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The First Amendment and the International "Free Flow" of Information

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The First Amendment and the International "Free Flow" of Information

FRED H. CATE*

In 1979, Mustapha Masmoudi, permanent delegate of Tunisia to the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), addressed the effect of the proliferation of Western¹ media and communication industries on Third World² receivers. In a paper entitled, "The New World Information Order,"³ Masmoudi argued that UNESCO's concern that the international flow of information be free was insufficient; instead, Masmoudi called for an international information flow that is not only free, but also balanced.

Masmoudi was preceded and followed by other representatives of Third World countries, who, while often disagreeing with the specifics of his proposed solution, concurred with Masmoudi's conclusion that the dominance of Western media had a detrimental effect in the Third World. These officials have suggested a variety of Third World interests that are affected by the imbalance in international communica-

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1. The term "Western" here and throughout the Article refers to the United States, Canada, and countries in Western Europe. The term does not refer to all countries in the western hemisphere.

2. The term "Third World" here and throughout the Article refers to countries other than the United States, Canada, the U.S.S.R., and those countries comprising Western Europe and the so-called Soviet bloc. The term "developing countries" as used below is synonymous with "Third World" countries.

3. Masmoudi, *The New World Information Order, in Crisis in International News* 77 (J. Richstad & M. Anderson eds. 1981) [hereinafter *Crisis*]. The New World Information Order is referred to variously by other commentators as the New World Information and Communication Order, the New World Communication Order, and the New International Information Order.

tion, including political sovereignty, cultural autonomy, and commercial development.

The United States, source of most of the Western press communications, first responded to the concern over the imbalance in communications flow with little interest. But when UNESCO began adopting resolutions that would impose limits on the press, the U.S. government responded quickly and severely, ultimately withdrawing from UNESCO. The U.S. press has demonstrated little more sympathy for the Third World's concerns. The communications imbalance issue has been largely ignored, and when proposed solutions were reported the U.S. press has shown determined opposition.

Today the United States is challenged not by proposals for redressing perceived inequities from the Third World, but rather by initiatives from its oldest and most powerful allies. Broadcasting restrictions agreed to by the European Commission in October 1989 would limit both the amount and content of U.S.-origin programming, in order to protect against further erosion of traditional European culture.

This article examines the debate over restricting the "free flow" of information as a means to diminishing the "cultural domination" exercised by the Western media in the Third World and by U.S. media in Western Europe. The article seeks to illustrate the diversity of views that exist in the debate over restricting the international flow of information for cultural and political reasons, and to analyze U.S. responses to those proposed restrictions in light of the First Amendment to the U.S. Constitution.

Part I of the article focuses on some of the concerns about information flow expressed by the Third World countries, and some of the proposed solutions. Part II focuses on the U.S. response to Third World proposals. Part III addresses the effect of the First Amendment on U.S. domestic media regulation, particularly broadcasting. Part IV considers the most recent challenge to U.S. concepts of free speech, the European Broadcasting Directive. The article concludes that the interests underlying the First Amendment, rather than blocking all efforts to create greater balance in the flow of information, weigh in favor of some media regulation.

I. THE DEBATE OVER "FREE FLOW": THIRD WORLD PERSPECTIVES

A. *Origins of the "Free Flow" Debate*

In 1948, the U.N. General Assembly adopted unanimously the

Universal Declaration of Human Rights.⁴ In Article 19 of the Declaration, the General Assembly explicitly recognized free expression as a fundamental human right: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."⁵

Article 19 provided not only for freedom of expression in the sense traditionally understood to be suggested by the First Amendment to the U.S. Constitution—"Congress shall make no law . . . abridging the freedom of speech, or of the press"⁶—but goes further to guarantee the right to *receive* information. The meaning of this extension, which implies a right to communicate instead of merely to speak, is significant. It suggests that the United Nations was not interested solely in the rights of speakers and writers, but also in the rights of listeners and hearers.

This view of an international free flow of communication was fostered by a quixotic campaign by the U.S. press and government during the 1940s and early 1950s to export First Amendment concepts to the rest of the world. This campaign, described by Margaret Blanchard as a "crusade,"⁷ focused on the political and social virtues of an unrestricted press and, to a lesser degree, on the freedom of people living in the Third World and particularly in the Soviet Union to listen to Voice of America programming and have access to Western films, books, and magazines.⁸

According to Professor Blanchard, the quest met with little success and came to an end in the early 1950s, largely because the U.S. press realized that the First Amendment could not be exported without considerable assistance from the federal government.⁹ That assistance brought with it government involvement in press affairs that many in the press believed violated a principle tenet of the First Amendment they were trying to export. In addition, as is discussed below,¹⁰ some countries were already showing determined opposition to U.S. concepts of a free press.

But the model of unrestricted communications that the United

4. G.A. Res. 217 (III), U.N. Doc. A/810 (1948).

5. *Id.* art. 19.

6. U.S. Const. amend. I.

7. M. Blanchard, *Exporting the First Amendment: The Press-Government Crusade of 1945-1952* 1 (1986).

8. *Id.* at 4.

9. *Id.* at 352.

10. See *infra* notes 14-71 and accompanying text.

States claimed to offer was not without influence. In the period before the 1960s, the general international commitment to unrestricted communications went virtually unchallenged. International discourse often focused on the free flow of information as an essential step in fostering cooperation and better relations between nations and peoples, and as particularly important to improving political and economic relations between the West and the Third World. When UNESCO was founded as the instrument through which many of the social and economic goals of the international community were to be achieved, its founders stressed in its constitution the importance of "unrestricted pursuit of objective truth and the free exchange of ideas and knowledge."¹¹

In 1957, however, the U.N. General Assembly adopted Resolution 1313 which stated: "*Reiterating its belief* in the free flow of undistorted news and information within countries and across national frontiers as the essential basis for an accurate and undistorted understanding of events and situations . . ."¹² The resolution concluded by calling on Member States to aid in "facilitating the free flow of accurate information through all media."¹³

A number of countries, particularly in the Third World, were displeased by the existing state of international communications. They charged that the "unrestricted" approach to international communications was a Western concept that had led to Western dominated news and entertainment programming. This resulted in "cultural domination" in the Third World and ignorance about Third World countries in the West.¹⁴ Moreover, the existence of an established Western media was for economic and technological reasons stymieing the development of indigenous news and entertainment media.¹⁵ Finally, with the development and deployment of the geostationary communications satellite, many Third World countries believed that the limited number of geostationary orbit slots were being filled by Western satellites, thereby furthering the dominance of Western media and making it increasingly difficult for Third World countries to deploy such satellites when they had the resources and capability to

11. UNESCO Const. preamble.

12. G.A. Res. 1313, 13 U.N. GAOR Supp. (No. 18) at 26, U.N. Doc. No. A/4090 (1958).

13. Id.

14. See generally *Communication and Domination: Essays to Honor Herbert I. Schiller* (J. Becker, G. Hedebro & L. Paldán eds. 1986).

15. See generally E. Contreras, J. Larson, J. Mayo & P. Spain, *Cross-Cultural Broadcasting* (1976).

do so.¹⁶

UNESCO became the forum for debate on these and other issues relating to the international communications flow and during the 1960s UNESCO sought to identify and propose solutions for regional communications problems. Proposals were considered for the specific purpose of creating Third World news agencies, in order to "increase the developing world's means of expression and to gather and exchange news, films, and various broadcasts for the mutual benefit of these countries."¹⁷ By 1969 the debate had taken on some of the flavor which continues to characterize it today. At a conference held in Canada, a group of communications experts adopted a recommendation calling for a "balanced circulation of news" and stressing in particular that more information should flow from the Third World to the West.¹⁸

At the 1970 General Conference of UNESCO, several developing countries raised "the issue of the unequal distribution of the media, asking that better adapted and balanced international news exchange systems be organized and stressing the right to cultural identity."¹⁹ At the 1972 General Conference, a majority of Member States "emphasized more forcefully still the potential dangers of news flow imbalance."²⁰ In 1974, the Soviet Union introduced a "draft declaration on fundamental principles governing the use of the mass media in strengthening peace and international understanding and in combating war propaganda, racism and apartheid."²¹ The 1974 General Conference recommended that two Intergovernment Conferences on communications policies be held.²² Finally, at the 1976 General Conference, UNESCO Director General Amadou-Mahtar M'Bow appointed a commission chaired by former Irish Foreign Minister and Nobel Peace Prize recipient Sean MacBride, to study "the totality of communication problems in modern societies."²³

While the MacBride Commission began its awesome task, the

16. See J. Powell, *International Broadcasting by Satellite: Issues of Regulation, Barriers to Communication* 207-10 (1985).

17. Int'l Comm'n for the Study of Comm. Probs., *Many Voices, One World* 40 (1980) [hereinafter *MacBride Comm'n Report*].

18. R. Stevenson & D. Shaw, *Foreign News and the New World Information Order* 5 (1984).

19. *MacBride Comm'n Report*, supra note 17, at 40.

20. *Id.*

21. Power & Abel, *Third World vs. The Media*, *N.Y. Times*, Sept. 21, 1980, § 6, at 119, col.

1. The text of the draft declaration was never published officially.

22. *MacBride Comm'n Report*, supra note 17, at 40.

23. *Id.* at xvii, 42.

UNESCO countries continued to confer. The two Intergovernmental Conferences—one in San Jose de Costa Rica in 1976 and another in Kuala Lumpur in 1979—produced recommendations urging that new communications policies be adopted “conceived in the context of national realities, free expression of thought and respect for individual and societal rights.”²⁴ The Kuala Lumpur Conference in particular stressed that “communication, considered both as a means of affirming a nation’s collective identity and an instrument of social integration, has a decisive role to play in the democratization of social relations”²⁵ At the 1978 UNESCO General Conference, a similar resolution was adopted that endorsed freedom of the press but also stressed the need “for the establishment of a new equilibrium and greater reciprocity in the flow of information . . . for a free flow and wider and more balanced dissemination of information.”²⁶

B. *The New World Information Order*

Probably the most far-reaching proposals for addressing the perceived imbalance in international communications came from Mustapha Masmoudi, the permanent delegate of Tunisia to UNESCO and a member of the MacBride Commission. In a paper entitled “The New World Information Order,”²⁷ Masmoudi argued that: “Information plays a paramount role in international relations, both as a means of communication between peoples and as an instrument of understanding and knowledge between nations. . . . However, what must be noted right away is that the present international information system shows a profound imbalance between developed and developing countries.”²⁸

Masmoudi identified seven features of that imbalance. First, Masmoudi cited a “flagrant quantitative imbalance between North and South,” evidenced by the fact that eighty percent of the world’s news flow originates from the major Western news agencies, of which only twenty to thirty percent treats the Third World, even though the Third World accounts for seventy-five percent of the world’s population.²⁹ Second, there exists “[a]n inequality in information

24. *Id.* at 40 (quoting from the San José Conference recommendation).

25. *Id.* at 41.

26. Power & Abel, *supra* note 19, at 121, col. 2 (quoting UNESCO Declaration on the Role of the Mass Media, arts. VI, IX).

27. Masmoudi, *supra* note 3, at 77.

28. *Id.* at 78.

29. *Id.* at 79.

resources.”³⁰ Third, the West shows “[a] de facto hegemony and a will to dominate” not only international communications, but also economics, politics, and technology.³¹ Fourth, Masmoudi cited the “lack of information on developing countries” that is reported in the Western and Western-dominated international media.³² Fifth, Masmoudi argued that the “present-day information system enshrines a form of political, economic and cultural colonialism.”³³

This consists in highlighting events whose significance . . . is limited or even nonexistent; in collecting isolated facts and presenting them as a “whole”; in setting out facts in such a way that . . . is necessarily favorable to the interests of the transnational system; in amplifying small-scale events so as to arouse unjustified fears; in keeping silent on situations unfavorable to the interests of the countries of origin of these media.³⁴

Sixth, Masmoudi stressed that the West influences control over media, even in the Third World, through direct investment, through a “near-monopoly on advertising throughout the world,” and through the direct use of propaganda in the West.³⁵ Finally, Masmoudi charged that Western media reports “[m]essages ill-suited to the areas in which they are disseminated.”³⁶

Masmoudi then addressed the meaning of “free flow” in the modern world. He concluded, first, that traditional Western guarantees of free expression had the effect of protecting the rights of individuals over the rights of groups or communities.³⁷ Thus, a society wishing to maintain some form of cultural identity could be prohibited from doing so, under traditional Western protections, because of the right of a speaker outside of that group. “[The present international legal framework] favors a small number of countries at the expense of the majority, thanks to a conception of liberty peculiar to those who own or control the communication media—and who are frequently the very same people who own or control the means of production.”³⁸

Masmoudi also concluded that because of the commercial nature of

30. *Id.* at 79-81.

