service in the U.S. See, LEDUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL (1973).

20. FCC Commissioner Cross remarked in 1960, during Congress' deliberations on whether to ratify the 1950 North American Regional Broadcasting Agreement (NARBA): "Each new international agreement in this complex and fast-growing field is more difficult to negotiate than its predecessor." Exec. Report No. 2, 86th Cong., 2d Sess. (1960).

10 kHz to 9 kHz.<sup>21</sup> Region II spectrum allocations, based upon 10 kHz spaces between assigned frequencies, were originally made in 1937;<sup>22</sup> major adjustments (preceded by years of conferences and discussions) were made in 1950.<sup>23</sup> The spacing rearrangement proposed in 1979 by the FCC was technologically feasible within varying cost estimates,<sup>24</sup> and offered the provision of twelve new channels and up to 1400 new stations. The reassignment was strongly resisted, however, by established domestic and foreign broadcasters.<sup>25</sup> They argued that the cost to convert would be high, not only in terms of engineering and materials, but also in terms of station identification and advertising; and that there was reason to believe that these costs would fall unevenly among stations and

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21. Three years ago, the Daytime Broadcasters Association (DBA), in hopes of gaining full-time frequency allocations, took up the cause of decreasing AM frequency spacing. The National Telecommunications and Information Agency (NTIA), then headed by Henry Geller, proposed the idea to the FCC by petition filed Jan. 10, 1979. The DBA and NTIA were joined by others seeking spectrum access - the National Black Media Coalition (NBMC), National Public Radio (NPR), and the Cubans, for example. Cuba had long been agitating for more spectrum space and less interference from U.S. stations, and had threatened to install two 500-watt superstations on frequencies duplicating two Florida stations. (By at least one estimation, that of William Salmon, special assistant to James Buckley, Under-Secretary of State for Security Assistance, Science and Technology, the threat was an idle one; Cuba has inadequate power resources to support such broadcasting. *BROADCASTING*, Nov. 9, 1981, at 44, 46. The possibility of Cuban superstations was, however, seen by most as real). Although no promises were ever made, many hoped that the new assignments, in providing Cuba with more stations, would quell this threat. The FCC made its formal proposal in Notice of Inquiry in the Matter of 9kHz Channel Spacing for AM Broadcasting, 44 Fed. Reg. 39,550 (1979).

22. Inter-American Radio Communications Convention, Dec. 13, 1937, with Annexes, 53 Stat. 1576, T.S. No. 938, reprinted in 3 BEAVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 462 (1969). This Convention included the Bahamas, Brazil, Canada, Cuba, the Dominican Republic, Haiti, Mexico, Panama, Paraguay and the United States. It was signed in Havana on December 13, 1937.

23. North American Regional Broadcasting Agreement, Nov. 15, 1950, 11 U.S.T. 413, T.I.A.S. No. 4460. This Agreement (NARBA) involved the Bahamas, Canada, Cuba, the Dominican Republic and the United States. (A separate agreement between Mexico and the U.S. was concluded later that year). NARBA was signed in Washington in November 1950, although it wasn't ratified by the U.S. until ten years later.

24. The estimates originally given by the FCC were substantially lower than those provided by the industry, or by industry-retained research groups. Aggregate engineering costs involved in station conversions have been estimated at from twenty million dollars (original FCC estimate) to forty-three million dollars (private research group). *BROADCASTING*, July 27, 1981, at 29.

25. The provision of new channels would result in increased competition and, by all estimates, in at least a minimal increase in interference. The FCC originally estimated overall service area losses of 2.4%-5%. *BROADCASTING*, July 27, 1981, at 29. A Canadian study, however, found probable service area losses of up to 45%, with 50% of all broadcasters bearing losses of at least 5%. *BROADCASTING*, July 27, 1981, at 7.

cause greater hardship in some states than in others.<sup>26</sup> Resistance from the U.S. National Association of Broadcasters and from conservative sources within the FCC itself was supported by Canada and other countries in Region II.<sup>27</sup> The FCC finally withdrew its proposal in August 1981.<sup>28</sup>

Threshold structural and operational decisions regarding the implementation of DBS broadcast service will be equally influential upon future development. Although DBS assignments on an exclusive, or nearly exclusive, national basis would not preclude future transborder arrangements, international DBS service will be more readily realized if multilateral and regional reservations are provided for in the initial table of assignments. While early structural decisions are not unalterable, and the states in Regions I and III could eventually make arrangements for additional international broadcasting, reaching such subsequent international agreement may be difficult and cumbersome. Reservation of spectrum and orbital slots for international satellite channels in Region II, even if there presently existed only tentative institu-

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26. Because the decreased spacing would cause some established stations to shift by up to 9 kHz (by an early Canadian proposal), or up to 4 kHz (by the American plan) while leaving others virtually unchanged, cost to each station would be determined by the difference between its old and its new assignments. *BROADCASTING*, June 15, 1981, at 71.

27. In addition, domestic manufacturers supported the status quo, pointing out that German and Japanese manufacturers were already geared to produce technology based on 9 kHz, creating a distinct disadvantage to American industry. Furthermore, some one million digitally-tuned receivers would be rendered totally obsolete, and a further four million would be impaired. *BROADCASTING*, July 27, 1981, at 29.

Had the FCC membership remained constant, the question of a shift of 9 kHz spacing would probably still be viable; but a new, industry-oriented Commission joined with a new-chaired NTIA to quash the proposal. Henry Geller was replaced at NTIA by Bernard J. Wunder, who favored retention of 10 kHz spacing; Geller had been a strong proponent of the change. Charles Ferris, another supporter of the proposal, was replaced at the FCC by Mark Fowler, a leader in the opposition to reassignment. The FCC added a new member shortly before the decision - Mimi Weyforth Dawson, who was also opposed to the change. A couple of members who had earlier supported the reallocation changed their minds; support for the status quo was also lent by State Department Under-Secretary for Security Assistance, Science and Technology, James L. Buckley. *BROADCASTING*, July 27, 1981, at 29.

Many of the thirty nations in the region were reserving decision until the U.S. made its position known, so the FCC/broadcast industry decision was determinative for the entire region.

28. *Public Notice*, Mimeo No. 002651, August 5, 1981, 50 Rad. Reg. 2d (P&F) 681. The issue was ultimately settled within the first three days of the November 1981 AM radio conference in Rio de Janeiro; the United States, arguing that in fact the financial and technical costs of the proposed spacing change would outweigh the benefits, joined Mexico, Canada, Argentina, Brazil and others in support of the status quo. Consensus was forthcoming. *BROADCASTING*, Nov. 9, 1981, at 38.

tional arrangements to make use of the reserved resource, could avoid the difficulties and delicacies of later negotiation.<sup>29</sup>

Countries which have been allocated national DBS assignments will assume vested interests in these orbital positions, frequencies, powers and beam patterns. Although these orbital assignments do not create a property interest in the assignee state, since the geostationary orbit is in outer space and therefore beyond sovereign appropriation,<sup>30</sup> they do create a resource allocation and investment expectation so great that nonconsensual use of another state's slot would be universally sanctioned.<sup>31</sup> Initial structural reservations for international DBS service will also provide the stimulus to develop the public and private institutional arrangements necessary for the operation of an international DBS system. Finally, such reservations will provide a more secure audience base for the development of programming specifically

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29. Although rearrangement for international service might be made easier if, as some writers have suggested, national DBS assignments are made leasable in some form, such leasing arrangements could equally be used for national service or purposes. See Levine, *Orbit and Spectrum Strategies*, June 1981 TELECOMMUNICATIONS POLICY 102. The interests of cross-cultural communication would best be served by initial reservations of frequency and orbit for international DBS services, regardless of the final decision as to the nature of rights in national assignments. See also, *Regulating International Airwaves: The 1979 WARC*, 21 VA. J. INT'L. L. 1, 42-52, (1980), discussing market allocation and other distributional possibilities, and A. DEVANY, R. ECKERT, C. MEYERS, D. O'HARA, & R. SCOTT, A PROPERTY SYSTEM APPROACH TO THE ELECTROMAGNETIC SPECTRUM (1980).

30. There is no question that outer space is beyond the sovereign claims of any state; this is settled in article one of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347 [hereinafter cited as Outer Space Treaty]. There is a question, however, (at least to a small minority of states) whether the geostationary orbit should be included in outer space. See, e.g., the Bogotá Declaration, *El Espectador* (Bogotá, Colombia), December 7, 1976, 13A (Trans.) *Declaration of the First Meeting of Equatorial Countries*, International Telecommunications Union Doc. WARC-BS (1977) 81-E, 17 January 1977, claiming equatorial state sovereignty over the geostationary orbital arc located above its land mass. The vast majority of states does include the geostationary orbit as a part of nonsovereign outer space. However, there continues to be substantial disagreement as to the lower limit of outer space and the dividing line between outer and air space. Some have argued for a spatial or physical definition of outer space and division from air space, while others have urged a functional approach to accommodate advances of technology. The U.S. space shuttle, which both flies and orbits, has further complicated the question. See, e.g., Kopal, *The Question of Defining Outer Space*, 8 J. SPACE L. 154 (1981); Almond, *Legal Definition of Outer Space*, PROCEEDINGS OF THE TWENTY-FIRST COLLOQUIUM ON THE LAW OF OUTER SPACE, IISL/IAF 77 (1978).

31. See note 17, *supra*. The initial investments made by users of the geostationary orbit are much larger than those made by terrestrial broadcasters. Their tacit property interests and their expectations will be concomitantly greater. See, e.g., Rice, *supra* note 11; FCC v. Midwest Video Corp., 440 U.S. 689, 699-701, 709 n.19 (1979).

designed for cross-cultural education and entertainment, thus avoiding present and future problems associated with the exportation of programming produced solely for domestic audiences.

In addition, there are many technical accommodations which must be considered for a viable international DBS system. The capabilities to exclude unwanted programming from the system, to provide foreign language sidebands on DBS video signals, and to delay broadcasts to account for time zone differentials all require technological coordination more easily accomplished in the formative stage of DBS technology.<sup>32</sup>

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32. Technological coordination is frequently accomplished by defining the new technology and classifying it within the existing mass communication structure. Coordination through classification has become increasingly difficult as new communication technology has blurred traditional distinctions. For example, the Communications Act of 1934 was divided into two broad parts (common carriers and broadcasters) outlining very different regulatory schemes for the communication technologies then existing (telegraph, telephone, and AM radio broadcasting). The common carrier telegraph and telephone systems were to be regulated as public utilities and were to have no control over the content of the information transmitted over their facilities. Radio broadcasters, on the other hand, were not to be subject to profit regulation, and were to have control not only of the frequency medium, but also of the messages transmitted. The tight technological distinction drawn in 1934 between common carriers (then only point-to-point transmitters by wire) and broadcasters (then only multi-point transmitters over the air) has been obliterated by new communication technologies and services.

Cable television posed the first difficult classification problem for the FCC. Coaxial cable could perform individual services like common carriers, but could also disseminate mass communication like a broadcaster. Although the characterization of cable television technology as either common carrier or broadcaster (or some hybrid of the two) directly determines the extent to which the cable operator/owner has first amendment rights, and whether cable franchises can be issued to aliens, this question has not yet been finally decided by either the FCC, the Supreme Court or the Congress. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979); Hagelin, *The First Amendment Stake in the New Technology: The Broadcast-Cable Controversy*, 44 U. CIN. L. REV. 427, 497-99 (1975). DBS satellites pose a similar classification problem for the FCC. The current fixed service satellites (FSS) are regulated as common carriers. The Commission must determine whether DBS owners may also program as broadcasters, or whether they are limited to providing transponder time for hire as a common carrier. See Rice, *supra* note 11. The situation is further complicated by the breakdown of differentiation between fixed service satellites and direct broadcast satellites, a distinction incorporated into ITU rulings and spectrum allocation scheme. Canada has announced that it is experimenting with a service capable of providing both fixed and broadcast service from a single satellite; this development, if successful, would make the former distinction obsolete. See LeDuc, *Transforming Principles into Policy*, 30/2 J. COM. 196, 199-200 (1980).

A hybridization of radio and television services has also developed. Radio and television broadcasts, previously thought of as discrete, are now considered to be ends of a continuum of service with the spectrum space requirements bearing a direct relationship to the number of video frames broadcast per minute. By broadcasting a single picture frame for three minutes, with audio, the service would utilize only a radio band width, which is

#### IV. ALTERNATIVE TECHNOLOGICAL ARRANGEMENTS FOR ACCOMPLISHMENT OF INTERNATIONAL DBS SERVICE

Implementation of current U.S. DBS policy would require technological arrangements bypassing recipient state control of information links. One way in which this bypass could be accomplished would be to use domestic or otherwise unused geostationary assignments to beam into other countries.<sup>33</sup> To the extent recipient states do not have advanced telecommunication technology, the opportunity for limitation of imported DBS programming would depend upon recipient state control over compatible terrestrial receiving equipment. Future technological advances in satellite receiving equipment, coupled with the cost reductions due to economies of scale in mass production, will increasingly limit the feasibility of state regulation of imported DBS signals through control of terrestrial receiving equipment.<sup>34</sup>

There are two technological arrangements by which to implement the Canadian-Swedish proposal, providing for the recipient state's exercise of prior consent and right of program participation. The international DBS programming could either be broadcast by two or more domestic satellites interconnected by inter-satellite service links,<sup>35</sup> or by a single satellite jointly controlled by

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roughly 1/10,000 of a television band width. Conventional television broadcasts sixty frames a second; the continuum covers this range. International organizations considering DBS service will have to weigh the trade-off between the number of frames per minute transmitted by the satellite and the availability of spectrum space for additional satellites.

33. A variation of this arrangement, which would also be consistent with U.S. DBS policy, would provide for communication with the recipient state government either by way of notification or of consultation prior to the transborder broadcast(s). The recipient states, however, would have no right to refuse the broadcast(s), and ultimately would be required to abide by the decision of the exporting state. Again, to make meaningful the paramount freedom of transborder communication would require technological arrangements bypassing recipient state checkpoints in the communication links. The underlying technological arrangements would not differ greatly between a scheme of prior consultation/notification and a scheme of unlimited communication rights.

