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# Radio for the 1990s: Legal Strategies in an Emerging Global Marketplace

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## SPECIAL FEATURE

# RADIO FOR THE 1990s: LEGAL STRATEGIES IN AN EMERGING GLOBAL MARKETPLACE

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I.	INTRODUCTION .....	378
II.	THE CURRENT TECHNOLOGICAL STAGE .....	381
	A. <i>Amplitude Modulation</i> .....	381
	B. <i>Frequency Modulation</i> .....	383
	C. <i>Satellite Distribution</i> .....	383
	D. <i>Digital Technology</i> .....	385
III.	THE GLOBAL MARKETPLACE .....	387
	A. <i>The United States</i> .....	388
	B. <i>Europe</i> .....	390
	1. <i>England</i> .....	391
	2. <i>France</i> .....	392
	3. <i>Eastern Bloc Nations</i> .....	393
	C. <i>Asia and Latin America</i> .....	395
IV.	INTERNATIONAL REGULATORY REGIME .....	396

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A. <i>International Telecommunications Union</i> .....	397
B. <i>World Administrative Radio Conferences</i> .....	398
C. <i>European Regulation</i> .....	400
D. <i>International Licensing Societies</i> .....	401
V. GUIDELINES FOR THE FUTURE .....	402

## I. INTRODUCTION

As our world, with all of its cultural and ethnic diversity, moves towards the twenty-first century, multi-faceted international communications will enable us to create a global village. The communications revolution that we are now experiencing is a direct result of advances in high technology. These advances offer instantaneous penetration of a worldwide market of viewers and listeners at an economically marginal cost. This emerging marketplace, coupled with the new presence of private commercial broadcasting in Europe and Asia, presents an enormous economic opportunity for the private sector. Nevertheless, this opportunity creates an equally challenging task for the international legal community—effective regulation of this paradigm.

In order to appreciate the size of the international broadcast industry, one must visualize the United States market, the dominant communications market for the past seventy-five years. In the United States, there are approximately ninety million homes with televisions, 53% of which are linked to cable systems.<sup>1</sup> Radio appeals to a major market of listeners, while offering greater audience penetration than television at a far less cost per individual reached. Furthermore, there are an estimated 527 million radio sets in the United States, 65% of which are located in homes and 35% elsewhere.<sup>2</sup>

In the European market, there are 222 million television households, approximately 25% of which are linked to some form of cable.<sup>3</sup> The Asian market consists of sixty-six million television homes, each with correspondingly proportionate radio markets.<sup>4</sup> In

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1. BROADCASTING/CABLE YEARBOOK 1989, at A-3.

2. *Id.*

3. Cryan & Crane, *International Telecommunications Pirates: Protecting U.S. Satellite Signals from Unauthorized Reception Abroad*, 17 N.Y.U.J. INT'L L. & POL. 855 (1985).

4. Cryan, Crane, & Marcil, *The Future of Sports Broadcasting: An International Question*, 10 SETON HALL LEGIS. J. 213, 227 (1987). It is interesting to note that of the 66 million

light of the emergence of a free Eastern Europe and newly forming democracies in Asia, the idea of a worldwide private communications industry has begun to spawn many new international commercial broadcasting ventures that are seemingly limitless in their potential.<sup>6</sup> To date, these new business ventures have been primarily in the field of television. However, commercial radio, often overshadowed by commercial television, has undergone growth equally dramatic over the past several years.<sup>6</sup> For example, in the five years since the West German government authorized commercial radio in that country, new private radio stations have grown so much that they currently represent 80 of the total 120 stations on the air.<sup>7</sup> Moreover, many other nations with strong government regulation of radio, like Ireland, have just recently allowed private commercial radio to air.<sup>8</sup> Other nations, like Great Britain, only recently broadened their systems to permit commercial broadcasting.<sup>9</sup>

Even more surprising is the fact that the Soviet Union recently opened the door for commercial broadcasting. The Soviet Union's two major radio networks, Yunost and Mayak, will distribute American "top-forty" musical formats for the first time. These networks reach 98% of the Soviet Union's 288 million people.<sup>10</sup> In contrast, the United States radio broadcasting market consists of 9,202 operating commercial radio stations.<sup>11</sup>

Therefore, if worldwide free market forces follow the Federal Communications Commission's (FCC) policy which encourages the establishment of commercial stations, the number of operating

television homes throughout Asia, only 27 television homes are located in the People's Republic of China. This figure is misleading, however, because those 27 million homes have an estimated audience of 400 million viewers. See also Redmont, *Inside Chinese Television: A New "Great Leap Forward,"* TELEVISION Q., Winter 1986, at 8.

5. Typical examples of these types of ventures are Sky Channel, featuring film and sports programs in Europe, Music Box, Europe's model of MTV, and Screen Sport, a clone of ESPN. See Redmont, *supra* note 4, at 224; see also *Sky TV Head Praises Europe's "TV Revolution,"* BROADCASTING ABROAD, July 1989, at 8. Many of these ventures resulted from Europe's lifting of its trade barriers pursuant to the integration of the European Community in 1992. See *Europe and America Prepare for 1992,* BROADCASTING ABROAD, June 1989, at 8.

6. See *European Radio Gets Its Due,* BROADCASTING ABROAD, Feb. 1990, at 7.

7. *Id.*

8. See *Ireland, First Private Station Goes on the Air. Finally,* WORLD BROADCASTING NEWS, Feb. 1990, at 18.

9. *Broadcasting Act, 1990.*

10. See *ABC, WW1 Head for the Soviet Union,* RADIO BUS. REP., Feb. 12, 1990, at 4.

11. See *Radio,* BILLBOARD, May 19, 1990, at 14.

commercial radio stations in the emerging world markets may also increase dramatically during the next ten years. These newly formed local radio stations will need commercial programming, the supply of which, at least in the television arena, will come predominantly from the United States, as it has in the past.<sup>12</sup> Accordingly, it is safe to assume that the United States will fill the void in radio as well. These endeavors will drive the international radio broadcast industry through the year 2000. Furthermore, the potential of emerging technologies such as digital broadcasting, and the creation of space for frequency spectrums,<sup>13</sup> presents the international communications industry with a need for regulatory reforms. What form that legal framework will take, in light of the many interests that must be balanced, will be the task of Congress, the FCC, and the controlling international organizations.

The growing impact of international communications is evidenced by the fact that President Bush recently announced that the United States government would conduct a first ever study of mass media globalization.<sup>14</sup> The National Telecommunications and Information Agency (NTIA) study will focus on the United States competitive international position, as well as look at ways the United States telecommunications infrastructure can be improved.<sup>15</sup> The fact that the President has authorized the NTIA study underscores the need for the creation of a coherent international regulatory regime to address the sociological, political, and economic aspects of international broadcasting. This Article outlines these issues and offers guidelines for their regulation. In order to examine and understand these components, however, this Article must first present a basic outline of the technology involved and then illustrate how the technology applies to the global marketplace. Next, this Article explores the legal framework which

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12. It is estimated that the United States exported \$4.2 billion worth of television programming in 1989. See *Europe and America Prepare for 1992*, *supra* note 5, at 8.

13. See 1990: *The New Decade*, BROADCASTING, Jan. 1, 1990, at 35-38.

14. *Media Globalization: Food for Fed Thought*, VARIETY, Feb. 21, 1990, at 336.

15. *NTIA's Obuchowski: Hoping to Make a Difference*, BROADCASTING, Jan. 29, 1990, at

41. Issues regarding the prominence of international communications have been given special attention in the U.S. for the past several years. In November 1989, for instance, the FCC established the Office of International Communications. The director of this office is responsible for coordinating the 80 employees who work on international matters. Additional government agencies with offices of international communications include the State Department's Bureau of International Communications and Information Policy and the International Section of the National Telecommunications and Information Administration. *The World According to Roseman*, BROADCASTING, Mar. 5, 1990, at 53.

governs the international broadcasting arena. Culminating in a look towards the future, the Article suggests guidelines for multi-national regulation.