31. *Id.*

32. *Id.* at 80.

33. *Id.*

34. *Id.*

35. *Id.* at 80-81.

36. *Id.* at 81.

37. *Id.* at 82.

38. *Id.*

the mass media, the right of access to information and to the media belongs only to those with the resources to obtain it.³⁹ Masmoudi pointed to the absence of any set of international regulations or code of ethics to govern journalism and to assure that journalists report information truthfully and equitably.⁴⁰

Masmoudi's arguments tie in closely with other Third World concerns that the West's dominance of technological and manufacturing resources creates a drastic inequality between Western and Third World countries.⁴¹ This inequality, according to Third World critics, is protected and furthered by a system of Western-oriented laws that stress free market activity and the importance of governmental noninterference. The Western analogy, for Masmoudi and others, might be to U.S. antitrust laws:⁴² while reflecting a preference for free market activity, these laws demonstrate the government's willingness to regulate in order to assure that the market mechanism operates reasonably fairly. Free market activity without such regulation of monopolies might still be "free"—in the sense of unregulated—but it would not be equitable or as productive or successful as the lawmakers desire. Similarly, Masmoudi might argue, a "free flow" of information, when carried on between states having radically different economic and political positions, requires regulation to assure that the market does not produce a result that is unfairly skewed.

In "The New World Information Order" Masmoudi pointed out that ninety percent of the world's radio frequency spectrum is controlled by a tiny fraction of the world's population in developed countries.⁴³ The technological lead and greater economic resources of the West, are protected by tariff systems, also established by the West, which provide favorable rates to Western countries for communications and communications technology-related trade.⁴⁴ This is in part, Masmoudi argues, because the infrastructure of international communications is largely inherited from trade and communication patterns of the colonial past. The infrastructure and tariffs favor a greater volume of traffic among developed countries and from developed to

39. *Id.*

40. *Id.* at 82-83.

41. See, e.g., Declaration on the Establishment of a New International Economic Order, U.N. Doc. A/RES/3201 (1974); Programme of Action on the Establishment of a New International Economic Order, U.N. Doc. A/RES/3202 (1974).

42. See, e.g., Sherman Act, 15 U.S.C. §§ 1-7 (1988); Clayton Act, 15 U.S.C. §§ 12-27 (1988).

43. Masmoudi, *supra* note 3, at 85; see generally T. McPhail, *Electronic Colonialism* 216 (1981).

44. Masmoudi, *supra* note 3, at 84.

developing countries, rather than among developing countries or from developing to developed countries.⁴⁵

Masmoudi, therefore, called for a "free and balanced" flow of information, brought about through a New World Information Order.

The new world information order founded on democratic principles seeks to establish relations of equality in the communications field between developed and developing nations and aims at greater justice and greater balance. Far from calling in question the freedom of information, it proposes to ensure that the principle is applied fairly and equitably for all nations and not only in the case of the more developed among them.⁴⁶

Under the new order, Third World countries would create national communications policies, national news agencies, and networks to facilitate improved production and exchange of programming.⁴⁷ Western countries would be called on to show greater respect for Third World values and cultures, and to report a wider variety of news from a wider variety of sources.⁴⁸ International organizations, such as UNESCO, would act to subsidize the work of Third World media and to sponsor research, training, and technological development of media in the Third World.⁴⁹ Masmoudi also called on international agencies to regulate spectrum and geostationary orbit distribution more fairly, paying greater attention to developing Third World capabilities.⁵⁰ Masmoudi urged a revision of the international telecommunications tariff structure, to provide more favorable terms for tariffs and air freight surcharges which apply to transporting publications to and from developing countries.⁵¹ Finally, Masmoudi called on professional journalists to establish an international code of ethics.⁵²

Masmoudi's most controversial specific recommendation called for regulations based on the content of the information being communicated. Masmoudi stressed that sovereign states have a right to objective, balanced, and accurate news, and therefore should have the right to correct or demand retraction of news that does not meet those cri-

45. T. McPhail, *supra* note 43, at 86.

46. *Id.* at 86.

47. *Id.* at 87.

48. *Id.* at 88.

49. *Id.* at 89-90.

50. See *id.* at 89-90, 93-95.

51. *Id.* at 94-95.

52. *Id.* at 95.

teria.⁵³ Masmoudi called for:

- Regulation to prevent abuses of the right of access to information;
- Definition of appropriate criteria to govern objective news selection;
- Regulation of the collection, processing, and transmission of news and data across national frontiers⁵⁴

Masmoudi was for many years regarded as the chief spokesperson for the Third World. As attention to international telecommunications waned in the 1980s, however, so has Masmoudi's standing. In fact, his own government has disavowed his position as spokesperson for Tunisia. Moreover, Masmoudi always represented the extreme position of the Third World. Contained in his proposals are most of those of other Third World leaders, but few countries in the Third World have endorsed Masmoudi's whole panoply of solutions.

C. *The Role of Cultural Autonomy*

One of the most important variations on the themes espoused by Masmoudi focuses on the Third World's concern with preserving cultural identity and independence. A prominent spokesperson for this issue is Mochtar Lubis, President of the Press Foundation of Asia and a member of the MacBride Commission. In a paper presented to the Commission entitled "Interaction Between Culture and Communication,"⁵⁵ Lubis adopted a more moderate tone than Masmoudi and disavowed much of the "domination" and anti-Western rhetoric that Masmoudi employed. Nonetheless, Lubis expressed concern over the impact of imported communications on the culture and cultural identity of Third World countries. According to Lubis, "modern communications [are] a powerful instrument to influence the attitudes, habits, taste, perceptions of many people around the world. . . . Thus communications penetrate into the deepest layers of the societal fabric and of culture."⁵⁶

Lubis argued that "[i]n most cases the new attitudes and appetites work to the detriment of traditional culture, and traditional products,

53. Id. at 93.

54. Id. at 92.

55. Lubis, *Interaction Between Culture and Communication*, 76 Int'l Comm'n for the Study of Comm. Probs. 1 (n.d.). The author gratefully acknowledges the cooperation of Elie Abel, Professor of Communications at Stanford University and the U.S. representative on the MacBride Commission, who provided the background papers prepared by members of the Commission.

56. Id. at 2.

and change social as well as cultural values, including ethics and aesthetics."⁵⁷ Lubis offered three examples: the impact of Western advertisements on Third World purchasing patterns; the impact of Western media on entertainment activities, noting particularly the decline of personal interaction and community cooperation; and the blame that the Western media placed on Third World countries for the oil shortages in the 1970s, without considering the role of oil in Third World economies.⁵⁸

Lubis stressed that governments should not restrict the media: cultural development requires a free exchange of ideas, perceptions and insights. But neither should corporations, economics, politics, ideology, or regulatory structures act to restrict free, two-way communications. A truly free exchange is impossible where so many factors act to create a dramatic imbalance between Western and Third World media and communications capabilities.

The deprivation of information to members or to groups in a society, the non-existence of a free flow of information, a one-way communication situation, monopolies of information or communications (whether by governments or private companies) causes a breakdown in the nerve system of the society which will produce cultural setbacks in the widest sense of the word. The same situation at the international level also causes similar breakdowns and setbacks among members of the international community.⁵⁹

Lubis's concern has been shared by many Third World countries. That concern is heightened by the fact that many communications problems are beyond the control of developing countries. Some of the issues are fairly straightforward. For instance, the fact that television and radio programming can often be bought from the West more affordably than it can be produced within developing countries has caused many Third World broadcasters to import the cheaper product.⁶⁰ When and if a country develops more advanced and economical programming abilities, its programs often tend to resemble Western shows. These problems have solutions—albeit disagreeable ones from a U.S. point of view—since any country is theoretically free to regulate its own internal broadcast entertainment industry.

More difficult problems are those caused by factors outside the

57. *Id.*

58. *Id.*

59. *Id.* at 4.

60. See E. Contreras, *supra* note 15, at 37.

individual nation's control, but still within regional or international control. For instance, many countries complain that the supply of international news is dominated by four wire services, all of which originate in the West.⁶¹ In the 1970s, a number of countries responded by creating the News Agencies Pool of Nonaligned Countries.⁶² This news service acts as an alternative to the Western "big four," and as a clearinghouse for Third World news. Theoretically, such an agency could also act as a clearinghouse for Third World entertainment programming as well, or perhaps even as a central production facility. Thus far, this has not been the case and, given the diversity within the Third World, seems unlikely in the near future.

The most difficult set of issues relating to the cultural autonomy concerns of the Third World are those problems which seem wholly beyond the control of Third World countries. These include the problems of the Western mass media ignoring Third World news and issues or portraying Third World countries in a unfavorable light. Also in this category is the problem of Direct Broadcast Satellites ("DBS"), whereby countries like the United States broadcast not only propaganda, but all forms of news and entertainment programming, into a country without that country's permission. Because of the economics involved, the problem is seldom one of a Western country deliberately broadcasting entertainment programming to an unwilling receiver country. Rather, the problem most often is spillover: the signal is broadcast from a satellite to a willing recipient, but the signal spills over into neighboring countries.⁶³

DBS spillover should arguably be less of a problem as new technology provides increasingly narrow signals. As DBS technology has improved, however, many broadcasters have begun covering entire nations, rather than a single city or installation, with a single broadcast signal, resulting in considerable spillover.⁶⁴ Moreover, the problems associated with unwanted signals are not limited to DBS spillover and the Third World. Canada has lodged frequent protests about the disastrous effect of signal spillover from U.S. broadcasting facilities near the U.S.-Canadian border on Canadian culture and on

61. Those four global news agencies are: Associated Press (New York), United Press International (New York), Reuters (London), Agence France-Presse (Paris). Commentators differ over whether the Soviet Union national news agency TASS should also be considered a global news agency. See generally D. Weaver and G. Wilhoit, *Foreign News in the Western Agencies*, in *Foreign News and the New World Information Order 153* (Stevenson ed. 1984); T. McPhail, *supra* note 43, 171-79 (1981).

62. Mankekar, *The Nonaligned News Pool*, in *Crisis*, *supra* note 3, at 369.

63. See J. Powell, *supra* note 16, at 212-15.

64. *Id.*

the Canadian broadcasting industry.⁶⁵ Culturally, economically, and politically, spillover poses a serious threat, and one which has thus far defied successful regulation by any agency other than the broadcasting country.

D. *The MacBride Commission Report*

After four years of extensive study, the MacBride Commission in 1980 produced its long awaited report. The report, published under the title *Many Voices, One World*,⁶⁶ thoroughly discussed many national and international communication issues. The report concluded with 82 specific recommendations, grouped together under five headings: Strengthening Independence and Self-Reliance, Social Consequences and New Tasks, Professional Integrity and Standards, Democratization of Communication, and Fostering International Cooperation. Many of these recommendations were primarily calls for further study.

