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DBS Under FCC and International Regulation

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DBS Under FCC and International Regulation

*The Georgetown Space Law Group**

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I. INTRODUCTION

While direct broadcasting satellites (DBS) always have been scientifically complex devices,¹ the issues arising from communications satellites make them legally complicated devices as well. In the United States the DBS technology is on the verge of full commercial exploitation, and the giants in the communications industry already have staked their claims to this potential technological gold mine.² In the international arena, DBS is the subject of a bit-

1. Direct broadcasting satellites are highpower, geostationary satellites that take audio and video signals from ground or other supersurface transmitters and retransmit them in the form of radio communication for direct reception by dish-shaped antennae. See generally Kluger, *A TV Dish in Every Yard*, Sci. Dig., Mar. 1982, at 76-77 (describing status and future outlook for satellite-to-dish signals).

2. The Federal Communications Commission already has accepted eight applications to provide DBS services to consumers. The FCC has accepted applications from CBS, Inc.; Direct Broadcasting Satellite Corp. (DBSC); Graphic Scanning Corp. (Graphic); RCA American Communications, Inc. (RCA); United States Satellite Broadcasting Company, Inc. (USSB); Video Satellite Systems, Inc. (Videosat); Western Union Telegraph Company (Western Union); and Satellite Television Corporation (STC). *In re Application of Columbia Broadcasting Sys., Inc.*, 92 F.C.C.2d 64 (1982).

ter international debate in the United Nations. Thus far, the United States position supporting free enterprise and free expression for DBS is proving to be the minority view.³

The Federal Communications Commission (FCC) regulates the United States DBS industry and has developed new regulations for evaluating proposed services and assigning broadcasting frequencies.⁴ The Commission's approach is consistent with the United States' international policy favoring the free flow of information and with domestic policy favoring reduced regulation of broadcasting.⁵ The rapid technological development of DBS in the United States, and the FCC's nurturing of that development, is intensifying the international debate in which a majority of the world's nations has expressed the fear that uncensored broadcasting would contaminate the various nations' cultures.⁶ The FCC's action in tentatively assigning frequencies in advance of the International Telecommunications Union's (ITU's) allocation of frequencies to the United States has exacerbated the fears and further intensified the debate.

This Article examines the legal and technological development

3. A recent United Nations General Assembly vote on the United States "free speech" position went 108 to 13 against the United States. Pace, *TV Curb Is Backed By U.N. Assembly*, N.Y. Times, Dec. 11, 1982, at A6, col. 1. Most developed nations joined the United States to make up the thirteen in minority. *See id.*

4. *See infra* part II, section B, subsection 2.

5. UNITED STATES DEP'T OF STATE, INTERNATIONAL COMMUNICATIONS POLICY (1980). *See generally* HOUSE COMM. ON GOV'T OPERATIONS, INTERNATIONAL INFORMATION FLOW: FORGING A NEW FRAMEWORK, H.R. REP. NO. 1535, 96th Cong., 2d Sess. 19-23 (1980) (discussing problems, means of resolution, and recommendations concerning international information systems). The continuing debate over the first amendment's scope and application illustrates the cherished position the amendment holds in American society and law. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that a "more exacting judicial scrutiny" of legislation that restrains the dissemination of information is appropriate); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 93-98 (1948) ("Public" speech should be immune to governmental interference while government may regulate "private" speech to some extent.). The amendment's philosophical basis, however, is unquestioned. *See* J.S. MILL, *ON LIBERTY* (1859) (in society's search for truth, even false opinion has value in open debate). The difficulty in deriving a cohesive approach toward the first amendment's application in particular circumstances triggers much of the debate. For example, the "clear and present danger" test attempts to delineate permissible governmental regulation of speech content by emphasizing that an imminent, temporal threat of action must exist. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919). The "two-tiered" approach categorizes certain types of speech, also based on content, as either less protected or unprotected. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). When the government seeks to regulate the exercise of free speech through time, place, and manner restrictions that are content-neutral, a "balancing approach" focuses upon the competing interests. *See* *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

6. *See infra* part III.

of DBS in both the domestic and international fora. Part II examines the development of DBS and information policy concerning DBS in the United States. The Article then in part III discusses the international positions of the developed nations, the developing countries, and the Soviet bloc on the DBS issues and reveals the results thus far in the policy debate among these nations and the United States. Part IV concludes the Article with a brief outline of the possibilities for international cooperation to solve the DBS controversy.

II. THE UNITED STATES POSITION: REGULATION OF TECHNOLOGY AND CONTENT

A. *The Constitution*

1. The First Amendment

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech."⁷ Consequently, American courts are particularly sensitive to any hint of governmental censorship or prior restraint;⁸ however, the courts recognize that some restraints on expression are necessary to the public interest and thus permissible to a limited extent. For example, the government may restrict the public use of "fighting words" because society has a compelling interest in preserving public order and preventing violence.⁹ Similarly, the government may restrict a speaker's access to public places—such as libraries, schools, and jail grounds—if the restriction is nondiscriminatory and is reasonable because of the nature of the place and the normal activities occurring there.¹⁰ Although the courts favor an open and unre-

7. U.S. CONST. amend. I.

8. *Near v. Minnesota*, 283 U.S. 697 (1931) (Prior restraint of news reporting is constitutionally impermissible.). Some types of speech, however, do not receive full first amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech given first amendment protection to extent it provides information of public interest); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (first amendment never has protected false information).

9. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

10. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding an antinoise ordinance near a school although it limited freedom of speech exercised in that location). It is crucial, however, that an alternative speech outlet be available. *Id.*; *Schad v. Mt. Ephraim*, 452 U.S. 61, 75-76 (1981); cf. *Young v. American Mini Theatres, Inc.* 427 U.S. 50 (1976) (city may place zoning restrictions on location of adult theaters).

If the area is a traditional "public forum" such as a street or a park, then the government may restrict access as long as the restriction is independent of the content of the

strained marketplace of ideas, the government has a compelling interest in protecting the privacy of a potential audience and the sensitivities of the unwilling listener.¹¹ At times, when speech intrudes into the home and a "captive audience" cannot avoid exposure, the government may have limited authority to restrict intrusion.¹² Offensiveness or indecency, as distinguished from obscenity, has raised particular problems.¹³ Visual display in public of a single four-letter expletive expressing a political opinion cannot be prohibited on the basis of offensiveness.¹⁴ The offended persons present can avert their eyes.¹⁵ The government, however, may restrict offensive or indecent speech to protect the privacy of the home or to protect a "captive audience" that cannot avoid exposure.¹⁶

Other types of speech that the first amendment specifically affects include defamation¹⁷ and commercial advertising.¹⁸ The de-

speech. *Village of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620 (1980) (struck down ordinance barring door-to-door and on-street solicitations of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (upholding individual's right to impart peacefully views to others on public street); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating city bans against distribution of leaflets). Commentators have interpreted *Schneider* as guaranteeing a right of access to public streets for the promulgation of views and opinions. See, e.g., Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 16-29.

No right of guaranteed access to private property exists. See *Hudgens v. NLRB*, 424 U.S. 507 (1976) (no first amendment right to enter shopping center to advertise labor dispute).

11. *Cohen v. California*, 403 U.S. 15, 21 (1971).

12. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (right of individual "to be let alone" sufficient for law enabling person to refuse certain types of mail); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (government may prohibit sound trucks on public streets emitting "loud and raucous" noises in order to protect homes or businesses when other outlets for speech are available).

13. See *infra* notes 37-40 and accompanying text for a discussion of the significance of this distinction in the broadcasting context.

14. *Cohen v. California*, 403 U.S. 15 (1971).

15. *Id.* at 21. *Accord Gooding v. Wilson*, 405 U.S. 518 (1972) (striking down state ordinance making use of "opprobrious words or abusive language" a breach of the peace).

16. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-12 (1975) (striking down municipal ordinance restricting drive-in movie theaters with screens visible from public streets from showing films containing nudity).

17. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (limiting public official's ability to recover damages in libel action relating to his official conduct); see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (applying *New York Times* rule to "public figures" involved in a public controversy). *But cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (*New York Times* rule does not apply to defamation action by private person).

18. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech provided first amendment protection to extent it provides

gree of protection afforded commercial speech is less than that provided other forms of speech; the government must meet a lesser standard to justify restrictions on it.¹⁹ Some forms of commercial speech receive no protection and, as such, are totally subject to governmental regulation. These forms of commercial speech include false facts,²⁰ misleading advertising,²¹ or advertisements in which the transactions proposed are illegal.²² In short, the first amendment does not operate as an absolute ban on any regulation of speech in this country. The network of broadcast regulation today perfectly illustrates this concept.

2. Applicability of First Amendment Law to Broadcasting

The rapid development of radio technology in the 1920's prompted the government to enact a comprehensive regulatory scheme for the communications industry.²³ In 1927 Congress enacted the Radio Act,²⁴ which created a five-member Federal Radio Commission (FRC) vested with comprehensive licensing and regulatory powers.²⁵ The continued technological progress in communi-

information of public interest).

19. The government must show that the regulation directly advances the interest asserted, that it is not more extensive than necessary to serve that interest, and that it has a substantial state interest in the regulation. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (first amendment prohibits ban on promotional advertising by utility).

20. The first amendment never has protected false facts. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

21. *Friedman v. Rogers*, 440 U.S. 1 (1979) (state may bar optometrists' use of trade name because of interest in protecting public from being misled).

22. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (advertisements promoting sex-based discrimination in employment illegal and subject to state regulation).

23. The government had tried to regulate radio on a piecemeal basis as early as in the *Wireless Ship Act of 1910*, ch. 379, 36 Stat. 629 (repealed 1934) (prohibited ships carrying 50 or more passengers from leaving American ports without radio communication equipment). In 1912 Congress enacted the first Radio Act, ch. 287, 37 Stat. 302 (1912) (repealed 1927), which required all radio operators to obtain a license from the Secretary of Commerce and Labor. The technological advances brought on by World War I accelerated development of the radio business and filled the broadcast spectrum with scores of stations. Since the 1912 Act did not set aside frequencies for private broadcasting stations, the broadcasters often interfered with each other on the spectrum; chaos, consequently, reigned in the industry. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-216 (1942) (historical discussion of radio regulation).

24. Ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

25. The primary duty of the Commission was to limit the number of stations in the broadcasting spectrum. At the time Congress passed the Act, 200 new stations were on the air, broadcasting on whatever frequency they chose. *National Broadcasting Co.*, 319 U.S. at 212 ("With everybody on the air, nobody could be heard.").

cations revealed the ineffectiveness of the Radio Act and prompted the passage of the Communications Act of 1934,²⁶ which established the Federal Communications Commission (FCC).²⁷ Congress charged the FCC to license radio broadcasters in the "public interest, convenience, and necessity."²⁸

While the first amendment protects broadcasted speech as well as other forms of speech, the protection of broadcasted speech has been different from that provided the printed or unamplified spoken word. Because the airwaves are a public resource and the space on the broadcasting spectrum is limited,²⁹ the government may license broadcasters, assign broadcasting frequencies to selected broadcasters, require that certain issues be aired, and mandate limited rights of access to the airwaves by the public.³⁰

The fairness doctrine³¹ is one example of governmental control of broadcasting content. This doctrine has two parts: The first requires the broadcaster to air issues of public importance; the second requires the broadcaster to present contrasting views on those controversial issues that he chooses to air.³² Also included in the

26. Ch. 657, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1976)).

27. Congress incorporated portions of the 1927 Act into the 1934 Act. The Supreme Court characterized the new Communications Act as an effort "to protect the national interest involved in the new and far-reaching science of broadcasting." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

28. 47 U.S.C. §§ 307(a), (d), 309(a), 310, 312 (1976). The Supreme Court has interpreted "public interest, convenience, and necessity" to include "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

29. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); see generally Rosenfeld, *The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas*, 44 *FORDHAM L. REV.* 877 (1976) (discussion of the underlying philosophical bases of "free speech" and the best means of attaining it in the broadcast media context).

30. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). The FRC established that "the public interest requires ample play for the free and fair competition of opposing views" on all discussions of issues important to the public. *Great Lakes Broadcasting Co.*, 3 *F.R.C.* 32, 33 (1929), *rev'd on other grounds*, 37 *F.2d* 993, *cert. denied*, 281 U.S. 706 (1930). The FCC adopted this policy of fair and balanced broadcasting, enforcing it through denial of license renewals or construction permits. See, e.g., *Young People's Ass'n for Propagation of the Gospel*, 6 *F.C.C.* 178 (1938).