34. A report of the Working Group on Direct Broadcast Satellites concluded: "Short of extreme measures, there appears to be no effective long term method of preventing the reception of unwelcome broadcasts—hence the desirability of international cooperation." Committee on the Peaceful Uses of Outer Space, 24 GAOR, at 12, U.N. Doc. A/AC.105/117 (1969).

35. The inter-satellite service link consists of:  
the establishment of extremely high capacity radio communication links *directly between satellites in orbit above the earth*. Thus, for example, a domestic satellite serving U.S. customers can link up directly with a satellite serving European customers *without going through either INTELSAT or submarine facilities*.

states included within its signal contours or beam footprint.<sup>36</sup> In essence, the choice is who controls the downlink of the DBS transmission—the individual state or an international organization. Individual state control of the downlink through use of domestic sat-

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Rutkowski, *The Inter-Satellite Service*, July 1981 TELECOMMUNICATIONS 64 (emphasis added). This development obviously presents some difficult and interesting questions: who would establish or even register such service? What effect will the bypass of INTELSAT's services have on that organization, and on U.S. participation in it? Policy effects can be expected to be thoroughgoing; while emphasis to date has been on reconciling differences, implementation of inter-satellite service links would presumably necessitate the development of some basic and universal policies. Further, the question of which domestic satellite services would be authorized to establish such links, and with whom, raises a plethora of policy and regulation concerns. Finally, the current domestic emphasis on deregulation and competition may be pulled up short by the necessity for governmental interventions.

Though intersatellite services links would not be appropriate to all nations' uses, those nations with developed or developing satellite broadcasting systems will surely be interested in establishing such links, and will, as a prerequisite, grapple with these and similar concerns. "Perhaps the first petition to inaugurate the Inter-Satellite Service will give the U.S. international telecommunications policy-making process [like the policy processes of other nations] a good test." *Id.*

36. If the international service is to be accomplished by use of simultaneous multiple satellite broadcasts, bilateral relay and transmitting agreements will have to be reached, and there would still be a net inefficiency in the systems since multiple satellites would be used to accomplish what a single satellite could do. *Id.*

However, there are clearly considerations beyond purely economic concerns which might prompt such development:

Developing countries have compelling reasons to want access to the spectrum and communications technology. In the past decade, there have been many efforts to harness the power of communications technology for education and social programs: to upgrade the quality of instruction, to reach preschool and out-of-school children, and to teach the basic survival skills in health, nutrition, and agriculture to adults, particularly those living in rural areas.

Hart, *supra* note 12, at 34. Such concerns are shared by some developed countries as well—Canada, the U.S.S.R. and Australia, for example, have significant populations in geographically isolated areas for whom radio communication is essential.

Lesser developed countries (LDCs) have additional concerns, however, which are not reflected in developed nations, and:

[t]he urgency of the need . . . cannot be overemphasized. Even in the present state of affairs, radio has become a vital and important instrument for creating national confidence and national pride and for projecting abroad the national point of view. Experience has shown that the full involvement of a people in the process of change and growth in developing countries cannot be achieved as well through any other means of mass communication as it can be through radio. Radio alone can reach the remotest of villages and the humblest of homes, and persuade the citizen to share in the vision and excitement of a country's development.

Menon, *Space Communication for Developing Countries: India as an Example*, in UNESCO, COMMUNICATION IN THE SPACE AGE: THE USE OF SATELLITE BY THE MASS MEDIA 125 (1968). Of course recognition of this need poses numerous questions of funding and of sharing of technologies which cannot be dealt with here. See, e.g., the MacBride Report, *infra* note 49; Robinson, *Regulating International Airwaves: The 1979 WARC*, 21 VA. J. INT'L L. 1, 37-42 (1980).

ellites and inter-satellite service relays would provide recipient states with a greater capacity to exercise the right of prior consent. Control of the downlink by an international organization places DBS programming beyond the direct control of the recipient state, thus limiting a state's capacity to exclude programming to jamming of the satellite signal. Only those states having developed telecommunications technology could jam satellite signals, and such jamming is difficult, costly, and could entail serious degradation of domestic service. Single satellite international service, therefore, would emphasize freedom of transborder communication at the expense of the recipient state's exercise of prior consent.

The greater the limitation upon the exercise of prior consent, the greater will be the demand for meaningful participation in program production. For example, a bilateral arrangement for the exchange of programs via inter-satellite service links would not require deep involvement in the program production process, but would probably involve only pre-broadcast screenings of the programming to determine whether to allow its carriage on the domestic downlink. Bilateral program exchanges are therefore more likely to involve material produced primarily for domestic consumption but incidentally appropriate or appealing to foreign state audiences. Recipient state concern over cultural dilution caused by imported foreign programming produced without its involvement would be mitigated by the potential to control the downlink distribution.

On the other hand, a multilateral arrangement to distribute programming via a single satellite would require far greater direct involvement of states in the production process and more complex institutional interaction. Each state must feel secure in its opportunity to participate in the decision-making process and must be assured that its national interest and cultural heritage will be respected. Such an institution would require an equal voting scheme, independent of technological differences, and a unanimous commitment to the sharing of broadcast production and DBS distribution technology.<sup>37</sup> Nothing short of these institutional procedures and purposes will compensate the individual recipient

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37. The development of this kind of agreement and commitment is without doubt more readily achieved regionally than globally; in fact, steps have already been taken in this direction. Probably the best example of regional communications cooperation is offered by the European Space Agency (ESA), formerly ESRO. ESA, formed in 1975 by ten signatory



state for its compromise of direct control over domestic downlinks. In a multilateral arrangement, it will be necessary to pro-

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nations, now includes seventeen members as well as associates and observers. Its purpose is to provide, through international cooperation, every necessary phase of telecommunications, and with the recent successful ARIANE launches it has accomplished this. ESA cooperates fully with NASA, previously the sole source of its launches, in "non-continuous programs which have no military and little economic significance." N.M. MATTE, *SPACE POLICY AND PROGRAMS TODAY AND TOMORROW* 74 (1980). ESA's recent launching of four ARIANE satellites, and INTELSAT'S placing of an order for another launch in 1981, establishes its capacity for independence from the American agency.

ESA has also cooperated in the joint French-West German venture *Symphonie*. The 1975 launch of the *Symphonie* satellite by NASA allows bilateral management and programming. Regional development in communications may mean anything from working out rules of access and use, to programming, management or launching—or all of these.

Other examples of regional development exist. The Commonwealth Telecommunications Board, established in 1928, invited membership of Nigeria, Ghana and Malaya in 1961; many of the newly-independent African states have subsequently joined as well. This cooperation, coupled with the collaboration of ITU, the Economic Commission for Africa (ECA) and Organization for African Unity (OAU), has resulted in the formation of the Pan-African Telecommunications Organization (PANAFTEL), which includes 38 member states and is developing regional satellite communications plans. ARABSAT, a consortium of 21 Arab states, is actively engaged in satellite telecommunications, and is presently contracting with ARIANE for launching and satellites and with the United States for telemetry. PALAPA is the regional communications entity of Indonesia and the South Asian islands; Intersputnik's MOLYNIYA 2 is intended to link Eastern Europe, Cuba, Mongolia and the U.S.S.R. by satellite; and NORDSAT, the five-member Scandinavian entity, has cooperated in programming and management for years. In addition, the European Broadcasting Union, a non-governmental, non-administrative coordinating organization, provides an example of the cooperation and collaboration requisite to communications regional development.

Regional development is desirable not only because it is more practicable than global efforts are likely to be, but also because it offers greater accountability of its members. International law in general, and international organizations in particular, offer little in the way of enforcement; this is not the case with regional organizations.

A regional tribunal could take prompt action to notify the manager of a satellite to disqualify a violating originator from continued use of the system. And where a state violated a regional plan through aggressive broadcasting by its own broadcasting system, sanctions could be taken against the state itself. These might include modification of the satellite beam to exclude coverage of the bulk of that nation's receiving sets.

Price, *First Amendment Constraints and the Direct Broadcast Satellite Controversy*, in *AMERICAN SOCIETY OF INTERNATIONAL LAW, DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS* 35, 80 (1975). For further discussions of regional developments in communication, see MATTE, *supra*; Wigand, *The Direct Satellite Connection: Definitions and Prospects*, 30/2 J. COM. 140 (1980); Dickinson, *Telecommunications Satellites and the European Broadcasting Union*, in *UNESCO, COMMUNICATION IN THE SPACE AGE* 101 (1968); Elias, *The Contribution of Telecommunications and Direct Satellite Broadcasting to Technical Assistance and Nation-Building in the "New" Countries: An African Viewpoint*, in *THE INTERNATIONAL LAW OF COMMUNICATION* 122 (E. McWhinney ed. 1971). Although hopes have been expressed in ITU conferences, the U.N. General Assembly, and elsewhere that global communications might be possible, the ongoing debates in UNESCO, the declarations made in Bogota and Talloires, and continuing discussions in other forums clearly

gram expressly for the international, cross-cultural audiences to be served.<sup>38</sup>

The technological arrangements necessary to implement the U.S.S.R. policy of an absolute sovereign right of every state to exclude unwanted broadcast programming would require a degree of international cooperation and consensus well beyond that required by the above schemes. Assurance of the sovereign right of prior consent could be achieved only by an international enforcement agency with the authority and capability to terminate the satellite source or intercept its signal, or by providing each and every state with the technological capacity to block offending programming.<sup>39</sup> The former alternative would require a detailed code and a complex adjudicatory process whereby a state's plea for international agency protection against offending exporting countries could be judged. The latter alternative would require a rapid equalization of technological capacity beyond any reasonable possibility.<sup>40</sup>

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demonstrate the difficulties involved in reaching world-wide agreement. Future developments and technologies may stimulate world-wide policy formation, but for the time being it is important to realize DBS's potential as fully as possible through its application in regional systems.

38. Although, as discussed below, the multilateral scheme could accommodate domestic production of programming by public and private entities for international consumption, these programs would, from conception through production, be designed for cross-cultural audiences.

39. The termination or interception of offensive signals would be an arguably military response to freely broadcast programming, and is an outgrowth of the U.S.S.R.'s insistence that unwanted broadcasts are as surely a violation of national sovereignty as is a physical invasion. See U.S.S.R. Working Papers, *supra* note 6. The suggestion of forming an international enforcement agency runs counter to the entire experience and history of international law and is, to understate, very unlikely. The closest modern history has come to such an enforcement agency is the use of United Nations military security forces pursuant to the U.N. Charter articles 42-47; such use has rarely been invoked, and then has often been held to be ineffective. The thought of a strict code enforced by an international agency is antithetical to the policies of negotiation and consensus which underlie international law.

40. Equalizing the distribution of telecommunication technology and program production capacity is also an important element of any arrangement built upon the Swedish-Canadian proposal, but that scheme does not depend upon such a rapid and exact parity for operational viability. The assumptions one is prepared to make regarding technological development can obviously play a determinative role in establishing one's point of view regarding implementation of one or another of these schemes.

Although some question the operational and economic viability of DBS service, see Doyle, *International Satellite Communications and the New Information Order: Distressing Broadcasting Satellites*, 8 SYR. J. INT'L L. & COM. 365 (1981), history suggests that if one is to err in planning for new telecommunication services, the error should be on the side of more, rather than less, technological advancement. The development of the burgeoning field of informatics is a case in point. Informatics, roughly definable as the commingling of computer and communication technologies, is defined and introduced in the MacBride

### V. PUBLIC AND/OR PRIVATE LICENSES FOR INTERNATIONAL DBS ASSIGNMENTS

International DBS assignments could be awarded to and operated by public entities, private entities, or both. Under the public model, rights in the license would be held by a consortium of states. Programming and operation of the service would be delegated to a subsidiary of the consortium. Although some programming might be produced by this subsidiary, the subsidiary would more likely serve as a network feed of programming produced by

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Report, *infra* note 49, at 64-67. This field of endeavor, virtually non-existent a decade ago, calls forth variations of the same problems and concerns as have become familiar in other communications fields, e.g., DBS and remote sensing; economic, social and political issues are involved, and the paramount concern is the balancing of national insistence on sovereignty and privacy with the desire for free exchange of information and ideas. In addition, the economic concerns regarding production and market development, voiced in other contexts primarily by LDCs, are in the context of informatics taken up by others: "The European nations' concern is economic, and their regulations have an ambivalent theme; both preserving privacy and reducing America's technological and business presence abroad." Olenick, *Transnational Data Flow: Data Protection or Economic Protectionism?*, in THE NEW WORLD INFORMATION ORDER 21, 23 (1979).

The sovereignty concerns are of a different nature in the field of transborder data flow (TDF) than in DBS, as they center on infringements of privacy and on dependence on (particularly, but not solely) the United States, rather than primarily on cultural "invasion". These concerns are nonetheless acute: "Information is power, and economic information is economic power. . . . [T]he ability to store and process certain types of data may well give one country political and technological advantages over other countries. This in turn leads to a loss of national sovereignty through supranational data flows." Louis Joinet, Secretary-General of French Commission on Data Processing and Liberties, *quoted in Pipe, National Policies, International Debates*, 29 J. COM. 115, 118 (1979). Not only may sovereignty be diminished through this process; its very nature and definition are modified. See, Gotlieb, Dalfen & Katz, *The Transborder Transfer of Information by Communications and Computer Systems: Issues and Approaches to Guiding Principles*, 68 AM. J. INT'L L. 227, 229 (1974).

In addition, the development of national systems of informatics is seen as indispensable for other reasons: "The flow of technical information within nations and across national boundaries is a major resource for development. Access to such information, which countries need for technical decision-making at all levels, is as crucial as access to news sources." MacBride Report, *infra* note 49, at 260. Beyond the fear of not having access to necessary information, some nations also fear "that they will be unable to participate in the world political and economic community" unless they develop their own national informatics schemes. HOUSE COMM. ON GOVERNMENT OPERATIONS, INTERNATIONAL INFORMATION FLOW: FORGING A NEW FRAMEWORK, H.R. REP. No. 96-1535, 96th Cong., 2d Sess. 21 (1980) [hereinafter cited as REPORT 1535].