## II. THE CURRENT TECHNOLOGICAL STAGE

Without question, a historical review of the twentieth century would note that one of the most dynamic developments of the period was the emergence of the use of radio waves or electromagnetic radiation, travelling at the speed of light, to carry human communications capable of being received by the public at large. To the layman, the term "radio" refers to aural or sound broadcasting that is received from amplitude-modulate (AM) or frequency-modulate (FM) stations.<sup>16</sup> Moreover, an additional form of radio waves, "television," is received from stations transmitting both visual and aural signals.<sup>17</sup> Historically, the first type of radio service was AM, which operates on the relatively low frequencies. FM, on the other hand, operates on higher frequency bands.<sup>18</sup>

### A. *Amplitude Modulation*

Radio was first used in the early 1900s in ship-to-ship and ship-to-shore telegraphic communications. This new communications medium was first known as "wireless." The United States Navy thought that the term "wireless" was too inclusive; it then adopted the word "radiotelegraph."<sup>19</sup> These early transmissions were governed by the Wireless Ship Act of 1910. Then, as the uses for radio expanded to land broadcasts, Congress passed the Radio Act of 1912, authorizing the Secretary of Commerce to license commercial radio stations.<sup>20</sup>

The first licensed radio station, WBZ, located in Springfield, Massachusetts, began broadcasting on September 15, 1921.<sup>21</sup> This station, and the many that followed, broadcast on the newly dedicated radio band, amplitude modulation (AM). Today AM com-

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16. See BROADCASTING/CABLE YEARBOOK 1989, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. Radio Act of 1912, ch. 287, §§ 1-10, 37 Stat. 302-308 (current version at 47 U.S.C. §§ 51-63 (1962)), *repealed by* Act of Feb. 23, 1927, ch. 169, § 39, 44 Stat. 1174.

21. See BROADCASTING/CABLE YEARBOOK 1989, *supra* note 1, at A-1.

prises the frequencies ranging from 540 to 1600 Khz.<sup>22</sup> The audio waves in AM broadcasts are impressed on the carrier wave in a manner which causes its amplitude (power) to vary with each audio wave while the frequency remains constant.<sup>23</sup>

The success of the first AM radio stations in the early 1920s forced the Department of Commerce to hold National Radio Conferences in 1922, 1923, 1924, and 1925 to deal with the problems from interference and spacing. Moreover, the confusion resulting from the vagueness of the 1912 Act prompted Congress to pass the Radio Act of 1927, which created the five member Federal Radio Commission.<sup>24</sup> Subsequently, Congress promulgated the Communications Act of 1934.<sup>25</sup> Accordingly, the Federal Radio Commission evolved into the Federal Communications Commission (FCC) under this Act.<sup>26</sup>

Currently, under the FCC, AM broadcast stations use power ranging from 250 to 50,000 watts. These stations are divided into four major classes: Class I with a power of 50,000 watts, Class II with a power of 250 watts to 50,000 watts, Class III with a power of 500 to 5,000 watts, and Class IV with a power of 1,000 watts for day use and 250 watts for night broadcasting.<sup>27</sup> The rise of AM radio between the 1920s and the 1960s was dramatic. By 1926, the National Broadcasting Company (NBC), a subsidiary of the Radio Corporation of America (RCA), formed the first network. NBC consisted of twenty-four stations and secured the first coast-to-coast hook-up in 1927. During these early years, AM was the only radio band. The listening public grew dependent and attached to the service that AM radio offered. However, technology continued to advance, and by the 1960s the usable frequency spectrum had expanded upward. Consequently, a new radio band was discovered, known as the frequency modulation (FM) band.<sup>28</sup>

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22. *Id.*

23. *Id.*

24. Radio Act of 1927, ch. 169, §§ 1, 2, 44 Stat. 1162 (current version at 47 U.S.C. §§ 81-119 (1962)), *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1102.

25. Communications Act of 1934, ch. 652, Title VI, § 609, 48 Stat. 1105 (codified as amended at 47 U.S.C. §§ 151-609 (1962)).

26. 47 U.S.C. § 154.

27. BROADCASTING/CABLE YEARBOOK 1989, *supra* note 1, at A-1. Because skyway transmission is a factor to be considered by the nighttime AM frequencies, the number of AM stations which operate at night must be limited. Therefore, about half of all U.S. AM stations are licensed for daytime operation only.

28. *Id.* at A-3.

### B. *Frequency Modulation*

Radio pioneers first utilized frequency modulation in 1940.<sup>29</sup> For radio purposes, the process of frequency modulation occurs when a transmitting station sends a modulated radio wave, that is picked up by a receiving antenna, producing a current with the same frequency characteristics as the original wave. The FM band has several technical advantages over the AM band, including higher fidelity, less static, and greater resistance to fading. The FM band ranges from 88 to 108 Mhz, with each station separated by 200 hz. In 1962, as part of an effort to distribute effectively the FM band nationwide, the FCC divided FM stations into three classes: Class A with a maximum power of 3,000 watts, Class B with a maximum power of 50,000 watts, and Class C reaching 100,000 watts.<sup>30</sup>

As FM stations developed throughout the nation, the superior sound quality generated by FM attracted huge listening audiences, much to the detriment of AM stations. In the last ten years, FM stations offering high quality musical formats have forced the AM band to offer alternative, non-musical formats; specifically, AM stations now offer news, talk, and information based programming.<sup>31</sup>

### C. *Satellite Distribution*

Originally, radio networks distributed radio signals by relaying them via microwave stations to each major city in the nation, where an affiliated station would receive and simultaneously re-transmit the signal, enabling the program to be picked up in most of the larger market areas in the United States. For many years, this was the only form of distributing national radio signals to the consumer. Advances in technology, however, brought the introduction of satellites for transmitting radio signals nationally at a relatively inexpensive cost.

A satellite, in essence, acts as a radio signal relay station in space. Radio relay satellites are capable of receiving pinpoint microwave signals, transmitted by program suppliers known as

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29. *Id.*

30. *Id.*

31. See *AM Stand-Alones Look for a Niche in Time*, BROADCASTING, Nov. 6, 1989, at 64.



uplinks. The satellite then retransmits the signal in a manner which literally sprays the signals across one-third of the earth, where parabolic dish antennae, known as downlinks, receive the signals.<sup>32</sup> These communications satellites, launched into positions above the equator, maintain geostationary orbit.<sup>33</sup> The satellites' transmitter-receivers are called transponders. Each transponder is capable of relaying a single color television channel, several radio audio channels, or one thousand telephone conversations at any one time. Most satellites have sixteen to twenty-four transponders.<sup>34</sup>

The first commercial satellite became operational in 1965, and since that time, the number of such satellites has steadily increased.<sup>35</sup> Today, most radio stations in the United States receive national programming via satellite which they re-broadcast locally. Traditionally, satellites used a microwave signal called C-Band. Today, however, there are also KU-Band satellites which use a higher quality microwave frequency.

In 1982, the FCC authorized a new satellite service giving rise to a new generation of high powered direct broadcast satellites (DBS), which distribute programming directly to the consumer, rather than through local re-broadcasters such as radio stations or cablevision systems.<sup>36</sup> The DBS service requires the consumer to possess special receiving equipment to pick-up signals from the satellite. When it created the high-powered DBS service, the FCC allocated the 12.2-12.7 Ghz frequency and granted construction permits to eight applicants.<sup>37</sup> The high-power DBS rules, set by the FCC, gave broad leeway to applicants to determine what sorts of services they want to offer. DBS operators opting to offer broadcast services will be subject to broadcast rules. Operators offering

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32. The angle of coverage of the retransmitted signal is called the "footprint," which covers most of North, Central, and South America. The effect of this technology is that signals relayed between three satellites stationed around the earth reach the total global marketplace. See generally I. POOL, *TECHNOLOGIES OF FREEDOM* (1983).