On the topic of the "balance" of the international flow of information, the Commission rejected many of the more controversial Third World proposals. The Commission recommended that developing countries strengthen their communication and news reporting industries.⁶⁷ The Commission called for a major research and development effort to increase the supply of paper for newsprint, reduction of telecommunication tariffs for poorer countries, and re-examination of the division of the electromagnetic spectrum and the geostationary orbit to assure that these resources are divided equally among countries.⁶⁸

With specific regard to preserving the cultural identity of Third World nations, the Commission recommended that countries identify and promote cultural priorities and that they introduce "guidelines with respect to advertising content and the values and attitudes that it fosters."⁶⁹ The Commission produced a variety of related recommendations, ranging from encouraging the development of non-commercial broadcasting to suggesting that the Western press "allot more space and time to reporting events in and background materials about foreign countries in general and news from the developing world in particular."⁷⁰ The professional press was called upon to adhere to a high standard of "truthfulness, accuracy and respect for human

65. See generally *id.* at 178, 213.

66. MacBride Comm'n Report, *supra* note 17.

67. *Id.* at 255-56.

68. *Id.* at 257-58.

69. *Id.* at 259-60.

70. *Id.* at 260-63.

rights;" when the press fails to meet that standard, the Commission concluded, "the public . . . is entitled to hold them accountable for their actions."⁷¹

Perhaps the most controversial recommendations of the MacBride Commission were those that called on the media to promote certain social, cultural, economic and political goals:

All those working in the mass media should contribute to the fulfillment of human rights, both individual and collective The contribution of the media in this regard is not only to foster these principles, but also to expose all infringements, wherever they occur, and to support those whose rights have been neglected or violated. . . .

The media should contribute to promoting the just cause of peoples struggling for freedom and independence and their right to live in peace and equality without foreign interferences.⁷²

The Commission also urged that: "Effective legal measures should be designed to: (a) limit the process of concentration and monopolization; (b) circumscribe the action of transnationals by requiring them to comply with specific criteria and conditions defined by national legislation and development policies"⁷³

Despite the fact that these represented the more moderate of Third World proposals, the MacBride Commission recommendations did little to ameliorate the conflict between Third World countries and the West over international communications flow.

II. THE DEBATE OVER "FREE FLOW": THE U.S. RESPONSE

A. *From the Press*

The United States—both press and government—almost wholly ignored Third World calls for attention to the "free flow" issue until the late 1970s. Faced with Masmoudi's proposal for a New World Information Order and the existence of a commission with an unknown stance on the issue, the press began to pay attention. One commentator referred to the New World Information Order as a "very touchy issue for most of the western press—particularly in the United States, where just mentioning it seems enough to transform normally calm, fair-minded news executives into desk-pounding

71. *Id.* at 262.

72. *Id.* at 265.

73. *Id.* at 266.

ideologues.”⁷⁴

Between 1976 and 1983, The New York Times ran 141 articles and editorials dealing with the press debate in UNESCO and the U.S. government's response. The tone of these pieces was almost uniformly hostile, often characterizing the issue as being an attempt by “undemocratic governments” to censor the press. In fact, more than half of the 141 pieces were editorials and columns criticizing the “quiet moves” being made by UNESCO to “curb freedom of the press.”

Several examples may help illustrate the vehemence of the press's opposition to the discussion about international information flow. In one editorial, “UNESCO as Censor,” The New York Times called UNESCO “the thought-controllers,” and concluded: “Let there be no doubt in the United Nations Educational, Scientific and Cultural Organization—which aims to become the arbiter of “responsible” communication—that American journalism values its freedom from official scrutiny and control more than it values UNESCO, or even the United Nations.”⁷⁵

Richard Leonard, chairman of the International Press Institute and editor of the Milwaukee Journal, gave the following characterization of the effects of the New World Information Order: “Among other things it would mean accepting the idea of state control over all news and information coming into or going out of any country, thereby imposing censorship and vastly reducing the amount of information about the world that a free society like ours needs. . . .”⁷⁶

Leonard is inaccurate in suggesting that even Masmoudi's proposal would require “state control over all news and information.” More significant, however, is Leonard's insistence on considering the most radical proposal—not the authoritative MacBride Commission Report—and a proposal that had already been disavowed by many Third World countries. Moreover, Leonard reflects a common U.S. view of the problem by focusing only on U.S. interests.

Not every Western response to the “free flow” debate has been hostile. Gerald Long, former managing director of Reuters, wrote:

The feeling among many nonindustrial countries . . . is that they lack the information structure present in the industrial

74. D. Wood, *Perspectives on a New World Information Order* 33 (1985) (unpublished A.B. thesis, Stanford University). The author gratefully acknowledges the assistance and critical insight of Donna C. Wood.

75. UNESCO as Censor, *N.Y. Times*, Oct. 24, 1980, at A32, col. 1.

76. R. Leonard, *U.S. Concerns with the UNESCO Communications Program* 3 (1984).

world, in which they are right, and that they should have that structure, in which aspiration they are justified; that their countries are little and poorly reported in the press of the industrial countries, which is true, and should be better reported, which is desirable.⁷⁷

Long, however, concluded by criticizing the debate for being too focused on the political consequences of information flow. Long's argument is essentially that the press should be in the business of the search for truth in events, not the study of problems. Long is joined in this perception by other Western journalists who, while sensitive to the Third World's communications problems, believe that the current debate reflects a political concern by Third World authoritarian governments to gain control over their countries' media.⁷⁸

A final category of Western response to the free flow debate has been one of sympathy, overshadowed by economic determinism. According to media experts, economic factors more than political motives or ideology shape the nature of news gathering agencies and the news that they gather and distribute. For instance, Mort Rosenblum, former editor of the International Herald Tribune, has suggested that there are only four major international news agencies because it is economically impossible to support more.⁷⁹ Similarly, the Western press tends to focus on Western events and only reports disasters from the Third World, reflecting the economic impossibility of keeping news bureaus throughout the Third World and the economic reality of what Western consumers want. Keith Fuller of Associated Press has noted that "AP's total gross revenue from the lesser-developed countries is less than 1 percent of our income. Our coverage costs in those areas exceed our revenue many times over."⁸⁰

The profit issue undoubtedly played a significant role in the almost uniform hostility evidenced by the Western press for the New World Information Order. As is discussed below with regard to the U.S. government's response,⁸¹ the Western press was always mindful that restrictions on the press in any form were likely to cause economic loss. John M. Eger, telecommunications adviser to Presidents Richard Nixon and Gerald Ford, former head of the White House Office of Telecommunications Policy, and, until 1986, senior vice president

77. Power & Abel, *supra* note 26, at 117 (quoting Gerald Long).

78. See Righter, *World Communication Issues*, in *Crisis*, *supra* note 3, at 56.

79. Rosenblum, *Reporting from the Third World*, in *Crisis*, *supra* note 3, at 221.

80. Fuller, *AP: Covering the World*, in *Crisis*, *supra* note 3, at 271, 273.

81. See *infra* notes 85-102 and accompanying text.

of CBS Worldwide Enterprises, equated the concern that "the free flow of information seems to be under fire" with a concern that "the channels of trade in communications goods and services are clogged."⁸² Eger cites to the fact that even fifteen years ago "more than half our workers were employed in something called an information sector, that more than half our gross national product depended on the production, use, storage and transfer of information, and that we needed a national information policy."⁸³

The U.S. concern over the New World Information Order is grounded in the fact that "international barriers pose serious problems for those companies directly involved in the communications business and for others who depend on the free flow of communications to do their business."⁸⁴

The New World Information Order, then, was viewed by the press not only as a challenge to First Amendment principles, but also as an impediment to higher profits resulting from global information flows.

B. *From the Government*

The U.S. government, like the press, following its unsuccessful effort to export U.S. concepts of the free flow of communications immediately following World War II, largely ignored the "free flow" debate until the mid-1970s. While the government had taken an active role in geostationary orbit and spectrum allocation talks, it had shown little interest in the Third World's concerns over the Western media's domination of international communications. When the Soviet Union in the 1974 UNESCO General Conference introduced a "draft declaration on fundamental principles governing the use of the mass media in strengthening peace and international understanding and in combating war propaganda, racism and apartheid," the U.S. delegation walked out of the Conference.⁸⁵ In 1976, U.S. Secretary of State Henry Kissinger threatened that the United States would withdraw from UNESCO if the Mass Media Declaration was adopted.⁸⁶

With the formation of the MacBride Commission, U.S. policy turned to one of concerted opposition. The U.S. representative on the MacBride Commission, Elie Abel, former dean of the Columbia

82. Eger, *The Importance of Working for a Free Flow of Global Information*, *Broadcasting*, Mar. 14, 1988, at 24.

83. *Id.*

84. *Id.*

85. Power & Abel, *supra* note 26, at 119, col. 2.

86. Frederick, *UNESCO's Mass Media Declaration, Ten Years of Accomplishment?* *Intermedia*, July-Sept. 1987, at 76.

School of Journalism, had been for many years an active journalist and was known to have little sympathy for the Third World's charges of cultural domination. James Buckley, Under Secretary of State for Security, Assistance, Science and Technology, when the MacBride Commission produced its report, described the U.S. response to the "free flow" debate as "fighting the good fight."⁸⁷ Buckley went on to address the issues more directly than did most Reagan Administration spokespersons:

Developing countries argue for what they call a better "balance" in international distributed news about their countries and their activities. We can and should make an effort to help these nations meet their own legitimate communications needs but never at the expense of free and unfettered reporting by nongovernmental agencies.⁸⁸

But the real concern for the United States, according to Buckley, is the importance of communications industries to the United States and the U.S.'s balance of payments. "For the United States, communications and information technologies represent a leading edge of U.S. strength. Policy and practice in international communications and information activities must actively enhance the overall well-being of the United States, the lives of its people, and its system of government."⁸⁹

The problem, Buckley wrote, is that the U.S. lead in communications is slipping. "Other industrialized nations are advancing in communications and information technologies; some are rapidly assuming a major role and gaining large shares of world markets. Newly industrialized countries wish to gain a foothold in an area which represents the wave of the future."⁹⁰

Buckley then turned to the opposition that the United States and U.S. communication values faced from other Western countries, from Eastern countries, and from the Third World—that is, from the U.S.'s economic competitors. For the United States to maintain its domination of the communications industry, it should undertake actions designed to, among other things, "enlarge acceptance of the principle of free international flow of information and ideas, including applicability of this principle to newly emerging communications and infor-

87. Buckley, *International Communications and Information Objectives*, Dep't St. Bull. (Mar. 4, 1982).

88. *Id.*

89. *Id.*

90. *Id.*

mation technologies.”⁹¹

In 1982, with the MacBride Commission Report in hand, the U.S. Congress passed the Beard Amendment to the State Department’s authorization bill.⁹² The amendment called for withholding U.S. contributions to UNESCO if the organization undertook measures to limit press freedom anywhere in the world.

In 1984, Edmund Hennelly, chairman of the U.S. Delegation to the 1983 UNESCO General Conference, testified on the free flow debate before the House Committee on Foreign Affairs. He noted that the UNESCO Secretariat, responding to prodding from the radical Third World states, often allied with the Soviet Bloc, had produced working papers concerning international rules and procedures which, no matter what their intention, would in fact have hobbled press freedom and the free flow of information throughout the world.⁹³

Hennelly went on to present a parade of horrors—the most odious by traditional Western standards of the regulations suggested by some Third World delegates—despite the fact that none of these were endorsed by the MacBride Commission and none had, or have since, been endorsed by UNESCO.⁹⁴

Hennelly testified that his instructions from the President included the elimination of programs which would limit press freedom or the free flow of information throughout the world from UNESCO’s Communications Sector. Additionally, if possible, to introduce into UNESCO programs Western free press concepts and values.⁹⁵

Hennelly then testified that his delegation was successful in this regard:

*UNESCO’s Communications sector was improved. Programs which could have hampered the workings of a free press were deleted or substantially modified, and several Western concepts were added, e.g. the concept that censorship, including state censorship, is an important impediment to the free flow of information, and the idea that the press has a critical role to play in exposing abuses of power.*⁹⁶

91. *Id.*

92. Pub. L. No. 97-241, § 109(a).

93. U.S. Withdrawal from UNESCO: Hearings Before the Subcomm. on Human Rights and International Organizations and on International Operations of the House Comm. on Foreign Affairs, 98th Cong., 2d Sess. 13-17 (1984) (statement of Edmund P. Hennelly, chairman of the U.S. Delegation to the 22nd General Conference of UNESCO).