Such attitudes and concerns have, not surprisingly, resulted in the creation of significant barriers to international information flow. Whether the problems of free TDF are seen as primarily trade-related in nature or less tangible—dealing with, for example, national sovereignty, personal privacy, a clash of international institutions, or cultural imperialism—the result is an effective stopping of the flow, with resultant loss of information

domestic affiliated stations expressly for international consumption. Decisions regarding which programs would or would not be carried by a public DBS service would be made by an equal voting process, in which each domestic affiliated station or state opted for the programming most appealing and appropriate to its audience. By this process, programming proposals having the broadest cross-cultural appeal would be funded, while programming proposals of interest to or appropriate for only narrow audiences would not.<sup>41</sup>

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exchange, of trade, and of efficiency. REPORT 1535 *supra*, at 13, 25. Barriers may take various forms, from the imposition of tariffs to an absolute prohibition of non-domestic services. *Id.* at 13. In addition, PTT anti-competitive policies and the threat of nationalization of facilities by LDC hosts discourage private investment and development.

The need for international agreement is clear. Preliminary efforts have been made by the Council of Europe (CE) and the Organization for Economic Cooperation and Development (OECD), but both are limited-membership, non-representative organizations as far as various positions on TDF are concerned. The U.N. is an inappropriate forum because of its already crowded agenda and the practical impossibility of active participation by all interested parties; the ITU has become too politicized to deal effectively with the intricacies of TDF. A partial answer may be the proposed formation of a consortium of LDCs, Eger, *Emerging Restrictions on Transnational Data Flows: Privacy Protection on Non-Tariff Trade Barriers?* 10 L. & POL. INT'L BUS. 1055, 1090 (1978), but surely the development of an international organization whose convention would dovetail with, or take precedence over, domestic laws is desirable and necessary.

Parallel to the requirement for central government policies concerning computer data bases is an increasing need for supra-national regulations governing the import and export of electronically transmitted data. Such codes of regulations incorporate technical standards including compatibility of systems, confidentiality and security of data stored and transmitted, and some normative dimensions as to the propriety of holding various sensitive information on individuals.

Pipes, *Data Base Development and International Dimension*, in ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) Doc. DAS/SPR/72-20 at 143. In addition to the guidelines discussed above, these international regulations would have to deal with the question of access by the subject individual or entity to information about himself or itself. See Gotlieb, Dalfen & Katz, *supra*, at 253-4. It might reasonably be assumed that a comprehensive international agreement would, while imposing relatively stringent guidelines, serve to stimulate TDF; Olenick, *supra* at 31.

Informatics can be seen, then, as another forum demanding resolution of the tension, inherent in international telecommunications, "between the conflicting state interests in protecting, conserving, and controlling information on the one hand, and of importing, exporting and exchanging ideas on the other—both in pursuit of state goals and in support of national policies." Gotlieb, Dalfen and Katz, *supra*, at 227. See also, OECD, GUIDELINES ON THE PROTECTION OF PRIVACIES AND TRANSBORDER BORDER DATA FLOWS (1981).

41. This kind of "popularity poll" programming raises the problem of lowest-common-denominator programming, already discussed in note 19 *supra*, and the fear that, in trying to appeal to everyone, the programming will be identifiable with no one.

The public broadcasting system in the U.S. is an example of the application of this theory. Though funded 50% with federal money, according to the Public Broadcasting Act of 1967, it is a non-governmental, non-political entity meant to encourage excellence and

Equal voting, however, is only one condition necessary for the operation of a public DBS system. Of equal importance is equality of opportunity in programming production among the affiliated domestic entities.<sup>42</sup> This would require financial and technological assistance in building modern studio facilities in countries without such facilities, and in training persons in film and video technique. The financial assistance could come from public subsidies apportioned among the affiliated states on a progressive basis.<sup>43</sup> Tech-

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diversity through the development of "noncommercial education broadcast stations . . . on a local, state, regional, and national basis." Public Broadcasting Act, 47 U.S.C. §396(g)(2)(G) (1976). The public system is designed to meet discrete and minority needs and interests; because of its public funding, it has a special duty to do so. Its "obligation includes not merely service to the general public but also service to significant, distinctive minority interests which are not and cannot be as fully served by commercial stations." Alabama Educational Television Commission, 50 F.C.C.2d 461, 472 (1975). Because of the system's need to garner popular support to achieve the remainder of its funding without abandoning its noncommercial status as federal spending on PBS is increasingly restricted, it has had to increase its appeal for private donations. These donations are obviously made on the basis of approval of programming; as a result, the system which was designed to respond to minority needs has been accused by some of being a government subsidy of the upper middle class. See further discussion at note 113, *infra*. Programming on PBS "should address itself to the ideal of excellence, not the idea of acceptability. . . . Once in a while it does, and you get a quick glimpse of its potential." Letter from E.B. White to the Carnegie Commission, *quoted in* D. GINSBURG, REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS 635 (1979). See generally A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING (1979).

On the other hand, national network television has been credited by some as a unifier, via provision of a common base-line of experience, of the diverse and separated cultures within the U.S.; international direct broadcasting could serve a similar function, and offer unparalleled opportunities for increased cross-cultural understanding and sharing. See note 48, *infra*.

42. The question of equal opportunity in domestic law has spawned various interpretations: Does equal opportunity mean simply refraining from erecting barriers to accomplishment, or does it involve a more active response in the form of remediation of those formerly deprived? In civil rights law, at least, equality of *result* rather than simply of opportunity has become the aim. This interpretation involves greater individual and social costs, but is more likely to bring about the needed changes.

43. A tension exists in international public organizations between inequality of investment or contribution and equality of voting or control. Organizations concerned directly with finance and credit, such as the International Monetary Fund, are operated on weighted voting schemes reflecting the disproportionate investment of member states. Organizations concerned with ministerial functions, such as the ITU, have adopted equal voting schemes without regard to size or state of technological development. U.S. participation in an international DBS consortium would not be for a direct, immediately measurable return on capital. Rather the benefits to the U.S. would come from longer term expansion of new markets and from a more open exchange of ideas throughout the world. See, e.g., Christol, *The International Telecommunications Union and the International Law of Outer Space*, in PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE, IISL/IAF 35 (1979); Snow, *INTELSAT: An International Example*, 30 J. COM. 147 (1980).

nological assistance could come through the open sharing within the consortium of know-how and experience. The training could be accomplished either through establishment of international universities for the study of telecommunications, or through scholarship programs in which students could attend universities in those countries having telecommunications specialities.<sup>44</sup>

The private model would require establishment of an international authority and development of general standards and procedures for comparing competing applicants and evaluating license renewals. At a minimum, these standards would look to the programming proposed and/or presented by each applicant, the applicant's familiarity with the audience, and the applicant's ownership composition. Applicants proposing quality programming of demonstrated cross-cultural appeal, who sought to learn about the peoples served and to respond to their needs, would be preferred. Similarly, applicants having an ownership structure reflective of the countries served, and employing citizens of these countries in management and staff positions, would also be preferred, as they would be more likely to provide satisfactory service than applicants owned and operated by corporations and citizens of any one country.<sup>45</sup> The procedure adopted by an international licensing

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A similar conflict of interests arose within INTELSAT between owners and users of the INTELSAT system. States having an ownership interest in excess of their percentage usage of the system tended to favor higher rates of return on their investment. States using the system to a greater extent than was reflected in their proportionate ownership tended to favor lower usage rates and lower rates of return on their investments. This conflict has been resolved by periodic adjustments of the permissible ownership allotments to reflect percentage changes in the use of the INTELSAT system. Colino, *International Cooperation Between Communications Satellite Systems: An Overview of Current Practices and Future Prospects*, 5 J. SPACE L. 65, 92 (1977).

44. Although it is difficult to predict precisely the programming such a public DBS system would yield, or to anticipate the quality and creativity these opportunities might unleash, some speculation about the general types of programming which would be provided is possible. The programming should avoid propagandizing; when a politically slanted statement or presentation is made, opportunity should be given to present other views as well. (The New World Information Order's "balanced flow" insists on this, as does the U.S. fairness doctrine). The programming should not, directly or indirectly, attempt to persuade anyone of the rightness or wrongness of given political principles; rather, it should make available quantities of information from many and diverse sources, allowing recipients to learn and to make informed choices. The programming should seek to educate people about the places and people around them, and about the commonality of human experience. News events, sports, films, national festivals and celebrations, concerts, plays, natural and social science research, and travel/adventure logs seem likely prospects for international DBS programming.

45. The FCC's license evaluation and ascertainment processes are reflected in these

authority should afford every applicant a full and fair consideration of its application and an opportunity to present firsthand the merits of its proposed programming or past service.<sup>46</sup> These procedures should also afford representatives of the international audience the opportunity for input into the licensing process.<sup>47</sup>

A hybrid model would include both public and private DBS systems, and would make possible the realization of the inherent advantages of each.<sup>48</sup>

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remarks. "Ascertainment" refers to the licensee's duty to ascertain the needs of the service population, and to respond to them. See note 104, *infra* and accompanying text. Local ownership structure, reflective of the service area, and integration of ownership and management have been a controlling factor in FCC licensing proceedings. See notes 139 and 140, *infra*. These guidelines are established in the name of the Communications Act's mandate of service for the public interest, convenience and necessity.

46. See, e.g., *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Cf. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), *rev'd sub nom. Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). In an effort to expedite the licensing process, Congress has recently authorized the Commission to employ a random selection process, but one which will ensure that groups which are now insufficiently represented in ownership of broadcast facilities will be given significant preferences. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 §1242(3)(A), 95 Stat. 736-37 (1981). It remains to be seen whether a random system will simplify licensing.

47. Domestically, audience members have standing to participate in the licensing process; this was firmly established in *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), where then Circuit Judge Burger wrote:

Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.

*Id.* at 1002. Judge Burger chided the broadcast industry for failing to grasp, even after fifty years of operation, "the simple fact that a broadcast license is a public trust subject to termination for breach of duty," *id.* at 1003, and says that the Commission can avoid the "clogging" of its dockets by a "host of parties" through efficient administration and application of guidelines.

The need sought to be met is to provide a means for reflection of listener appraisal of a licensee's performance as the performance meets or fails to meet the licensee's statutory obligation to operate the facility in the public interest . . . . [I]ntervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every license.

*Id.* at 1006.

48. Private commercial systems afford the advantages of costless service and greater independence from government, but most appeal to broad, homogeneous cross-sections of the society to be financially viable. Public systems, not dependent upon mass appeal for revenue, afford the advantages of greater program selectivity and diversity, but at the risk of domination by the government or by interest groups influential in the government. See

## VI. PRACTICAL CONSIDERATION AFFECTING U.S. DBS POLICY

U.S. satellite and television program production technology are unrivaled. The U.S. is today the largest exporter of satellite equipment and broadcast programming in the world.<sup>49</sup> Few nations have satellite technology, and many have only rudimentary terrestrial telephone and/or broadcast systems.<sup>50</sup> Clearly, the U.S. would enjoy a wide advantage in the free flow of transborder communication by DBS were an open skies access scheme now adopted. However, this advantage may come at the sacrifice of other U.S. interests at home and abroad. It must be remembered that although few nations today have satellite technology, those industrialized countries which do are making rapid advances in research and development and may soon rival the U.S. for the satellite export market. Industrialized countries are already competitive with the U.S. in the export of broadcast production technology and are gaining in the export of broadcast program material.<sup>51</sup>

If it is in the best economic interest of the U.S. to expand export markets for DBS technology and related production equipment, the U.S. must ask whether such market expansion will more

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note 41, *supra*. Public systems must also maintain a far greater degree of political neutrality than private systems.

Some are skeptical as to whether a sufficiently viable economic base exists to warrant private investment in international DBS programming; see remarks of Harry Olsson reported in Friendly, *The Control of Program Content in International Telecommunications: A Discussion of General Principles*, 13 COLUM. J. TRANSNAT'L L. 40, 61 (1974). Reservation of international DBS assignments would greatly increase economic viability for private investment. See text accompanying note 31, *supra*. Mass audiences have an inherent commercial value to mass producers of goods and services. Each generation of new mass telecommunication technology in the U.S. has resulted in new marketing opportunities. Tourism, air transportation, banking and investment industries may find international DBS audiences especially attractive.

49. UNESCO, INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, MANY VOICES, ONE WORLD: COMMUNICATION AND SOCIETY TODAY AND TOMORROW, 108-09 (1980) [hereinafter cited as MACBRIDE REPORT].

50. *Id.* at 123-34.

51. In satellite technology, Japan, West Germany, France and the Netherlands are producing sophisticated equipment and can successfully compete with the U.S. in a world market. In programming, Britain and Canada have developed export systems, and regional groups such as NORDSAT develop their own programming which, it might be expected, may be exported in the future. If film production is a valid indicator, the U.S. can expect heavy competition from Italy, France, Britain, India and the U.S.S.R., as well as others. See generally BROADCASTING YEARBOOK (1980-1981).



likely occur through cooperation with an international DBS organization or through unilateral U.S. action. The U.S. must also consider whether developing countries entering the DBS market will purchase from the U.S. if the U.S. pursues a policy of unilateralism, or whether they will turn to industrialized countries which are cooperating in international institutional arrangements and have thus embraced DBS policy positions more closely in line with their own.

U.S. leadership in the development of international fixed satellite service (FSS) through its investment in and assistance to INTELSAT provides a remarkable contrast to its stance on DBS.<sup>52</sup>

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52. INTELSAT was established in 1964 by the eleven nations signing the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, Aug. 20, 1964, 15 U.S.T. 1705, T.I.A.S. No. 5646. Open to all ITU members (presently 154 nations), INTELSAT currently consists of 106 member states. INTELSAT is organized in two segments: the space segment, including satellites, telemetry, and so on, owned and operated by the international consortium itself; and the ground segment, consisting of earth stations individually owned and operated by the telecommunications entities of the nations in which they are located. See the COMSAT Study, 77 F.C.C.2d 564, 589-90 (1980).