33. Geostationary orbit exists 22,300 miles above the equator. Any object deployed within this orbit will revolve at the same rate of speed and in the same direction as the earth, thereby remaining "stationary" over a fixed point on the globe. Waite & Rowan, *International Communications Law, Part II: Satellite Regulation and the Space WARC*, 20 INT'L LAW. 341 n.1 (1986).

34. See BROADCASTING/CABLE YEARBOOK 1990, at A-6.

35. *Id.*

36. *Id.* at A-7.

37. *Id.*

common-carrier services will be subject to common-carrier rules.<sup>38</sup> The FCC declined to impose any ownership restrictions, and imposed no technical standards on the service beyond those required by international agreements.<sup>39</sup>

#### *D. Digital Technology*

The advent of digital broadcasting represents the greatest technological advance in radio since the first use of the FM band. Historically, radio signals were transmitted through the use of analog technology, whereby electromagnetic waves are used to represent sound waves.<sup>40</sup> Digital techniques, on the other hand, do not convert data into another medium, as is done with analog technology. Rather, the sound wave is converted into discrete voltage levels as a series of pulses, representing the one or zero condition associated with binary numbers. The wave is then transferred and reproduced by the receiving and amplifying unit which decodes the binary numbers.<sup>41</sup>

The advantage of digital technology is that it enables sound to be reproduced with far less distortion and far greater fidelity. Higher quality fidelity results from the use of digital techniques because the sound is not converted but reproduced each time. The potential uses of digital technology are not limited to broadcasting, although the numerous other applications of this promising technology will have tremendous concurrent impact on the broadcasting industry.<sup>42</sup>

One recent advance is the development of an analog to digital converter on a single microprocessor chip. This development promises to lead to an explosion of applications in the radio world. It could give current analogue users the opportunity to utilize digital components to improve quality.<sup>43</sup> Everything from digital telephone transmission and digital microwave transmission, including the high powered DBS, to Digital Audio Broadcasting (DAB), either on a local terrestrial level or via satellite, is now technologically possible.<sup>44</sup>

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38. *Id.*

39. *Id.*

40. *Id.* See also Graham, PENGUIN DICTIONARY OF TELECOMMUNICATIONS 14 (1983).

41. Graham, *supra* note 40, at 54.

42. *The Digital Craze*, in RADIO WORLD ANNUAL, at 32 (1990).

43. *Id.*

44. See *Broadcasting in the Digital Era*, in RADIO WORLD ANNUAL, *supra* note 42, at 63;

The most promising aspect of DAB is that it may lead to the creation, in effect, of a new radio band. DAB could offer a new local, over-the-air service beyond AM and FM. Technologically, moreover, DAB can deliver a national satellite service, making it possible for consumers to receive programming directly from satellite by using a digital radio receiver, either in the home or in the car.<sup>45</sup> Some members of the broadcasting industry have labeled this type of transmission Radio Satellite Service (RSS).<sup>46</sup>

The impact of this new radio band would be felt throughout the Broadcasting Industry. An entirely new terrestrial radio band would significantly affect the current radio industry, both economically and legally, by disrupting the balance of stations and advertising dollars. Through a variety of factors, including enhanced sound quality, DAB could potentially attract music listeners away from the FM band, much the same way FM drew listeners from the AM band during the 1960s and 1970s.

DAB's yet untapped potential has created a great deal of discussion at the FCC regarding how to develop and utilize the new technology.<sup>47</sup> Additionally, the complexity of the issues has produced a variety of opinions within the broadcast industry as to exactly how these digital advances should be used.<sup>48</sup> Some of the questions raised include whether DAB should be implemented as a local radio service or as a nationwide radio service, transmitting directly from the satellite to the consumer. The potential of a satellite-to-consumer service is enormous, in light of the ease with which the signal can be relayed around the world. Such a system could lead to the creation of a worldwide network whereby one could transmit a signal from New York City capable of being received directly by an automobile in Australia. The advertising, marketing, and informational ramifications of such a network are enormous.<sup>49</sup> In a global marketplace, the economies of scale offered

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*DBS: The Next Generation*, BROADCASTING, Feb. 26, 1990, at 27-30.

45. See Carter, *DAB Sparks Interest*, RADIO WORLD, Feb. 21, 1990, at 1, 8.

46. *Monday Memo*, BROADCASTING, Dec. 11, 1989, at 30.

47. See *DAB Plan Divides Broadcasters*, BROADCASTING, Aug. 27, 1990, at 60.

48. *Monday Memo*, *supra* note 46, at 30.

49. If the legal complexity can be worked out, a major advantage of DAB is that it is "spectrum efficient." For instance, while one TV channel uses spectrum equal to six FM channels, that same amount of spectrum could accommodate approximately sixteen DAB channels. *Id.* See also *NAB Goes for the Brass Ring with DAB*, BROADCASTING, Feb. 4, 1991, at 15. As a means of increasing the amount of spectrum available to accommodate the needs of the private broadcasting industry, the House of Representatives recently introduced a bill that gives spectrum retained for government use and not currently utilized to the private

by such a network to a product or service like Coca-Cola, McDonald's, or Merrill Lynch is very powerful, especially in terms of the number of listeners reached per advertising dollar spent.

Though DAB offers great potential, the proper implementation and regulation of a digital radio band presents many problems. The issues raised by DAB include who will allocate the spectrum internationally and domestically and from where the spectrum will come. Another unresolved question is whether local terrestrial delivery and/or international satellite delivery will be implemented. Currently, there is insufficient spectrum available to accommodate both new users and current users of spectrum.<sup>50</sup>

Based upon the knowledge that ultimately any legal framework for international communications must address these new spectrum issues, we must first examine how the untapped demographic markets of the world, where only recently have the commercial applications of the AM and FM bands been discovered, are going to shape this emerging international broadcasting industry. This factor is of particular significance in light of the fact that for the past seventy-five years the United States has been the dominant market in the world.

### III. THE GLOBAL MARKETPLACE

Although the pace of technological advance is fairly uniform among the industrialized nations of the world, it cannot be said that similar uniformity exists among broadcasting markets. It is useful to survey these domestic markets, which are each at different levels of development, to gain a better understanding of the shape of the emerging international broadcasting industry.

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sector. This type of movement will allow the benefits of emerging technology to reach the public in an expedited fashion. See *House Introduces a Bill to Reallocate Some Govt. Radio Frequencies to Civilian Use*, BILLBOARD, Jan. 26, 1991, at 22. Additional movement towards a uniform spectrum standard is set forth in the agreement within the International Telecommunications Union regarding spectrum use for DAB. See *CCIR Agrees on Spectrum*, RADIO WORLD, Jan. 9, 1991, at 1.

50. It is interesting to note that Japan has already implemented DAB via satellite. The network must be connected to a cable system, however, thus limiting the potential audience. This application of cable radio requires that subscribers pay a monthly fee for the commercial-free programming. See *Digital Audio Broadcasting a Reality in Japan*, BILLBOARD, Feb. 9, 1991, at 73.

### A. *The United States*

Commercial broadcasting in the United States has a seventy year history. The legacy of the early years of broadcasting still impacts the industry today. For example, manipulation of regulatory schemes established during the Great Depression<sup>51</sup> allows the industry to enjoy relatively stable sales and financing in spite of current recessionary trends. Of course, government regulation of the broadcasting industry has come a long way since the Great Depression. Today, a degree of sophistication has been reached which allows the Government to pursue desirable social change while, at the same time, providing economic benefits to the industry.