94. *Id.*

95. *Id.* at 24.

96. *Id.*

—That progress was made in this area was recognized by such staunch defenders of press freedom as the World Press Freedom Committee whose representative at the conference sent telegrams to interested groups at the end of the conference indicating that, and I paraphrase—if anyone is looking for a reason to leave UNESCO, they will not find it in the communications program adopted at the conference. In the words of the *Wall Street Journal*, "efforts to impose a New World Communications Order were derailed."

—I understand that the State Department's current report to Congress, in compliance with the Beard Amendment, indicates that UNESCO is not doing anything counter to the intent of that amendment to impede the ability of a free press.⁹⁷

Hennelly's testimony aside, U.S. Secretary of State George Shultz nonetheless notified U.N. Secretary General Javier Perez de Cuellar and UNESCO Director General Amadou Mahtar M'Bow that the United States was withdrawing from UNESCO, citing concerns about the budget and that UNESCO was straying from its original agenda.⁹⁸ In his response to Secretary Shultz, Director General M'Bow stressed that "in the thirty-seven years since its foundation, there may have been some changes in the subjects of immediate concern to Unesco and in the weight of emphasis placed by the General Conference on particular aspects of the programmes which it has adopted."⁹⁹ The Director General noted that in those 37 years, many former colonies had come to political independence; the membership of UNESCO had increased from 28 to 161 sovereign states. UNESCO owed those nations, as much as the United States, its assistance in helping attain its objectives of international peace and of the common welfare of mankind.¹⁰⁰

Director General M'Bow then turned to what he seemed to feel underlay the U.S. action:

97. *Id.*

98. Letter from U.S. Secretary of State George Shultz to UNESCO Director General Amadou-Mahtar M'Bow (Dec. 28, 1983) (copy on file at the offices of the *Virginia Journal of International Law*); letter from U.S. Secretary of State George Shultz to U.N. Secretary General Javier Perez de Cuellar (Dec. 29, 1983) (copy on file at the offices of the *Virginia Journal of International Law*).

99. Letter from UNESCO Director General Amadou-Mahtar M'Bow to U.S. Secretary of State George Shultz (Jan. 18, 1984) (copy on file at the offices of the *Virginia Journal of International Law*).

100. *Id.*

The new factor whose fundamental nature has perhaps not always been sufficiently appreciated in this: the most deprived countries have realized the basic importance of the assertion of their cultural identity in the process of taking full possession of their rediscovered dignity. They have also realized that none of the major problems they face can be properly solved without suitable development of education at all levels, without a surer grasp of science and technology, and without an increase in their potential in the various fields of information and communication, given the extent to which the techniques of communication are affecting and will increasingly affect the life of both individuals and societies.¹⁰¹

Despite M'Bow's pleas, the United States withdrew from UNESCO in December 1984.¹⁰²

III. THE DEBATE OVER "FREE FLOW": THE ROLE OF THE FIRST AMENDMENT

A. *First Amendment Rationales*

The First Amendment to the U.S. Constitution is cited by many U.S. critics as the principled basis for their opposition to the New World Information Order and similar proposals.¹⁰³ According to these critics, the First Amendment constitutes a ban on restrictions

101. *Id.*

102. *N.Y. Times*, Dec. 31, 1984, § 1, at 3, col. 4.

103. For discussion of the impediment that commentators suggest the First Amendment may pose to recognition of the New World Information Order, see Farley, *Conflicts Over Government Control of Information—The United States and UNESCO*, 59 *Tul. L. Rev.* 1071 (1985); Theberge, *U.N.E.S.C.O.'s "New World Information Order": Colliding With First Amendment Values*, 67 *A.B.A. J.* 714 (1981).

The First Amendment, by its own terms, restricts only the U.S. Congress, though the Supreme Court has applied it to the other branches of the federal government, as well as, by virtue of the Fourteenth Amendment, state and local governments. Although the Court has been willing to assume "*arguendo*, that First Amendment protections beyond our national boundaries," it has never sought to apply the dictates of the First Amendment to restrict any foreign authority. *Haig v. Agee*, 453 U.S. 280, 308 (1981).

Congress and the President, by adopting restrictions promulgated by a foreign or international body into U.S. law, or by accepting such restrictions into a treaty, could create a situation in which the First Amendment might apply. Similarly, a U.S. court, by seeking to enforce such restrictions, could find itself at odds with the First Amendment. Absent action by the U.S. government, the actions of foreign authorities are unlikely to raise domestic constitutional issues. See Note, *The New World Information and Communication Order: Is the International Programme for the Development of Communication the Answer?*, 15 *N.Y.U. J. Int'l L. & Pol.* 953, 982-83 & n.104 (1983).

on the press or the international flow of communications. Yet this view of the First Amendment is inconsistent with two of the major rationales which scholars and the Supreme Court have indicated underlie the First Amendment.¹⁰⁴

The first of these is the marketplace rationale, according to which society benefits from an uninhibited exchange of ideas. John Locke wrote:

[T]he business of laws is not to provide for the truth of opinions For the truth certainly would do well enough if she were once left to shift for herself. . . . She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. . . . [I]f truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.¹⁰⁵

The marketplace of ideas rationale does not require believing that truth will always triumph over falsehood. Rather, part of the justification stems from the idea that truth is not always easily recognized and that truth may arise out of what was once perceived as falsehood. It is therefore important that all speech—whether viewed as true or false—be placed before the public.¹⁰⁶

104. Two less frequently cited rationales underlying the First Amendment are self-fulfillment and safety-valve. The self-fulfillment rationale assumes that people have a natural ability and desire to think freely and to express themselves freely. "Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature." T. Emerson, *The System of Freedom of Expression* 6 (1970). Individuals would be repressed and frustrated by limitations on their free expression. They would not develop themselves or their ideas as fully; therefore, they would contribute less to society. See generally L. Tribe, *American Constitutional Law* 785-89 (1988).

The safety-valve rationale was articulated by Justice Brandeis, who wrote in *Whitney v. California*:

[I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

274 U.S. 357, 375 (1927) (Brandeis, J., concurring). By limiting the ability of an individual to convince others of his ideas through spoken or written advocacy, laws curbing free expression encourage discontent and violence. See T. Emerson, *Toward a General Theory of the First Amendment* 11-15 (1966).

105. J. Locke, *A Letter Concerning Toleration* 45-46 (P. Romanell ed. 1955) (1st ed. 1689); see also J. Mill, *On Liberty* 18, 28-29 (D. Spitz ed. 1975) (1st ed. 1859).

106. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . .").

According to the second rationale, self-governance, the First Amendment protects unfettered free speech because in a democratic society the public must have all information necessary to "govern." Alexander Meiklejohn has written that a democratic society that depends on its members to be both citizens and rulers must be open to discussion about and criticism of government, even allowing for "arguments against our theory of government."¹⁰⁷

The vital importance of self-governance speech has run through many U.S. Supreme Court opinions. The Court has repeatedly asserted that:

expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values. . . . [S]peech concerning public affairs is more than self-expression; it is the essence of self-government." There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."¹⁰⁸

These interpretations of the underpinnings of the First Amendment are striking in that the two most often relied on by commentators and courts—the marketplace of ideas and self-governance rationales—both focus on *listening* as much as speaking. The marketplace of ideas is valuable only to the extent that those ideas are received into the society, to be debated, accepted, modified, or rejected; if an idea is merely expressed, but not heard or read, it is of little value. Likewise, speech which informs voters and elected officials has merit only if it is heard by those voters and officials. The Constitution does not require that someone listen to another's ideas, but it does protect another's

107. A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 65-66 (1948). Meiklejohn also notes:

Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! . . . We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

Id.

108. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted); see also *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

right to express those ideas precisely so that if someone wishes to listen, she may.

This view of the First Amendment is consistent with restrictions, such as time, manner, and place, that the Supreme Court has placed on freedom of expression.¹⁰⁹ Moreover, this view is supported by common sense and demonstrated practice. The town meeting is the archetypal example of an occasion in which free speech warrants the highest protection under the First Amendment. If, in a town meeting, everyone spoke at the same time, no one would hear, nothing positive would result, except for however better those in attendance felt for having expressed themselves. What makes speech at the town meeting work, is that while everyone may speak, they take turns doing so, with one speaking while the others listen. It is only through this regulation of speech—through these restrictions on the free flow of information—that the goals which the First Amendment is designed to serve are promoted.

B. *Restrictions on the Press Generally*

Within the United States, there exist in fact many restrictions on the press and the flow of communications. Michael Gartner, president of the News Division at NBC News and former president of the American Society of Newspaper Editors, has identified at least eleven contemporary restrictions on free speech in the United States.¹¹⁰

Consider the current precarious position of commercial speech in the United States. Following *Posadas de Puerto Rico Assocs. v. Tourism Co.*,¹¹¹ if the government can constitutionally regulate an activity, it may also regulate speech regarding that activity. *Posadas* involved advertisements for gambling in Puerto Rico. The U.S. Congress has banned the advertisement on television of cigarettes; bans on products containing alcohol are currently pending.¹¹² Another example is obscenity. Under the Supreme Court's ruling in *Miller v. Califor-*

109. See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535 (1980) ("This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication").

110. Gartner, Speech to American Society of Newspaper Editors, San Francisco (Apr. 9, 1987).

111. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986).

112. See generally *Lowe v. Securities & Exch. Comm'n*, 472 U.S. 181 (1985); *Bolger v. Youngs Drug Prods. Coop.*, 463 U.S. 60 (1983); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

nia,¹¹³ a broad variety of speech related to sexual conduct is susceptible to prohibition if it offends community standards.¹¹⁴ "Fighting words"—words that may incite listeners to violence—also may constitutionally be regulated.¹¹⁵

Perhaps there is no greater restriction on free speech in the United States than defamation law. Defamation actions in the United States, while difficult to win, are easy to bring, extremely expensive for the press to defend, and phenomenally costly in the few instances where the press does lose. A great deal of attention has been focused on this problem and the severe threat it poses to a free press. Scholars and government officials have proposed a variety of solutions, including limitations on punitive damages, procedural changes, and the creation of a declaratory judgment action, but no one has suggested that defamation actions be eliminated.¹¹⁶ Despite the magnitude of the threat to the press, particularly the smaller press, and despite the absolute language of the First Amendment, no one is considering eliminating the right of a defamed individual to seek to have her injury compensated.

C. *The Regulation of Broadcasting*

Probably the closest analogy, however, to the international "free flow" debate, and particularly arguments about cultural domination, is the U.S. regulation of the television broadcast industry. The analogy is close because both domestic broadcast regulations and many of the MacBride Commission proposals focus on broadcasting, as opposed to print media; because the financial capital and technological sophistication required to mount a broadcast operation is uniquely relevant to both sets of regulations; and because in both cases the two factors justifying the regulation are (1) economic and electromagnetic

113. *Miller v. California*, 413 U.S. 15 (1973).

114. See generally *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Ginsberg v. New York*, 390 U.S. 629 (1968); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

115. See generally *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

116. See Smolla & Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 *Wm. & Mary L. Rev.* 25 (1989); Annenberg Washington Program, *Proposal for the Reform of Libel Law* (1988); Franklin, *Constitutional Libel Law: The Role of Content*, 34 *UCLA L. Rev.* 1657 (1987); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 *Calif. L. Rev.* 809 (1986); Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 *Calif. L. Rev.* 847 (1986); Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 *U.S.F. L. Rev.* 1 (1983).

spectrum scarcity, and (2) the importance of using scarce resources in "the public interest."¹¹⁷ It is therefore profitable to examine the considerable extent to which U.S. television broadcast regulations impinge on the First Amendment, the rationales advanced by the government for that imposition, and the applicability of those rationales to international communications regulations that might be unacceptable to the United States because they are thought to offend First Amendment interests.