31. See Communications Act of 1934, § 309(a), 47 U.S.C. § 309(a) (1976).

32. *Red Lion Broadcasting*, 395 U.S. at 377. The FCC has issued numerous reports on the fairness doctrine and its application. See, e.g., *The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 *F.C.C.2d* 26 (1971); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 *F.C.C.* 598 (1964); *Report and Statement of Policy re: Comm'n en banc Programming Inquiry*, 44 *F.C.C.* 2303 (1960); *Editorializing by Broadcast Licensees*, 13 *F.C.C.* 1246 (1949); see also Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 *HARV. C.R.-C.L. L. REV.* 138 (1975). See Note, *FCC Regulation of Broadcast News: First Amendment Perils of*

fairness doctrine is the requirement that a broadcaster must give a person an opportunity to respond on the air if another party has maligned the person during a program discussing a controversial issue of public importance.³³

Additional access regulation appears in the political sphere. Any broadcaster that sells or gives time to a political candidate must offer equal treatment to all other candidates for the same office.³⁴ A candidate triggers this requirement when he personally appears during the program.³⁵ In addition, the broadcaster must provide "reasonable access" to a legally qualified candidate for federal office who wants to purchase political advertising.³⁶

The FCC also regulates obscene, offensive, or indecent speech³⁷ broadcast over the air, but the Commission may not act as a "censor."³⁸ As an example of the Commission's power in this context, the Supreme Court upheld the FCC's censure of a station for indecent language broadcast in a satiric monologue on a weekday afternoon.³⁹ The timing of the broadcast made it available to children, and the pervasive nature of the broadcast media created an intrusion into the privacy of the home.⁴⁰

Conflicting Standards of Review, 48 *FORDHAM L. REV.* 1227 (1980), for a discussion of the fairness doctrine's applicability to broadcast news reporting.

33. 47 C.F.R. § 73.123 (1983) (the "personal attack" rule). The FCC recently proposed that Congress amend the Communications Act to repeal the fairness doctrine and "equal time" provisions. For a discussion of the likely outcome of FCC content deregulation, see Student Symposium, *The Future of Content Regulation in Broadcasting*, 69 *CALIF. L. REV.* 555 (1981).

34. Communications Act of 1934, § 315, 47 U.S.C. § 315 (1976).

35. *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 2-3 (3d Cir. 1951). Equal opportunity, however, does not apply to the broadcaster's coverage of a bona fide news event. Communications Act of 1934, § 315(a), 47 U.S.C. § 315(a) (1976).

36. Communications Act of 1934, § 312(a)(7), 47 U.S.C. § 312(a)(7) (1976). The FCC will defer to the broadcaster's judgment if his decision is reasonable and made in good faith. *Columbia Broadcasting Sys., Inc. v. FCC*, 453 U.S. 367, 386-88 (1981).

37. See 18 U.S.C. § 1464 (1976). The FCC has used its authority to impose sanctions against programming that it judged obscene. *Sonderling Broadcasting Corp.*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (FCC constitutionally can adjudge obscene a radio call-in show broadcasting explicit discussions of sexual acts in titillating context during daytime hours).

38. Communications Act of 1934, § 326, 47 U.S.C. § 326 (1976).

39. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

40. *Id.* at 738-41, 748-50. Persuasive arguments have been made that the Court's rationale in this type of content regulation simply is inadequate. The listener "invites" the content into his home by turning on his set; he can avoid offensiveness by turning off the set. Also, the "child" involved in the sole complaint by a listener was seventeen years old. See *id.* at 764-66 (Brennan, J., dissenting); see also Shinnars, *Offensive Personal Product Advertising on the Broadcast Media: Can it be Constitutionally Censored?*, 34 *FED. COM. L.J.* 49 (1982) (analyzing *Pacifica* in context of commercial advertising restrictions). The

The fairness doctrine, the equal opportunity provision, the reasonable access requirements, and obscene broadcast regulation represent a delicate balance between the protections of the first amendment and the obligations of a broadcaster operating in the public interest.⁴¹ No matter how delicate, however, these requirements do constitute a significant restriction upon a broadcaster's choice of program content. The United States Supreme Court has refused to extend this content regulation to the printed media.⁴² The courts base the disparate treatment of broadcasters and publishers on the limited space of the broadcasting spectrum and the characterization of the airwaves as a public resource.⁴³

3. DBS and the First Amendment

Because the FCC does not regulate DBS as a separate entity, the same regulatory regimes will apply to it as apply to other limited access broadcasting, such as cable systems. The primary remaining regulation on cable systems is the "must carry" rule, which requires cablecasters to carry all local stations within thirty-five miles of the system's community.⁴⁴ The FCC has eliminated restrictions on pay cable systems, however, because it lacked jurisdiction over systems that did not transmit initially over scarce spectrum resources or retransmit programs originally broadcast over the air.⁴⁵ Similarly, the FCC policy, and federal statute, proscribing "obscene, indecent, and profane" language over the air-

FCC, however, has limited the impact of *Pacifica* in subsequent policy statements. See *In re WGBH Educational Foundation*, 69 F.C.C.2d 1250, 1254 (1978) (stressing repetitive occurrence of words in *Pacifica*); *Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation*, 59 F.C.C.2d 892 (1971) (broadcaster not responsible for offensive speech uttered during coverage of a news event when no time for editing). See also Gard & Endress, *The Impact of Pacifica Foundation on Two Traditions of Freedom of Expression*, 27 CLEV. ST. L. REV. 465 (1978).

41. For example, even when the FCC requires the broadcaster to provide access, the broadcaster may charge for that access. Communications Act of 1934, § 315(b), 47 U.S.C. § 315(b) (1976). For 45 days before a primary and 60 days before a general election, the candidate must receive the lowest advertising rate the station offers. At all other times, he is to be charged no more than the comparable rate to other advertisers. *Id.* Moreover, a broadcaster may opt not to accept editorial advertising. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

42. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

43. See *supra* note 29 and accompanying text.

44. See 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1980); Revision of Cable Television Rules Regarding Leapfrogging, Carriage of Local Independent Signals, and Non-Network Programming Exclusivity, 87 F.C.C.2d 580 (1981).

45. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

waves does not apply to cablecasters.⁴⁶ The courts emphasize the choice available to the listener as the basis for striking down attempts to regulate the distribution of indecent programming over cable.⁴⁷ The viewer can "avert his eyes" by not inviting (subscribing to) the service. Since DBS transmits directly to the viewer, regulation of obscenity is still an open issue. The FCC has stated that it will regulate cablecasters as broadcasters to the extent that cable systems originate programming and broadcast it over the air.⁴⁸

B. Regulation of DBS in the United States

On June 23, 1982, the FCC pursuant to Title III of the Communications Act of 1934, as amended, promulgated Interim Rules for the licensing and operation of DBS.⁴⁹ These rules were to govern the authorization of DBS services on an experimental basis until the July 1983 Regional Administrative Radio Conference (RARC) in Geneva, Switzerland. The purpose of the Conference, which the International Telecommunication Union (ITU) sponsored, was to plan the orbit and to allocate frequencies for DBS in the Western Hemisphere.

The FCC's DBS policy is "to maintain an open and flexible approach that will allow the business judgments of the individual applicants to shape the character of the services offered."⁵⁰ The Commission hopes that this "open skies policy [will] encourage the submission of a wide variety of proposals" and, consequently, afford the public the "full benefits of experimentation with this new service."⁵¹ The FCC believes that a flexible regulatory approach is in the public interest during the experimental phase of DBS opera-

46. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

47. *Id.* But see Notice of Proposed Rule Making in MM Docket 83-331, F.C.C. Release No. 83-130, at 10-11 (May 25, 1983) (issue of whether Congress intended to subject cable systems to fairness doctrine and equal time requirements).

48. Amendment of Part 76 of the Comm'n's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 87 F.C.C.2d 40 (1981). The FCC always has regulated "common carriers" differently than broadcasters. Common carriers may not refuse service to anyone based on transmission content. Communications Act of 1934, § 201(a), 47 U.S.C. § 201(a) (1976). The Commission now is considering whether it can and should regulate the content of common carrier transmissions that may be indecent or obscene. Notice of Inquiry, 48 Fed. Reg. 43,348 (1983) (to be codified at 47 C.F.R. ch. 1) (proposed Sept. 23, 1983). This proposal would affect leased access through DBS.

49. Interim Rules, 47 Fed. Reg. 31,574 (1982) (to be codified at 47 C.F.R. pt. 100).

50. Report and Order, 90 F.C.C.2d 676, 698 (1982).

51. *Id.*

tion for several reasons: the hands-off approach "will allow operators . . . to experiment with service offerings to find the [offerings] that the public needs and wants"; the selected approach permits experimentation "with technical and organizational characteristics"; and an unintrusive FCC policy will allow the Commission "to gather information about the operation of the industry, . . . [and] to make better-informed decisions about permanent regulatory policies."⁵² A more restrictive approach, in contrast, might constrain prematurely the evolution of DBS services and increase the costs and risks to DBS operators in developing this new technology. These constraints might reduce the ability of DBS operators to attract financing and, thus, decrease the probability that the private sector will undertake DBS ventures.⁵³ Thus, the Interim Rules impose a minimum number of regulatory requirements on applicants for licenses to operate DBS systems.⁵⁴ The FCC, however, did retain the option to impose further regulation once the systems are operational, if experience with the DBS systems shows that increased regulation is necessary.⁵⁵

1. Background of DBS Regulation

The FCC formally began consideration of domestic policies for DBS with a Notice of Inquiry released October 29, 1980.⁵⁶ The Notice of Inquiry requested comment from the industry on two Commission staff reports—one discussing DBS technical characteristics and the other analyzing long-range regulatory policies. The Commission also requested comment on the nature of regulations and policies that should apply to the industry in the interim period prior to the 1983 RARC. Two months later the FCC received an application from Satellite Television Corporation (STC), a subsidiary of the Communications Satellite Corporation (COMSAT), for authority to begin construction of satellites for a satellite-to-home video broadcasting system. By the summer of 1981, the FCC had issued its recommendations for the interim period in a Notice of Proposed Policy Statement and Rulemaking (Notice).⁵⁷ When the Commission issued this Notice, it accepted STC's application for filing and established a forty-five day cutoff period for the submis-

52. *Id.* at 707-08.

53. *Id.*

54. *See infra* part II, section B, subsection 2.

55. Report and Order, *supra* note 50, at 708.

56. Notice of Inquiry, 45 Fed. Reg. 72,719 (1980).

57. 86 F.C.C.2d 719 (1981). The FCC issued this Notice on June 1, 1981.

sion of other applications that the Commission would consider with STC's application.⁵⁸ The Commission received thirteen additional applications during the ensuing forty-five days. The FCC accepted seven applications for filing, partially accepted one application, and rejected five applications as incomplete and unacceptable for filing.⁵⁹

2. The Interim Rules

One of the issues confronting the FCC was whether to authorize the initiation of DBS systems before the 1983 RARC, even though the outcome of the RARC might affect the FCC rules. An ancillary concern was that any authorization of DBS systems prior to the 1983 RARC would restrict the negotiating flexibility of the United States at the RARC or predetermine the nation's permanent policies and regulations. The FCC concluded, however, that its approval of one or more DBS applications would not affect adversely the negotiating position of the United States at the RARC. The Commission found that the existence of definite DBS proposals might assist in formulating realistic United States proposals for presentation at the RARC.⁶⁰ The FCC also clearly stated that the spectrum allocation and rules for licensing set forth in the Interim Rules were all subject to revision based upon the outcome of the RARC. The revision most likely to affect the American situation would have been if the RARC had limited the United States to fewer spectrum-orbits than the FCC already had allocated to its approved applicants. Accordingly, the Interim Rules put all applicants on notice that approval of their systems was conditioned upon the outcome of the RARC and that if spectrum or orbital positions were not available for all the systems authorized, the FCC might force applicants to go through comparative hearings or assign applicants fewer frequencies or orbital positions different from the positions requested. Further, the FCC decided that it would not assign frequencies or orbital positions until the conclusion of the RARC.⁶¹ Finally, the FCC stated that it would require

58. Interim Direct Broadcast Satellite Applications, 46 Fed. Reg. 32,497 (1981).

59. Advance, Inc., 88 F.C.C.2d 100 (1981).

60. Report and Order, *supra* note 50, at 684.

61. Interim Rules, *supra* note 49, at 31,575 (to be codified at 47 C.F.R. § 100.13(b)).

In fact, the Final Acts of the RARC assigned to the United States 32 channels at each of eight orbital positions and thus eliminated any need for the FCC to consider comparative issues or to apply other selection procedures in the further processing of the first round of DBS applications. See Memorandum Opinion and Order, F.C.C. 83-451, ___ F.C.C.2d ___

all operators of interim DBS systems to come into compliance with any permanent regulations that the FCC or RARC implements subsequently.⁶²

The Interim Rules that the FCC promulgated to regulate DBS service added a new Part 100, entitled "Direct Broadcast Satellite Service," to Title 47 of the Code of Federal Regulations.⁶³ In addition, the FCC amended the table of frequency allocations appearing in Part 2 of Title 47 by allocating to DBS a 500 MHz range in the 12.2-12.7 GHz frequency band for downlinks from space to earth, and a 500 MHz range in the 17.3-17.8 GHz frequency band for feeder links from earth to space.⁶⁴ The FCC also amended Part 94 of Title 47 to cope with the interference that will occur between DBS and private operational-fixed microwave service (FS).⁶⁵

Four subparts compose the new Part 100. Subpart A sets forth the basis and purpose of the Interim Rules—to prescribe the manner in which the Commission may make available parts of the radio frequency spectrum for the development of broadcast satellite service prior to the adoption of permanent rules.⁶⁶ The Rules define DBS service as "[a] radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public."⁶⁷ Direct reception, for the purposes of DBS, encompasses both individual and community reception.⁶⁸ Subpart B sets forth eligibility requirements and licensing procedures for DBS systems. The only eligibility restriction in Subpart B is the prevention of foreign ownership or control

(Oct. 7, 1983), at 2 n.4.