In the past decade, government activity has encouraged change and growth. For example, the FCC's removal of a holding provision which prohibited an acquiring entity from selling a broadcast property within three years after purchase has bolstered broadcast station sales.<sup>52</sup>

In an unrelated development, the United States Tax Court recently ruled that purchasers of cable television franchises may amortize the costs of acquiring a franchise under provisions of the Internal Revenue Code allowing depreciation of certain intangible assets.<sup>53</sup> This represents an important victory for broadcasters with a strong positive cash flow, who have historically taken the position that they should be permitted to utilize this valuable tax benefit for broadcast licenses and network application contracts, as well as cable franchises costs.<sup>54</sup> Such a move by the Government encourages investment in the broadcast industry, and thus insures a bright future for domestic broadcasting. This policy shift by the Government encourages investment in the broadcast industry, helping to insure a bright future for domestic broadcasting. An ex-

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51. The FCC was created in 1934 as part of the New Deal. See Federal Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (1990)).

52. The "three-year rule" was eliminated by the FCC in 1982. *Report and Order in B.L. Docket No. 81-897*, 52 R.R. 2d 1081 (1982).

53. *Telecommunications, Inc.*, 95 T.C. 495 (1990). The court held that a cable television franchise fell within the definition of a "franchise" under 26 U.S.C. § 1253 (1969). Furthermore, the court stated that the purchaser was thus qualified to receive a depreciation allowance against income for federal tax purposes under special rules for transfers of franchises, trademarks, and trade names. *Telecommunications, Inc.*, 95 T.C. at 495. A similar case involving depreciation of an FCC license is currently pending decision. See *Jefferson-Pilot Corp.*, No. — (T.C. argued Dec. 1989).

54. See *Precedent-Setting Tax Issue Casts Big Shadow Over Cable*, BROADCASTING, Feb. 12, 1990, at 37.

amination of the global marketplace reveals that the broadcasting industry has enjoyed a relatively stable domestic condition for sale and financing, even in light of the current recessionary tendencies, while internationally the new opportunity of commercial broadcasting has opened a floodgate of activity leading to a degree of chaos.<sup>55</sup> Currently, in the United States, broadcast station sales have been bolstered by the FCC's removal of the three-year holding provision which required an acquiring entity to own a broadcast property for three years before selling.<sup>56</sup>

Perhaps one of the most important developments in the broadcast industry in recent years is the emergence of federal governmental policies aimed at encouraging minority participation in broadcasting at the ownership level. Examples of this are found in the current provisions of the FCC regulations and the IRS Code which benefit minorities. For example, the FCC has instituted several programs aimed at increasing minority ownership of broadcast properties. One minority aid provision permits a broadcaster in danger of losing its license to sell to a minority owned enterprise at depressed prices, rather than risk losing its license to revocation by the FCC.<sup>57</sup> Another minority preference program grants minorities, including women, preference in comparative hearing cases.<sup>58</sup> The Supreme Court recently upheld the validity of this FCC policy adopted to promote diversity in programming.<sup>59</sup>

Potentially, the most powerful minority preference legislation authorizes the FCC to issue a tax certificate to a holder of a broadcast license who sells to a minority owned enterprise. The tax certificate effectively eliminates the tax which the seller would other-

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55. There are many examples of the current confusion over broadcasting policy in Europe. In almost every country on the continent, problems have arisen over what type of legislation should be enacted to regulate the emerging private commercial industry. One clear example exists in Italy, where the government tried, unsuccessfully for 14 years until 1990, to pass a broadcasting bill. The new law still lacks consensus support among Italian broadcasters and legislators. *Critics Attack Italian Broadcasting Bill*, BROADCASTING, Aug. 27, 1990, at 55. This subject is more fully developed *infra* part (B).

56. See *Report and Order in B.L. Docket No. 81-897*, *supra* note 52.

57. The FCC policy is outlined at 47 C.F.R. § 73.2080 (1989).

58. Comparative hearings occur where two or more applicants have applied for a new license.

59. *Metro Broadcasting, Inc. v. FCC*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2997, 111 L.Ed. 2d. 445 (1990). Specifically, the Court upheld the constitutionality of favoring minority ownership in broadcast licenses as furthering the congressional mandate to the FCC to promote programming diversity. Congress determined that ownership leads to corresponding programming diversity aimed at minorities.

wise pay on any capital gains on the sale.<sup>60</sup> As a very attractive tax benefit to the seller, this provision has propelled many sales in the industry.<sup>61</sup> This is true even though other tax regulations allow sellers to defer the gain on sale, as long as the proceeds are reinvested in replacement broadcast property within two years.<sup>62</sup>

Of particular interest to the broadcasting industry are efforts aimed at winning congressional reconsideration of FCC regulations which currently limit ownership by non-United States citizens to a maximum of twenty percent in a broadcast property.<sup>63</sup> Aware of the driving force of the international broadcasting marketplace and the need for American companies to be free to enter markets in other countries in order to compete at the multinational level, the National Telecommunications Information Administration is advocating a relaxation of the United States foreign ownership restrictions. The hope is that the United States will assume a lead position that other nations will follow, so broadcasting can operate in a global market free from protectionism.<sup>64</sup> The promise of international broadcasting compels a more comprehensive look at emerging world markets, providing a clearer picture of what the immediate future for the industry will look like world wide.

### B. Europe

Far and away the largest market in international broadcasting is the European market.<sup>65</sup> The nations of Europe have started to dissolve many longstanding barriers to commercial broadcasting.

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60. 28 U.S.C. § 1071 (1982). Several requirements must be met to be eligible for the tax certificate, including the demonstration that the purchasing company is minority owned or controlled. The test for this requirement is 50% ownership of the voting stock of the corporation or ownership of at least 20% of the partnership's total equity. *Id.* See generally *Minority Ownership in Broadcasting*, 52 R.R. 2d 1301 n.1 (1982); *Statement of Policy on Minority Ownership Broadcasting Facilities*, 68 F.C.C. 2d 979 n.20 (1978).

61. See *Ragan Does it Again*, BROADCASTING, Aug. 14, 1989, p. 63. One of the largest users of the tax certificate is Ragan Henry, a minority broadcaster who has purchased several stations under this provision.

62. See NATIONAL ASS'N OF BROADCASTERS, COUNSEL FROM THE LEGAL DEP'T INFO-PAK, MAXIMIZING THE BENEFITS OF TAX CERTIFICATES IN TELECOMMUNICATIONS VENTURES 1-4 (Oct.-Nov. 1988).

63. See 47 C.F.R. § 310 (1958).

64. NTIA Calls for Suggestions on Strengthening U.S. Telecommunications, BROADCASTING, Jan. 15, 1990, at 116; see generally NTIA's Obuchowski: Hoping to Make a Difference, *supra* note 15, at 41-42.

65. In television alone, the United States market of 80 to 85 million households is only three-quarters the size of Europe's 120 million household market. Professor Albert Scharf: Dean of EBU, BROADCASTING, Jan. 1, 1990, at 96.

In many European countries, the first private radio stations will be established this year. For example, Czechoslovakia's first FM station, Radio Vox, will begin broadcasting by the end of this year. Poland and other Eastern bloc nations are following suit.<sup>66</sup>

The dominant player in the European broadcasting industry has been the European Broadcasting Union (EBU).<sup>67</sup> Long governed by Europe's noncommercial state-run services, the EBU must now cope with the extraordinary demands of privatization. With each passing month, steps toward privatization are moving Europe more fully into the international broadcasting arena.<sup>68</sup>

### 1. England

Great Britain recently commenced a plan to deregulate its broadcast industry that will last well into the next century. The point of departure was the enactment of the Broadcast Act of 1990.<sup>69</sup> This omnibus legislation completely restructured television, radio, and cable regulation in the United Kingdom.<sup>70</sup>

Perhaps the most extensive piece of legislation in British history,<sup>71</sup> the Broadcasting Act mandates several radical changes. The most controversial of these is the elimination of the national Independent Television Network (ITV), in which Britain's commercial broadcasters were grouped. The Act dismantles ITV's three-decade monopoly on commercial television. Chief among its provisions is the restructuring and addition of new national television channels. On January 1, 1991, ITV became Channel 3,<sup>72</sup> and its sixteen independent franchises are currently being auctioned under a competi-

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66. See Hennessey, *Music Biz Looks 'East and West' for Results*, BILLBOARD, Nov. 24, 1990, at 5.