Although it has been criticized as non-universal (since it includes, for example, none of the Soviet bloc countries) and as overly westernized, and weighted to remain so, see Kopal, *East-West Cooperation in Space Telecommunications: A Socialist Countries' Viewpoint* [sic] in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 99, 102-03 (E. McWhinney ed. 1971), INTELSAT is interesting in several regards. Voting was originally based on investment shares, and has recently been modified to reflect utilization of services as well. Furthermore, INTELSAT regulates itself, unlike U.S. domestic communications entities, which are subject to federal regulation. Finally, while INTELSAT is similar to other international organizations in that it is composed of governmental representatives and uses a treaty or agreement as the basis of its self-regulation, it is completely unlike others in that it "is the only such organization that involves the operation of an enterprise along commercial lines." Snow, *supra* note 43, at 149. Each member is not only an owner, but also a user. INTELSAT's commercial basis posits many interesting questions and concerns; for one thing, commercial operation clearly precludes the provision of services to LDC *gratis* or at reduced rates, since such a decision would be justifiable only on a political, not a profit-making, basis. INTELSAT's primary goal is "efficient provision, technologically and economically, of world-wide satellite communications." *Id.* at 155. "[T]he United States took the initiative in laying the institutional groundwork for an organization to provide . . . public telecommunications by satellite between the United States and other countries." *Id.* at 148. When INTELSAT was formed in 1964, see note 43, *supra*, the U.S. and the U.S.S.R. were the only nations with satellite communications potential; for political reasons the two did not communicate. The U.S., in helping to form INTELSAT, contributed technological expertise as well as more than half of the initial investment costs. *Id.*

U.S. dominance of INTELSAT in these early stages was unassailable: "Space segment procurement was from United States manufacturing concerns and launch services were from NASA." COMSAT Study, *supra*, at 591. U.S. ownership (53%) and management of INTELSAT were determinative of the latter's early development; the U.S. representative to INTELSAT, COMSAT, retained its position as Manager of INTELSAT for the first nine

U.S. policy on FSS has consistently emphasized international cooperation; the result has been rapid development of efficient international FSS service at decreasing cost. The extent to which U.S. policy on FSS has led to an expansion of the FSS export market and has enabled the U.S. to acquire a major share of this market must be considered in the formulation of U.S. DBS policy. U.S. unilateralism with respect to DBS service could result in a stultification of international development and loss of U.S. export opportunities.<sup>53</sup>

The U.S. free flow policy may also disserve domestic economic interests in a stable DBS industry and pose costly and troublesome administrative problems. Many applications have been submitted to the FCC for authority to provide domestic DBS broadcast service.<sup>54</sup> The FCC, in reviewing these applications, must carefully consider the economic impact upon the national broadcast networks, local affiliate stations, program producers and distributors, and of course, the American public. After reaching a decision on the structure of the domestic DBS industry (a process that may take many years and involve complex cost-benefit analy-

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years of the organization, and accordingly shaped INTELSAT's policies and practices to a great degree. Throughout this period of early development, U.S. policy consistently emphasized and encouraged technological growth and expansion of services. Though the U.S. role has diminished considerably, in accession to the 1973 final agreements of INTELSAT, its emphasis on cooperation and development continues. Snow, *supra*, note 43, at 148.

INTELSAT's extraordinary progress in the field of telecommunications satellites in recent years, combining high scientific advances with unexpectedly low financial costs, has been largely the product of United States technological and managerial skill. Without this distinctively American contribution it would be hardly possible to talk seriously today about achieving a global system to telecommunications satellites.

McWhinney, *The Development of an International Law of Communications*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 11, 14 (E. McWhinney ed. 1971).

53. See generally McWhinney, *supra* note 52; Chayes, *Unilateralism in U.S. Satellite Communications Policy*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 42 (E. McWhinney ed. 1971).

54. See *Inquiry into the Development of Regulatory Policy in Regard to Interim Direct Broadcast Satellite Service*, 46 Fed. Reg. 30,124 (1981). Among the fourteen parties with applications on file are several seeking to provide free or pay television directly to the home (for example, COMSAT's Satellite Television Corporation (STC)), several proposing to feed satellite signals to television stations for broadcast into the home (for example, Hubbard Broadcasting's United States Satellite Broadcasting Company), and a few offering to provide high resolution television services (for example, CBS), *BROADCASTING*, July 6, 1981 at 11. The varied service sought to be provided by DBS operators will further complicate the problem of classifying DBS technology within the established communication system. See discussion at note 32, *supra*.

sis and careful balancing of social and economic interests), could the FCC then ignore a foreign satellite service blanketing the U.S.? The specter of pirate satellites, broadcasting without regard to consequences to domestic media, may become as threatening to the U.S. as it now is to other countries.<sup>55</sup> As DBS technology spreads among the nations of the world (which it is likely to do at a much more rapid pace than has been the case for other technologies), it will become increasingly difficult for the U.S. to abide its free flow policy.

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55. The problem of pirate radio broadcasts has plagued several nations over the past half century. Pirate broadcasts are unsolicited, undesirable, and apparently invulnerable to attempts at regulation or termination. "The pirate broadcaster is one who transmits into the territory of a nation from beyond that nation's territorial boundaries and without its authorization." Smith, *Pirate Broadcasting*, 41 S. CAL. L. REV. 769, 770 (1968). (One wonders whether this definition necessarily includes broadcasts proposed under the U.S. free flow policy).

Pirate broadcasts are objectionable for several reasons: they often subvert domestic broadcast policy (e.g., against advertising); they may interfere with established spectrum allocation for other AM or FM radio uses and marine or emergency bands; they may cause economic harm to domestic broadcasters; they may pose problems of tax evasion and copyright infringement; they may create undesirable commercial pressures in the target country; and finally, pirate broadcasts may be morally and/or culturally offensive or objectionable. "At stake is more than a system of national communication, because broadcasting also has the vitally important task of identifying and strengthening cultural entities, regional entities and community loyalties." Canadian Radio Television Commission, *Integration of Cable Television in the Canadian Broadcast System* (1971).

The United Kingdom is among those nations targeted; the unregistered ship *Caroline* has broadcast from international waters off the English coast more or less continuously since the 1930s, and continues to do so today, BROADCASTING, Sept. 1981, despite passage and enforcement of the Act to Suppress Broadcasting from Ships or Aircraft and Certain Marine Structures (Marine Offences Act of 1967). France has also faced unwelcome broadcasting from Radio Europe I, owned by Frenchmen and broadcasting from the German Saar region.

Various efforts have been made, domestically (as stated above) and internationally, to eliminate this problem: the ITU's Radio Regulations art. 7, no. 28 ¶1 prohibits pirate broadcasting; the Council of Europe has classified such activities as illegal, as have the Administrative Council of the European Broadcasting Union and the International Broadcasting Union. The major problems center on questions of jurisdiction—especially if the broadcasts are initiated on the high seas—and enforcement. Neither question has been settled by international law, though the European Convention on Human Rights, art. 10, the Geneva Convention on the High Seas, and the Geneva Convention on the Territorial Sea and Contiguous Zone have all been brought into consideration. In addition, customary international law, at least according to some sources, allows any nation to assert jurisdiction over one in flagrant violation of international law.

No real resolution, and no practicable solution, has yet been reached on the question of broadcast piracy. It may be assumed, however, that as direct broadcasting from satellites becomes the norm, piracy will be more and more broadly practiced, and the need for resolution more pressing. See generally, Smith, *supra*; Hunnings, *Pirate Broadcasting in European Waters*, 14 INT'L & COMP. L.Q. 410 (1965); Price, *supra* note 37, at 44-48.

U.S. exportation of DBS broadcast programming also poses practical problems. It is doubtful whether a U.S. free flow policy would be construed to allow international DBS broadcasters operating from within the U.S. to go unregulated, unlike their domestic counterparts. More likely would be the use of some type of licensing scheme, along the lines of current domestic practice. If a DBS broadcaster must obtain an FCC license to transmit internationally, how is the licensee's performance during the license term to be judged? Would the FCC refuse to consider programming exported to foreign audiences? If foreign programming services were unilaterally reviewed, what standards should the Commission apply? And should foreign citizens receiving exported U.S. programming have the same standing to contest DBS license renewals as U.S. citizens have to contest terrestrial license renewals?<sup>56</sup>

Finally, the U.S. free flow policy may entail political costs and may disserve U.S. foreign relations. Developing nations forced to choose between U.S. and U.S.S.R. policy leads on DBS may be pressed to accept code restrictions as a protection against the threat of foreign DBS programming. In its present form, the proposed U.S.S.R. code applies to all DBS transmissions, including national as well as international service.<sup>57</sup> In addition, the definition of DBS service adopted by the ITU includes both transmission direct to homes and transmission to community reception points for terrestrial relay to homes.<sup>58</sup> Should the present code proposal be adopted, arguably it would apply to purely domestic DBS service and to terrestrial communication links. Such an argument could be used to legitimize outside control of or influence upon domestic communication policy through economic and political coercion.<sup>59</sup>

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56. See discussion of standing, *supra* note 47. In practice, therefore, U.S. free flow policy would argue for the unfettered freedom to communicate, internationally, programming which is subject to domestic regulatory review. This contradiction would be directly attributable to the inconsistency between U.S. domestic and international communications policies. See remarks of Abram Chayes reprinted in Friendly, *The Control of Program Content*, *supra* note 48, at 40-67.

57. The U.S.S.R. proposal seeks to "elaborate principles governing the use by states of artificial earth satellites for direct television broadcasting with a view to concluding an international agreement," U.N. Doc. A/AC.105/117, Annex III (1972), without distinguishing national from international broadcasting.

58. 1976 Edition, Radio Regulations, vol. 1, ITU, Geneva. DBS is defined as a satellite transmitter of "signals [which] are intended for direct reception by the general public." "Direct reception" is then defined as including both "individual reception" and "community reception."

59. An attempt by one state, through military, economic and/or political coercion, to

Just as U.S. insistence upon the absolute right of communication may result in less international communication, the U.S.S.R. insistence upon the absolute right of sovereign prior consent could result in reduced sovereign control of domestic communication.

The U.S. free flow position further exacerbates the plight of developing nations by failing to provide policy alternatives more consistent with their present needs and social and cultural traditions. Many developing nations may well be unwilling or unable to adopt a free flow policy domestically. Should these developing countries seek some consistency between their international and domestic communication policies, and should they be forced to choose between free flow and code restrictions, they might opt for a code for lack of a more suitable model.

Politically, the critical question is not how much communication freedom *ought* ideally to be protected, but how much *can* be protected in light of popular intolerance. For mass communication, domestic or international, to exist there must be popularly accepted limitations upon the right to communicate.<sup>60</sup> The failure to appreciate these political realities in the formulation of U.S. DBS policy could cost the U.S. its leadership position in advancing open communication policies throughout the world.

#### VII. CONSIDERATION OF U.S. DBS POLICY IN INTERNATIONAL AND DOMESTIC CONTEXTS

Although detailed international agreements and fully developed institutional arrangements are not preconditions to the res-

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determine communication policies of another state should be of major concern to the U.S. Any agreement by the U.S. to a prior consent principle for satellite television broadcasting should be sharply distinguished from U.S. policy against interference by one state in the communication affairs of another, a violation of international law and national sovereignty which is forbidden in the U.N. Charter, U.N. CHARTER art. 2, paras. 4, 7, and indeed by *jus cogens*. A principal basis of the prior consent principle is the state's sovereign right to control information flowing within its borders. Although agreement by the U.S. to a prior consent principle would imply affirmation of the independent right of every state to determine for itself its internal and international communication policies, on an issue of this magnitude, the U.S. should seek to avoid misunderstandings through adoption of express clarifying language. As part of a prior consent convention, such language could strongly affirm the sovereign right of every state to determine freely its telecommunication policy without coercion by any other state. Such clarifying language might not have much practical effect on states already subject to foreign control of, or influence upon, their communication channels, but it could well focus attention on the critical distinction between prior consent and state communication sovereignty.

60. See Chafee, Book Review, 62 HARV. L. REV. 891 (1949). Professor Chafee, defending the clear and present danger test then used by the Supreme Court, suggested that the

ervation of international DBS assignments, such reservations depend, preliminarily, on the prospect of some minimal accommodation of policy among the countries of the Western Hemisphere. Until common principles are recognized among states in the Americas, international structural reservations and the benefits of the full communication potential of DBS technology cannot be realized. If such accommodation is to be achieved, the U.S. must inevitably play a major role.

The U.S., however, has deep misgivings regarding modification of its international free flow position. There is, first, concern that modification of the absolute right to receive and transmit information regardless of means and frontiers might be perceived, or publicized, as a compromise by the U.S. of its general human rights principles. Article 19 of the Universal Declaration of Human Rights<sup>61</sup> secures for every person the right to obtain information and to form opinions freely. No nation has more aggressively advanced the individual's right to know, domestically and internationally, than the U.S. The fear is that should the U.S. cooperate with some international institution having the powers of programming review and sanctions—an institution likely to include nations not having communication freedom<sup>62</sup>—this cooperation might be interpreted as endorsing or acquiescing to government control and censorship. Can U.S. international communications policy draw a principled distinction between participation in DBS program controls and commitment to the individual right to obtain and impart information?

The corollary of the individual right to obtain and impart in-

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pursuit of an absolute immunity for public discussion might result in popular pressure for legislation and, ultimately, no immunity. A similar phenomenon could occur internationally.

61. The Universal Declaration of Human Rights, art. 19, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/777 (1948) states:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

See also, International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975 [Helsinki Accord], reprinted in 14 INTL LEGAL MATERIALS 1292, 1315 (1975). Cf., International Telecommunication Convention, Dec. 22, 1952, arts. 29, 30, 6 U.S.T. 1213, T.I.A.S. No. 3266, establishing the right of a state to halt transmission of a private telegram, or to suspend indefinitely any international telecommunication service, which appears dangerous to security or public decency.

62. A recent world press survey indicated that less than one quarter of the nations of the world have a "free press". MACBRIDE REPORT, *supra* note 49, at 19.

formation is the individual right to privacy, and the right to be free from unwanted communications. If this right can be realized only through the mechanism of government,<sup>63</sup> the antagonism between content controls and human rights breaks down; the issue then is cast not in terms of the right of government to control information coming within its borders, but rather in terms of the right of the individual to be free from unwanted communication intrusion. Such a right of privacy has been recognized in U.S. broadcast law in a number of contexts, with courts relying upon the ubiquitous nature of radio and television programming and its entry into the home to support restrictions on programming content.<sup>64</sup> In a recent case dealing with the broadcast of indecent language,<sup>65</sup> the Supreme Court likened the broadcast material to a "nuisance," subject to regulation like air pollution, and strongly affirmed the individual right to be free of obnoxious and offensive broadcasts. If this personal privacy right established in domestic communication law is to be recognized in international policy, the U.S. must agree to some controls upon the flow of transborder communication. U.S. policy on international DBS broadcasting should respect personal privacy rights, as well as advance the principle of freedom of communication.<sup>66</sup>

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63. American communications law evidences a belief that this is true; cases have affirmed the authority, and even the duty, of the legislative and administrative bodies to intervene to safeguard personal privacy. The argument that listeners and viewers can turn off their receiving sets to void unwanted and obnoxious communications coming into their homes has not proven persuasive. See discussion at note 74, *infra*.