In the Memorandum Opinion and Order, the FCC stated that it neither will reserve nor grant specific orbital locations and frequency assignments to an individual permittee until such permittee complies with the due diligence requirement. *Id.* at 4. The FCC will make such assignments, then, on a first-come, first-served basis. *See infra* note 76 and accompanying text. Moreover, the FCC will assign no specific orbital positions or channels to second-round permittees before July 17, 1984, unless all first-round permittees have demonstrated due diligence before that date.

62. Report and Order, *supra* note 50, at 684. For a discussion of the results of RARC-83, see *infra* notes 219-27 and accompanying text.

63. Interim Rules, *supra* note 49, at 31,574-76.

64. Report and Order, *supra* note 50, at 720-22. The 12 GHz band "is the only band of spectrum allocated internationally to DBS for which technology will be available" in the near future. *Id.* at 698. The FCC RARC-83 Advisory Committee has estimated that the United States will need between 65 and 207 channels by the year 2000 for DBS services. The 500 MHz allocation is based on that estimate. *Id.*

65. *Id.* at 721-22. *See infra* text accompanying notes 102-05.

66. Interim Rules, *supra* note 49, at 31,574 (to be codified at 47 C.F.R. § 100.1(b)).

67. *Id.* at 31,574-75 (to be codified at 47 C.F.R. § 100.3).

68. *Id.*

of DBS stations.⁶⁹ The types of ownership restrictions applicable to terrestrial broadcasting entities do not appear in the Interim Rules with respect to DBS.⁷⁰

The licensing procedures constitute the bulk of Subpart B. Applications for an interim DBS system must describe the type of service that the applicant will provide and the technology that the applicant will employ.⁷¹ As long as frequencies and orbital slots remain available for assignment, the FCC plans to treat all frequencies and orbital positions within the relevant frequency range as having equal value to prevent conflicts from arising over a particular frequency or orbital position.⁷² Comparative hearings among applicants, then, should not be necessary. The licensing procedures require a forty-five day period for public comment on each application, after which the FCC will determine whether authorization of the proposed system is in the public interest.⁷³ The license term for an interim DBS system is five years.⁷⁴ Policies and rules that the FCC subsequently adopts may modify the terms and conditions of granted licenses. In most circumstances, however, the regulatory policies in force at the time of the grant will remain in effect for the system throughout its operating lifetime.⁷⁵

The Interim Rules impose a diligence requirement for the construction of authorized DBS systems. Permittees must start construction, or at least complete contracting for construction, of the satellite station within one year of the grant of the construction permit, and an authorized satellite station must be operational within six years of the grant of the construction permit unless the permittee makes an adequate showing that the FCC should grant an exception.⁷⁶

69. *Id.* at 31,575 (to be codified at 47 C.F.R. § 100.11).

70. *Compare* 47 C.F.R. § 100.11 (1982) *with* 47 C.F.R. § 73.636(a)(1) (1982) (prohibiting ownership of more than one television station in a single market) *and* 47 C.F.R. § 73.636(a)(2) (1982) (limiting the total number of television stations that any one entity may own).

71. 47 C.F.R. § 100.13(a) (1982).

72. *Id.* § 100.13(b).

73. *Id.* § 100.15. The Interim Rules also provide for the establishment of a 45 day cut-off period for the filing of applications that the FCC will consider in conjunction with the original application from STC. The FCC will consider these applications to have equal priority with the STC application. Applications filed after that cut-off date will have lower priority in the event of conflicting requests for frequencies or other orbital positions.

74. *Id.* § 100.17.

75. *Id.* § 100.19(a).

76. *Id.* § 100.19(b). The FCC waived the one-year due-diligence-in-construction requirement of 47 C.F.R. § 100.19(b) (1982) for all existing first-round permittees and instead substituted July 17, 1984, as the date by which the due diligence requirement must be met.

Subpart C of Part 100 contains the technical requirements applicable to interim DBS systems licensed under the Interim Rules. The Commission has imposed no technical standards other than the requirements now contained in applicable international agreements. These requirements include the technical characteristics contained in Annexes 8 and 9 of the Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service in Frequency Bands 11.7-12.2 GHz (in Regions 2 and 3) and 11.7-12.5 GHz (in Region 1), adopted in Geneva in 1977. Nonetheless, the Interim Rules permit systems to depart from the technical characteristics specified in the Final Acts, upon adequate showing, if the result does not interfere excessively with other operational or planned systems.⁷⁷ In short, apart from international requirements, DBS operators will be free to determine the characteristics of the system that they use and the services that they offer.

Subpart D contains the equal employment opportunity requirements, which are the same as the requirements that apply to radio and television broadcasters.⁷⁸

3. Bases for Finding a Public Interest

In deciding whether to authorize interim DBS systems, the FCC made a preliminary determination that DBS services on a regular or permanent basis would serve the public interest.⁷⁹ The Commission found that DBS had the potential to serve the public interest in five distinct ways: (1) DBS could provide service to remote areas currently with little or no television service;⁸⁰ (2) DBS

Memorandum Opinion and Order, *supra* note 61, at 4, 6.

77. *Id.* § 100.21.

78. *Id.* § 100.51; 47 C.F.R. § 73.2080 (1982).

79. Report and Order, *supra* note 50, at 678. The Notice contained such a preliminary determination of public interest. Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719, 728-29 (1981). The Commission similarly found that authorization of DBS systems in the 12.2-12.7 GHz band would serve the public interest. Report and Order, *supra*, note 50, at 679.

80. Report and Order, *supra* note 50, at 680. The DBS contribution would further the statutory goal of providing an equitable distribution of television service throughout the nation. Estimates of the National Telecommunications and Information Administration (NTIA) of the United States Department of Commerce show that in 1973 almost five million people lived in areas in which they could not receive any over-the-air television signals. The Nielsen rating service has estimated that in 1981 approximately eleven million people received three or fewer channels. *Id.* at nn.9-10. The FCC, therefore, concluded that for isolated households in the United States, satellite technology seems to offer the only new source of television service likely to be practical in the foreseeable future, with the possible exception of low power television and video cassette and disc equipment. *Id.* at 680.

would make available additional channels of television programming throughout the country;⁸¹ (3) DBS systems could bring individualized programming to viewers by tailoring programs to small audiences with specialized tastes;⁸² (4) DBS systems could provide innovative services such as high definition television (HDTV), stereophonic sound, teletext, and dual-language sound tracks;⁸³ and (5) DBS systems could provide a variety of nonentertainment services, including educational programming and transmission of medical data.⁸⁴ The Commission balanced these potential benefits of the new technology with the possible disadvantages of DBS and concluded that the advantages of DBS clearly predominate.

4. Consideration of Possible Adverse Effects

Critics have cited three potential disadvantages to the FCC's facilitation of DBS. The first concerned the effect of authorizing DBS systems before the 1983 RARC. The FCC concluded that no serious disadvantage would arise from interim authorization on an experimental basis before the RARC allocates frequencies.⁸⁵ As described below,⁸⁶ the RARC results confirmed the FCC's judgment that the RARC would not cause significant damage to its interim authorizations. The other two often-cited concerns are the impact of DBS systems on existing terrestrial broadcasting service and the interference of DBS systems with terrestrial FS operations now us-

81. *Id.* at 681. The high prices for which television stations in urban areas have been selling suggested to the Commission that great unmet demand exists for television channels in urban areas. The United States obtained spectrum space for an additional 32 channels nationwide at RARC-83. *See infra* text accompanying note 220.

82. Report and Order, *supra* note 50, at 681. The FCC found that the amount and quality of programming now available is limited because of the small number of outlets that produce original programming. If subscription programming becomes widely available and if many new outlets begin competing for audiences and advertising revenues, the FCC would expect to see a substantial increase in the funds spent on program production. *Id.* at 682.

83. *Id.* Many of the submitted applications for DBS systems proposed innovative services. The FCC stated that the flexible regulatory and spectrum allocation provisions contained in the Interim Rules and the Report and Order would allow for the authorization of such innovative services. *Id.*

84. *Id.* Although the FCC expects DBS operators to provide nonentertainment services if the demand exists, the Commission does not intend to reserve channels for such services.

85. *See supra* text accompanying notes 60-62. The United States did obtain eight orbital positions, each with 500 MHz of spectrum space, at RARC-83, as well as adoption of most of the technical parameters it had proposed. The location of the eight orbital positions, however, was not what it had sought. *See infra* text accompanying notes 219-227.

86. *See infra* notes 219-27 and accompanying text.

ing the 12 GHz band.⁸⁷ In its response to these concerns, the FCC has emphasized the value of making DBS services available to the public as soon as possible, both because of the benefits that such services can provide and because of the experiential information the Commission and industry can gain from the interim systems.⁸⁸

(a) *Impact on Local Broadcasting*

The FCC had to resolve two issues on the relationship of DBS to local broadcasting: First, whether the FCC has authority to authorize nonlocal broadcast services; and, second, the effect DBS systems might have on local broadcasters' audiences, revenues, and public service programming. The Commission deftly disposed of the first issue. DBS systems will be structurally nonlocal, whereas the Communications Act provides that: "[i]n considering applications for licenses . . . the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."⁸⁹ The FCC, however, had concluded in the Notice and reaffirmed in a Report and Order that it does have the authority to authorize nonlocal broadcast service.⁹⁰ The statutory obligation is merely to provide fair, efficient, and equitable distribution of radio service across the nation; the Commission adopted its policy of localism in the regulation of radio and television by choice rather than by statutory command.⁹¹ Moreover, the FCC considers the statutory mandate to "encourage the larger and more effective use of radio"⁹² as obligating it to utilize the satellite technology that DBS offers to improve services to underserved areas of the nation.⁹³

The second issue—the impact of DBS on local broadcasters—is more critical because of its economic implications. Understandably, local broadcasters submitted many comments concerning this issue in response to the Notice.⁹⁴ Some broadcasters argued that competition from DBS systems would cause them to

87. Report and Order, *supra* note 50, at 684-92.

88. *See, e.g., id.* at 692, 697-98.

89. Communications Act of 1934, § 307(b), 47 U.S.C. § 307(b) (1976).

90. Report and Order, *supra* note 50, at 686; Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719, 736-37 (1981).

91. Report and Order, *supra* note 50, at 686.

92. Communications Act of 1934, § 303(g), 47 U.S.C. § 303(g) (1976).

93. Report and Order, *supra* note 50, at 686.

94. *See id.* at 686-88 nn.24-28 and accompanying text.

reduce the amount or quality of locally produced programming and public service programming. Others argued that advertiser supported DBS systems would compete directly with terrestrial broadcasters for audiences and advertising revenues, bidding against them for premium programming and thus increasing the price and reducing the quality of programming available to advertiser supported and public television stations. Another fear was a negative effect on advertising revenues and on fund raising abilities of public television stations arising from the DBS subscription systems' attraction of affluent viewers away from existing broadcasters.⁹⁵ The National Association of Broadcasters and the Corporation for Public Broadcasting also argued that programming provided by DBS systems could not address local needs and would not replace adequately the local programming that might be lost. In response to these complaints, the FCC has reviewed numerous market and economic studies on the effect of DBS systems on existing broadcasters under a number of scenarios.⁹⁶ The Commission, while conceding that little reliable evidence exists on the probable effects of DBS on the audiences and revenues of local broadcasters, has concluded that

[t]he record developed in this proceeding does not support a finding that DBS is likely to have a substantial adverse impact on local services. . . . [N]either the comments nor any other evidence we have seen has shown that DBS systems would have so detrimental an effect on existing service as to justify our choosing not to authorize the service on an experimental basis.⁹⁷

Citing *FCC v. Sanders Brothers Radio Station*⁹⁸ and *Carroll Broadcasting Co. v. FCC*,⁹⁹ the Commission asserted in the Report and Order that the FCC is required to consider the economic effect of a new service on existing broadcasters only if strong evidence exists that a significant net reduction in service to the public will result. Moreover, the Commission cannot reject a new service solely because its entry will reduce the revenues or profits of existing licensees.¹⁰⁰ Finally, the Commissioners concluded that claims of adverse effects from DBS were too speculative to block the authorization of a service that has so many potential benefits—particularly the capability to provide service to underserved

95. *Id.* at 686-87.