The federal government first regulated broadcasting in the Radio Act of 1927.¹¹⁸ The 1927 Act contained a provision requiring broadcasters that carry the advertisements of one political candidate to give or sell equal time to opposing candidates.¹¹⁹ Since 1927, Congress has imposed content-based limits—limits triggered by, or directed towards, the content of speech, and the most suspect of regulations under the First Amendment—on broadcast speech dealing with, among other subjects, indecency,¹²⁰ cigarette advertising,¹²¹ and lotteries.¹²²

Congress authorized the Federal Communications Commission (FCC) to regulate broadcasting—at that time, still radio broadcasting—in the Communications Act of 1934.¹²³ According to the Act, the FCC was to regulate broadcasting according to "public interest, convenience and necessity."¹²⁴ As with the 1927 Act, no mention was made of the First Amendment rights of broadcasters; rather, the focus was on the right of the society receiving the broadcast. Broadcasts were to be regulated in a way that served the interests of that society, within the limits of the technologically and economically possible.

One of the FCC's early regulatory acts was to define the relationships that were permissible between a network programmer and a local broadcast affiliate. This was done in an effort to assure that no one person or group exercised too much control of programming. This action was undertaken in spite of the First Amendment rights of

117. For the statutory standard for regulating broadcasting in the United States, see 47 U.S.C. § 309(a) (1982).

118. Pub. L. No. 69-632, 44 Stat. 1162 (1927). For a brief but more complete discussion of the history of broadcast regulation see Dyk, *Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer*, 5 *Yale J. on Reg.* 299, 301-08 (1988).

119. *Id.* § 18.

120. 18 U.S.C. § 1464 (1982).

121. 15 U.S.C. § 1335 (1982).

122. 18 U.S.C. § 1304 (1982).

123. 47 U.S.C. §§ 151ff (1982).

124. 47 U.S.C. § 309(a) (1982).

the network or the affiliate to broadcast what it could, how it could. The FCC's action, when challenged in court, became the first real First Amendment test of the FCC's regulatory activities. In *National Broadcasting Co. v. United States*,¹²⁵ the Supreme Court rejected National Broadcasting Company's First Amendment claim:

Freedom of utterance is abridged to many who wish to use the limited facilities of radio *Because it cannot be used by all, some who wish to use it must be denied* The right of free speech does not include, however, the right to use the facilities of a radio without a license.¹²⁶

The rationale that the Court was referring to in this case has become known as the scarcity rationale: because there is insufficient electromagnetic spectrum for everyone to broadcast, the government may legitimately deny some people's free expression rights. The United States has accepted this principle on an international scale as well, as evidenced by its participation in and support for international conferences on broadcast spectrum and geostationary orbit allocation.

As part of the Communications Act, Congress passed what became section 315, the equal time rule, under which a broadcaster who sells or gives time for a candidate's use must treat all other candidates for the same office equally.¹²⁷ In 1949, the FCC unveiled a broader approach, known generally as the fairness doctrine.¹²⁸ According to this doctrine, broadcasters are required to air issues that "are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely."¹²⁹ When the broadcaster does treat such issues, it must assure that important contrasting views are also presented.

In 1958, the Commission promulgated two corollaries to the fairness doctrine: the personal attack rule, under which the FCC had ordered stations that broadcast programs which attack a person's character during a discussion of a controversial issue of public importance to inform the person and offer her an opportunity to rebut the

125. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

126. *Id.* at 226-27 (emphasis added).

127. 47 U.S.C. § 315 (1982).

128. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (report). The FCC determined that the Fairness Doctrine violated the First Amendment in *Syracuse Peace Council v. Television Station WTVH*, Syracuse, N.Y., 52 Fed. Reg. 31,768 (1987). For a more complete description of the subsequent history of the fairness doctrine, see *infra* notes 132-36 and accompanying text.

129. T. Carter, M. Franklin, J. Wright, *The First Amendment and the Fifth Estate* 59 (1986).

attack,¹³⁰ and the political editorializing rule, which gives candidates the right to reply to editorials criticizing them or favoring their opponents.¹³¹ It is from the former application of the fairness doctrine—the personal attack rule—that the seminal statement on the constitutionality of broadcast regulation arose.

In *Red Lion Broadcasting Co. v. Federal Communications Commission*,¹³² the Supreme Court considered whether the personal attack rule violated the First Amendment. The Court reiterated its scarcity argument, concluding that "Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations."¹³³ The Court analogized broadcasting regulations to restrictions on sound trucks and public address systems:¹³⁴ "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."¹³⁵ This is not to say, the Court continued, that the First Amendment is irrelevant to broadcast communications. Rather,

the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . *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.*¹³⁶

While the FCC, under a chairman noted for his deregulatory zeal, Dennis Patrick, has dismantled one key component of the Commission's broadcast regulations—the fairness doctrine¹³⁷—most of the

130. 47 C.F.R. § 73.1920 (1987).

131. 47 C.F.R. § 73.1930 (1987).

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

133. *Id.* at 389.

134. See generally *Kovacs v. Cooper*, 336 U.S. 77 (1949).

135. *Red Lion*, 395 U.S. at 387.

136. *Id.* at 390 (citations omitted) (emphasis added).

137. The elimination of the fairness doctrine has an involved history, which is recited only briefly here. In 1987, the U.S. Court of Appeals for the District of Columbia remanded a case in which the FCC had sought to enforce the fairness doctrine against television station WTVH to the Commission with instructions that the Commission consider the station's contentions that enforcement of the fairness doctrine deprived the station of its constitutional rights.

substantial restrictions discussed above remain.¹³⁸ Some regulations—such as those limiting broadcast indecency—are being enforced by the Bush Administration FCC, under Chairman Alfred Sikes, with renewed vigor.¹³⁹ Moreover, even the fairness doctrine, following the FCC's action, was passed as a statute by the 100th Congress,¹⁴⁰ although it was subsequently vetoed by the President.¹⁴¹ *Red Lion*, the Supreme Court's seminal statement on regulating the broadcast media, has been repeatedly upheld in subsequent Court decisions.¹⁴²

Congress appears neither satisfied with current press restrictions in the United States nor likely to remove any existing restrictions. On the contrary, the 101st Congress has considered and continues to debate bills which focus on television programming for children¹⁴³ and violence in video programming generally.¹⁴⁴ The proponents of these bills include traditional First Amendment defenders, like Senator Paul Simon (D-Ill.). In a recent column, Senator Simon asked, "Is a free society like ours—one that shuns government censorship and has a commercial television industry—powerless to protect itself

Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987). Noting that another panel of the Court of Appeals for the District of Columbia had determined that the fairness doctrine was not codified in the Communications Act, *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), the *Meredith* court held that the Commission was not free "to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." *Meredith*, 809 F.2d at 873-74.

In *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. 5043, 63 Rad. Reg. 2d (P&F) 541 (1987), the Commission addressed the constitutionality of the fairness doctrine and determined that the doctrine was an unconstitutional restriction on broadcast speech. *Id.* at 5052.

Congress responded by enacting a statutory fairness doctrine, S. 742, 100th Cong., 1st Sess. (1987), but on June 19, 1987, President Reagan vetoed the bill. 11 Weekly Comp. Pres. Doc. 705 (June 19, 1987).

138. See *supra* notes 105-131 and accompanying text.

139. On October 26, 1989, the FCC instituted enforcement proceedings against eight stations for broadcasting indecent material. Commission Announces Action on 95 Indecency Complaints, 1989 FCC Daily Digest 313,127. Thirty-three Senators responded with a letter to the FCC applauding the Commission's action. 33 Senators Applaud FCC Enforcement of Indecency Standard, *Comm. Daily*, Nov. 29, 1989, at 2.

140. S. 742, 100th Cong., 1st Sess. (1987).

141. 11 Weekly Comp. Pres. Doc. 705 (June 19, 1987).

142. See, e.g., *CBS, Inc., v. FCC*, 453 U.S. 367 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

143. S. 707, 101st Cong., 1st Sess. (1989) (introduced by Sen. Metzenbaum); S. 1215, 101st Cong., 1st Sess. (1989) (introduced by Sen. Wirth); H.R. 1677, 101st Cong., 1st Sess. (1989) (introduced by Rep. Bryant).

144. S. 593, 101st Cong., 1st Sess. (1989) (introduced by Sen. Simon).

and its children from the harm caused by excessive TV violence?"¹⁴⁵

Many supporters of these pending bills see the proposed legislation not as efforts to curb press freedom, but rather as practical responses to important problems to which the media contribute. Moreover, these legislators can justifiably claim the support of a long line of precedents in which their colleagues in Congress, and the FCC, supported by the courts, have restricted the press either to give meaning to the First Amendment or when no other means of achieving significant social and political objectives was available.

D. *The First Amendment and the "Free and Balanced Flow"*

The principles enunciated in *Red Lion*, and the rationales which underlie the First Amendment generally, are remarkably similar to those proposed by developing countries. The representatives of those countries argue that "free flow"—in the sense of unregulated flow—is not consistent with U.N. standards on freedom of communication. Rather, where there is a shortage of physical and economic resources, where a dramatic imbalance already exists between speakers, and where the communications are vitally important to the governance of a society and the development of its members, some regulation is necessary to avoid a chaos of communication in which no one can effectively communicate, to avoid the communication of inaccurate information, and to avoid the monopolization of the communicative process by a few powerful players, particularly where those players are politically similar.

Or, in the words of the U.S. Supreme Court, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."¹⁴⁶ The government and the international community should seek to create and preserve a communications "marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."¹⁴⁷ Each individual, in every country, has a right to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . ."¹⁴⁸

The First Amendment—rather than standing in opposition to UNESCO's efforts to protect the free flow, to provide access to infor-

145. Simon, *Coming Soon: An Act That Should Reduce Television Violence*, *Newsday*, Aug. 21, 1989, at 55, col. 2.

146. *Red Lion*, 395 U.S. at 390.

147. *Id.*

148. *Id.*

mation from a variety of sources, and to avoid monopolization of the communications industry by Western mass media—may in fact mandate such efforts. This does not mean that every restriction designed to achieve those ends would be constitutionally permissible under the First Amendment. Instead, it suggests that U.S. government and press officials can no longer successfully hide behind the First Amendment in refusing to take the concerns of the Third World about the “free flow” seriously.

IV. THE NEW CHALLENGE: 1992 AND THE EUROPEAN COMMISSION BROADCASTING DIRECTIVE

The New World Information Order has largely faded from public view. UNESCO Director General M'Bow was replaced in 1987 by Federico Mayor, a Spanish biochemist who has proven far more amenable to U.S. interests. On a recent visit to Washington, D.C., Director General Mayor said “UNESCO must guarantee the free flow of information—full stop.” Plans for the New World Information Order, Mayor said, “no longer exist.”¹⁴⁹

Instead, the United States today finds its support for a press unrestricted by other countries challenged from an unanticipated source. Western European allies, not Third World countries, led by France, not Tunisia, are seeking to protect their cultural identities by restricting importation of U.S. programming. Recent actions by the Council of Ministers of the European Communities (EC) and the Council of Europe promise dramatic changes to the “free flow” of communications into and throughout Europe.

Under the EC Council Directive Concerning the Pursuit of Television Broadcasting Activities (Directive) adopted by the EC Council of Ministers in Luxembourg on October 3, 1989,¹⁵⁰ each of the twelve Member States must take steps within eighteen months to regulate broadcasters which are under its jurisdiction, operate on a frequency allocated by the state, or transmit via a satellite ground station located in the state.¹⁵¹ The regulations include limiting the placement, content, and amount of advertising; regulating the content of programming to protect minors and assure moral suitability; and guaranteeing a right of reply to persons injured by the broadcasting of incorrect

149. Schwartz, UNESCO Chief Vows Major Reforms, *Wash. Post*, Feb. 25, 1989, at A19, col. 4 (quoting Federico Mayor).

150. 32 O.J. Eur. Comm. (No. L 298) 23 (1989) [hereinafter Directive].