67. See generally EUROPEAN BROADCASTING UNION, ORGANIZATIONAL BROCHURE (1985).

68. See Professor Albert Scharf: *Dean of the EBU*, supra note 65, at 96.

69. Broadcasting Act, 1990, ch. 42.

70. *Id.*; see *Britain Begins Broadcasting Overhaul*, BROADCASTING ABROAD, Feb. 1990, at 3. A complete analysis of the new British broadcasting regulations is beyond the scope of this Article. For an historical critique of commercial radio regulation in the United Kingdom, see Jones, *The Regulation of Commercial Radio Broadcasting in the United Kingdom*, 14 N.C.J. INT'L L. & COM. REG. 255 (1989).

71. Engrafted in the Act, which was originally introduced in Parliament as a White Paper on December 7, 1989, are 1,500 amendments by the House of Commons plus an additional 700 amendments that were added by the House of Lords. Telly, *British Law Opens Up 16 TV Franchises*, ELECTRONIC MEDIA, Nov. 12, 1990, at 3. The Act, as passed, is divided into 204 sections and 22 schedules.

72. See Broadcasting Act, 1990, ch. 42, sec. 14.



tive bidding system.<sup>73</sup> An independent channel, Channel 5, is slated to begin operation on January 1, 1993.<sup>74</sup> Additional competition will be provided in January 1993 when Channel 4, a public trust, begins selling advertising.<sup>75</sup>

In addition to the changes mentioned above, the Broadcasting Act also dismantles the former governing body of virtually the entire British broadcasting industry, the powerful Independent Broadcasting Authority. In its place, the Act authorizes the creation of the Independent Television Commission and the Radio Authority. In sum, the revolutionary Act represents an overhaul of the entire British broadcasting industry.

## 2. France

The French Government first allowed private radio in 1981. Thereafter, chaos ensued in both the AM and FM bands as radio stations began to fight for frequencies without any regulatory framework. Existing radio license-holders operated without engineering standards or legal regulations, and the industry appeared to be in a state of anarchy.<sup>76</sup> The subsequent involvement of government agencies added to the confusion, which in the end only helped the larger networks.

In January of 1989, the French Government passed new legislation which established the Conseil Superieur de L'Audiovisuel (CSA) to regulate the industry.<sup>77</sup> The CSA set up technical standards, placed restrictions on the mix of national and local programs, and established the scope of local broadcast areas.<sup>78</sup>

More specifically, the CSA recently established classifications of radio licenses. The first classification is non-commercial radio, which comprises about three hundred licenses. A second category, which totals about five hundred licenses, is made up of local or regional commercial radio stations which are independent of net-

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73. *Id.*; Brown, *Central Controller to Pick Network ITV Programmes*, *The Independent* (London), Feb. 15, 1991, at 10.

74. *Broadcasting Act*, 1990, ch. 42, sec. 28.

75. *Id.* sec. 23. See Koenig, *Franchise Follies as Bidders Wage Battle of Box*, *The Independent* (London), Jan. 20, 1991, at 11.

76. See *FM: Les Accords Majeurs*, *TELERAMA*, Mar. 22, 1989, at 160-61.

77. See *L'Organisation de la Bande FM: Le CSA Definit sa Politique d'Attribution des Fréquences Radiophoniques*, *Le Monde*, Sept. 1, 1989, at 6.

78. *Id.*

work affiliation.<sup>79</sup> This latter category typically covers a market of six million people and offer programs of local or regional interest. The third category created by the CSA includes holders of local commercial licenses who have the right to carry network programming. These stations mix national and local programming. The fourth category, national commercial radio, is driven exclusively by national advertisements.<sup>80</sup>

During the next decade, the CSA must exhibit strong resolve in balancing the interests of the commercial marketplace against the most prudent distribution of spectrum. In furtherance of this objective, the CSA has set up regional branches, called Les Comités Techniques Radiophoniques (CTR). These branches enforce the proper application of the FM band and ensure that licensed radio stations both observe broadcasting regulations, as well as broadcast within their authorized frequency band.<sup>81</sup> To date the only three established CTRs are located in Dijon, Paris, and Marseilles, though, by the end of 1991, there are to be sixteen.

In the wake of this bold move toward free market broadcasting, among the only restrictions established by the French Government are some minor provisions restricting the number of commercial spots during broadcasts. For example, French law permits no more than seven minutes of commercial time per half hour on the French station RTC.<sup>82</sup> These minor restrictions should not present too many problems to the operator. Beyond these regulations, the new stations are free to operate within the marketplace, much like stations in the United States. Over the next few years, free market principles will become more entrenched, perhaps leading to a more balanced broadcast market for the French people.

### 3. Eastern Bloc Nations

In the wake of Perestroika and Glasnost, the Eastern Bloc nations have undergone radical changes in all phases of their societies. The changes also include dramatic developments in broadcasting. Most indications suggest that the Eastern Bloc will follow

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79. See generally CONSEIL SUPERIEUR DE L'AUDIOVISUEL, *LA LETTRE DU CSA* No. 4, 1-7 (Jan. 1990).

80. *Id.*

81. See generally *Le Nouveau Pouvoir Radio*, DOSSIER, 1989, at 34.

82. See *La Pub sur les Radio*, L'EVENEMENT DE JEUDI, Mar. 1, 1989, at 99.

the lead of Western Europe toward commercialization.<sup>83</sup> This is evident in Hungary where the Government recently completed the first steps towards privatization. In fact, planning is underway for a new FM station, that is a joint venture between American and Hungarian interests. The station, called Radio Bridge, will be affiliated with the Voice of America.<sup>84</sup> When it comes on the air, the station will be the fourth one of its kind in Hungary.

Other Eastern Bloc nations are entering into similar joint ventures. For instance, in Poland, Solidarity's radio station began a joint venture with a French radio network. The station, which offers a mostly musical format, represents the beginning of the liberalization of the media in Poland.<sup>85</sup> In an effort to realize its goal of an open media, Poland recently sent a delegation to the United States to learn more about commercial broadcasting, while at the same time hoping to attract American investment in Polish broadcasting properties.<sup>86</sup>

In a surprising development, the Soviet Union recently opened its broadcasting network to Western programming. This may ultimately lead to private as well as commercial radio in the Soviet Union. The impetus for the move was an invitation by the Soviets to U.S. radio stations, offering an opportunity to broadcast live from Moscow back to the United States.<sup>87</sup>

This type of activity potentially represents the beginning of a lasting relationship between the Soviet radio network and U.S. and Western broadcasters. Several United States radio program suppliers have already begun to offer programming to Gosteleradio, the official broadcasting agency of the Soviet Union.<sup>88</sup> The commercial potential for this type of exchange is enormous, especially in light of the large population of the Soviet Union. Alternatively, recent

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83. See Hennessey, *supra* note 66, at 5, 68-69; Borg & Emmert, *Telecommunications: A Bridge to Better East-West Relations*, 14 N.C.J. INT'L L. & COM. REG. 279 (1989).

84. See *Hungarian FM to Feature American Sound*, BROADCASTING, Jan. 29, 1990, at 33; see also Zeidenberg, *Hungary: A Goulash of Media Activity*, BROADCASTING, July 23, 1990, at 81.

85. See Jakubowicz, *Poland: Media Systems in Transition*, INTERMEDIA, June-July 1989, at 25.

86. *Polish Delegation Reaches for U.S. Investment*, BROADCASTING, Feb. 12, 1990, at 31.