96. *See, e.g., id.* at 688 nn.29-30, 705 n.69.

97. *Id.* at 691.

98. 309 U.S. 470 (1940).

99. 258 F.2d 440 (D.C. Cir. 1958).

100. Report and Order, *supra* note 50, at 689.

areas.¹⁰¹

(b) *Spectrum Sharing Problems*

The FCC also confronted complaints that a conflict could arise between future DBS operators and the present users of FS operations in the 12 GHz band.¹⁰² Currently, the FCC licenses about 1900 private microwave links in that band. Local governments, banks, newspapers, railroads, utility companies, universities, and others use these systems because of particular needs for greater bandwidths, congestion in the lower frequencies, or FCC rules prohibiting their access to lower frequency bands.¹⁰³ The FS operations in the 12 GHz band very likely will interfere with reception of DBS signals.

The FCC seeks to resolve this potential conflict by providing for a transition period during which DBS and FS operators will have coequal status. This equal status, however, will be temporary; FS operators must prepare for a move to another band by replacing equipment and taking other necessary steps. In the meantime, the FCC has conducted a rulemaking to determine the other bands in the frequency spectrum that will be available and capable of utilization by FS operators and to consider the possibilities of pooling microwave frequency spectrum between various types of users. The Commission issued a report based on the rulemaking shortly after the conclusion of the RARC. With respect to the temporary accommodation of both FS and DBS operations on the 12 GHz band, during the five-year period ending September 4, 1988, the FCC will not require FS operations authorized before September 4, 1983, to protect domestic DBS reception from interference. The FCC will require that terrestrial operations licensed after September 4, 1983, and all FS operations licensed after September 4, 1988, operate on a strict noninterference basis and make any and all adjustments necessary to prevent interference to operating DBS systems.¹⁰⁴ During the five-year period that DBS operators will have to accommodate existing FS operations, the Report and Or-

101. *Id.* at 691-92.

102. *Id.* at 692-706.

103. *Id.* at 699.

104. *Id.* at 702; 47 C.F.R. § 94.65(h) (1982). The report referred to above adopted a final rule to provide frequencies and revised rules for the reaccommodation of existing 12 GHz fixed microwave users who will be displaced by DBS service. See First Report and Order, 48 Fed. Reg. 50,722 (1983). The rule changes permit the displaced links access to the following bands: 6525-6875 MHz, 12.7-13.2 GHz, and 17.7-19.7 GHz.

der suggests various options for DBS operators to pursue, among them: agreements with terrestrial station operators, and adequate replacement of terrestrial equipment. Although the FCC will not require DBS operators to pay the costs of relocating FS operations, they may have a "strong incentive to compensate the FS users for the costs of moving to other frequency bands during this period."¹⁰⁵

5. Flexible Regulatory Approach

An intriguing aspect of the FCC's action on DBS authorization is its adoption of a "flexible regulatory approach."¹⁰⁶ The actual result of the flexible approach is to allow DBS operators, for the moment at least, to function essentially without regulation. That the FCC has chosen this highly technological area of telecommunications in which to try out a free market approach is at least noteworthy in view of the enormous sums of money required to finance DBS systems and the logistical steps required to get a system up and operating. The rationale for this deferential approach undoubtedly is to expedite the introduction of DBS service and to allow operators to experiment to find the most desirable service offerings. A brief examination of several facets of the regulatory scheme illustrates the unintrusive nature of the "flexible" approach.

The Commission declined to require DBS systems to operate under a particular service classification during this developmental and experimental stage. In other words, the FCC will not classify DBS operators as broadcasters, common carriers, private radio operators, or some combination or variant of these classifications.¹⁰⁷ Nonetheless, once the DBS operator decides how it is going to operate, the FCC will impose the applicable statutory requirements. For example, the FCC probably will treat an applicant proposing to provide direct-to-home service and to retain control over the content of the transmissions as a broadcaster and subject it to the broadcasting provisions of Title III of the Communications Act.¹⁰⁸ If, instead, a DBS operator proposes to operate as a common carrier (without providing the programming itself), the Commission will require the DBS operator to offer its satellite transmission ser-

105. Report and Order, *supra* note 50, at 702 n.60.

106. *Id.* at 706.

107. *Id.* at 708-09.

108. See 47 U.S.C. § 315 (1976 & Supp. V 1981); Report and Order, *supra* note 50, at 709.

vices indiscriminately to the public pursuant to the tariff under Title II of the Communications Act.¹⁰⁹ Alternatively, a DBS operator may function as a broadcaster with respect to some of its channels and as a common carrier with respect to others.¹¹⁰ Interestingly, the FCC has declined to license the customers of DBS common carriers as broadcasters, although it has retained the discretion to apply appropriate regulatory constraints if circumstances suggest their necessity.¹¹¹

The Commission also decided not to impose any restrictions on multiple ownership or control of DBS systems.¹¹² The FCC expects considerable competition among DBS systems and, thus, does not think that multiple-ownership restrictions are necessary. Moreover, industry observers expect many alternative video services to be available by the time DBS systems go into operation; consequently, the FCC contemplates sufficient competition to prevent monopolistic pricing or other abuses of market power. Of course, the antitrust laws exist to prevent excessive horizontal concentration.¹¹³ In short, the FCC feels that interim restrictions on multiple ownership or control of DBS channels are unnecessary to assure diversity of sources of programming.¹¹⁴

The Interim Rules impose no access requirements on DBS licensees operating as broadcasters other than the limitations required by Title II of the Communications Act on common carrier DBS operators. The FCC concluded that DBS licensees probably will have ample economic incentives to offer services that the public most desires and needs without any formal access requirements.¹¹⁵ Similarly, the Commission declined to adopt rules imposing program content requirements or otherwise ensuring that DBS programming is responsive to viewer needs.¹¹⁶

Finally, the technical requirements in the Interim Rules consist only of the technical guidelines specified in the WARC-77 Final Acts, conditioned by the outcome of RARC-83.¹¹⁷ Specifically, the rules impose no compatibility standards; DBS operators, thus,

109. See 47 U.S.C. §§ 201-209 (1976). Report and Order, *supra* note 50, at 709.

110. Report and Order, *supra* note 50, at 709.

111. *Id.* at 709-11.

112. *Id.* at 711-13.

113. *Id.*

114. *Id.*

115. *Id.* at 714.

116. *Id.* at 714-15. The FCC declined to follow CBS' advice and exclude DBS systems using conventional broadcast services from the 12 GHz band.

117. See *infra* notes 219-27 and accompanying text.

will be free to offer new services in response to advances in technology or changes in viewer's tastes. Similarly, operators may offer either HDTV, conventional television signals, or both.¹¹⁸ The FCC, however, did promise to examine carefully interim applications to ensure that technical proposals efficiently utilize the orbit and frequency resources and are flexible enough to assure the Commission of the applicants' ability to accommodate any permanent rules or technical standards.¹¹⁹

6. Analysis of Current Applications for Proposed DBS Services

Shortly after deciding to provide an environment for DBS free of regulatory impediments, the Commission turned its attention to the applicants seeking to provide DBS service. On September 23, 1982, the Commission granted the application of the Satellite Television Corporation (STC), a subsidiary of COMSAT, to construct and operate a DBS system. The Commission on November 4, 1982, issued conditional construction permits to seven other DBS applicants: CBS, Inc.; DBSC; Graphic; RCA; USSB; Videosat; and Western Union. The Commission's action authorizes the eight approved applicants to commence preparations for the initial phases of their proposed services. The assignment of frequencies and orbital positions was confirmed largely by the outcome of the 1983 Region 2 Administrative Radio Conference (RARC-83).¹²⁰ This subsection discusses the services that the eight approved applicants have proposed and attempts to assess the proposals in terms of the principles that the Commission cited in its Report and Order.

118. Report and Order, *supra* note 50, at 715-18.

119. *Id.* at 717. The Final Acts of the RARC include international technical parameters of DBS systems, orbital locations, channel utilization requirements, and international procedures required for plan modification and DBS system implementation by individual administrations. The FCC adopted a Memorandum Opinion and Order, *supra* note 61, to set forth procedures for further processing of proposals for the establishment of DBS systems in light of the conclusion of the RARC. The Memorandum Opinion and Order requires DBS permittees and other applicants to conform their applications to the Final Acts of the RARC or to demonstrate how their proposals can be made consistent with the technical and procedural parameters of the RARC agreement. The FCC intends to use the plan that the RARC adopted regarding utilization of assignments specified for use by the United States as the primary basis for domestic utilization of the DBS service. The Memorandum Opinion and Order stated that the FCC expects that United States licensees will wish to take full advantage of the significant technical flexibility provided by the RARC plan to permittees seeking to implement systems that vary from, but are not inconsistent with, the technical parameters in the plan.

120. See *infra* notes 219-27 and accompanying text.

(a) *Service to Consumers with Limited Television Exposure*

The FCC immediately recognized that DBS could improve service to households with access to fewer than three television stations.¹²¹ These households tend to be concentrated in the Western Mountain States. Under the current schemes set forth by the applicants, Graphic, Videosat, USSB, and Western Union plan to offer initial service to the Western and Mountain time zones.¹²² Graphic's broadcasts will include entertainment and informational programming delivered in conventional National Television System Committee (NTSC) service.¹²³ Graphic expects to offer subscriptions to individual homeowners for \$24.95 per month after an initial installation charge of \$300. When fully operational the system would include options to purchase stereophonic and second language capabilities.¹²⁴

USSB will offer its programming to independent broadcasters—first to full-service stations, then to low-power stations. The consumer may choose to receive from the broadcaster or directly from the satellite. USSB will offer advertiser supported entertainment on its first channel to supplement those programs that local broadcasters produce; the second channel will offer twenty-four hour news service.¹²⁵ By distributing its programming to independent television stations, USSB hopes to make the independents fully competitive with the network affiliates.¹²⁶ USSB plans to broadcast in conventional NTSC, but expects to help develop HDTV and use it when this innovative video service becomes feasible.¹²⁷

Videosat also hopes to offer advertiser supported programming to broadcasters and individual households. Households, however, will receive direct satellite broadcasts only in areas not served by Videosat broadcasters. Videosat's affiliate, Dominion Satellite

121. Report and Order, *supra* note 50, at 680.

122. *In re* Application of Columbia Broadcasting Sys., Inc. 92 F.C.C.2d 64, 74-79 (1982). On January 3, 1983, the FCC received a Petition for Clarification from DBSC. Among its requests, DBSC asked for an order allowing it to transmit to more of the continental United States than the originally granted eastern half.

123. The National Television System Committee (NTSC) set the standard of 525 scanning lines for television receivers. For a comparison of NTSC and high definition television (HDTV), see *infra* note 148 and accompanying text.

124. 92 F.C.C.2d at 74.

125. *Id.* at 76-77.

126. *Good News, Bad News in DBS Spacerush*, BROADCASTING, July 20, 1981, at 23, 24.

127. 92 F.C.C.2d at 77.

Network, will produce the news and entertainment programming that Videosat plans to offer. Videosat will transmit NTSC signals and does not propose to introduce HDTV. The application reveals that Videosat plans to offer some satellite space to other programmers.¹²⁸

Western Union will make its capabilities open to other programmers. Because it will broadcast others' programs, Western Union does not describe the types of services it may offer or whether advertisers or subscribers will support the broadcasts. Initially, Western Union plans to deliver programming in NTSC signals, but the company may offer HDTV if the technology becomes feasible.¹²⁹

Ultimately, all applicants propose to service the television-deficient Western and Mountain time zones.¹³⁰ Nonetheless, the consumers in these regions will not receive the full benefit of DBS until the 1990's.¹³¹ Further, although DBS may offer improved service for these households immediately, it may not be the panacea that the FCC announced. Whether consumers will spend up to \$1,000 for an antenna plus installation and service fees is uncertain.