151. *Id.* art. 2.

facts.¹⁵² In addition, and most troubling to U.S. observers, the Directive calls on Member States to ensure that a majority of broadcast programming is of European origin.¹⁵³

The EC Directive resembles the Council of Europe's Convention on Transfrontier Television (Convention) adopted by the twenty-two member Council of Europe in March 1989.¹⁵⁴ The Directive, however, once implemented by the Member States into their national laws is enforceable through each Member State's national law and court system, while the Convention requires a complicated arbitration proceeding to resolve disputes. In addition, if a Member State does not act within two years, the Directive comes into force against each Member State, but not against private entities, automatically.

A. *Details of the Directive and the Convention*

1. *Source of Broadcast Programming*

The Directive obligates Member States to ensure that "where practicable and by appropriate means," a majority of broadcast transmission time, excluding time occupied by news, sports, games, advertising, and teletext, is reserved for "European works."¹⁵⁵ "European works" are defined to include programming originating from Member States or other European states which are party to the Convention, which also meet one of three conditions: (1) they are made by producers "established" in Member States; (2) the production of the works is supervised and actually controlled by producers established in Member States; or (3) a majority of financing for each production is supplied by EC co-producers and the co-production is not controlled by any producer established outside of the EC.¹⁵⁶

"European works" may also include programming originating from European states which are neither Member States nor adherents to the Convention, but is produced by producers established in Member States or in European countries which will agree to abide by the Treaty of Rome, provided that the production must be "mainly made" with authors and workers residing in European countries.¹⁵⁷

Programming which meets none of the definitions above, can still be considered a European work "to an extent corresponding to the

152. *Id.* arts. 10-23.

153. *Id.* art. 4.

154. Council of Europe, Convention Transfrontier Television (1989).

155. Directive, *supra* note 146, art. 4.

156. *Id.* art. 6.

157. *Id.*

production of the contribution of European co-producers to the total production costs," provided that the production is made "mainly" with authors and workers residing in European countries.¹⁵⁸

In addition, the Directive requires that, where a Member State cannot ensure that a majority of broadcast transmission time, excluding time occupied by news, sports, games, advertising, and teletext, is reserved for "European works," the state must at least ensure that the percentage of non-European origin broadcasting does not exceed the prior year's percentage.¹⁵⁹

Because of vociferous opposition from the Bush Administration and the U.S. television and movie production industries,¹⁶⁰ the Council of Ministers issued an interpretive release promising that the quota provisions would not be enforced against Member States.¹⁶¹ It is unclear, however, whether that declaration is legally binding on the EC or even whether the Commission, the EC's political branch, is likely to go along. One Commission official stated: "Articles 4 and 5 are politically binding to the member states for the purposes of attaining the objectives laid down in them. . . ."¹⁶² Martin Bangemann, Commission vice president, was quoted as saying: "I will not go to court. . . . But a directive is a directive, and it is obligatory. We will have to monitor the broadcasters. If the quotas haven't been met, the Commission will report to the council and the Parliament."¹⁶³

2. *Limits on Advertising and Sponsorship*

a. Placement

The Directive regulates the placement of broadcast advertising and indicates a strong preference for limiting advertising to the intervals between separate programs. Advertising must be "readily recognizable as such and kept quite separate" from programs.¹⁶⁴

Article 11 contains more specific regulations affecting the placement of advertisements. With few exceptions, advertisements are to be inserted only between programs or between autonomous parts of programs, such as the time between periods in sports events. Advertisements are not permitted during religious services. News and current affairs programs, documentaries, religious program other than

158. *Id.*

159. *Id.* art. 4.

160. See *infra* notes 177-205 and accompanying text.

161. EC Adopts Quota Directive; to Take Effect in 18 Mos., *Variety*, Oct. 4, 1989, at 1.

162. *Id.* at 2 (quoting Commission official).

163. *Id.* (quoting Martin Bangemann).

164. Directive, *supra* note 150, art. 10(2).

actual services, and children's programs may not be interrupted by advertising if they are of less than thirty minutes duration. Advertisements during programs are permitted only if, in addition to the above conditions, the "integrity and value of the programme . . . and the rights of the rights holders are not prejudiced."¹⁶⁵

b. Content of Advertisements

The Directive provides stringent limits on the contents of broadcast advertising. For instance, the Directive provides that television advertising shall not:

- (a) prejudice respect for human dignity;
- (b) include any discrimination on grounds of race, sex or nationality;
- (c) be offensive to religious or political beliefs;
- (d) encourage behavior prejudicial to health or to safety;
- (e) encourage behavior prejudicial to the protection of the environment.¹⁶⁶

Broadcast advertising for cigarettes and other tobacco products and for medical products and treatments available only by prescription is prohibited.¹⁶⁷ Broadcast advertising for alcoholic beverages must not be targeted at minors or depict minors consuming alcoholic beverages; link alcohol consumption with enhanced physical, social, or sexual success or with driving; place emphasis on high alcohol content as being a positive quality; encourage immoderate consumption; or present abstinence or moderation in a bad light.¹⁶⁸ Broadcasters must not exploit the "inexperience or credulity" of minors or the "special trust minors place in parents, teachers or other persons."¹⁶⁹ Broadcast advertising also should not encourage minors "to persuade parents or others to purchase the goods" or "services being advertised or show minors in dangerous situations."¹⁷⁰

Advertisers may not use subliminal techniques nor engage in "sur-reptitious advertising," which is defined by article 1 of the Directive as representations in regular programming of goods, trademarks, or other identifying features of a product or its producer intended to

165. Id. art. 11.

166. Id. art. 12.

167. Id. arts. 13-14.

168. Id. art. 15.

169. Id. art. 16.

170. Id.

serve advertising purposes.¹⁷¹

c. Amount of Advertising

The Directive restricts broadcast advertising to no more than fifteen percent of daily transmission time, or twenty percent of advertising including direct offers to the public provided that the spot advertising does not exceed twenty percent.¹⁷² Direct offers may not exceed one hour per day and spot advertising may not exceed twenty percent of any one hour period.¹⁷³

d. Sponsored Programming

Sponsors of programming must not affect the "responsibility and editorial independence of the broadcaster."¹⁷⁴ The name or logo of the sponsor must appear at the beginning or end of the program, and the program may not contain special promotional references to any product or service offered by the sponsor.¹⁷⁵ Producers of tobacco and prescription medical products may not sponsor programming, nor may news and current affairs programs be sponsored under any conditions.¹⁷⁶

3. *Protection of Minors*

The Directive broadly regulates the content of broadcast programming to protect minors, as well as to achieve other social goals unrelated to the protection of minors. Member States are required to restrict programs "which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence," by time and means of broadcast, to assure that minors in the area of transmission do not "normally" hear or see such broadcasts.¹⁷⁷ The Directive goes further, however, to require Member States to "ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."¹⁷⁸

171. *Id.* arts. 1, 10.

172. *Id.* art. 18.

173. *Id.*

174. *Id.* art. 17.

175. *Id.*

176. *Id.*

177. *Id.* art. 22.

178. *Id.*

4. *Right of Reply*

The Directive guarantees a right of reply to any natural or legal person, irrespective of nationality, whose reputation or name have been damaged by an assertion of incorrect facts in a broadcast program. Member States are required to adopt measures implementing this right of reply "or the equivalent remedies."¹⁷⁹

Broadcasters could refuse to grant a right to reply if it is not justified, would involve an act punishable under national law, would render the broadcaster liable to civil proceedings, or would "transgress standards of public decency." The right of reply measures must be subject to judicial review.¹⁸⁰

B. *The U.S. Response*

The European Broadcasting Directive poses an interesting opportunity to see how the United States will respond to restrictions which are equally or more intrusive than those proposed by Third World countries, but which come from traditional allies and powerful trading partners.

Thus far the United States—both press and government—have responded to the European broadcasting restrictions in much the same way as they responded to the New World Information Order: first neglect, then open hostility. But the vocabulary of the debate has changed. The First Amendment rhetoric has been replaced by economic parlance. Instead of "free flow," U.S. officials now employ terms like "protectionism"¹⁸¹ and "economic fortress."¹⁸²

For instance, Jack Valenti, president of the Motion Picture Association of America, has argued that the European restriction "hurls a lance right at the heart of the U.S. industry's future."¹⁸³ Responding to the charge that the proliferation of U.S. programming is damaging European culture, Valenti responded:

Has culture botulism yet appeared anywhere in Europe? Is

179. *Id.* art. 23.

180. *Id.*

181. Television Broadcasting and the European Community: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 7 (1989) (statement of Julius L. Katz, Deputy U.S. Trade Representative) [hereinafter Hearings]; *id.* at 20 (statement of J. Michael Farren, Under Secretary of Commerce for International Trade).

182. *Id.* at 50 (statement of Richard Frank, President, Walt Disney Studios).

183. J. Valenti, The European Community Makes Ominous Sounds About Broadcast Quotas, remarks to the Advisory Comm. on Int'l Comm. and Info. Pol'y, Dep't of State, Wash., D.C., at 3 (July 17, 1989).

the culture in any of these European countries so flimsily anchored that European consumers must be caged and blinded else their links with their past, like an exploding star, vanish? Or is the real game not culture, but commerce?¹⁸⁴

Richard Frank, president of the Walt Disney Studios, has predicted that the broadcasting Directive marks the beginning of a descent "into a new dark age of unending economic warfare."¹⁸⁵

The response from the U.S. government has been no less agitated. David Webster, senior fellow at The Annenberg Washington Program in Communications Policy Studies, and chairman of the Trans-Atlantic Dialogue on European Broadcasting, a working group of senior communications industry officials from the United States and Europe, described the scene as of November 1989:

During the past few months, Carla Hills has roared around Europe, Mr. Mosbacher has assaulted the barricades of Brussels, Jack Valenti has spoken out in Cannes, and Jim Baker astonished the somewhat interim British foreign Secretary, Mr. Major . . . by raising with him twice, and in sharpish terms, the issue of television quotas in Europe To cap it off with the ultimate weapon, the President actually wrote to Margaret Thatcher on the subject. It's all good stuff and unlikely to lose you many votes in the Congress or in the country.¹⁸⁶

U.S. Trade Representative Carla Hills issued a statement "deplor[ing]" the EC's decision as "blatantly protectionist and unjustifiable," and referring to the European content provision as "an enemy of free trade."¹⁸⁷ She also threatened action against the EC under section 301 of the Trade Act of 1988.¹⁸⁸

184. *Id.* at 4.

185. Hearings, *supra* note 181, at 50 (statement of Richard Frank).

186. Remarks by David Webster, *The Phony War: European TV Quotas and American Excitement*, to The Mid-Atlantic Club at the Carnegie Endowment for Int'l Peace, Wash., D.C. (Nov. 9, 1989) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter *The Phony War*]. The author gratefully acknowledges the generous assistance and insight of David Webster.

187. Congress Lashes Out at European TV Content Restrictions, *Comm. Daily*, Oct. 13, 1989, at 1-2 [hereinafter *Congress Lashes Out*] (quoting U.S. Trade Representative Carla Hills); Administration Urged to "Protect" U.S. Access to EC Broadcasting Market, 6 *Int'l Trade Rep. (BNA)* 1337 (Oct. 18, 1989) (quoting U.S. Trade Representative Carla Hills).

188. Hearings, *supra* note 165, at 9 (statement of Julius L. Katz referring to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 99-418 § 1301, 102 Stat. 1164 (1988)).