87. See *Soviets Open Doors to U.S. Rock Radio*, BROADCASTING ABROAD, Nov. 1989, at 35.

88. *Radio Express, Westwood Vying for Soviet Market*, VARIETY, Jan. 24, 1990, at 168. For a more detailed analysis of the European broadcasting paradigm, see generally D. BROWNE, *COMPARING BROADCASTING SYSTEMS: THE EXPERIENCE OF SIX INDUSTRIALIZED NATIONS* (1989).

developments within the U.S.S.R. indicate that an effort is underway to stem the pace of liberalization by conservatives within the country. The mixed signals being sent from Moscow cast a shadow of uncertainty upon the status of the private broadcasting industry in the Soviet Union, as well as the future of possible joint ventures with the west.<sup>89</sup>

### C. *Asia and Latin America*

Asia and the entire Pacific Rim are emerging as key markets for international trade. An illustration of the size and magnitude of the Asian market is the recent sale of the world's largest cable franchise, located in Hong Kong, to a consortium including two U.S. companies, U.S. West and Paramount.<sup>90</sup> The franchise, comprised of 1.5 million households, will require \$500 million to build. For United States concerns, Hong Kong represents not only a growing international communications and trade center, but more importantly a gateway to other Asian nations.

While many multinational companies are concentrating on "Europe 1992," equally promising opportunities for broadcasting exist in Asia and Latin America. The untapped commercial potential in Asia and Latin America requires that broadcasters, cable companies, and telecommunications firms begin to focus on those regions in the near future, before the opportunity abates. Recent events in Mexico serve as an example of new opportunities for American broadcasters in Latin America. The Salinas administration, for instance, recently eased restrictions raising the foreign ownership ceiling from 49% to 100%.<sup>91</sup>

In Latin America, Cadeña Radio Central (CRC) recently expanded its service to twenty-four hours of programming each day. CRC, the oldest Spanish language satellite radio network in the world, now broadcasts throughout North and South America.<sup>92</sup>

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89. Even in light of these problems, joint ventures continue to emerge. See *Melodiya European Corporation*, BILLBOARD, Jan. 5, 1990, at 71.

90. See *Hong Kong Gives Cable Group Go-Ahead*, BROADCASTING ABROAD, Oct. 1989, at 4.

91. See *East and South: New Compass Points in the Search of Media Markets*, BROADCASTING, Oct. 5, 1990, at 5.

It is interesting to note that the nations of the Pacific rim have opened their doors as well. Specifically, in Australia the government recently announced the auction of 20 new and converted FM licenses to the highest bidder. See *FM Stations Will Soon Fill Aussie Airwaves*, WORLD BROADCASTING NEWS, Oct. 1988, at 19.

92. See *CRC Announces Expansion of 24-Hour Spanish Language Programming*, RA-

The network, owned by a large multinational corporation based in Mexico City, called Grupo Famega, which owns stations in Mexico and the United States, is one of the largest international broadcasters in the world. Another example of recently launched broadcasting ventures in Latin America is HBO OLe, a Latin American version of HBO. This joint venture between HBO/Time Warner and Omnivision, a Venezuelan firm, shows the media's move towards a global marketplace.<sup>93</sup> The significance of this type of venture is that paid television historically has led the way for all types of private broadcasting, acting as a first step toward the emergence of such activity.

#### IV. INTERNATIONAL REGULATORY REGIME

International broadcasting is governed by a complex matrix of organizations and agreements throughout the world. This Article has outlined the existing technology and the dynamics of the emerging world market. A number of legal issues arise out of the topics already discussed in this Article, including the regulation of 1) domestic over the air broadcasting, 2) domestic distribution of satellite signals, 3) international distribution of satellite signals across many borders, and 4) the domestic and international allotment of satellite and terrestrial frequencies.<sup>94</sup> As discussed, each nation governs its domestic broadcasting industry through a communications agency. However, when nations attempt to regulate international radio signals, the brunt of this responsibility usually falls upon the oldest multi-national communications organization, the International Telecommunications Union (ITU). Through its work, the ITU provides the regulatory framework for the global telecommunications market. The continued vitality of the ITU is

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DIO NEWS TODAY, July 1, 1990, at 1.

93. *HBO OLe Targeted to Latin America*, BROADCASTING, Jan. 21, 1991, at 36.

94. The allotment of satellite space is a major concern of many nations given the finite slots available for geostationary satellites and frequency. This problem is exacerbated by the rate at which the technologically advanced nations deploy satellites or require frequencies. Alternatively, many lesser developed nations find themselves with slots and frequencies that such nations are, as of yet, not capable of utilizing. This, in turn, raises many difficult legal questions, including whether or not to grant such frequencies. The ITU responded to the need to address the concerns of developing nations by creating the Telecommunications Development Bureau. See *ITU Moves to Aid Developing Nations*, BROADCASTING ABROAD, Sept. 1989, at 14. For a comprehensive analysis of these issues, see Rothblatt, *ITU Regulation of Satellite Communication*, 18 STAN. J. INT'L L. 1 (1982). See also Weissner, *The Public Order of the Geostationary Orbit: Blueprints for the Future*, 9 YALE J. WORLD PUB. ORDER 217 (1983).

especially imperative in regard to the furious pace of change occurring today in the broadcasting industry. As the changes the industry has been experiencing continue to take root and grow, the demand for greater coordination among nations increases with each passing year of financial success in the private broadcasting industry.

#### A. *International Telecommunications Union*

The ITU was founded in 1865,<sup>95</sup> to unify, through agreements and cooperation of its 150 member nations, the regulation and use of telecommunications.<sup>96</sup> Currently, the ITU establishes technical standards, regulations, and operating procedures for the industry. Additionally, the ITU formulates agreements on allocation of radio frequencies and orbital positions of satellites.<sup>97</sup> Furthermore, since the signing of the International Telecommunications Convention (ITC), that governs the activities of the ITU,<sup>98</sup> the ITU has steadily increased its authority over satellite communications by establishing new international legal norms to ensure the uniform and undisputed use of international communications.<sup>99</sup>

In light of the emerging technologies that utilize satellite and terrestrial digital broadcasting, the ITU's greatest problem may be

95. Rusch, Book Review, 36 FED. COMM. L.J. 95 (1984).

96. *International Communications and Information Policy: Hearing Before the Subcomm. on Arms Control, Oceans, International Operations, and Environment of the Senate Comm. on Foreign Relations, 98th Cong., 1st Sess. 4* (1983) (statement of George P. Schultz, Secretary of State).

97. *Id.*

98. International Communications Convention, *opened for signature* Nov. 12, 1965, 18 U.S.T. 575, T.I.A.S. No. 6267. The ITU formally came into being as a result of Article 52 of the ITC. See generally CODDING & RUTKOWSKI, *THE INTERNATIONAL TELECOMMUNICATIONS UNION IN A CHANGING WORLD* (1982); D. LANE, *INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM* (1970). For a detailed analysis of the ITU, see Nubten & Smits, *The Regulation of International Telecommunication Services: A New Approach*, 14 N.C.J. INT'L L. & COM. REG. 191 (1989).

99. Another major multilateral organization concerned with satellite signals is the United Nations Committee on the Peaceful Use of Outer Space (COPOUS). COPOUS was established in 1967 to study the technological feasibility of communications by direct broadcast from satellites and the current and foreseeable developments in the field. See G.A. Res. 2260 (XXII), 22 U.N. GAOR Supp. (No. 16) at 11, U.N. Doc. A/6883 (1967), *reprinted in* DJONOVICH, *UNITED NATIONS RESOLUTIONS 251, 252* (1966-68). The legal subcommittee of COPOUS drafted nine articles governing the use of satellites, none of which have been adopted due to political disagreements. Some of the articles address state responsibility, international cooperation, and international law regarding satellites. *International Co-operation in the Peaceful Uses of Outer Space: Report of the Committee on the Peaceful Uses of Outer Space*, 22 U.N. GAOR Annexes (Agenda Item 32) at 1, U.N. Doc. A/6804 (1967).

the regulation and allocation of new spectrum. Within the ITU and pursuant to the ITC, the members of the Union form and authorize World Administrative Radio Conferences (WARCs) to discuss specific radio broadcasting matters, such as digital and satellite technology.<sup>100</sup> The 1992 WARC will consider digital direct broadcast service via satellite, terrestrial digital broadcast, and high definition television (HDTV).<sup>101</sup> Decisions made in 1992 will undoubtedly affect generations to come.