64. See, e.g., *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975); *Notice to Trustees of the University of Pennsylvania*, 57 F.C.C.2d 783 (1975); *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964); *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931).

65. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

66. The Supreme Court has also upheld against first amendment attack the use of zoning ordinances to regulate the places at which sexually explicit magazines, books and movies can be distributed. In *United States v. O'Brien*, 391 U.S. 367 (1968), The Supreme Court established guidelines on government restrictions which infringe upon first amendment rights. In *O'Brien*, the Court said such restrictions were permissible if (i) the regulation lay within the constitutional power of the government and furthered a substantial government interest, (ii) that interest was unrelated to the suppression of free expression, and (iii) the restriction of free expression was no greater than was necessary to promote the government interest. 391 U.S. at 377.

In a 5-4 decision the court held in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), that restrictive zoning of adult bookstores did not violate first amendment freedoms so long as the restricting ordinance defined clearly what characteristics were to be considered and so long as alternative access to the market remained available. The government's concern for the public health and safety, *Bayou Landing, Ltd. v. Watts*, 563 F.2d

The U.S. is also concerned that acquiescence to proposed controls on DBS not compromise international press freedom. U.S. DBS policy has been influenced by developments affecting other international communications media. UNESCO's consideration of licensing news journalists<sup>67</sup> and of monitoring news and wire service for balance and distortion<sup>68</sup> has met with strong resistance in the U.S.<sup>69</sup> as well as in other nations committed to a free and pluralistic exchange of expression.<sup>70</sup> Taken in the context of the U.S. record on past matters of the UNESCO agenda, the U.S. is understandably apprehensive that any compromise of the free flow principles on DBS might weaken its position of resistance to controls on other communication media.<sup>71</sup>

Participation by the U.S. in an agency responsible for internationally broadcast satellite programming, however, can be disting-

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1172 (5th Cir. 1977), and its paramount interest in protecting, preserving and improving the character and quality of residential neighborhoods, *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978), justify such zoning. These restrictions, within these guidelines, are not an unconstitutional prior restraint on free speech. See *Metropolitan Board of Zoning Appeals v. Zaphiriou*, \_\_\_ Ind. App. \_\_\_, 376 N.E. 2d 110 (1978).

67. See N.Y. Times, Nov. 23, 1978, at A12, col. 5.

68. The proposal finds its basis in UNESCO's General Conference Declaration of Mass Media (Nov. 22, 1978). Article X states: "2. It is important that free flow and wider and better balanced dissemination of information be encouraged." Both the licensing of journalists and the monitoring of news services are discussed in the MacBride Report, note 49 *supra*, and are supported by many of the proponents of a New World Information Order.

69. U.S. response has been uniformly and strongly negative. It has taken the form of threats of withdrawal from UNESCO (mentioned though not endorsed by Assistant Secretary of State Elliott Abrams) and of a House Resolution, H.R. Res. 142, 97th Cong., 1st Sess., 127 CONG. REC. H2316 (1981), calling on UNESCO to "cease efforts to attempt to regulate news content."

70. "The Declaration of Tallories" was formulated and signed in Tallories, France in May 1981 by representatives of 100 print and broadcast organizations from twenty nations, including the U.S. It is a strong demand to UNESCO that attempts to formulate press rules and to regulate news content be halted in the name of international press freedom, which the Declaration terms "a basic human right." It finds domestic support in H.R. Cong. Res. 137, 97th Cong., 1st Sess., 127 CONG. REC. H2329 (1981).

71. The U.S. often finds itself unable to acquiesce in UNESCO's pronouncements because of concern over infringements of the U.S. Constitution or Bill of Rights. For example, though the U.S. is surely one of the freest members of UNESCO, it has been reluctant or unable to ratify such agreements as those dealing with civil and political rights, International Covenant on Civil and Political Rights, *supra* note 61, and with human rights, Universal Declaration of Human Rights, *id.* Furthermore, the U.S., with its tradition of and insistence upon individual freedoms, is often pitted against UNESCO's and the General Assembly's new majority, which demands satisfaction of social needs; the U.S. serves as a rallying point for the democracies. Theberge, *UNESCO's "New World Information Order": Colliding with First Amendment Values*, 67 A.B.A.J. 714 (1981) expresses cogently the fears of many in the U.S. that there may be no way to reconcile the demands for a New World Information Order with the democratic traditions and principles of a free press.



ished from support for similar regulatory measures with respect to other communications functions. U.S. communication law has sharply distinguished the gathering of news, electronic transmissions from point-to-point, and print dissemination, from broadcast dissemination. The radio spectrum has always been treated as a scarce natural resource far less accessible to the average person than other mass media.<sup>72</sup> And although great advances in electronic mass communication technology have caused some to question the accuracy of this assumption (especially as compared to daily newspapers), the distinctions between the print and broadcast media and between broadcast and point-to-point transmission persist. The well-defined and widely disparate domestic treatment of the broadcaster, newspaper publisher, news gatherer, and point-to-point common carrier would provide firm support for a similar distinction internationally between the DBS broadcaster, newspaper publisher, news journalist, and wire service.<sup>73</sup>

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72. Justice Frankfurter wrote in 1943 that it was important to remember certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.

*National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943) (footnote omitted). Although domestic broadcast regulation has recently been relaxed to reflect the lessening of scarcity of terrestrial outlets, scarcity will continue to mark DBS technology for the foreseeable future. See notes 3 and 15, *supra*.

73. Although vigorous debate continues over the rationale for, and wisdom of, the electronic/print first amendment dichotomy, differential treatment of these two media, deriving ultimately from the public interest obligation imposed on all broadcast licensees by the Communications Act, is firmly established. See, e.g., *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). Broadcast stations are licensed, newspapers are not. Broadcasters are required to be fair and balanced in their coverage of controversial issues; newspapers are not. Broadcasters must afford access to persons attacked; newspapers need not. Sex, violence and indecent material can be banned from broadcasting, but not from books.

The lines of conflict are drawn between the publisher/broadcaster's freedom to communicate and the public's right to know (or to exclude). Limitations on the broadcaster's freedom to communicate have regularly been upheld against first amendment challenge by the Supreme Court and other federal courts of appeal. The Supreme Court has said that although broadcasters do have some first amendment rights, it is the public's "right to know" and to receive suitable access to social, political, esthetic, moral and other ideas which is paramount over the broadcasters' right to disseminate information. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). However, over the same time period that the Court has been affirming restrictions on broadcasters, it has granted new and broader freedoms to news journalists and newspaper publishers. Under no circumstances has the Court permitted a prior injunction against publishing information in a publisher's posses-

Finally, U.S. policy on DBS must be consistent with domestic law and with the constraints imposed upon the federal government by the first amendment to the Constitution. Any modification in this area must be principled and based upon a clear conceptual foundation to avoid undercutting domestic constitutional protections of the highest order.

Traditional first amendment analysis focuses on the prohibition of government intervention in the communication process.<sup>74</sup> This line of inquiry begins by asking what limitations, if any, the first amendment imposes upon government regulation of information.<sup>75</sup> The affirmative theory of the first amendment, which underlies much of U.S. broadcast law, emphasizes the positive responsibility of the federal government to "unclog obstructions in

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sion, even where the information has been unlawfully obtained from the government. *New York Times Co. v. United States*, 403 U.S. 713 (1971). No matter how biased or scornful a newspaper report on a public official may be, the official has no right of criminal complaint, or of access to the paper to respond, and may recover under the civil law only if (s)he can prove the report was both false and published with actual knowledge that it was to be likely untrue. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). And finally, the Court has recently held that the first amendment protects the journalist's right to seek information from public proceedings and papers. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 535 (1980).

74. Domestic law has long grappled with the tension between governmental restraint and communications freedom. Nowhere is the Supreme Court's struggle and uncertain conception of communications freedom better illustrated than in *New York Times Co. v. United States*, the landmark "Pentagon Papers" case, *supra* note 73. Although the ultimate result of the case was that the executive branch of the federal government could not restrain publication of documents unlawfully obtained from federal files, the separate opinions filed by each of the nine Justices reveal widely different understandings of the first amendment and its role in a democratic society. As Chief Justice Burger remarked in his dissent, "Only those who view the first amendment as an absolute in all circumstances . . . can find such a case as this to be simple or easy." *Id.* at 748. Indeed, even the Court's foremost first amendment absolutist, Justice Black, narrowly defined communication and refused to accept competing values to preserve the integrity of his absolutist position. Justice Black believed that the freedoms of press and speech covered only printed and oral communication occurring in a passive context, and he refused to acknowledge a constitutional right of individual privacy to be free of intrusive information gathering and dissemination. The debate over first amendment values among the members of the Court will surely continue and multiply with each new generation of communication technology. However, there are no longer any absolutist justices on the Supreme Court, and the present justices seem inclined to balance carefully competing constitutional values with the first amendment, while remaining sensitive to first amendment interests arising in an array of modern contexts.

75. As applied to international DBS broadcasting, the traditional theory would ask whether the first amendment in any way constrains government regulation of imported and exported programming and if so, whether these constraints are the same as those applied to domestic broadcasting.

the market place of ideas."<sup>76</sup> Under the affirmative theory of the first amendment, government is not only permitted to intervene in the communication flow, but, under certain circumstances, has an affirmative duty to do so in order to broaden dissemination of, and citizen access to, political, social and aesthetic ideas and information.<sup>77</sup> An affirmative first amendment analysis would ask not what the U.S. might do by way of regulating international DBS service, but rather what it must do to provide its citizens with some opportunity for cross-cultural communication. U.S. intransigence on its free flow policy to the extent of excluding international DBS service would be as offensive to the affirmative first amendment theory as a federal government claim of an absolute right to control imported and exported information, unrestrained by the first amendment, would be to the traditional theory. Denial of citizens' access to all cross-cultural communication by DBS, due to insistence upon either an absolute right to communicate internationally or an absolute right to control U.S. international communications, would perpetuate, rather than unclog, current obstacles to an international marketplace of ideas.<sup>78</sup>

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76. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.* at 390.

77. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 653-67 (1970). After describing the current concentration of control and scarcity of access in domestic mass media, Professor Emerson states:

The result is that the system is choked with communication based upon conventional wisdom and becomes incapable of performing its basic function. Search for truth is handicapped because much of the argument is never heard or is heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens and feedback to the government is feeble. The possibility of orderly social change is greatly diminished because those persons with the most urgent grievances come to believe the system is unworkable and merely shields the existing order. Under these circumstances it becomes *essential*, if the system is to survive, that a search be made for ways to use the law and legal institutions in an *affirmative* program to restore the system to effective working order.

*Id.* at 628-29 (emphasis added).

78. Professor Price's excellent paper on the first amendment constraints upon U.S. policy on DBS, see Price, *supra* note 37, describes long-standing international concern over transborder broadcasting, even in nations having strong free speech traditions such as Great Britain and Canada. His analysis begins by asking the extreme question of whether the first amendment imposes any constraint on federal government regulation of the import and export of information; or, in other words, whether the first amendment has application only to communication originated and received within U.S. borders. Professor Price asserts

The affirmative theory, however, does not afford the federal government unrestricted license to control communication flow. Government intervention may not be undertaken for partisan political purposes.<sup>79</sup> Government may not determine truth or falsity of ideas.<sup>80</sup> And government may not dictate the content of broadcast communication.<sup>81</sup> Government intervention under the affirma-

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that this narrow view would make a mockery of the principle of free and fair debate, but finds little judicial support for the contrary position.

After rejecting this minimalist interpretation of first amendment scope, he then considers whether different standards might exist for internal and transborder communication. In the broadcast area, Professor Price cites examples of limitations upon international communications which would be tolerated upon domestic communication: the first, an FCC regulation which restrains broadcasters transmitting internationally from airing programs which reflect adversely on U.S. politics and society, Price, *supra* note 37, at 58, citing 47 C.F.R. § 73.788(a) (1980), and the second, the statutory prohibition against alien ownership of U.S. broadcast stations, Price, *supra* note 37, at 60, citing 47 U.S.C. §310 (1976). Although these constraints upon the export and import of broadcast information have not been squarely tested by the courts, Professor Price suggests that they would be affirmed because of judicial deference to administrative and legislative determinations, especially in the foreign policy field. Likewise, he believes it beyond question that the FCC could regulate imported broadcast signals to insure compliance with domestic law on lotteries, obscenity and, presumably, fairness. Finally, Professor Price cites examples of domestic broadcast regulation (ownership, competition and content) as further support for the proposition that U.S. agreement to and participation in international control of DBS programming would not offend the Constitution nor violate domestic laws. *Id.* at 57-68.

79. After affirming the FCC's chain broadcasting rules as applied to license awards in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), Justice Frankfurter stated for the court:

But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

*Id.* at 226.

The issue did, of course, arise. *See, e.g., National Broadcasting Co. v. FCC*, 516 F.2d 1101, *vacated as moot*, 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976), which involved NBC's broadcasting of the documentary "Pensions: The Broken Promise." The FCC determined that the program violated the fairness doctrine, but the Court of Appeals reversed on the basis that intervention by the FCC was political in nature, going to support certain prospective legislation and to reject other proposals.

80. *Thaddeus L. Kowalski*, 46 F.C.C.2d 124 (1974); *Neckritz v. FCC*, 502 F.2d 411 (D.C. Cir. 1974); *National Broadcasting Co. v. FCC*, 516 F.2d 1101, *vacated as moot*, 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). See also note 79 *supra*.