J. Michael Farren, Undersecretary of Commerce for International Trade, testified before Congress that the Bush Administration has made the broadcasting Directive one of "the highest" priorities on its international trade agenda.¹⁸⁹ "We believe the Directive's restrictive provisions are contrary to international law and the EC's obligations under GATT.¹⁹⁰ They are unwarranted and unnecessary and pose a real threat to an important U.S. industry."¹⁹¹ Undersecretary Farren went on to declare: "[E]ven if this were purely a cultural matter, this would not constitute a reason for an exemption from basic rules of fair trade. There is no GATT exception, for example, for a generic exclusion of cultural items."¹⁹²

Following up on the Bush Administration threat to treat the Directive as a trade issue, Rufus Yerxa, U.S. Ambassador to GATT, denounced the Directive at a GATT meeting in Geneva on October 11, 1989, as "blatantly protectionist and discriminatory . . . and an infringement of the United States' GATT rights."¹⁹³ According to Julius Katz, Deputy U.S. Trade Representative, the Administration believes that the Directive violates article I of GATT, dealing with most-favored-nation status, by according preferential treatment to broadcast programming from "other non-EC members of the Council of Europe."¹⁹⁴ Moreover, the Administration believes that the Directive violates the national treatment provision of article III, "which requires GATT contracting parties to extend to the products of other contracting parties treatment 'no less favorable than that accorded to like products of national origin.'"¹⁹⁵

European officials have responded, however, that GATT is about the supply of goods¹⁹⁶ and television broadcasting is a service.¹⁹⁷ Since the early 1970s, the United States and other countries have sought to make services part of GATT and discussions to that end are

189. Id. at 20 (statement of J. Michael Farren).

190. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

191. Hearings, supra note 181, at 20 (statement of J. Michael Farren).

192. Id. at 23.

193. Administration Urged, supra note 187, at 1337.

194. Hearings, supra note 181, at 10 (testimony of Julius Katz).

195. Id. at 11 (quoting GATT, supra note 190, art. III).

196. GATT refers only to "the production and exchange of goods." GATT, supra note 190, Preamble (emphasis added). "GATT presently regulates only trade in goods, although an agreement on government procurement, negotiated during the Tokyo Round of 1979, applies to 'services incidental to the supply of products' as well." Berg, Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States, 28 Harv. Int'l L.J. 1, 2 & n.8 (1987).

197. Harper, Europe's Changing Channels, American Way, Jan. 25, 1990, at 42, 46.

currently underway in the Uruguay Round of GATT negotiations.¹⁹⁸ But at present, European representatives argue, broadcasting is a service and therefore not covered by GATT. The European position is strengthened somewhat by the holdings of the European Court of Justice in *Sacchi*¹⁹⁹ and, most recently, in *BVA v. Dutch State*,²⁰⁰ that the transmission of broadcast programming is a service under articles 59 and 60 of the Treaty of Rome.²⁰¹ The EC may have anticipated the GATT threat in the Preamble to the Directive: "Whereas television broadcasting constitutes, in normal circumstances, a service within the meaning of the Treaty [of Rome]"²⁰²

To the extent that the United States argues that the issue is video programming—in the tangible sense of reels of film and magnetic tape—rather than the provision of a television signal, the Europeans point to article IV of GATT, which provides a partial exemption from national treatment obligations for film.²⁰³

Action under the GATT could take years and the GATT has no independent enforcement authority. In addition, Jean Dondelinger, EC cultural affairs minister, argues that action under the GATT is impossible because the quotas are not mandatory. The Directive requires a majority of European-originated programming only "where practicable and by appropriate means."²⁰⁴ "[T]he allegations made publicly by the American authorities that our directive is running against the rules of GATT are unfounded."²⁰⁵

Irrespective of the likelihood that a trade complaint filed by the United States under GATT would produce practical results, the U.S. Congress has wasted no time in threatening a variety of unilateral responses to the Directive. On October 4, 1989, Representative Bill Thomas (R-Cal.) introduced a resolution calling on the U.S. Trade Representative to use trade laws to retaliate against enactment of the Directive. "Unless the Europeans are forced to change their directive, they could conceivably be emboldened to place more trade barriers on

198. See Berg, *supra* note 184; Rivers, Slater & Paolini, *Putting Services on the Table: The New GATT Round*, 23 *Stan. J. Int'l L.* 13 (1987).

199. *Sacchi*, Declaratory Ruling 155/73, 1974 E. Comm. Ct. J. Rep. 409, 432.

200. *BVA v. Dutch State*, decided Apr. 26, 1988 (unpublished).

201. "Service" is defined in article 60 of the Treaty of Rome in negative terms; that is, those acts "normally provided for remuneration" that are "not governed by those provisions relating to freedom of movement for goods, capital and persons." EEC Treaty of 1957, art. 60.

202. Directive, *supra* note 150, Preamble.

203. GATT, *supra* note 190, art. IV.

204. Directive, *supra* note 150, art. IV.

205. Harper, *Europe's Changing Channels, American Way*, Jan. 15, 1990, at 42, 46 (quoting Jean Dondelinger).

U.S. agricultural and industrial products."²⁰⁶

On October 11, Representative Bill Richardson (D-N.M.) threatened to introduce legislation banning the Corporation for Public Broadcasting from buying BBC and other European programming. In a statement delivered on the floor of the House, Representative Richardson said "[a]ny support from taxpayer-supported institutions in furthering the European entertainment industry is unacceptable as long as the EC broadcast initiative is in effect."²⁰⁷

Six days later, the House Ways and Means Committee unanimously approved a resolution attacking the Directive as "restrictive and discriminatory" and calling on the Bush Administration to take "all appropriate and feasible action" to protect U.S. access to European broadcasting markets.²⁰⁸ Representative Richard Schulze (R-Pa.) summed up the mood in Congress when he said, "[i]t looks like our worst nightmares are coming true. EC 1992 is nothing more than a front for protectionism."²⁰⁹

C. *The First Amendment and the Broadcasting Directive*

The First Amendment has so far not been dragged out to justify the U.S. outrage at the broadcasting limits. This may be due in part to the U.S. preoccupation with the economic issues involved in the European actions. It may also reflect some degree of understanding on the part of U.S. officials that Western Europe is unlikely to be impressed, much less stopped, by arguments couched in a uniquely U.S. concept of free speech.²¹⁰

It may also reflect a certain wariness on the part of U.S. officials to employ the First Amendment to bolster opposition to concepts of "free speech" which, in the United States, the First Amendment has been used to justify. Given the limits on expression which the First Amendment has been used to justify within the United States in the service of preserving certain cultural ideals, its absence from the current debate is noteworthy. As discussed above,²¹¹ the First Amendment has been employed in the United States to support a variety of limitations similar to many of those in the Directive and the Conven-

206. Europe Agrees to "TV Without Frontiers," Broadcasting, Oct. 9, 1989, at 42 (quoting Rep. Thomas).

207. Congress Lashes Out, *supra* note 171, at 3 (quoting Rep. Richardson).

208. H. Res. 257, 101st Cong., 1st Sess. (1989).

209. Administration Urged, *supra* note 187, at 1337 (quoting Rep. Schulze).

210. For discussion of the extraterritorial application of the First Amendment, see *supra* note 98.

211. See *supra* notes 105-31 and accompanying text.

tion. The U.S. government, citing the First Amendment for justification, has imposed right of reply requirements on broadcasters in the form of the personal attack rule, which guaranteed a right of reply to individuals who are attacked in the course of a discussion of controversial issues,²¹² and the political editorializing rule, which gave candidates the right to reply to editorials criticizing them or favoring their opponents.²¹³

The U.S. government has restricted advertising, based on the content of that advertising, for cigarettes,²¹⁴ lotteries,²¹⁵ and political candidates.²¹⁶ The responsiveness of programming to community needs has been considered in the context of broadcast license renewals²¹⁷ and programming content is evaluated by the government for other purposes as well.²¹⁸

Finally, while U.S. law does not directly restrict the involvement of non-U.S. citizens or residents in broadcast programming, it does impose stringent restrictions on the holding of broadcast licenses by foreign persons. Federal law prohibits the FCC from granting a broadcast license to a non-U.S. citizen or to any company if non-U.S. citizens own or control more than twenty-five percent of the stock.²¹⁹ The FCC is also forbidden from granting a broadcast license to any corporation that has a non-U.S. citizen as an officer.²²⁰

Congress, the President, and the FCC have repeatedly relied on the First Amendment to justify restrictions on the content of broadcast speech, and have avoided First Amendment issues to severely limit the involvement of non-U.S. citizens in U.S. broadcasting. Considered honestly, the First Amendment may argue for permitting certain restrictions on the flow of information, even if those restrictions run counter to certain trade principles.

212. 47 C.F.R. § 73.1920 (1989).

213. 47 C.F.R. § 73.1930 (1989).

214. 15 U.S.C. § 1335 (1982).

215. 18 U.S.C. § 1304 (1982).

216. Pub L. No. 69-632, § 18, 44 Stat. 1162 (1927).

217. 47 C.F.R. § 73.3526(a)(8) (1989).

218. Programming content may be evaluated to determine if any qualifies as meritorious programming and may therefore be considered in mitigation of licensee violations of FCC rules. See *RKO General, Inc. v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). Programming content may be evaluated to determine if the licensee qualifies for a renewal expectancy. See *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

219. 47 U.S.C. § 310(b) (Supp. 1989).

220. *Id.*

D. *Looking Ahead*

The European Community claims a heritage of free expression no less deeply rooted than that of the United States under the First Amendment. Both in international and regional agreements, European nations have repeatedly committed themselves to guaranteeing the right of every citizen to communicate: "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers."²²¹

No right of unfettered communication, whether guaranteed by the First Amendment, the United Nations Charter, or the European Convention for the Protection of Human Rights and Fundamental Freedoms, quoted above,²²² is absolute. Former federal judge Robert Bork has written:

Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.²²³

The controversy over the international "free flow" of information is in large part a controversy over where those lines should be drawn. In the United States, Congress and the Administration have drawn those lines to protect the health of citizens,²²⁴ to provide for expanded access to the airwaves,²²⁵ even to defend some sense of community morality.²²⁶ When countries in the Third World and Western Europe sought, in different ways, to draw lines to protect cultural values and fledgling communications industries, the United States was outraged.

Many leaders in the Third World questioned why the U.S. response

221. European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 221 art. 10(1).

222. See *id.*

223. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 28 (1971).

224. See *supra* note 107 and accompanying text.

225. See *supra* notes 112-31 and accompanying text.

226. See *supra* notes 108-109 and accompanying text.

to the New World Information Order was so vociferous. European officials are asking the same question about the broadcast Directive. Current restrictions in the United Kingdom effectively restrict U.S. programs to fourteen percent of broadcast television.²²⁷ Elsewhere in Europe, the share of non-European broadcast programming is approximately twenty-three percent.²²⁸ A virtual explosion in European broadcasting outlets is expected to increase available air time in EC countries from 250,000 hours per year to more than 400,000 hours per year within five years.²²⁹ "That means that from the current 80,000 hours a year, foreign broadcasters can look forward to up to 200,000 hours," an increase of 150 percent.²³⁰ Moreover, under the current country-by-country quota system, the penalties for non-compliance have proven severe in some countries.²³¹

Part of the cause for U.S. outrage is that the Directive is perceived as posing economic issues. Exports of U.S. television programming and films is the second largest contributor to a positive trade balance for the United States, returning over \$2.5 billion to the United States during 1988. Europe alone constitutes approximately \$1.8 billion in revenues to the U.S. television and film industries.²³² Moreover, it is the European resale market for television movies that turn many losers into big money-makers.²³³ Secretary Buckley's lament with regard to the potential economic impact of the New World Information Order, that other countries "wish to gain a foothold in an area which represents the wave of the future," is thought by many to be applicable to the EC broadcast Directive.²³⁴

The magnitude of danger posed by the Directive to U.S. programming interests is impossible to assess with any precision. Representatives of some U.S. organizations, particularly the Motion Picture Association of America,²³⁵ have certainly claimed that the Directive

227. Revzin, *The Battle for Europe's TV Future*, Wall St. J., Oct. 6, 1989, at B1, B4.

228. Wenham, *Principles and Practicalities*, Working Papers of the Trans-Atlantic Dialogue on European Broadcasting 1 (1989) (copy on file at the offices of the Virginia Journal of International Law).