(b) More Stations to Urban Households

Under the initial phase proposals that the FCC granted, viewers in the Eastern time zone fare quite well. Seven applicants intend to provide initial service to the Eastern United States.¹³² DBSC and RCA expect to lease their broadcasting capabilities to individual programmers.¹³³ While DBSC expects to offer advertiser supported service, RCA does not comment on this issue.¹³⁴ Both RCA and DBSC will transmit NTSC signals, but RCA expects to use HDTV when that technology becomes available.¹³⁵ In addition, RCA has noted that it may reserve satellite space for NBC, an RCA company.¹³⁶

CBS plans to offer advertiser supported entertainment and in-

128. *Id.* at 78.

129. *Id.* at 78-79.

130. *Id.* at 70-79; see also *In re Application of Satellite Television Corporation*, 91 F.C.C.2d 953, 959 (1982).

131. None of the applicants expect to implement their second phase until 1990.

132. 92 F.C.C.2d at 70-79; see also 91 F.C.C.2d at 958-59.

133. 92 F.C.C.2d at 72, 75.

134. *Id.* at 72.

135. *Id.* at 75.

136. *Id.*

formation programs on its first channel. The second channel will supplement the first by offering special sports, cultural, and religious programming at a monthly or per-view charge. The third channel will offer satellite-to-theater service and closed circuit service for business, educational, and medical institutions.¹³⁷ CBS hopes to offer these services in HDTV exclusively;¹³⁸ the company, thus, may be the primary innovator in this new technology.

STC will offer subscriber supported programming directly to individual households. Although STC will transmit NTSC signals, it plans a wide range of experimentation with HDTV services.¹³⁹ STC describes its programming as counter-programming, meaning that it will offer programs more diverse than the programs currently available.¹⁴⁰

The DBS applicants hope to offer twenty-six primary channels to the Eastern United States.¹⁴¹ In all, seven of the eight applicants will provide initial service to the East, with four applicants committed solely to the East during the initial phase.¹⁴² The National Association of Broadcasters raises serious doubts concerning the economic viability of these DBS channels.¹⁴³ The FCC, however, has dismissed this concern¹⁴⁴ and believes, along with the various applicants, that these additional channels can compete successfully with cable and other subscription video services in urban markets.

(c) *Narrowcasting*

The FCC also praised DBS for its potential "narrowcast"¹⁴⁵ capabilities, the ability to reach individualized audiences on a national scale. In narrowcasting, the transmitter aggregates isolated groups too small and scattered for network programming. Programmers, therefore, would have an economic incentive to satisfy

137. *Id.* at 70-71.

138. *Id.* at 70.

139. 91 F.C.C.2d at 958.

140. *Id.* at 969..

141. The total includes: CBS—three, DBSC—six, RCA—six, USSB—three, STC—three, Videosat—one, and Western Union—four.

142. Only Graphic will not provide service to the Eastern time zone. The four providing exclusive initial service are CBS, RCA, STC, and DBSC. DBSC has petitioned the FCC to allow the company to provide initial service throughout the continental United States. See *supra* note 122.

143. See 91 F.C.C.2d at 982-83.

144. *Id.* at 984-87.

145. Report and Order, 90 F.C.C.2d 676, 681 (1981).

the particular tastes of specific audiences. DBS programming, then, could prove an alternative to the least common denominator approach that the networks practice.¹⁴⁶ Unfortunately, only the STC application notes any attempt to produce this type of programming.¹⁴⁷ The other applications contain only general headings such as entertainment, information, or news. Of course, DBS will not begin operation until 1986 and programmers may choose not to predict audience tastes five years in advance. Nonetheless, that only one applicant mentions narrowcasting as a goal or option during the initial phase is discouraging. The viability of DBS would appear to depend on providing services different from those services already available.

(d) *New Technologies*

(1) High Definition Television

The most innovative service that DBS will provide is high definition television (HDTV). HDTV possesses several advantages over conventional National Television System Committee (NTSC) signals, including enhanced color reproduction,¹⁴⁸ improved widescreen capabilities, and associated high quality stereophonic sound.¹⁴⁹ Current television sets cannot receive a HDTV signal, so the consumer will need a converter or new receiver to utilize this signal.¹⁵⁰

Of the eight applicants, only CBS intends to offer HDTV exclusively. DBSC, RCA, USSB, Western Union, and STC expect to experiment with HDTV and ultimately to offer the service. CBS sought to preserve the 12 GHz band exclusively for HDTV, but the Commission felt that such a reservation would not promote the most efficient use of the band.¹⁵¹ Instead, the Commission intends to let the marketplace determine the band use with the FCC providing minimal regulation.¹⁵²

An FCC advisory committee has undertaken to determine the

146. *Id.* at 681-82.

147. 91 F.C.C.2d at 969.

148. HDTV would offer between 800-1500 horizontal scanning lines; NTSC offers 525.

149. WORKING GROUP 1-B SUBCOMM. 1 (SERVICE REQUIREMENTS) OF FCC ADVISORY COMM. ON DIRECT BROADCASTING SATELLITES, DRAFT REPORT 11 (Gen. Docket No. 80-398 vol. 4 (1982)) [hereinafter cited as DRAFT REPORT].

150. *Id.* at 6; see also Fagan, *Direct Broadcast Satellites and the FCC: A Case Study in the Regulation of New Technology*, 29 FED. B. NEWS & J. 378, 383 n.34 (1982).

151. 92 F.C.C.2d at 90-91.

152. *Id.* at 91; 90 F.C.C.2d at 704-05.

market for HDTV. A report by Kalba Bowen Associates predicts that by 1984 7000 television receivers will have HDTV capability, with the number increasing to 1.1 million by 1990.¹⁵³ The report expects demand for HDTV to explode ten to twelve years after its introduction.¹⁵⁴ By 1999 HDTV will stand as the broadcast standard, according to the study.¹⁵⁵ A report by Marder Associates for CBS predicts that eighty percent of television consumers would replace their present television sets with HDTV models, even if the price of the new models exceeded the price of current sets by fifty percent.¹⁵⁶ On the other hand, a poll that Magid conducted for USSB shows that sixty-three percent of consumers would not purchase a new set if the cost rose to twice the cost of a conventional set.¹⁵⁷ The Magid study concludes that although consumers react positively to HDTV, HDTV broadcasters would not find a ready-made market and would have to stimulate demand.¹⁵⁸ All of the studies, however, have come under severe attack.¹⁵⁹ Indeed, the advisory group characterized the Kalba Bowen study as "overly optimistic."¹⁶⁰ Even considering the study as overly optimistic, consumer demand based on the Kalba Bowen study would not support the CBS HDTV system.¹⁶¹ This is a sobering fact in light of the failure of video disc cassettes to perform as well as predicted.¹⁶²

(2) Teletext

DBS systems could become major suppliers of teletext transmissions. CBS expects to provide teletext services to hospitals and

153. DRAFT REPORT, *supra* note 149, at 22.

154. *Id.* at 24. The group based this projection on demand curves for FM radio and color television.

155. *Id.*

156. *Id.* at 34.

157. *Id.* at 30.

158. *Id.* at 31.

159. The Kalba Bowen study fails to consider any improvement in NTSC. In addition, the report fails to consider a longer start-up time. CBS will broadcast only in the East initially, and the price of the antenna may depress demand. Further, analogies to FM radio and color television may be inappropriate. The Magid study was based on a telephone survey of 600 households. Paul Gerhold, an authority on market research, believed that the questions were poor and cast a negative view on HDTV. The Marder poll was based on respondents listed in the telephone directory. The study fails to account for respondents who did not participate. This omission flaws the results because the respondents who did participate may have had a major interest in television or television viewing. *Id.* at 25, 31.

160. *Id.* at 42.

161. *Id.* at 41.

162. *Id.* at 28.

businesses on its third channel.¹⁶³ Graphic customers should be able to call by telephone and receive teletext information on their home computers.¹⁶⁴ DBSC also plans to offer teletext and data services.¹⁶⁵ Finally, the application of STC reveals plans to offer teletext services in the fully operational system.¹⁶⁶

The FCC advisory group presented three studies on the market for teletext communications. A study by International Resource Development reports that DBS could provide service amounting to \$9 billion by 1990.¹⁶⁷ Strategic, Inc. sees a \$1 billion market in 1985 increasing to \$5 billion by the end of the decade.¹⁶⁸ The Institute for the Future report predicts a \$3.7 billion market for DBS by 1990.¹⁶⁹ In its application Graphic Scanning expects teletext demand to increase from 1000 to 110,000 subscribers between 1986 and 1990.¹⁷⁰ Again, the studies exhibit glaring deficiencies. While the studies do not expect DBS to provide all teletext transmissions,¹⁷¹ not a single study even explains why DBS should capture any of the market. The advisory group called the studies at best informed guesses.¹⁷² The teletext demand, in these studies, appears to rely on a strong home computer market that currently exceeds present teletext capacity.

(3) Other Technological Services

DBS applicants propose a number of new services for consumers. STC, DBSC, USSB, Graphic, and Western Union will provide subchannels that allow broadcasts in second languages.¹⁷³ These applicants as well as CBS and RCA also will offer stereophonic sound when the systems become fully operational.¹⁷⁴ Finally,

163. 92 F.C.C.2d at 71.

164. *Id.* at 74; see also *Good News, Bad News in DBS Spacerush*, *supra* note 126, at 26.

165. *Good News, Bad News in DBS Spacerush*, *supra* note 126, at 26.

166. 91 F.C.C.2d at 958.

167. WORKING GROUP I-B SUBCOMM. 1 (SERVICE REQUIREMENTS) OF FCC ADVISORY COMM. ON DIRECT BROADCASTING SATELLITES, FINAL REPORT 9 (Gen. Docket No. 80-398 vol. 4 (1982)) [hereinafter cited as FINAL REPORT].

168. *Id.*

169. *Id.* at 10.

170. *Good News, Bad News in DBS Spacerush*, *supra* note 126, at 26.

171. Both the International Resource Development and the Institute for the Future studies give DBS only 10% of the teletext market. FINAL REPORT, *supra* note 167, at 9, 10.

172. *Id.* at 14.

173. 92 F.C.C.2d at 72, 74, 77, 79; 91 F.C.C.2d at 958.

174. 92 F.C.C.2d at 70-79; 91 F.C.C.2d at 958.

DBSC intends to offer an alarm system through its subchannels.¹⁷⁵

(e) *Initial Cost of DBS*

Of the DBS applicants, only CBS failed to present an estimate of the cost for its system.¹⁷⁶ The cost estimates range from \$136 million to \$969.7 million for the initial phase.¹⁷⁷ The applicants will invest more than \$3.1 billion. The potential DBS operators, of course, premise this investment on the beliefs that video viewers have not reached their saturation point, that consumers will purchase equipment to receive the satellite transmission, and that DBS services will provide a competitive product. One commissioner already has expressed an opinion that at least one company may "lose its shirt."¹⁷⁸ The FCC, however, plans to let market forces determine the viability of DBS. To the eight parties granted applications, DBS represents a multimillion dollar gamble—a gamble that could open billion dollar markets and revolutionize television viewing.

7. DBS: Technology in Search of a Market

The Commission's treatment of DBS has been characterized as nothing short of historic:¹⁷⁹ the introduction of a new radio service largely free from the constraints of federal regulation. Despite its relative freedom from obtrusive regulation, DBS service still must overcome the competitive problems that the video marketplace presents. This portion of the Article attempts to assess the approved proposals in terms of the experience of other innovative video services. The Commission deemed itself an inappropriate forum for addressing the economic viability of DBS service, and clearly the Commission cannot warrant that a service it authorizes

175. *Good News, Bad News in DBS Spacerush*, *supra* note 126, at 26.

176. The FCC granted the CBS application on the condition that CBS provide this information by February 3, 1982. 92 F.C.C.2d at 109-10.

177. The following table summarizes the cost estimates: (in millions of dollars)

Graphic	136
Western Union	161.7 (initial cost)
Videosat	232.1 (Phase I cost)
RCA	374
DBSC	577
STC	683.6
USSB	969

92 F.C.C.2d at 105-08; 91 F.C.C.2d at 957.

178. 91 F.C.C.2d 953, 1000 (Jones, Comm'r., dissenting).

179. Fagan, *supra* note 150, at 382-83.

will be a commercial success. Nonetheless, a serious inquiry into the nature of the video product and the number of video consumers likely to need or want DBS service has relevance beyond the issue of economic viability. Such an inquiry goes to the core of the Commission's responsibility for determining that a proposed allocation of scarce spectrum space will serve the public interest.