81. 47 U.S.C. § 326 (1976) states:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

See also *Yale Broadcasting v. FCC*, 414 U.S. 914 (1973) (Douglas, J., dissenting);

tive theory of the first amendment is tested by whether it results in expanded choice, and by whether the public has received a greater array of communication and balance of belief.<sup>82</sup>

### VIII. AFFIRMATIVE FIRST AMENDMENT THEORY AS APPLIED TO DBS PROPOSALS

The affirmative theory, as applied by the courts and the FCC, provides an interesting contrast to the present policy proposals for international DBS service. While the affirmative theory might tolerate the proposed U.S.S.R. code restrictions on DBS regarding such things as pornography, racial hatred and narcotic use<sup>83</sup> (intended to make the programming more generally acceptable, and therefore, of service to a wider audience), it would be offended by

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Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976); Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

82. See, e.g., Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) in which the Court of Appeals overturned an FCC decision to rely on the marketplace to provide competition; the Court said that competition might sometimes be inadequate to this purpose, and that in such cases the FCC had a duty to intervene, e.g. to consider market diversity in its deliberations regarding a format change application. In WNCN Listeners' Guild v. FCC, 45 RAD. REG. 2d (P & F) 1404 (1979), the FCC issued a policy statement establishing its reliance upon market competition rather than agency regulation to provide diversity. The Court of Appeals, in vacating this statement of policy, admonished the FCC that the market may give an imperfect reflection of society's needs, and that the agency should be ready to step in and regulate to promote diversity when necessary. Although the Supreme Court overturned the Court of Appeals and supported the Commission view, strong arguments are found on both sides and the issue may not yet be finally settled. See WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), *rev'd* 450 U.S. 582 (1981).

A discussion articulating the FCC's responsibility can be found in Emerson, *supra* note 77, at 634. Emerson places the burden of proof upon the government proponent of the regulation to establish

(a) that the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that end, and that this objective cannot be achieved by other means; (b) that the regulation does not limit the content of expression; (c) that the regulation operates equitably and with no undue advantage to any group or point of view; (d) that the control is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.

*Id.*

83. 47 U.S.C. § 303(m)(1)(D) (1976) provides that the Commission shall -  
(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee -

. . . .

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning . . . .

See also 18 U.S.C. § 1464 (1976); Palmetto Broadcasting Co., 34 F.C.C. 101 (1963).

direct attempts to determine what does and what does not undermine foundations of local culture and tradition, or misinform the public. For example, although the FCC has sought in its rules to provide an outlet for local community expression, it has attempted to do so by requiring broadcast licensees to research and respond to unique local culture; the FCC does not itself determine the foundations of a particular local culture.<sup>84</sup> Similarly, the FCC may require a broadcast licensee to give a more balanced presentation of a public interest issue, but the manner in which other perspectives are presented and the amount of time allotted these perspectives are within the broad discretion of the broadcaster.<sup>85</sup> The Commission never endeavors to determine truth or falsity, or what is and what is not misinformation.<sup>86</sup>

The affirmative theory also contrasts with the Swedish-Canadian proposal in some respects. The affirmative theory would not tolerate prior restraints or a government's arbitrary per program exclusion of DBS communication under the guise of prior consent. Exclusion would be justified only where a state could show a compelling need to protect the welfare of its citizens, or to promote the development of new channels of communication. U.S. law strives to check *ad hoc* or arbitrary administrative action, especially as it applies to freedom of communication. The FCC has repeatedly refused to engage in detailed inquiries into the daily programming and management decisions of the licensee, and has

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84. See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1973). For cases considering earlier FCC ascertainment policy, see *Brown Broadcasting Co., Inc.*, 9 F.C.C.2d 168 (1967), discussing the need to ascertain local needs and to program to meet them; *Almardon Inc. of Florida*, 16 F.C.C.2d 395 (1969), requiring that applicant survey his service area, set forth and analyze suggestions, evaluate priorities and propose responsive programming; and *Southern Minnesota Supply Co.*, 18 F.C.C.2d 824 (1969), establishing the need to ascertain and meet the needs and interests of the service area.

85. See, *Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964).

86. The 1974 Fairness Report in discussing accurate news reporting stated that it would not be "useful or appropriate [for the FCC] to investigate charges to news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion," *Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, *supra* note 85, at 21. Moreover, deliberate distortion will not prejudice license renewal unless it is shown that the licensee was directly and knowingly involved. See also, *Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650 (1969).

instead reviewed the broadcaster's composite programming record every three years when licenses are renewed to determine overall balance and quality of public service.<sup>87</sup> The Commission has never enjoined the broadcast of a program, nor summarily ordered a licensee off the air.<sup>88</sup> And when the Commission does act, its actions must not be tainted by partisan or political bias.<sup>89</sup> On the other hand, the Commission has acted aggressively on matters affecting the welfare of children, public health and safety, and community morals.<sup>90</sup> The FCC has also intervened in the communica-

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87. "[A]ny approach whereby a government agency would undertake to govern day-to-day editorial decisions of broadcast licensees endangers the loss of journalistic discretion and First Amendment values." *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1119 (D.C. Cir. 1976) (referring to *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)); see also, *Democratic Nat'l Comm. v. FCC*, 481 F.2d 543 (D.C. Cir. 1973). The FCC in granting this broad discretion to the licensee, has stated: "The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate." *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 36 F.C.C.2d 40, 48, 24 RAD. REG. 2d (P & F) 1917 (1972). This policy clearly establishes great agency deference to broadcaster judgment. See *National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1976); see also text accompanying note 92, *infra*.

88. See *Near v. Minnesota*, 283 U.S. 697 (1931).

"[I]ndividual licensees should be free to program as they see fit without judicial interference; . . . neither the F.C.C. nor the NAB should be permitted to interfere with independent licensee decisionmaking." *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1153 (C.D. Cal. 1976). The appropriate remedy in case of "a serious danger that the defendants would ignore" other rulings and guidelines, is not at any rate ordering a broadcaster off the air. Rather, the FCC issues gentle warnings, enforcement letters, and finally, if necessary, cease and desist orders. The sanction of denying license renewal has rarely been used. See D. GILLMORE & J. BARRON, *MASS COMMUNICATION LAW*, 871-73 (3d ed. 1979); 47 U.S.C. §§ 312, 503(b)(1)-(5) (1976).

89. See Justice Douglas' concurrence in *Columbia Broadcasting*: the fear which provided the stimulus for the creation of the first amendment "was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 148 (1973) (Douglas, J., concurring). See also note 82, *supra*.

90. Early on, service "inimical to the public welfare or contrary to the public interest" was denied. *Lottery Cases*, 188 U.S. 321 (1903). *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), denied service found to be against community morals and public interest in that it included religious attacks, obstructed justice, and was sensational rather than instructive or informative. Such denial of license did not violate the first amendment, the court held, since other avenues of expression were freely available. Justice Groner wrote:

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth or innocence by the free

tions flow to nurture the development of new mass communication services and thereby ultimately to expand mass communication outlets.<sup>91</sup>

The U.S. free flow policy shares with the affirmative first amendment theory the goals of promoting communication and protecting the individual's right to be informed. However, there exist substantial conceptual differences between the two. Free flow policy is absolutist and values freedom of communication as an end in itself. Affirmative theory is relativistic and values free communication as a means to achieve popular enlightenment. Free flow seeks the unfettered movement of information, whereas the affirmative theory is equally concerned with the quantity of information and the diversity of sources.<sup>92</sup>

The affirmative theory also suggests international procedural possibilities. Domestically, the affirmative theory depends upon a grand scheme of bureaucratic deference among appellate and trial courts, the FCC and broadcast licenses. Appellate courts are bound to accept the trial court's findings of fact, and may overturn the trial court's decision only if there has been a clearly erroneous application of law.<sup>93</sup> In reviewing FCC decisions, trial courts may

use of words suggestive of sexual morality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests.

*Id.* at 852-53.

Although standards have grown somewhat more lenient, there is still a definite protectionism toward youth, the public health and safety, and community morals. See Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974), *aff'd sub nom.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); Amendment of Part 73 of the Federal Communications Commission Rules with Regard to the Advertisement of Cigarettes, 16 F.C.C.2d 284 (1969); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Yale Broadcasting v. FCC, 414 U.S. 914 (1973); Writer's Guild of America, West, Inc., v. FCC, 423 F. Supp. 1964 (C.D. Cal. 1976).

91. See, United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

92. [T]he greatest distortions in our system of free expression have developed in the mass media, and the efforts to eliminate these distortions have created many of the most difficult and controversial questions. The principal goals of regulation are (1) to create a greater diversity in the expression communicated by the media, and (2) to give a greater number of individuals and groups access to the media. Emerson, *supra* note 77, at 653. See generally, remarks of Professor Abram Chayes and Mr. Harry Olsson in *Control of Program Content*, *supra* note 48, at 40-67.

93. See, e.g., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-36 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler eds. 1973).



not substitute their judgment for that of the Commission, and even where the court may disagree with the wisdom of an FCC determination, it will not reverse the Commission unless the determination was arbitrary, capricious or totally unsupported by the tendered record.<sup>94</sup> And, as noted above, the FCC, in reviewing programming decisions of a broadcaster, may not substitute its judgment for that of the broadcaster, and can apply sanctions only after holding hearings and finding the broadcaster's conduct clearly unreasonable and unwarranted.<sup>95</sup>

Advancement of affirmative first amendment theory in U.S. international communication policy would provide a new alternative to present policy proposals, new prospects for compromise, and a new degree of consistency between domestic and international communications law. Although the first amendment may apply different standards to domestic and international communications,<sup>96</sup> the affirmative theory provides an opportunity to develop an as yet unrealized congruity between domestic and international law on the concept and meaning of freedom of communication.

#### IX. THE COMMUNICATIONS ACT OF 1934 AND THE MACBRIDE REPORT

Previous sections have suggested that it is possible for the U.S. government to participate in some form of international DBS programming review arrangement without compromise of its com-

94. Administrative Procedure Act, 5 U.S.C. § 706 (1976).

[I]ndustry regulation has been entrusted by Congress "to the informed judgment of the Commission, and not to the preferences of reviewing courts." If an agency has "genuinely engaged in reasoned decision-making . . . the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards."

National Broadcasting Co. v. FCC, 516 F.2d 1101, 1122 (D.C. Cir. 1974), *citing* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968), *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 851 (1970).

95. "The FCC's function becomes that of correcting the licensee for abuse of discussion, as our [the court's] function in judicial review is that of correcting the agency for abuse of discretion." *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1120 (D.C. Cir. 1974). *See* 47 U.S.C. §§ 312(c), 506(b)(3) (1976). *See also* notes 79, 87 and 88, *supra*.

96. Because of the foreign policy implications, the first amendment might grant greater policy leeway to the federal government in the regulation of international communication than in domestic communication. Moreover, with respect to international communications, the federal government might have more flexibility to control outgoing information directed at persons not covered by first amendment protections, than to control incoming information directed as U.S. citizens. *See, Comment, Direct Satellite Broadcasting and the First Amendment*, 15 HARV. INT'L L.J. 514 (1974). Although the first amendment

mitment to international human rights and press freedom, and consistent with the first amendment. This section considers more particularly the ways in which accommodation might be reached as to the actual operation of an international DBS organization. The specific concern of this section is with the degree of divergence between the policies embodied in the Communications Act of 1934 as they have been implemented, and the recommendations of UNESCO's International Commission for the Study of Communications Problems (the MacBride Commission), should they be implemented.<sup>98</sup> If the MacBride Commission recommendations are supported by a majority of states at the 1983 RARC, could the U.S. join in a consensus on international DBS regulation consistent with the principles established in the Communications Act and the rules of the Federal Communications Commission developed pursuant thereto?<sup>99</sup>

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does not apply to non-U.S. citizens, its guiding principles might usefully be applied in considering sales of telecommunications technology to other countries, such as the proposed sale of telemetry to ARABSAT.

97. The Communications Act of 1934, *supra* note 17. For background reading on the 1934 Act, and on domestic communications law and policy generally, see M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW (1977 & Supp. 1979); D. GILLMORE & J. BARRON, MASS COMMUNICATIONS LAW: CASES AND COMMENT (1974); D. GINSBURG, REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS (1979); W. JONES, THE ELECTRONIC MASS MEDIA (2d ed. 1979).

98. The "MacBride Commission," the International Commission for the Study of Communication Problems, was established in 1976 by UNESCO Director-General Amadou-Mahtar M'Bow. Headed by Sean MacBride of Ireland, the Commission was comprised of representatives of France, Zaire, Columbia, the U.S.S.R., the U.S., Indonesia, Tunisia, Japan, Nigeria, Yugoslavia, Egypt, the Netherlands, Chile, India and Canada. Its purpose was "to undertake a review of all the problems of communication in contemporary society seen against the background of technological progress and recent developments in international relations with due regard to their complexity and magnitude." MACBRIDE REPORT, *supra* note 49, at xiv.

The culmination of the Commission's two years of work is its publication MANY VOICES, ONE WORLD, *id.* The report suggests the establishment of a New World Information Order, a proposal which has met with passionate and varied response worldwide. More important, the study provides an invaluable collection of materials drawn from reports and position papers submitted by national, regional, international, and private entities and reflecting professional, academic and political views on every aspect of communications from technology to policy. Because it draws together information and views from a multiplicity of sources and clearly reflects the developing balance of interests in UNESCO, the Report is a seminal and invaluable source.

99. It should not be assumed that there is a high degree of consensus on the recommendations of the MacBride Report. The Theberge article, *supra* note 71, warns that UNESCO efforts to implement the MacBride Report suggest that Western biases are likely to be replaced by those of the Soviet Union and other antidemocratic nations. Popular reviews of the MacBride Report in the U.S. press, led, as in many domestic first amendment

The policies established by the 1934 Congress in the Communications Act addressed questions of both industry structure and programming service.<sup>100</sup> The structural policies rested upon a congressional declaration that the electromagnetic spectrum is owned by the citizens of the U.S. Congress mandated that broadcasting services be allocated by the FCC equitably among the several states of the U.S.,<sup>101</sup> that the FCC encourage the most efficient and effective development of new communication technology,<sup>102</sup> and that broadcast licensees operate in the public interest.<sup>103</sup>

The content regulations settled upon by Congress rested on the proposition that the electromagnetic spectrum is a scarce natural resource and that broadcasting is an inherently limited technology.<sup>104</sup> As has been frequently stated by the courts, Congress recognized that if everyone had a right to broadcast, the rights would be worthless and the public would lose the benefit of broadcast technology. Therefore, government must allow some persons access to broadcast technology while disallowing others. However, those awarded the right to broadcast are not to hold these rights for personal or selfish purposes, but as public trustees responsible to the citizens in their city of license.<sup>105</sup> This

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issues, by the New York Times and Washington Post, have been uniformly and unreservedly critical. See note 69, *supra*.