Even with its long history, the ITU has recently reconsidered its role in international communications. The ITU's current director, installed in November 1989, set forth the organization's current mandate to transform the ITU into a true intergovernmental organization. This new agenda envisions the ITU's duties to include working toward a balanced, well-developed telecommunications network that will act as a conduit for world peace.<sup>102</sup> Therefore, as international broadcasters struggle with the issues of new markets and new spectra, the ITU must maintain its resolve to deal even-handedly with each broadcaster. If the ITU can successfully maintain this balance, it will ensure a solid future for the industry.

### B. World Administrative Radio Conferences

As discussed earlier, the ITU assembles and authorizes World Administrative Radio Conferences (WARCs) as the mechanism for addressing issues specific to radio. The next WARC, to be held in Spain in 1992, will examine many critical issues regarding the emerging international radio industry. WARC 1992 will address a series of spectrum allocation issues first raised in earlier conferences.<sup>103</sup> The delegates at the ITU's 13th Plenipotentiary Conference, held in 1989,<sup>104</sup> agreed that WARC 1992 will confront major

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100. See ISSUES IN INTERNATIONAL TELECOMMUNICATIONS POLICY: A SOURCEBOOK 65-68 (J. Yurow ed. 1983).

101. See NAB Urges FCC to Oppose Frequency Proposals at WARC '92, BROADCASTING, Feb. 26, 1990, at 50.

102. See Guiding ITU into a Brave New Telecom World, BROADCASTING ABROAD, Feb. 1990, at 10.

103. See An Inquiry Relating to Preparation for the International Telecommunication Union World Administrative Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum, Notice of Inquiry, 4 FCC Rec. No. 25 at 8546 (FCC Dec. 13, 1989) (No. 89-554) [hereinafter NOI]. See also WARC '92: An Exercise in Spectrum Allocation, SATELLITE COMM., May 1990, at 22.

104. See NOI, *supra* note 103, at 8546. See also FCC Proposes Additional Satellite

allocation issues, such as new space services, high frequency bands, and satellite bands.<sup>105</sup>

In view of the pending 1992 WARC and its impact upon the United States broadcast industry as a whole, the FCC adopted a Notice of Inquiry (NOI), in December 1989, outlining the goals of the WARC.<sup>106</sup> The NOI calls for public comment to assist the FCC, the NTIA, and the State Department in formulating U.S. proposals and policies for the 1992 conference.<sup>107</sup>

As the FCC and the other federal agencies prepare for WARC 1992, it is important to realize the significance of the conference's prospective international allocation decisions. The spectrum issues agreed to at this conference will determine the manner of implementation of technologies of the twenty-first century.

Possibly the most controversial issue addressed at WARC 1992 will be the allocation of Fixed Satellite Service (FSS) and Broadcast Satellite Service (BSS).<sup>108</sup> BSS allocations could be used to provide wide area, high quality service to listeners with portable and automobile receivers.<sup>109</sup> Although the impact of this type of service upon the current radio industry would be enormous, the prospect of BSS raises many difficult legal and policy questions. The major legal issue is whether the FCC's policy of favoring local over national broadcasting should be changed, at least in regard to spectrum allocation. The answers provided to these issues will be the polestars for the industry for the near future, and thus the im-

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*Items for WARC '92*, SATELLITE NEWS, June 11, 1990, at 1 [hereinafter *WARC '92*].

105. *NOI*, *supra* note 103. The Plenipotentiary Conference meets as the supreme body of the ITU every five to six years and determines the general policy of the ITU and the methods of giving effect to the policy. The Plenipotentiary Conference also establishes the basis for the ITU's budget, the limits on expenditures, and the basis for member country contributions. *ITU — 125 Years Old: At the Cutting Edge of Telecommunications*, U.N. CHRON., Sept. 1990, at 76.

106. *See NOI*, *supra* note 103.

107. *See Warc '92*, *supra* note 104.

108. FSS describes those satellites which are currently in geostationary orbit and relay signals from program suppliers, or networks, to local retail retransmitters or broadcasters, namely, local radio and TV stations. The term BSS applies to satellites which relay signals from program suppliers directly to the consumer, without the use of local retransmitters or broadcasters. This distinction is the most sensitive issue surrounding DAB because it would eliminate the local broadcaster, an entity historically protected under FCC regulation. *See NOI*, *supra* note 103, at 8548.

109. *See WARC '92*, *supra* note 104, at 3. Note that this Notice of Inquiry calls for an allocation of BSS signals in the 500-3,000 Mhz range. *See NOI*, *supra* note 103, at 8548. Moreover, this proposal is technically interwoven with HDTV, and therefore any decision made affecting BSS will impact the technical viability of HDTV. *See id.* *See also Sikes, More Competition Needed*, *Communications Daily*, Jan. 25, 1991, at 4.



plications of WARC 1992 are far reaching.

### C. *European Regulation*

As the European Community (EC) presses towards unification, one of its most urgent needs is to harmonize the divergent media laws of its twelve member-nations through uniform regulation.<sup>110</sup> Without such harmonization, new transborder broadcasting services will face a range of conflicting requirements.<sup>111</sup> Though the immediate benefits of consistent regulations are more readily apparent with television, the advantages are equally applicable to radio. In response to this need, the EC created a legislative plan in October 1989, which grew out of their effort to remove all trade barriers between member nations by 1992.<sup>112</sup> Among other things, the legislative plan, more than four years in the making, requires that at least fifty percent of radio programming be European produced.<sup>113</sup>

In addition to the prospective legislative reforms, the European Broadcasting Union (EBU), historically the most powerful broadcasting organization on the continent, now faces extraordinary new challenges as the 1990s usher in new commercial services and broadcasting. The EBU is a professional, noncommercial association whose objective is to integrate communications activities throughout its membership by promoting the development of broadcasting, the exchange of radio and television programs, and the enforcement of international agreements relating to

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110. For a more thorough discussion of this topic, see Comment, *Copyright Protection of Software in the EEC: The Competing Policies Underlying Community and National Law and the Case for Harmonization*, 75 CALIF. L. REV. 633 (1987).

111. See *European Regulatory Premier*, BROADCASTING ABROAD, June 1989, at 11. The European Common Market was formed by several treaties binding the major nations on the continent, ultimately resulting in the Treaty of Rome, which created the European Economic Community. See Wingard, *Europe 1992: Mass Media Developments*, N.Y.L.J., Nov. 30, 1990, at 5. The original members of the European Common Market were France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. See Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 176; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. These nations were later joined by Great Britain, Denmark, Ireland, Greece, Spain, and Portugal. See Comment, *supra* note 110, at 635.

112. See *An Uncommon Market for U.S. Entertainment*, L.A. Times, Dec. 5, 1990, at F2, col. 3; *The World at War*, ECONOMIST, Aug. 4, 1990, at 59.