The protracted proceedings before the Commission have not resulted in a diminution of the uncertainty surrounding DBS service. The questions of whether consumer interest will justify the enormous start-up costs and whether DBS programming will prove distinctive from programming available in abundance via existing transmission modes remain unanswered. While potential for successful DBS service arguably exists,¹⁸⁰ a distinction, nevertheless, must be made between the broad potential audience for DBS service and the number of consumers who choose DBS over the other available options. Furthermore, the protracted time frame during which the proposed DBS systems will become operational is significant; an even greater variety of video delivery modes than now exists will characterize the communications industry by the time DBS systems are fully ready to compete.¹⁸¹ The leading option to conventional television probably will continue to be cable, which experts expect to reach fifty percent of all American television households by 1990.¹⁸² Cable, however, has been demonstrably slow in reaching the core cities of large urban areas. Consequently, a significant opportunity exists for an assortment of over-the-air services. These services include subscription television (STV), multi-point distribution services (MDS), low-power televisions (LPTV), and satellite master antenna televisions (SMATV). Although limited in the number of channels offered and the geographic areas served, these services, nonetheless, enjoy one significant competitive advantage—an ability to step quickly and cheaply into the

180. The distinguishing feature of DBS technology is its capacity for aggregating a national or regional audience. Recent market research has produced estimates, exceeding 15 million, of the number of homes that could have rooftop satellite dishes by 1990. Another recent survey concluded that 54% of consumers would be interested in having a satellite dish that would provide them with multichannel reception on a regular basis. The survey also reported that among those consumers already receiving cable service, interest would be as much as 52%. Bedell, *Future of Cable TV is Being Fashioned Today*, N.Y. Times, Sept. 29, 1982, § 1, at A1, col. 2.

181. Holsendolph, *Tougher Times Ahead for Cable TV*, N.Y. Times, July 11, 1982, § 3, at 1, col. 2; telephone interview with Ernest Holsendolph (Feb. 3, 1983) (discussing the future of cable TV).

182. National Cable Television Ass'n Submission to House Subcomm. on Telecommunications, Consumer Protection, and Finance (available through J. Walter Thompson).

void left by cable. The steady growth that the industry expects from these delivery systems through the end of this decade suggests that the number of consumers who experience a specific need for DBS service will be somewhat lower than the number currently expressing an "interest" in rooftop dishes.

Whether DBS service successfully attracts enough of an audience to become economically viable undoubtedly will depend more upon programming than upon any other single consideration. Indeed, recent events in the subscription cable area illustrate the truism that "the program is the thing."¹⁸³ Programming, and not technology, is the means by which consumers distinguish the various alternative services from each other. DBS programming continues to be largely an unknown quantity. None of the approved applicants for DBS have brought forth explicit plans indicating that DBS programming will be better than or different from the entertainment fare that other services are now providing.

In sum, finding an audience and developing a distinctive product are the key problems confronting direct satellite broadcasters as they prepare to enter the competitive market. At the same time, some of the issues concerning spectrum use and regulatory options could resurface. Indeed, merely establishing a secure niche in the video marketplace does not guarantee service in the public interest. The authorization of DBS service required the dedication of valuable spectrum space, precluding the use of that space by both its preexisting users and other potentially beneficial services. How well the Commission has managed the 11.7-12.7 GHz band is open to question if DBS service offers nothing more than familiar entertainment fare to an audience for whom it is already available in abundance. In that case, DBS service will have achieved economic success without realizing any of the benefits cited as justification for authorizing the service.

III. REGULATION OF DBS IN THE INTERNATIONAL FORUM

A. *The Vehicle for Technically Oriented DBS Regulations: The ITU*

1. International Telecommunication Union

The International Telecommunication Union (ITU) is the major international organization for the coordination and regulation

183. O'Connor, *Another Blow to Quality Cable*, N.Y. Times, Mar. 6, 1983, § 2, at 25, col. 1.

of international telecommunications. Established in 1932, the ITU is the oldest of the telecommunications organizations and is now a specialized agency of the United Nations.¹⁸⁴ The ITU is composed of representatives from 157 member nations.¹⁸⁵ The scope of ITU activities is limited to technical issues,¹⁸⁶ with the United Nations Educational, Scientific, and Cultural Organization and other multinational groups handling policy.¹⁸⁷

The ITU's main functions with respect to satellite broadcasting are to maintain international cooperation and rational use of telecommunications, to harmonize actions of all countries planning to use DBS, to allocate and to improve the use of the radio frequency spectrum, to make regulations governing DBS,¹⁸⁸ and to allocate positions on the geostationary orbit.¹⁸⁹ The principal organs of the ITU relevant to DBS regulation are the Plenipotentiary Conference, the Administrative Conferences, and two of the four permanent committees: the International Frequency Registration Board (IFRB)¹⁹⁰ and the International Radio Consultative Com-

184. UNITED NATIONS, EVERYMAN'S UNITED NATIONS 532 (8th ed. 1968). The United Nations recognized ITU as a specialized agency in 1947. The ITU has evolved into its present state over more than a century; its predecessor, the International Telegraph Union, was established on May 17, 1865, at a Paris conference. The ITU resulted from a merger of that body with the International Radiotelegraph Union in 1932. The ITU is headquartered in Geneva, Switzerland. Rutkowski, *The 1979 World Administrative Radio Conference: The ITU in a Changing World*, 13 INT'L LAW. 289, 290 (1979).

185. Codding, *The ITU and the Plenipotentiary*, INTERMEDIA, Jan. 1983, at XXIII. Each member nation has one vote. International Telecommunication Convention, Oct. 25, 1973, 28 U.S.T. 2495, 2511, T.I.A.S. No. 8572 [hereinafter cited as I.T.C.].

186. OFFICE OF TECHNOLOGY ASSESSMENT, RADIOFREQUENCY USE AND MANAGEMENT, IMPACTS FROM THE WORLD ADMINISTRATIVE RADIO CONFERENCE OF 1979 46 (1982) [hereinafter cited as O.T.A. STUDY]. The International Telecommunication Convention contains the body of rules that governs the ITU. See I.T.C., *supra* note 185, 28 U.S.T. at 2497-2590.

187. O.T.A. STUDY, *supra* note 186, at 26-27. For example, UNESCO has studied questions concerning the New World Information Order. *Id.* at 54. The International Telegraph Convention and the International Radiotelegraph Convention combined to form the International Telecommunication Convention. G. CODDING & A. RUTKOWSKI, THE INTERNATIONAL TELECOMMUNICATION UNION IN A CHANGING WORLD 18 (1982). The 1973 modification resulted in the Convention that currently governs. See I.T.C., *supra* note 185, 28 U.S.T. at 2497.

188. See I.T.C., *supra* note 185, 28 U.S.T. at 2512, art. 4. Although no enforcement mechanism exists to ensure a member's performance, membership in the Union entails a treaty obligation to conform to collective decisions of the members. O.T.A. STUDY, *supra* note 186, at 46.

189. Report of the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space, U.N. Doc. A/CONF.101/10, at 96 (1982) [hereinafter cited as Report of UNCEPUOS].

190. The Atlantic City Telecommunication Conference created the IFRB in 1947. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 117.

mittee (CCIR).¹⁹¹

The IFRB is a five-member elected board responsible for registering the basic technical characteristics of each space network station in accordance with ITU regulations, including the positions that countries assign to geostationary satellites¹⁹² and the frequencies that countries use on the radio spectrum. The registration of spectrum allocations puts other nations on notice of the assignment and protects the registered country from harmful interference by other users of the same band.¹⁹³ The Board's primary notification task is to record in the Master Frequency Register the frequencies assigned to member administrations.¹⁹⁴ Coordination ensures that after a space system goes into operation it will not receive interference from, or cause interference to, other space or terrestrial systems sharing frequencies.¹⁹⁵

As one of the two technical study groups of the ITU, the CCIR conducts studies and makes recommendations on technological developments.¹⁹⁶ Experts from member countries, scientific and industrial organizations, and even some private companies may participate in CCIR studies.¹⁹⁷ Members respect the CCIR as a source of information and guidance on the use of new technologies; consequently, they generally accept CCIR recommendations.¹⁹⁸

The Plenipotentiary Conference is the highest branch in the ITU structure. The Conference meets every five to eight years to consider administrative and organizational matters.¹⁹⁹ The Confer-

191. O.T.A. STUDY, *supra* note 186, at 49. The third and fourth permanent organs are the General Secretariat, which makes arrangements for the conferences and, therefore, indirectly controls DBS, and the CCITT, which studies and makes recommendations regarding technical developments, operations, and tariffs for telephone and telegraphy. *Id.*

192. Report of UNCEPUOS, *supra* note 189, at 97. The IFRB produces technical and operational standards for allocation. "Allocation" is defined as entry into the Table of Frequency Allocations of a given frequency band for use by one or more terrestrial or space radiocommunication services. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 250.

193. Jasentulyana, *Regulations Governing Space Telecommunication*, in 1 *MANUAL ON SPACE LAW* 208 (N. Jasentulyana & A. Lee eds. 1979). Allocation of a position on the geostationary orbit and assignments on the radio frequency band, however, are not equivalent to sovereignty over the space. O.T.A. STUDY, *supra* note 186, at 51.

194. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 123. The WARC-79 significantly altered the IFRB's Table of Frequency Allocations by adding satellite radiocommunication services to the Table. *Id.* at 259.

195. *Id.* at 206. Article 10 of the Convention delineates the IFRB's functions.

196. Report of UNCEPUOS, *supra* note 189, at 97.

197. O.T.A. STUDY, *supra* note 186, at 49.

198. *Id.*

199. D. LEIVE, *THE FUTURE OF THE INTERNATIONAL TELECOMMUNICATION UNION* 3 (1972). The Administrative Council meets annually to handle administrative ITU functions between the Plenipotentiary Conferences. *Id.*

ence is the only arm of the ITU that may modify the Convention²⁰⁰ to keep pace with developing technologies and world policies.

2. ITU Conferences

The ITU carries out its duties through world and regional conferences.²⁰¹ These conferences include the World Administrative Radio Conferences (WARCs), which meet infrequently to discuss specific topics,²⁰² the Regional Administrative Radio Conferences (RARCs), which convene to discuss communications problems of a regional scope,²⁰³ and the Plenipotentiary Conferences. Several ITU conferences in recent years have been significant to the development of DBS:²⁰⁴ the 1971 Space WARC, the 1977 Broadcast Satellite WARC, the 1979 WARC, the 1982 Plenipotentiary, and the 1983 RARC. These conferences are discussed below.

The 1971 WARC for Space Telecommunications (WARC-71) convened to discuss the developments and use of geostationary satellites in communications.²⁰⁵ Participants at the WARC-71 modified the ITU technical standards contained in the Table of Frequency Allocations, and arranged the use of orbital positions and frequency channels.²⁰⁶ The WARC-71 adopted a resolution directing a later conference, the WARC which eventually met in 1977, to draft technical criteria, principles, and plans for DBS.²⁰⁷

The 1977 WARC for Broadcasting Satellites (WARC-BS-77) affected significantly DBS development.²⁰⁸ Representatives at the WARC-BS-77 equitably assigned the space service frequencies and orbital positions on an a priori basis among all ITU members, a reversal of the previous a posteriori method.²⁰⁹ WARC-BS-77 called

200. O.T.A. STUDY, *supra* note 186, at 47.

201. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 59.

202. *Id.* at 70. Recent WARC's include the WARC-BS-77, the WARC-79, and the WARC-71. See *infra* notes 205-11 and accompanying text.

203. See I.T.C., *supra* note 185, 28 U.S.T., at 2515, art. 7.

204. *Jasentuliyana*, *supra* note 193, at 198-208.

205. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 46.

206. *Id.*

207. *Id.* at 49.

208. The WARC-BS-77 convened from January 10 to February 13, 1977. Butler, *World Administrative Radio Conference for Planning Broadcasting Satellite Service*, 5 J. SPACE L. 93, 94 (1977).

209. Rothblatt, *ITU Regulation of Satellite Communication*, 18 STAN. J. INT'L L. 1, 10 (1982). *A priori* assignment is a method whereby slots are assigned in anticipation of future needs. This contrasts the previous ITU policy of *a posteriori* assignment, under which slots are assigned when a country is technologically capable of using them, the so-called "first-come-first-served" approach. Rutkowski, *supra* note 184, at 306-09.

for a subsequent conference to undertake more detailed planning for broadcast satellites.²¹⁰ This resulted in the RARC-83.