U.S.S.R. reaction to the final text of the Report has been equally negative. Mr. Sergei Losev, the U.S.S.R. representative on the MacBride Commission, set forth his concerns in the *General Comments*. Mr. Losev criticized the Commission for discussing too widely the right to communicate and for being caught up in the "old-fashioned and used trite formulas such as the notion of a free flow of information." MACBRIDE REPORT, *supra* note 49, at 279. Mr. Losev asserts that these rights have never gained international recognition, nor recognition in any of the countries represented on the Commission, obviously including the U.S. He concludes that the Report is too westernized and that it erodes the position of developing countries by underplaying the role of Western mass media in damaging national cultures. *Id.* at 279-80.

In fact one of the greatest strengths of the MacBride Report, its unification of diverse viewpoints and information sources, also results in its greatest shortcoming. Sean MacBride apologizes for the Report's superficiality and the necessity of lumping together issues and viewpoints more validly considered individually. Such is certainly the case when considerations of press freedom fail to distinguish between print and broadcast media.

100. 47 U.S.C. § 301 (1976).

101. 47 U.S.C. § 307(b) (1976).

102. 47 U.S.C. § 303(g) (1976).

103. 47 U.S.C. §§ 307(a), (d), 309(a), 310, 312 (1976).

104. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 211 (1943); and *RCA Global Communications, Inc.*, 56 F.C.C.2d 660 (1975).

105. There is nothing in the First Amendment which prohibits the Government

public trustee concept is the foundation of broadcast content regulation in the United States.

The policies of the Communications Act are echoed in the MacBride Report General Recommendations. The MacBride Commission urges that the geostationary orbit is a scarce natural resource, that it is beyond private and sovereign appropriation, and that its development must be for the common good of all persons.<sup>106</sup> The MacBride Commission insists that access to the geostationary orbit and DBS technology be enjoyed equally by all states and that those engaging in DBS operations not do so solely for partisan, national or financial purposes.<sup>107</sup>

Similarity between the policies of the Communications Act and the recommendations of the MacBride Report should not be surprising, since the 1934 Congress and the MacBride Commission faced similar sets of technological and political constraints, albeit one with terrestrial technology and the other with space technology. In both instances the new technology required a high degree of centralized coordination and had to be implemented over a large land mass containing multiple political units. In both instances the new service would affect people from diverse regions having different local needs, interests and tastes. Both the 1934 Congress and the MacBride Commission appreciated the great educational and entertainment potential of the new technology, as well as the risks of political abuse. And both explicitly recognized the need for some compromise of the absolute right to communicate by the new technology as a practical condition precedent to its implementation. Given these policy similarities between the Communications Act and the MacBride Report recommendations, one would expect that domestic administrative rules and initiatives might be responsive to certain of the MacBride Commission's concerns.

#### *A. Narrowing the Communication Gap Between Rich and Poor*

A fundamental theme of the MacBride Report is the need to eliminate among individuals and nations the gross material in-

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from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

106. MACBRIDE REPORT, *supra* note 49, at 12-13.

107. *Id.* at 10, 96-99, 152-55, 260.

equalities which threaten international peace.<sup>108</sup> The MacBride Commission believes that widely unequal access to communication technology perpetuates material disadvantage and dependency; thus the Commission recommends the development of new communication opportunities as a principal means of promoting independence and self-reliance.<sup>109</sup> The U.S. has sought to reduce disparities in access to communication technology based on wealth. The FCC has long attempted to provide parity of broadcast service between rural and urban communities and between small and large cities through various schemes of cross-subsidization and licensing preferences.<sup>110</sup>

The FCC has confronted problems of urban income disparity in formulating rules for the wiring of major cities for cable television. The FCC was rightly concerned that cable television companies, if left to their own choice, would wire the more affluent, and disregard the poorer sections of the city. The FCC sought to avoid this inequality by requiring review of cable installation plans and timetables before granting franchises, and by offering positive financial incentives to companies wiring disadvantaged areas on an equivalent priority basis.<sup>111</sup> The FCC, followed by state government agencies, has also sought to increase equality of access to cable television technology by requiring cable franchisees to provide studio production facilities and channel time, without cost and on a nondiscriminatory basis, to all persons and groups in the community.<sup>112</sup>

Less often appreciated but arguably the greatest source of wealth equalization with respect to mass communication services is the zero cost of broadcast programming. Broadcasting in the U.S. today is free, a public good available to rich and poor alike. No program production tax is levied upon the sale of television

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108. See generally, MACBRIDE REPORT, *supra* note 49, at 96-111, 123-34, 253-72.

109. *Id.* at 254-58.

110. G. GROSS & J. HERRING, TELECOMMUNICATIONS: ECONOMICS AND REGULATIONS 326 (1936); L. JOHNSON, *Communication Satellites and Telephone Rates: Problems of Government Regulation*, Rand Memorandum RM-12845-NASA, 14, 28 (1961); Policy Statement to Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190 (1965); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977).

111. 47 C.F.R. § 76.31(a)(2) (1980).

112. Cable Television Report and Order, 36 F.C.C.2d 143, *rev'd by FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). See also, Channels and Facilities for Locally Originated Educational and Public Service Programming, Docket No. 90174 (New York Commission on Cable Television).

equipment, nor are direct or indirect charges levied for the reception of service. The primacy of free broadcasting in the U.S. communication system has often been affirmed.<sup>113</sup>

The miracle of costless broadcasting, an essential element of education and entertainment in contemporary U.S. society, results from reliance upon commercial sponsorship to finance production costs. Reliance upon a private capital base to finance U.S. broadcast services has not resulted in wealth discrimination with respect to use and enjoyment, but rather has allowed for shared access and experience across all income divisions. In contrast, programming by the public broadcasting system in the U.S. has been widely criticized on behalf of low income and minority persons. It is claimed that public broadcasting is elitist, that it programs exclusively for upper middle class audiences, and that it is a government subsidy to the rich.<sup>114</sup>

Domestic experience with regard to commercial broadcasting is therefore directly at odds with the bias of the MacBride Report against the private sector. The MacBride Commission found that "[t]he social effects of the commercialization of the mass media are a major concern in policy formulation and decisionmaking by private and public bodies," and recommended that "[i]n expanding communication systems, preference should be given to noncom-

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113. See, e.g., Cable Television Report and Order, 36 F.C.C.2d 143, 164-65, *rev'd by* F.C.C. v. Midwest Video Corp. 440 U.S. 689 (1979). See also Wiley, *Introduction, Communications Law: Policy and Problems*, 61 VA. L. REV. 465, 468 (1975).

114. The dissatisfaction has been cogently expressed by FCC Commissioner Benjamin L. Hooks, who wrote in his dissenting opinion in Puerto Rican Media Action and Educational Council, Inc., 51 F.C.C.2d 1178 (1975):

By styling itself, preponderantly, as a Harvard liberal arts course, public broadcasting has forsaken those less privileged and influential whose cultural and educational needs are far more on a "street academy" or community college scale. . . . Public television, without the legal or moral right to do so, has become the Caucasian intellectual's home entertainment game.

*Id.* at 1199 (footnote omitted). The reasons for public broadcasting's failure, or partial failure, to meet its mandate of local and minority service are complex, but one major cause is the lack of money. Federal funding cutbacks begun under the Nixon Administration will be intensified in the Reagan Administration. Program choices are constrained by inadequate budgets; locally-owned and land grant college-based public broadcasting stations can't afford to undertake programming themselves, but must acquire it from centralized sources via auction. See note 41, *supra*. It should not be assumed that such purchase of a program is necessarily a good indication of its popularity or desirability: for example, in the 1974-75 season programming auction, "[a]fter several rounds of bids, the top choice turned out to be *Japanese Film Festival*, apparently because it was one of the least expensive offerings." S. HEAD, *BROADCASTING IN AMERICA* 188 (3d. ed. 1976). See also, Chapman, *Down with Public Television*, HARPER'S, Aug. 1979, at 77.

mercial forms of mass communication."<sup>115</sup> While few would deny the need for some noncommercial mass media in society, the benefits derived from commercial mass media should not be underestimated, nor should its adverse societal impact be overestimated. Mr. Elie Abel, the U.S. representative on the MacBride Commission, commented that "[a]t no time [had] the commission seen evidence adduced in support of the notion that market and commercial considerations necessarily exert a negative effect upon communication flows."<sup>116</sup> He further asserted that the MacBride Commission is aware of the benefits of an independent media, and that "market mechanisms play an increasingly important role [in the media] today even in so-called planned economies."<sup>117</sup> Mr. Abel cited support of courageous journalism as a benefit of commercial mass media; he could also have added the wealth equalization to which commercial media has contributed.

#### *B. Control of Commercial Content and Private Access to DBS Technology*

Reliance upon a private capital base and commercial sponsorship to finance DBS programming services is possible without ignoring the MacBride Commission's concern over the commercialization of the mass media and the potential for private abuse. U.S. domestic law has also addressed these concerns. Historically, commercial speech has been subject to far greater government regulation in the U.S. than has political or other speech.<sup>118</sup> This difference in the degree of first amendment protection has been justified by proposing a basic distinction between communication for the purpose of pecuniary profit and exchange of money, and communication for the purposes of intellectual provocation or the exchange of ideas.<sup>119</sup> While recent Supreme Court cases suggest a

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115. MACBRIDE REPORT, *supra* note 49, at 260.

116. *Id.* at 260 n.1.

117. *Id.*

118. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

119. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech . . . . Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction

narrowing of the gap between commercial and political speech, with commercial speech receiving greater protections than formerly, important distinctions allowing time, place and manner regulation of commercial speech, especially broadcast, persist.<sup>120</sup>

Paid commercial broadcast advertisements are subject to both FCC and Federal Trade Commission (FTC) scrutiny.<sup>121</sup> The FTC monitors the accuracy and truthfulness of broadcast advertisements and has the power to ban misleading commercials and to compel sponsor retraction of false claims.<sup>122</sup> The FCC has largely been concerned with problems of excessive commercialization by broadcast stations<sup>123</sup> and broader public interest concerns regarding the content and conduct of broadcast advertising. For example, the FCC, and later Congress, prohibited the broadcast of cigarette advertising;<sup>124</sup> and the Commission has studied at length the problems of advertising associated with children's television pro-

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on advertising is incidental to a valid limitation on economic activity.

*Id.* at 388-89. These remaining discrepancies in constitutional status are premised upon the assumption that commercial speech, since it is motivated by pecuniary profit, is more "hardy" than political speech and, therefore, less likely to wilt in the chill of government regulation.

120. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), where the Court discusses the permissible time, place and manner restrictions on advertising by attorneys and states that "the special problems of advertising on the electronic broadcasting media will warrant special consideration." *Id.* at 384. See also *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

121. See *Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising*, 32 F.C.C.2d 396 (1961); *Westinghouse Broadcasting Co.*, 27 RAD. REG. 2d (P & F) 670 (1973); W. JONES, *ELECTRONIC MASS MEDIA*, 276-79 (2d ed. 1979).

122. See *Licensee Responsibility*, *supra* note 121, at 400, 404, 405; *FTC Statement on Broadcast Ratings*, 1 F.C.C.2d 1078 (1965); *K Mart Enterprises, Inc.*, 3 TRADE REG. REP. (CCH) ¶ 20,661 (1974); *Warner-Lambert Co. v. Federal Trade Comm.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

123. See *AM-FM Program Forms*, 30 Fed. Reg. 10,195 (1965); *Television Program Forms*, 31 Fed. Reg. 13,228 (1966), suggesting a maximum of 18 minutes per hour of commercial messages for AM and FM and a maximum of 16 minutes per hour for TV. In reliance upon competitive market forces to check excess commercialization, the FCC eliminated the guidelines as to AM and FM in its recent Radio Deregulation rules, *supra* note 18. The guidelines as to TV continue to apply. See *WNJU-TV Broadcasting Corp.*, 57 F.C.C.2d 394 (1975). In addition, FCC rules delegating authority to the Broadcasting Bureau include guidelines on the percentage of broadcast time to be devoted by television to non-commercial, non-entertainment programming. 47 C.F.R. § 0.281(a)(8) (1980).

124. "After January 1, 1971, it shall be unlawful to advertise cigarettes in any medium of electronic communication subject to the jurisdiction of the F.C.C." *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. § 1335 (1976). The constitutionality of the prohibition was upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972).



gramming and has prohibited practices which tended to confuse the programming and commercials in the child's mind.<sup>125</sup>

Similar safeguards would be necessary if there is to be private commercial access to DBS technology. Inquiry by an international organization into the commercial advertising practices which a private applicant proposes to follow, both as to the types of commercial messages to be presented and the manner of presentation, would clearly seem appropriate. Applicants limiting commercial messages to announcements of support for program funding, or to institutional advertising to promote national, firm or industry goodwill, might be preferred over applicants proposing product advertising. There might also be selectivity as to the particular products to be sold via DBS service. Review of the accuracy and the truthfulness of DBS advertisements and the authority to ban misleading commercials and/or to compel sponsor retraction would clearly be necessary.<sup>126</sup>

Additionally, the MacBride Report recommends consideration of ways to reduce the influence of commercial mass media on national and international political processes.<sup>127</sup> U.S. communication

125. See Children's Television Report and Policy Statement, *supra* note 90.

On the basis of the information gathered in the course of the Commission's inquiry, it has become apparent that children, especially young children, have considerable difficulty distinguishing commercial matter from program matter . . . . Special measures should, therefore, be taken by licensees to insure that an adequate separation is maintained on programs designed for children.

*Id.* at ¶¶47, 49.