113. See *An Uncommon Market for U.S. Entertainment*, *supra* note 112, at F2, col. 3; *The World at War*, *supra* note 112, at 59.

broadcasting.<sup>114</sup>

The EBU operates a network of over-the-air, state controlled, non-commercial broadcast stations. Some nations have two or more of these stations transmitting within their territory.<sup>115</sup> The increasing number of commercial ventures entering the European market has spawned the formation of the Association for Commercial Television,<sup>116</sup> representing competition with which the EBU never before had to contend. Such developments suggest a new era in European broadcasting, that will permit increased participation by U.S. companies. These developments represent true inroads toward the creation of a global telecommunications village.<sup>117</sup>

#### *D. International Licensing Societies*

The emergence of commercial radio and the corresponding increase in air play of American copyrighted music on foreign radio stations, raises the sensitive legal question of how to coordinate the international licensing of protected music for radio air play. Historically, in the U.S., recording artists sign with either of the two major licensing societies, Broadcast Music, Inc. (BMI) or the American Society of Composers, Authors & Publishers (ASCAP), who then authorizes radio stations to broadcast the artists' music.<sup>118</sup> The process by which the societies serve artists is best illustrated by way of an example. Suppose an artist, who is a member of BMI, releases an album. In order to play that album, radio stations pay a blanket licensing fee to air all of the society's music based upon the size of their listening audience. BMI then receives the money and distributes it to the artist based upon the album's success, that the society calculates by using a formula which considers sales and success on the music charts, as well other fac-

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114. As of January 1985, the EBU had 37 active members, in 32 different countries, with an additional 60 associate members in 45 countries. See EUROPEAN BROADCASTING UNION, ORGANIZATIONAL BROCHURE (1985).

115. Professor Albert Scharf: *Dean of the EBU*, *supra* note 65, at 96.

116. See Wingard, *supra* note 111, at 5.

117. See *id*; *Europe '92 from U.S. Point of View*, BROADCASTING, Dec. 4, 1989, at 103. An example of the growing participation in Europe by the U.S. based radio industry is the recent announcement that the Emaris Broadcasting Corporation has agreed to acquire a 15% interest in MAXXIMUM, an FM radio station in Paris, which the broadcaster plans to turn into a network throughout France. *Vive la FM*, BROADCASTING, Apr. 9, 1990, at 65.

118. See generally *The BMI Story*, NEW YORK, 1990; Comment, *Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103, 105-07 (1984).

tors.<sup>119</sup> The U.S. societies have reciprocal agreements with many licensing societies around the world, including societies in England, France, and Germany. These European societies are not accustomed to demanding the large licensing fees which U.S. societies exact from radio stations in the U.S. The novelty of higher licensing fees is attributable to the fact that, in the past, most European radio stations were state-run endeavors which did not play popular American music.<sup>120</sup> The advent of commercial radio in Europe has brought a tremendous increase in air-play for American artists, and the attendant requirement of higher fees, creating some tension with foreign broadcasters and the European societies. Additional tensions continue to mount as groups in the U.S. press for the removal of all foreign air-play restrictions imposed upon U.S.-produced music, including the removal of air-play quotas.<sup>121</sup> As private international radio continues to grow, the development of a single licensing society for the entire European continent would greatly reduce the bureaucracy that currently exists for dealing with licensing matters and allow controversial issues such as quotas to be discussed at a central forum.<sup>122</sup>

## V. GUIDELINES FOR THE FUTURE

As the 1990s progress, international broadcasting will have to grapple with cultural, political, and technological changes. In light of this, the industry, both domestic and international, and the U.S. Government, should set forth workable guidelines for the future. For instance, the U.S. system of spectrum allocation strikes a delicate balance between private broadcasting rights on the one hand, and the public interest on the other. Under this system the FCC

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119. As an example, in 1989, ASCAP took in \$317 million, \$57 million of which came from foreign societies. In turn, ASCAP distributed \$198 million to the artists. *ASCAP Rakes in \$317.1-mil in '89*, VARIETY, Feb. 21, 1990, at 341-42.

120. Historically, U.S. copyrighted material has had little republication or broadcast on European stations, and thus the fees paid to the U.S. rights holders have been small. However, with the growing exposure of U.S. music in Europe, societies are now collecting fees for this extra exposure. See *UK Royalty Agency Rakes in \$11.4 Mil in Indie Radio Fees*, BILLBOARD, Jan. 12, 1991, at 63.

121. See *Europeans Scorn ASCAP's Demand on 1992 Quotas*, VARIETY, Jan. 31, 1990, at 81.

122. It is interesting to note that with respect to the analogous licensing problem for cable retransmissions in Europe, a continent-wide society was created called the Association for the International Collective Management of Audiovisual Works, (AGICOA). See Madoff, *AGICOA, International Satellite and Cable Television*, U.C.L.A. COMMUNICATIONS LAW PROGRAM 393 (1985).

places broadcast licenses in the hands of private individuals as a public trust. Issuing broadcast licenses to private individuals allows programming to operate in a free market, where station formats grow or decline based upon economic acceptance in the market. This system requires a balance between the number of national and local stations, which preserves the economic viability of local radio, and ensures the effective dissemination of local news and information, thus serving the public interest. Since its inception, the broadcast industry has operated successfully under this system of spectrum allocation. Promoting this delicate balance throughout the emerging international private broadcasting industry would be a sound beginning for multi-national regulatory reform. Beyond this, the U.S. should take additional steps to foster a more dynamic international broadcasting industry.

First, the U.S. should encourage the establishment of a governmental organization for international broadcasters, private corporations, and international broadcasting agencies that would allow such groups to meet to discuss mutual needs and interests. This idea has already taken root in a new bill that creates an Office of Emerging and Advanced Telecommunications.<sup>123</sup> This agency would promote joint ventures in international broadcasting and possibly help fund such undertakings.

Second, Congress must examine the issue of spectrum allocation for both terrestrial and satellite distribution on the domestic and international levels. Any decision concerning spectrum must balance the interests of local programming with the need for national distribution.<sup>124</sup> As Congress determines how to allocate spectrum, it must be wary of the idea of offering spectrum to the highest bidder, which could lead to an industry in which only wealthy players could afford to pay the auction price for licenses. This could result in the elimination of minority ownership and, in turn, would diminish ownership diversity. Specifically, limiting spectrum to the highest bidder would likely conflict with Congress' mandate to ensure that station ownership be available to ethnically diverse groups, which theoretically guarantees that an ethnically diverse

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123. See H.R. 531, 102d Cong., 1st Sess., 137 Cong. Rec. H512 (1991) (a bill to establish procedures to improve the allocation and assignment to the electromagnetic spectrum proposed by Rep. Ed Markey).

124. See *House Introduces a Bill to Reallocate Some Govt. Radio Frequencies to Civilian Use*, *supra* note 49; *House is on Course to OK Spectrum Reallocation*, BROADCASTING, Feb. 19, 1990, at 77; *Spectrum for Sale*, BROADCASTING, Jan. 29, 1990, at 6.

array of programming and points of view are delivered to the public. Our heritage as United States citizens encompasses the heterogeneity of ideas and cultures to which we are exposed. Limiting the availability of broadcast licenses to those with the most economic power would diminish the public's freedom of choice, and hence the marketplace of ideas would shrink.

The issue of spectrum allocation and distribution is of paramount concern in Europe, where the complete lack of spectrum coordination has left the radio broadcasting industry in chaos and created delays and uncertainty in the rapid development of private commercial broadcasting.<sup>125</sup> Thus, a third step for the U.S. to take would be to send an intergovernmental task force to help Europe with the enormous technical and legal task of regulating spectrum.

Finally, the United States should take a leading position in dropping trade barriers to international broadcasting. If the United States believes in an international free market for all goods and services, then Congress should create a program of reciprocity which rewards a foreign nation which drops its broadcast barriers to the United States. Possibly the most crucial and sensitive barrier is the current policy that prohibits foreign ownership of broadcast entities. If the United States truly wants to foster the free market system, it should eliminate foreign ownership limits in the United States for foreign nationals and corporations from countries that have correspondingly eliminated their foreign ownership restrictions.<sup>126</sup> Taking this type of lead position in the broadcasting industry can only bring the world closer to realizing a global media marketplace.

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125. See *Eyewitness: The Way Things Are in Eastern Europe*, BROADCASTING, Apr. 30, 1990, at 66.

126. See *Hill Questions Foreign Ownership of U.S. Media*, BROADCASTING, Nov. 20, 1989, at 56; see also *A Foreign Ownership Commentary*, BROADCASTING, Apr. 22, 1991, at 16.