Although the 1979 WARC (WARC-79) did not discuss DBS issues specifically, some of its results were pertinent to DBS. WARC-79 decided to divide the 12 GHz band between broadcast satellite and fixed satellite services, and to guarantee equitable access for all members to orbital positions and frequencies.²¹¹ WARC-79 adopted an allocation plan of 11.7-12.2 GHz for fixed satellite service (FSS), with direct broadcast satellites permitted to operate in this band with restrictions, and of 12.3-12.7 GHz primarily for direct broadcast satellites, with FSS permitted to operate in this band under certain conditions. The Conference devised the 12.1-12.3 band to accommodate both direct broadcast satellites and FSS until the 1983 RARC could establish permanent rules.²¹²

The 1982 Plenipotentiary Conference²¹³ less significantly affected direct regulation of DBS.²¹⁴ The Conference called for an increased role for the International Telegraph and Telephone Consultative Committee (CCITT) in the future of telecommunications.²¹⁵ The CCITT now has jurisdiction over all telecommunications services other than radio communication.²¹⁶ The Plenipotentiary Conference agreed to hold several future meetings to discuss DBS issues: a recently held 1983 RARC, a 1985 WARC, and a 1988 WARC.²¹⁷ Additionally, the Plenipotentiary Conference called for a World Administrative Telegraph and Telephone Conference to establish a broad regulatory scheme for all existing and

210. Butler, *supra* note 208, at 95.

211. Rothblatt, *supra* note 209, at 12.

212. *Id.* at 13.

213. Plenipotentiaries meet every five to nine years. In the interim, the Administrative Council meets to oversee policy and ITU functions. O.T.A. STUDY, *supra* note 186, at 47. Each member of the ITU has a right to send one or more representatives to the Plenipotentiary Conferences, G. CODDING & A. RUTKOWSKI, *supra* note 187, at 60-61, and numerous observers are usually present to watch the proceedings. The ITU does not release details of the entire conference to the general public, so most administrations find it advantageous to send a delegation. *Id.*

214. The General Secretariat performs much of the preparatory work for the Plenipotentiary Conferences. The Secretariat gathers proposals that member countries submit, produces minutes of the meetings, and publishes final reports of the conferences. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 63.

215. Rutkowski, *Report on the ITU Plenipotentiary*, CHRON. OF INT'L COM., Nov.-Dec. 1982, at 1, 7. For a description of the CCITT, see *supra* note 191.

216. Rutkowski, *supra* note 215, at 7. In spite of the enormous political and technological changes that have taken place in telecommunications, much of the current regulatory framework has existed since 1865.

217. G. CODDING & A. RUTKOWSKI, *supra* note 187, at 7.

foreseen telecommunications services.²¹⁸

The most significant conference for DBS matters has been the 1983 Regional Administrative Radio Conference (RARC-83) for Region 2,²¹⁹ which met for five weeks in Geneva during June and July. The United States sought and obtained eight satellite orbital positions, with a maximum of 500 MHz of spectrum space, and up to thirty-two channels of service each.²²⁰ The United States also achieved one of its major goals—establishment of the lower end of the DBS band at 12.2 GHz. This ruling ensures a full 500 MHz for FSS.²²¹

The United States, however, failed at RARC-83 in other significant matters. The nation, for example, failed to obtain approval of its positioning plan at RARC-83. The United States proposal would have permitted the satellites to serve adequately the entire continental United States.²²² The plan accepted by RARC breaks up the United States orbital positioning arc to accommodate Canadian and Mexican satellites. As a result, Western satellites cannot serve the United States Mountain time zone.²²³ This plan also gives low elevation angles for satellites that will serve the Eastern United States, causing inadequate eclipse protection during the spring and fall equinoxes.²²⁴

The failure of the United States proposal for a highpower standard was an even more serious setback. The United States had proposed a standard power flux density (pfd) of minus 105 db to the square meter. The standard that the RARC approved was a pfd of minus 107 db, which translates into a sixty percent difference in power.²²⁵ Although the approved standard is sufficient for

218. *Id.*

219. Region 2 consists of the Americas and Greenland. Jasentuliyana, *supra* note 193, at 229.

220. *Coming to Consensus in Geneva*, BROADCASTING, July 18, 1983, at 24.

221. Thus, FSS would encompass the 11.7-12.2 GHz spectrum range and DBS would cover the 12.2-12.7 GHz spectrum band. *Id.*

222. *Id.* The proposal called for eight satellites in an arc beginning at 170 degrees west and continuing east at intervals of approximately 10 degrees. *Id.*

223. *Id.* The allotted positions of United States satellites are 175 degrees west, 166 degrees, 157 degrees, 148 degrees, 119 degrees, 110 degrees, 101 degrees, and 61.5 degrees. *U.S. Team Back from Geneva, Pleased with Itself and ITU*, BROADCASTING, July 25, 1983, at 26.

224. *Coming to Consensus in Geneva*, *supra* note 220, at 24. When the earth crossed between the sun and the satellite in the 61.5 degree west slot, the sun's rays would not reach the satellite's solar-powered batteries. Therefore, the satellite could go dark as early as 9:23 p.m. and remain dark for up to 72 minutes. *Id.*

225. *U.S. Team Back from Geneva, Pleased with Itself and ITU*, *supra* note 223, at 27.

current technology, the United States had hoped for a higher standard to allow for growth.²²⁶ Consequently, the United States already has disclosed that it will not abide by the RARC's decision, but will proceed instead with development of the higher standard technology. These actions could weaken the ITU agreement.²²⁷

B. *The International Views on Broader Policy Issues*

1. Europe and Canada

Although the European nations generally have sided with the United States in United Nations debates on international broadcasting issues,²²⁸ the United States and its European allies do not share a common view on the role of government in regulating broadcasting. The premium that the United States places upon the free flow of information over government prior restraint and content regulation²²⁹ puts it at the radical edge of the international DBS debate. Canada, the United Kingdom, and most other European nations—countries that share a common cultural heritage with the United States—see pervasive government regulation as necessary for the protection of their citizens from potential commercial abuses and for the provision of educational and informational services throughout their respective nations. DBS provides these countries with the capability of fulfilling these goals by enabling them to reach isolated rural populations with local programming for the first time.²³⁰ Thus, the democratic and industrialized nations of Europe and North America do not speak with one voice

226. *Id.* The United States contends that the higher standard would permit use of a .75 meter antenna at less than one-third the cost of the one meter antenna required for the lower standard. *Id.*

227. The United States signed the RARC Agreement, which became effective on January 1, 1984. Procedurally, the RARC Agreement constitutes a recommendation to the 1985 World Administrative Radio Conference on the Use of the Geostationary Orbit and the Planning of Space Services Utilizing It. The 1985 Conference will include formally the RARC Agreement in the ITU Radio Regulations.

228. *See supra* note 3.

229. *See, e.g.,* FCC v. *Pacifica Found.*, 438 U.S. 726 (1978). *Pacifica* discloses that content regulation in the United States has a narrow scope, limited for all practical purposes to the elimination of "offensive language" accessible to minors. This prohibition includes sexual references, but does not include racial slurs, violence, or other socially unacceptable conversation. Julian Bond's claim that the FCC should prohibit radio stations in the South from using words such as "nigger" in broadcasting provides an interesting opposing view. *See* G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1258-59 author's note (10th ed. 1980).

230. HER MAJESTY'S STATIONERY OFFICE, *DIRECT BROADCASTING BY SATELLITE: REPORT OF A HOME OFFICE STUDY* 29, 58 (1981) (British report).

in the DBS debate.

In essence, the United States and its Canadian and European allies seem to be following reverse patterns for development in this capital-intensive new industry. For example, when the United States Congress launched COMSAT in the early 1960's, the lawmakers clearly intended to reduce the government's involvement in the fledgling industry and the degree of content regulation as the industry developed.²³¹ As the new communications technology developed in the industrialized nations of Europe and Canada, the legislatures seemed to favor the constant supervision of government to attain a balanced distribution of broadcast and telecommunications services. This subsection of the Article discusses the emerging DBS policy of the democratic and industrial Western nations other than the United States. This subsection also explores how the growing discord between the United States and its allies could prevent the developed nations from assuming a united position in the international debate.

(a) *The European Space Agency*

The European nations created the European Space Agency (ESA) in 1975 for the purpose of promoting the peaceful cooperation among the member nations in space research and technology.²³² Initially, the ESA did not pursue aggressively the development of DBS because—in the view of some observers—the agency wanted to protect investments in cable systems.²³³ Recently, however, the ESA has escalated its efforts to provide DBS services to smaller nations such as Luxembourg and Switzerland.²³⁴ In the case of the larger nations—France, Germany, and the United

231. See Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419; H.R. 11040, 87th Cong., 2d Sess., reprinted in 1962 U.S. CODE CONG. & AD. NEWS 489. Debates within Congress and from outside pressure groups are discussed at length in M. KINSLEY, *OUTER SPACE AND INNER SANCTUMS: GOVERNMENT, BUSINESS, AND SATELLITE COMMUNICATION* 1-27 (1976).

232. ESA BULLETIN, Feb. 1982, at 1. The ESA Bulletin is the official publication of the European Space Agency.

The ESA grew out of two earlier organizations: the European Space Research Organization (ESRO) and the European Organization for the Development and Construction of Space Vehicle Launchers (ELDO). Its members states are Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom, with Austria and Norway as associate members and Canada as an observer.

233. *RTL's Satellite Plans Put Off*, Multichannel News, Dec. 27, 1982, at 33, col. 1; *Secunda, Satellite TV Breaks Down Barriers Over European Border*, VARIETY, Oct. 26, 1982, at 28, 29.

234. See J. PELTON, *GLOBAL COMMUNICATIONS AND SATELLITE POLICY* 57 (1974).

Kingdom—ESA is promoting resource pooling to enable those countries to utilize the DBS broadcasting slots that the WARC allocated to them in 1979.

Luxembourg's program most closely resembles the United States system because it allows for and encourages commercial programming.²³⁵ DBS observers anticipate that with strong terrestrial equipment, Luxembourg's programs will cover the European "Golden Triangle," which includes France, Germany, and parts of the British Isles. Recalling the case of the "Luxembourg effect"²³⁶ in radio, many nations—particularly the United Kingdom, Holland, and Belgium—have tried to increase ESA-member nations' responsibility for "overspill" under international law. Therefore, the ESA probably will forge its accords to protect national culture and to resolve environmental problems resulting from the over-reach of powerful signals.

In addition, ESA may consider creating prior consent regulations to provide economic protection against unlicensed foreign competition to member nations. According to some observers, the potential receiving nations in Europe withheld their legislative initiatives in DBS regulation until after the ITU negotiations were finalized in June 1983.²³⁷ ESA members now plan to institute consent regulations over DBS broadcasts.

(b) Switzerland

A report issued by Switzerland's *Poste Telephone et Telegraphique* (PTT) described the Swiss government's plans to launch a DBS satellite using the ESA's Ariane launcher to ensure the viability of all communications within and among the cantons of the Swiss federation.²³⁸ Reaffirming that the frequency spectrum and orbits of geostationary satellites are limited natural resources, the PTT stated that the geostationary slots should be treated with

235. Luxembourg will provide this DBS programming by 1986. See *Luxembourg Plans Satellite TV Service*, Wash. Post, Oct. 13, 1983, at C14, col. 2.

236. The "Luxembourg effect" is defined as follows: "Cross-modulation between two radio signals [passing] through the ionosphere, due to the non-linearity of the propagation characteristics of free charges in space. Because of this effect, the program of a powerful station is sometimes heard when a receiver is tuned to a weaker station on a different frequency." J. MARKUS, *ELECTRONICS AND NUCLEONICS DICTIONARY* 374 (3d ed. 1966).

237. Telephone interview with Mary Pitella, Public Affairs Officer of STC (Jan. 21, 1983).

238. As in most of Europe, national governmental agencies are created by statute to serve the public and to ensure that the nation has continuous communication, postal, telephone, and telegraph services.

parsimony in the interest of all nations.²³⁹ The report also restated the Swiss intention to adhere to the Geneva ITU accords and to refrain from broadcasting into other nations without their prior consent. This reference to the existing international regimes implies that the Swiss government expects to incorporate the acknowledged principles of international law into domestic broadcasting legislation. The report, however, recommends that government should not shape actively the content of the Swiss DBS system.²⁴⁰ The PTT stated that total control of DBS is neither the right of any private group or person nor the sole right of the government. Instead, the governmental agency proposed a "mixed" system, which would allow up to one-third of the funding for the DBS industry to come from private sources.²⁴¹ Although the PTT would retain exclusive rights for the transmission of radioelectric signals and sounds, the proposed system presumably would serve the national interest by providing greater program selection to the isolated areas of rural cantons.

(c) Canada

The new Canadian Constitution,²⁴² adopted in 1981, at first glance supports an expansive freedom of the press and electronic media. According to section 2(b) of the Constitution, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" are "fundamental freedoms."²⁴³ This prominent effort to protect the emerging telecommunications media, however, actually reflects the Canadian government's aggressive view of the national government's proper role in fostering and regulating program content. The notion that only the government adequately can protect its people from dangerous abuses of liberty permeates the Canadian Constitution.²⁴⁴ Unsurprisingly, the Canadian government carefully monitors the content

239. The PTT's report acknowledged the possibility of overlap between Switzerland and its neighbors, France and Germany. Switzerland expects to launch its DBS in 1985-86, using a minimum of three to five channels. SWISS FEDERAL POSTAL AND TELEPHONE SERVICE, RADIO DIFFUSION PAR SATELLITE (1981).