229. Harper, *supra* note 205, at 46.

230. *Id.*

231. During the summer of 1989, the French Conseil *supérieur de l'audiovisuel* announced it would fine television stations \$10,000 for every hour of programming that exceeded French national broadcasting quotas, and promptly imposed a \$6 million retroactive fine against a station, *La Cinq*, for failing to adhere to existing national quotas limiting programming of non-French origin. Hearings, *supra* note 181, at 54 (statement of Richard Frank).

232. Hearings, *supra* note 181, at 41 (statement of Jack Valenti).

233. Harper, *supra* note 205, at 44.

234. Buckley, *supra* note 87.

235. See *supra* notes 179-80 and accompanying text.

constitutes an immediate and grave threat. As discussed above,²³⁶ however, the Directive may pose significant economic opportunities for U.S. program producers. The Trans-Atlantic Dialogue on European Broadcasting, which includes representatives from NBC, CBS, Capital Cities/ABC Video Enterprises, Fox, the Hearst Corporation, Warner Brothers, Walt Disney Television, as well as a number of U.S. advertising agencies, law firms, and investment companies, issued a press release shortly after passage of the Directive was announced, applauding features of the Directive:

The Directive also provides substantial new opportunities for non-European investors to play a vital role in the rapid expansion of the European production industry, making programs in Europe using European talent.

In summary, with the Directive now adopted, there are new opportunities for growth and cooperation within Europe and with other countries.²³⁷

Even if no imminent economic harm is threatened, U.S. officials have expressed considerable apprehension about the precedent created by acquiescing in any "trade barrier." Undersecretary of Commerce for International Trade Farren told Congress, "[t]he quota could also serve as a damaging precedent exacerbating pressure for other such measures, in the EC and elsewhere."²³⁸ Jack Valenti expressed the concern more vividly: "I have learned to my dismay that all restrictions are infected with a viral contagion, leaping from one market to another. They beget and breed other restrictions. It's like being nibbled to death by ducks."²³⁹

Opposition based on fear of the Directive as a precedent for other trade-restrictive measures suggests that U.S. government and industry officials do not believe or respect the motives articulated by the EC for adopting the Directive. Representatives of the Bush Administration have consistently maintained, in the words of Undersecretary Farren:

The EC's actions limiting non-EC countries to 50 percent of television programming in the EC is *pure and simple* protectionism.

.....

236. See *supra* notes 223-27 and accompanying text.

237. European Ministers' Broadcast Directive Seen As Positive, Cooperative Step for European TV Program Production Industry 2 (Oct. 3, 1989) (news release) (copy on file at the offices of the Virginia Journal of International Law).

238. Hearings, *supra* note 181, at 23 (statement of J. Michael Farren).

239. *Id.* at 41 (statement of Jack Valenti).

The Directive . . . is a clear attempt to protect certain domestic industries. Some European officials argue, however, that the measure is designed to protect European *culture*; and that it is not an economic measure at all.

We do not agree. It is clearly an economic measure designed to protect the European industry from external competition.²⁴⁰

Yet in Europe, the issue actually *is* about culture, as well as trade. "What makes Europe is its diversity," according to French playwright Jean-Claude Carriere. "If you take a plane from Paris and you fly for half an hour, you find yourself in a totally different culture." If you eliminate the distinctive cultural attributes, "we are not Europe anymore."²⁴¹ David Webster writes:

[The debate is] not about widjits. It's about, of course, trade, but also about deeply complex linguistic and cultural issues. They still occasionally tear up the cobblestones in Belgium and throw them at each other on such matters. . . . Ethnic and linguistic factors—cultural issues—are still very important in Europe.²⁴²

Because of its geographic setting, the size of its markets, and its economic and industrial strength, the United States has had few occasions to deal with neighboring countries over cultural issues. When cultural issues have arisen, they have most frequently been raised by other countries considering the impact of U.S. cultural norms. For instance, Canada has repeatedly protested about the incursion of U.S. terrestrial broadcast signals and DBS spill-over into Canadian territory.²⁴³

Moreover, the United States claims a diverse variety of cultural heritages and a comparatively short history as a sovereign nation. As a result, while social critics may charge that a primary culture has evolved which seeks to dominate others, in the United States less attention is paid to the concept of a historically defined and distinct culture than is in France or Italy.

Scholars disagree about the extent to which television influences culture as opposed to culture influencing television, and the extent to

240. Hearings, *supra* note 181, at 20, 22 (statement of J. Michael Farren).

241. Bering-Jensen, *Trouble Sticking with the Program*, *Insight*, June 26, 1989, at 48 (quoting Jean-Claude Carriere).

242. Webster, *The Phony War*, *supra* note 186, at 4.

243. See *supra* note 63 and accompanying text.

which culture can be protected by broadcasting quotas.²⁴⁴ But the issue is taken very seriously in Europe where, out of an annual total of 105,000 hours of video programming, only 5,000 are actually produced in Europe.²⁴⁵ Robert Maxwell, Chairman and Chief Executive Officer of Maxwell Communications and MacMillan, Inc., testified before Congress:

The heart of this issue, Mr. Chairman, is the preservation of Europe's cultural diversity.

. . . .

No nation should tolerate its culture being subjugated by a foreign one. This is an extremely sensitive issue with European nations. This cannot be put into the category with beef and automotive products. This issue speaks to the heart of cultural integrity.²⁴⁶

The angry U.S. response may also reflect the vigor with which the U.S. government first broached the subject of the Directive with its European allies. By the time the Administration became concerned, the Directive had already been adopted by the European Parliament and therefore could not be altered. The Administration could only seek to have the measure defeated in the Council of Ministers.

[I]t was a matter of passing or not passing the Directive as a whole. No European government wished to be seen to give in to such overt American pressure, even if they themselves had no particular enthusiasm for the Directive. . . . Even the French, who had argued for sterner quota restrictions voted for it, possibly on the grounds that if the Americans were so upset it must be ok.²⁴⁷

This European perception of the Administration's unfounded arrogance was only strengthened when the United States proposed that

244. These issues are beyond the scope of this Article. For interesting commentary on the general subject, see Tracey, *Global TV: The Myth of Wall-to-Wall Dallas* (copy on file at the offices of the Virginia Journal of International Law); Bruce, Reidenberg & Cate, *The European Community Broadcast Directive: The Need for a Fresh Look at Its Impact on the Fundamental Rights of Broadcasters and the Public*, Working Papers of the Trans-Atlantic Dialogue on European Broadcasting 4 (1989) (copy on file at the offices of the Virginia Journal of International Law). The author gratefully acknowledges the encouragement and insight of his former colleagues at Debevoise & Plimpton, particularly Robert R. Bruce and Jeffrey P. Cunard.

245. Hearings, *supra* note 181, at 48 (statement of Robert Maxwell, Chairman and Chief Executive Officer, Maxwell Communications and MacMillan, Inc.).

246. *Id.*

247. Webster, *The Phony War*, *supra* note 186, at 4.

Commerce Secretary Robert Mosbacher be invited to participate in EC Commission deliberations on the Directive. "That's out of the question," responded Corrado Pirzio-Birdi, acting head of the EC Commission delegation in Washington, D.C. "Do you think the U.S. Congress would ever give us a seat at the table in working out U.S. legislation? I mean, you must be kidding."²⁴⁸

The United States' effectiveness with European officials has not been increased by frequent statements, like that of Undersecretary Farren, that "the United States has no such programming quotas. The U.S. market in audio-visual works is almost entirely unregulated."²⁴⁹ European officials know that not only is ownership of U.S. broadcast outlets by non-U.S. citizens prohibited by statute,²⁵⁰ but the United States imports less than two percent of its broadcast programming.²⁵¹

The Directive offers an opportunity to U.S. program producers to more than double their exports to Europe. Rather than dealing with twelve or twenty-three separate national regulatory structures, the Directive opens the door to pan-European broadcasting and a pan-European market of 325 million consumers. More importantly, the Directive provides the United States an opportunity to offer to other countries its own well-developed, written jurisprudence of reconciling the need to solve important societal concerns with profound regard for one concept of freedom of expression.

Irrespective of the merits, if any, of the broadcasting Directive, or of the New World Information Order, the United States has failed thus far to make a significant positive contribution to help resolve the issues which underlie the calls for both measures. Instead, the response from the U.S. government and U.S. industry has been marked by its preoccupation with economic issues, a corresponding failure to understand or even seriously consider the objectives of Third World or European nations, particularly where those goals involve cultural issues, and an all-or-nothing, confrontational attitude.

The New World Information Order is all but dead. The broadcast Directive, on the other hand, is alive and well, at least for the moment. In the long run, the threat of U.S. retaliation combined with

248. U.S. Lobbying on Broadcasting Measure "Counterproductive," EC Official Says, 6 Int'l Trade Rep. (BNA) 1420, 1421 (Nov. 1, 1989) (quoting Corrado Pirzio-Birdi).

249. Hearings, *supra* note 181, at 23.

250. See *supra* notes 215-16 and accompanying text.

251. Harper, *supra* note 205, at 45.

the more influential force of European consumer tastes, are likely to give expanded meaning to the qualifying phrase, "where practical and by appropriate means."²⁵² The British may have received more personal attention from higher levels of the U.S. government than did the Tunisians, but the outcome of their communications initiatives may not be that different.

The U.S. government and the U.S. communications industry, not often bedfellows, will have scored a victory of sorts. But they will have missed the opportunity to achieve a greater victory: to use more than 200 years of experience grappling with difficult First Amendment issues—albeit different ones than other parts of the world may now face—to assist other countries engaged in similar battles.

V. CONCLUSION

During the past three decades, many Third World countries have complained that the flow of information between countries is dramatically uneven. This communications flow may be characterized as "free"—in the sense of unrestricted—but it is not equitable, just, or productive. In fact, the imbalance in communications flow has had a disastrous impact on the cultural development and integrity of many Third World countries.

In 1980, the MacBride Commission completed a four-year study of communications issues throughout the world. The Commission concluded that the international flow of information was considerably and systematically uneven, to the detriment of many Third World nations and cultures. The Commission disavowed many of the more radical Third World solutions, but it did call upon governments and international organizations to adopt regulations to encourage greater reciprocity in communications flow between the Third World and the West. The Commission also called on the press to adhere to a higher standard of ethics and accuracy, and to promote "the just cause of peoples struggling for freedom and independence."²⁵³

The response of Western countries, and particularly the United States, to these Third World concerns has ranged from indifference to hostility. Spokespersons for the U.S. government and press have expressed suspicion about Third World goals, focused on extreme solutions rather than those of the MacBride Commission, and demonstrated an unwillingness to consider any restrictions on the press.

252. Directive, *supra* note 150, art. 4.

253. MacBride Comm'n Report, *supra* note 17, at 265.

Such restrictions, U.S. officials argue, would violate the First Amendment.

These officials ignore, however, the substantial restrictions on the press that the U.S. Supreme Court has held to be permissible under the First Amendment. Moreover, these critics fail to recognize that for the First Amendment and other national and international guarantees of free speech and free communication to have meaning, they must permit some restrictions. Otherwise, there would be chaos in place of communication. "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."²⁵⁴

The United States has a wealth of experience struggling to solve important issues in light of the First Amendment. This history, together with this unparalleled commitment to freedom of expression, should inform U.S. policy when dealing with nations grappling with similar issues, and should be offered as assistance in those struggles.

The regulation of broadcasting in the United States provides a particularly useful analogy. Where technological, economic, or political factors make it impossible for everyone to have access to the media, the government must act to assure that those who have access neither monopolize the media nor use it to the detriment of societal interests. This is what many Third World countries have sought. This is also what many European countries seek.

The First Amendment, rather than bolstering economic arguments that restrictions on broadcasting and other news flows are not to be permitted, may weigh in favor of some restrictions. The justifications for those restrictions may differ depending upon the context. Not all restrictions in service of any public interest are to be allowed, but the United States cannot hide behind the First Amendment, refusing to consider Third World and European interests in a free and balanced flow of communications.

254. *Red Lion*, 395 U.S. at 376.