126. See notes 121 and 122, *supra*, and accompanying text. It may be very difficult, however, to go beyond this degree of regulation by applying, for example, fairness doctrine concepts to balance product advertisements. At one point, the FCC flirted with the imposition of the fairness doctrine on broadcast product advertisements on the theory that commercials invariably emphasize only the positive aspects of a product, and the public has a right to know the negative aspects as well. Because every product has some negative aspects to someone, the Commission received a host of requests for enforcement against varied products. The definitional and administrative difficulties inherent in the attempt to balance the positive and negative aspects of every broadcast commercial caused the Commission to redefine its position and limit the fairness doctrine to paid announcements presenting an express editorial opinion on a contemporary issue. Handling of Public Issues Under the Fairness Doctrine, *supra* note 85, Part III (Application of the Fairness Doctrine to the Broadcast of Paid Announcements), ¶60. The FCC's reconsideration of the fairness doctrine as applied to paid announcements was upheld in *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

The Commission was also unwilling to adopt an FTC proposal providing access for purposes of counter commercials, *Matter of Handling Public Issues*, Part III, *supra*, ¶72. See also *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977).

127. MACBRIDE REPORT, *supra* note 49, at 260.

policy has been sensitive to political and propaganda use of commercial access to television, and has sought to limit the use of television by commercial entities for purposes other than consumer product sponsorship and promotion of company good will. Paid commercial editorials ("aditorials") trigger the fairness doctrine and subject broadcasters to regulatory oversight.<sup>128</sup> For this reason, the three major U.S. networks have uniformly refused to accept paid editorial announcements by commercial entities. Indeed, even official political parties have no right under U.S. law to purchase broadcast time to air their views. The Supreme Court had held, in a case involving the Democratic National Committee, that the national television networks can refuse to sell air time for general political advertisements and that nothing in the Communications Act of 1934 nor the first amendment grants a right of access to political parties.<sup>129</sup> In the opinion, Chief Justice Burger straightforwardly addressed the inequalities inherent in a right of paid political access to the broadcast media. The Court found that under such a scheme, the wealthy would have far greater opportunities than the poor to advance their views and establish political agendas, and that governmental attempts to devise compensatory schemes would involve cumbersome and intolerable involvement in daily broadcast programming.<sup>130</sup> The Court concluded that the public right to know was better served by requiring broadcast licensees to be fair in their coverage of issues, rather than by allowing a right of access for a select few persons to present their views.<sup>131</sup> Similar limitations upon access by commercial and political entities to DBS technology under a private system would seem appropriate.

*C. Promoting Diversity and Choice in the Content of Communication*

Another major concern of the MacBride Report is that the

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128. Part III (Application of the Fairness Doctrine to the Broadcast of Paid Announcements, Editorial Advertising), *supra* note 126. See *Wilderness Society*, 30 F.C.C.2d 643 (1971), applying the fairness doctrine to paid commercial messages by ESSO on the need to develop Alaskan oil reserves and the lack of environmental damage.

129. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See generally, *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209 (1978).

130. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-21, 127 (1973).

131. *Id.* at 122-27.

mass media be responsive to the unique needs and interests of minority groups. The Report states:

Diversity and choice in the content of communication are a precondition for democratic participation. Every individual and particular groups should be able to form judgments on the basis of a full range of information and a variety of messages and opinions and have the opportunity to share these ideas with others. The development of decentralized and diversified media should provide larger opportunities for a real direct involvement of the people in communication processes.<sup>132</sup>

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132. MACBRIDE REPORT, *supra* note 49, at 266-67. It is important to note here that ongoing attempts are being made, with varying degrees of success, to meet this need. The Report mentions several regional cooperatives or news services, including CANA in the Caribbean and PANA in Africa, which have recently been organized or instituted. Others in the planning stages include an Asian network, a Latin American Feature agency and a network involving the oil-producing countries and dealing primarily with problems and prospects in worldwide energy development. *Id.* at 85-86.

LDC's are beginning to pool their resources for practical reasons as well as in furtherance of their goal to create a more balanced information flow. Communications undertakings require increasingly complex technology. Resources are pooled to acquire equipment, to train personnel (for example technicians, legal staffs, foreign correspondents and editors) and to secure satellite potential.

There are also established and successful alternative international news services; the News Agency Pool of Non-Aligned Countries (Pool) and the Inter Press Service (IPS) have made gains and continue to develop. IPS, formed in 1964, is headquartered in Rome and includes regional (language-based) centers in Bogota, London and Tunis, and IPS Third World, centered in Panama. IPS included (as of 1978) eighteen national news services, and drew stories from a wealth of other (non-national) sources including the UN (and various of its agencies), the Pool, the World Council of Churches, and so on. The emphasis of IPS reporting is on continuing process rather than spot event; IPS stories are longer than conventional news stories and provide in-depth coverage rather than (or in addition to) instant news. IPS seeks to develop

[n]ew approaches to types of information to be transmitted . . . [because] news of the social process is in short supply in stories of the traditional agencies. . . . IPS is trying to develop a kind of journalism "which focuses directly on the processes of development . . . to provide systematic and procedural coverage of the successes and problems of development in the various Third World countries."

Hester, *Inter Press Service: News For and About the Third World*, in *THIRD WORLD MASS MEDIA: ISSUES, THEORY AND RESEARCH* 83, 89 (1979), quoting Harris, *The International Information Order: Problems and Responses*, Research and Information Unit IPS (January 1979).

The Pool was formed in 1975 and three years later included more than fifty nations. Its focus, like IPS', is basically upon development within its service area. Pool's objectives include increasing cooperation and understanding among non-aligned and lesser developed nations, and eliminating dependence on established news services. (The charges of "cultural imperialism" to which Western journalists react with such outrage are leveled, it should be mentioned, just as squarely at TASS as at UPI, AP and Reuters).

Although the Third World would like to turn the one-way news and information flow into a balanced flow, there are clearly obstacles to the use by Western news services of the

Mentioned in the Report as deserving of particular consideration were the concerns of children, youth, and national, ethnic, religious and linguistic minorities.<sup>133</sup>

Again, U.S. domestic law has addressed the same concerns and has sought to stimulate programming reflective of, and responsive to, minority life and needs. Chief Justice Burger has been a leading force in this area as well. In a landmark decision, which he rendered prior to his appointment to the Supreme Court, he held that private citizens and groups have standing (a right to participate and be heard) in hearings before the FCC and the courts to contest the renewal of broadcast stations' licenses.<sup>134</sup> The case, which involved complaints of racial discrimination against a Mississippi television station, became precedent for many other minority groups to redress grievances against radio and television stations. Faced with the mutually unattractive prospect of pro-

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stories provided by IPS, the Pool and other such organizations. First, while it has been charged that the developed countries simply don't care about the problems and concerns of LDCs, since their audiences are viewed simply as purchasers of a commodity (news), it has been maintained that very little foreign news, from whatever nation at whatever level of development, is included in domestic services. See remarks of M. Masmoudi and E. Abel, MACBRIDE REPORT, *supra* note 49, at 147 n.3, 148 n.2.

Second, the nature of this news itself discourages such exchange. News which is politically engendered and/or is edited and designed to convey a certain impression or viewpoint is not likely to find a warm reception from news services and audiences which seek unbiased and factual reporting. It may be "that a balanced flow of news is an unrealistic expectation, and that internal restrictions on views in the Third World is an important (and Western) explanation for a paucity of serious and vital news flowing to the West." Merrill, "The Free Flow of News" and "Western Communication Imperialism": *Divergent Views on Ethical Issues*, in THIRD WORLD MASS MEDIA: ISSUES, THEORY AND RESEARCH 27, 41 (1979). Government-sponsored news reporting may simply contrast too starkly with the kind of investigative, sometimes anti-government, journalism to which many developed nations have become accustomed.

A third and related obstacle is the format of the news stories. The IPS/Pool emphasis on process is arguably necessary and even laudable, but Western audiences may not have the interest or desire to follow sustained, developmental journalism about areas and concerns in which they are not involved. "Spot coverage" as developed by Western news service probably responds to audience desires; the longer and in-depth stories from IPS or the Pool may fail to appeal simply because of format.

Finally, although the gap is rapidly narrowing, the technical quality of programs prepared by smaller, less sophisticated services may be partly responsible for the reluctance of the established international services to carry such programs.

Whatever the causes, it is clear that although the Third World news services offer an important and valuable alternative to the established international services, a truthful and truly balanced flow from genuinely diverse sources is not yet a reality.

133. MACBRIDE REPORT, *supra* note 49, at 168-69, 188.

134. United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

longed litigation, broadcasters and minority citizen groups frequently reach accommodation of interests through private negotiations.<sup>135</sup> Some of the major concerns which have been addressed in this ongoing dialogue include underrepresentation and stereotyping of groups in programming and inattentiveness or insensitivity to minority cultural values.

Other interest groups with more diffuse aims have also benefited from the liberalization of the standing rules. Groups concerned with the quantity and quality of children's television programming,<sup>136</sup> with avoidance of sex and violence during family viewing hours,<sup>137</sup> and with the spread of spiritual or sectarian messages have all received favorable forums in the Commission and the courts.<sup>138</sup>

The FCC licensing policies also reflect concern for minority needs and interests by seeking to increase minority ownership of broadcast stations through the provision of preferential tax treatment of transfers to minority-controlled corporations.<sup>139</sup> The Commission has sought further to stimulate diverse program service by granting license preferences to Black and foreign language radio formats in certain markets.

In these respects, U.S. domestic broadcast policy has embraced and encouraged the MacBride Report objectives of democratization of communication and the removal of obstacles to an open communication process and a free interchange of ideas, information and experience among equals, without dominance or discrimination. The absolutist position asserted by the U.S. in inter-

135. See *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42 (1975).

136. See *Children's Television Report and Policy Statement*, *supra* note 90.

137. See *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418 (1975).

138. Religious programming poses special problems for the Commission. See Cox, *The FCC, the Constitution and Religious Broadcast Programming*, 34 GEO. WASH. L. REV. 196 (1965); Lacey, *The Electric Church: An F.C.C. - "Established" Institution?* 31 FED. COM. L.J. 235 (1979); Loevinger, *Religious Liberty and Broadcasting*, 33 GEO. WASH. L. REV. 631 (1965).

139. See, e.g., *Statement on Policy of Minority Ownership*, 68 F.C.C.2d 979 (1978); *Clarification of Distress Sale Policy*, 44 RAD. REG. 2d (P&F) 479 (1978). The FCC has also cooperated with the Equal Employment Opportunity Commission to encourage affirmative action programs for employment of minorities. See 47 C.F.R. § 73.2080 (1980). Licensee performance under affirmative action programs is considered in conjunction with applications for license renewals. See *EEO Processing Guidelines*, 47 RAD. REG. 2d (P&F) 438 (1980). See also note 45, *supra*.

national forums is not only at wide variance with its own domestic policies, but in the long run may work against the U.S. interest in increasing transborder communication. The choice before the U.S. may be either to insist on the absolute freedom to communicate, in which case there may be no international DBS service, or to modify its policy and agree to popular controls not inconsistent with its domestic policies,<sup>140</sup> in which case the people of the Western Hemisphere might for the first time share in the common cultural experience of broadcasting.

### X. CONCLUSION

This article advances a principle of fairness as an alternative to the polar positions of free flow and prior consent over international satellite radio and television transmission, with specific reference to the upcoming 1983 Regional Administrative Radio Conference of Western Hemisphere countries to determine international DBS policy. Under the fairness principle, transborder satellite broadcasting would be both promoted and controlled by multinational public and private institutions. Although some prior consent would still be required under the fairness principle, countries would give their consent at the time they entered into international institutional arrangements to regulate DBS programming, thus avoiding the problems of unilateral and per program censorship. It is concluded that adoption of the fairness principle by the U.S. in international DBS negotiations would be fully compatible with domestic constitutional values and administrative regulations, that the fairness principle has unique advantages as compared with the other proposed policies for DBS, and that it offers the most promising route to implementation of transborder satellite communication in the Western Hemisphere.

The fairness principle represents a common law, rather than code, approach to the problems of international DBS service and is

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140. See remarks of Abram Chayes in *Control of Program Content*, *supra* note 48, at 40-67.

[W]e have all departed a long way from the free flow of information concept as an absolute principle and we are talking practicalities. All of us have a somewhat different view of practicality, but I think it is time to go back to what . . . is the best strategy for increasing the free flow of information. . . . Is it to try to impose our moral absolutist view all around the world? Or is it to try to get something going that we can expand and build up?

*Id.* at 65.

more easily implemented on a regional level. Nonetheless, agreement among Western Hemisphere countries on the objectives and institutional arrangements necessary for commencement of trans-border broadcasting will take time and is unlikely to be achieved by the 1983 RARC. This lag in consensus is particularly troubling, since any initial structural or operational decisions made at the 1983 RARC regarding DBS service may, like initial decisions regarding other mass communication technology, have an enduring impact and preclude future policy options. For this reason it is suggested that some orbital assignments and transmitting frequencies be reserved expressly for international DBS service to the people of the Americas at the 1983 RARC. Structural reservations for international DBS service would not only protect cross-border communication from foreclosure by national interests, but would also serve to spur creative collaboration to utilize these resources.

The potential of international DBS radio and television to advance common understanding and respect among people of different nations and cultures is great. Each generation of mass communication technology, from the advent of AM radio, has expanded social communities and produced new appreciation of the common needs and interests of people. With DBS technology, we are poised on the threshold of international communities and the realization of a better world order. Indeed, fulfillment of our present technological potential for cross-cultural communication may be our best hope to avoid military confrontation. Why then, with the opportunities so rich and the alternatives so grave, have the nations of the world made so little progress in almost a quarter of a century toward accommodation on DBS policy? It would seem that there is a deeply felt concern (if not a fear) shared by developed and developing nations alike over the long term impact of radio and television. No country can be certain of how modern mass communication systems will affect social and political structures, or of how people possessed of more information and freedom of choice will choose to organize their society and to interact in the global community. On another level, there may also be an individual ethical uncertainty which has undermined accommodation. Morality, after all, has meaning only in the choices of free and informed men and women. No one can be certain of the moral code by which free persons will exercise their freedom in the future.

These governmental and individual uncertainties are easily understandable and have been present at each stage of mass communication development. Solutions to these obstacles in the past have come not so much from political negotiations as from a shared faith in the future—faith in the promise of the technology and faith in the common sense and compassion of people in the utilization of new communication resources. Of all the nations of the world, the U.S. should have confidence in the future of telecommunications technology and faith in freedom of information and individual choice.