* 240. *Id.* Switzerland is a federation of independent cantons. The PTT proposed to provide independent programming to the communities in the rural cantons that cannot afford terrestrial equipment. *Id.*

241. *Id.*

242. Constitution Act, 1982, pt. I, enacted by Canada Act, 1982, U.K. 1982, c. 11.

243. Constitution Act, 1982, pt. I, § 2(b). The new Canadian Constitution replaces the British North America Act of 1867 as the Canadian Charter of the Rights and Freedoms.

244. See, e.g., Constitution Act, 1982, pt. I.

of programming in television broadcasts to limit the presentation of socially undesirable programming and to ensure the development of the medium's educational and public interest potential.

The Canadian government takes the position that state support of, and government involvement in, the communications industry is consistent with its constitutional authority to promote national unity throughout its large and diverse country. No group other than the Canadian government has the funds or the incentive to sponsor programming that will reach provinces in the Northwest Territory. Also consistent with this concern for national unity is the governmental effort to ensure that Canadian corporations are the primary contractors for the Canadian DBS industry.²⁴⁵

Finally, the Canadian government feels a strong commitment to protect its culture from contamination by foreign broadcasts. The government imposes a statutory limitation upon the percentage of foreign programs and advertisements that may appear on a station within a specified period of time. Of all of the developed DBS producing nations, Canada remains the country that the United States' aggressive commercial policies most threaten. If past experience provides valid precedent for future broadcasting controversies, Canadian DBS faces the prospect of direct competition with American DBS programming. This competition will have the two-fold effect of subjecting Canadian viewers to "inferior" programming and of threatening the economic viability of the Canadian DBS industry. For these reasons, the Canadian government recently has begun a program designed to eliminate overspill broadcasting from the United States into Canadian territory.²⁴⁶

245. With respect to service for distant provinces, prior to the development of the Anik C satellite and the DBS industry, these regions could not be served because of the economic infeasibility of terrestrial broadcasting over a large area with a sparse population. CANADIAN DEP'T OF COMMUNICATIONS, CANADIAN SATELLITE COMMUNICATIONS 2, 5 (1967). With respect to the utilization of Canadian contractors, this is consistent with § 3 of the Parliament's Broadcasting Act of 1968. CAN. REV. STAT. ch. 25, § 3 (1968). The Act has its historical roots in the Aird Commission's 1929 report, which put forward the now accepted idea that airwaves are public property and, therefore, should be subject to government regulation. CANADIAN DEP'T OF COMMUNICATIONS, DIRECT-TO-HOME SATELLITE BROADCASTING FOR CANADA 6 (1983) [hereinafter cited as CANADIAN DEP'T OF COMMUNICATIONS, DIRECT-TO-HOME SATELLITE BROADCASTING]. Although the Act did not contemplate broadcasting from satellites, it remains "the principal policy statement guiding the actions of the CBC, the CRTC, [the] government, and the broadcasting industry in general." *Id.* Section 3 of the Act provides that systems be "owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada . . ." Broadcasting Act of 1968, § 3.

246. See Canadian Dep't of Communications, Fox Takes Steps to Reinforce Canadian

Obviously, fruitful negotiation with the United States would facilitate the implementation of the Canadian plan. To that end, Canada has undertaken certain efforts to strengthen its diplomatic relations with our nation's communications authorities. The Canadian government in the late 1960's created a communications satellite system to operate in conjunction with radio and terrestrial systems.²⁴⁷ The Canadian government expects communications satellites to start low frequency DBS transmissions for United States based corporations as well as for the Canadian population within the next two years.²⁴⁸

The Canadian view that government should regulate directly the content of DBS programming openly conflicts with the position of its neighbor, the United States.²⁴⁹ The Canadians are wary of the United States' aggressive exploitation of the new industry and fear that Canadian entrepreneurs will be lost in the technology scramble. Therefore, a substantial likelihood exists that Canada will promulgate DBS content regulations to protect its economic interests as well as its national and cultural values.

(d) *The United Kingdom*

The concept of "free press" that prevails in the United Kingdom is a precursor to the principles that appear in the United States Constitution. The British perception, however, is dramati-

Broadcasting System (Oct. 7, 1982) (news release). The release states that "[i]n the very near future, we expect to enhance significantly viewers' diversity of choice in a new broadcasting environment which will include more and better Canadian programming But, in the meantime, we must protect licensed Canadian broadcast undertakings because these are the foundations upon which we must build." *Id.* According to the release, both the Radio Act and the Broadcasting Act contain provisions for enforcement. *See also* CANADIAN DEP'T OF COMMUNICATIONS, DIRECT-TO-HOME SATELLITE BROADCASTING, *supra* note 245, at 83 (concerning the problems that overflow from the United States causes to Canada).

Canada's Broadcasting Act of 1968 presents "a standard for gauging the performance of the Canadian broadcasting system." *Id.* at 30. According to that standard, "all broadcasters are required to provide programming of high standard, using predominantly Canadian creative and other sources." *Id.* That most American programming under this standard is "inferior" is hardly surprising.

247. CANADIAN DEP'T OF COMMUNICATIONS, CANADIAN SATELLITE COMMUNICATIONS 6.

248. Canadian Radio-Television and Telecommunications Act, CAN. REV. STAT. ch. T-4, §§ 70-93 (1974) (provided for telephone communications via satellite) (revised 1975 & 1976). The government also has established the Broadcasting Strategy of March 1, 1983, to develop Canadian broadcasting by funding up to "one-third of the costs of Canadian drama, variety and children's programming produced by private Canadian program producers for exhibition . . . in Canada." CANADIAN DEP'T OF COMMUNICATIONS, DIRECT-TO-HOME SATELLITE BROADCASTING, *supra* note 245, at 32.

249. *See supra* part II, section B.

cally different in its insistence that the press and broadcasting media be socially responsible. An assumed link between government control and social responsibility led to the creation of the government run British Broadcasting Corporation (BBC) fifty years ago.²⁵⁰ In concept, the British approach resembles the systems of Canada, Switzerland, and other European nations. The United Kingdom attempts to blend governmental involvement in providing the public services of entertainment and information with the promotion of general social welfare. These goals might not be so readily attainable, in the United Kingdom's view, if the government left telecommunications entirely to private industry. The quality controls upon programming are particularly well-known in the case of the BBC, whose programs are popular in the United States and other English speaking nations.

Public funds that Parliament allocates finance the BBC's services. The source of these public funds is a license fee imposed upon BBC viewers. That audiences paid a "license" fee to receive broadcast signals from the time of its inception led commentators to consider BBC radio, and later, television, as the "rich man's toy."²⁵¹ The rationale for this Parliament controlled system remains that Parliament can judge best the value and quality of BBC programming because Parliament is ultimately responsible to the electorate. In this sense, the BBC's model is particularly instructive for DBS regulation because of the link between sponsorship of the medium and audience response. As an illustration, the viewing public and government authorities greeted the move towards advertising on television in the United Kingdom with some trepidation. This uneasiness explains the government's eventual regulation of the duration and content of television commercials.²⁵² The government anticipates that the existing regulatory system for television and other forms of broadcasting sufficiently will accommodate new technology broadcasting.²⁵³ Thus, all of the present

250. According to the Home Secretary in charge of broadcasting for the United Kingdom, "the primary function of the corporation is to provide public services, television and radio services." HER MAJESTY'S STATIONERY OFFICE, *supra* note 230, at 33. This report also discusses the costs, accessibility, and regulatory framework for DBS, including copyright and environmental concerns.

251. See LORD WINDLESHAM, BROADCASTING IN A FREE SOCIETY 20-21 (1980). The book's final chapter is devoted to future trends in DBS broadcasting. Lord Windlesham is reluctant to accept the position that the United Kingdom's content regulation effectively can meet the needs of the inherently different nature of DBS industry.

252. See HER MAJESTY'S STATIONERY OFFICE, *supra* note 230, at 58.

253. *Id.* at 64.

content regulations in the United Kingdom probably will apply to DBS.

2. The Developing Countries

The United Nations has been the predominant forum for developing nations to express their views on the appropriate legal constraints for DBS. Although the developing nations are not at the forefront of DBS development, they have used the United Nations forum to make their concerns known to the nations developing the technology.²⁵⁴ The immediate problems that developing countries confront are the spillover effects of satellite broadcasts as other nations' DBS systems become operational. Over the past two decades of United Nations debates, the developing countries have become increasingly unified in articulating their fears. Because their overriding concern has been that the content of Western programs would contaminate their cultures and disrupt their political independence, the central issue has become one of national sovereignty versus the free flow of information.²⁵⁵ The United Nations forum that has been most responsive to these worries is the United Nations Educational, Scientific, and Cultural Organization (UNESCO). In UNESCO the developing nations outnumber the developed countries, especially when the Soviet bloc joins the developing nations in the voting. Thus, the developing countries have an influential role at the United Nations in the development of principles governing the use of DBS.

In 1946 both the United Nations and UNESCO considered the principle of the free flow of information to be the international

254. Most developing nations will not confront the issue of regulating the content of a national DBS system through national laws for another decade or so. Some nations, however, such as Saudi Arabia, Romania, China, and Indonesia, probably will launch national DBS spacecraft within the next decade. *Communications Daily*, Sept. 7, 1982, at 3-4. These nations very likely will raise the question of whether national laws should regulate content much sooner. Nonetheless, the majority of developing nations probably will participate in joint or multinational DBS satellite ventures because they do not have the resources to launch their own national spacecraft. For these nations, principles articulated in bilateral, regional, and international legal regimes will control content regulation.

255. Many writers have discussed the problem that DBS poses to developing countries striving to maintain their cultural and national integrity. A recent House Report recognized both national sovereignty and fear of cultural erosion as being among the social, political, and cultural barriers to the free flow of information. HOUSE COMM. ON GOV'T OPERATIONS, INTERNATIONAL INFORMATION FLOW: FORGING A NEW FRAMEWORK, H.R. REP. No. 1535, 96th Cong., 2d Sess. 19-23 (1980). For more detail on these issues, see T. McPHAIL, *ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING COMMUNICATION* (1981) and K. NORDENSTRENG & H. SCHILLER, *NATIONAL SOVEREIGNTY AND INTERNATIONAL COMMUNICATION* (1979).

ideal.²⁵⁶ Article 19 of the 1948 Universal Declaration of Human Rights asserted that persons have the right "to seek, receive and impart information and ideas through any media and regardless of frontiers."²⁵⁷ The General Conference of UNESCO adopted a similar principle recommending that member states "recognize the right of citizens to listen freely to broadcasts from other countries."²⁵⁸

In the 1960's, however, the Soviet bloc and developing countries increasingly called for more restrictions on DBS broadcasts. These nations interpreted the potential of DBS broadcasts to be quantitatively and qualitatively different from other forms of communication.²⁵⁹ For instance, a DBS transmission can cover about 1,000,000 square miles while broadcasts relayed from satellites to terrestrial stations and then to individual receivers can cover a maximum of about 10,000 square miles. Moreover, as the technology needed for ground receivers of DBS broadcasts has become simpler, the sophistication of technology for jamming celestial broadcasts, as opposed to terrestrial broadcasts, has grown more expensive and difficult to use effectively.²⁶⁰ In sum, these nations foresaw that for nations to control the reception of foreign DBS satellites would be very difficult;²⁶¹ thus, "[p]sychologically, DBS

256. The preeminence of the principle of the free flow of information regardless of borders has undergone considerable erosion as the competing principles regarding the rights of national sovereignty, including the right to nonintervention in domestic affairs and the right to preserve one's cultural integrity, have become predominant in the developing countries and the Soviet bloc countries. See *infra* notes 259-301 and accompanying text.

257. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 75 (1948).

258. Records of the General Conference, UNESCO 3d Sess., vol. II, U.N. Doc. 3 C/110, Res. 7.2221 (1948). For a discussion of other relevant UNESCO documents, see *infra* notes 309-49 and accompanying text.

259. For a discussion of the developing countries' early expressions of concern regarding the use of space communications, see *infra* text accompanying notes 316-22.

260. C. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 606 (1982).

261. The "technology inversion" aspect of DBS is not an entirely negative prospect for the developing countries. Although the possible inability to control the receipt of foreign DBS is of great concern to the developing countries, that the DBS ground receivers are less expensive than other communications systems means that these nations can skip the stage of building costly terrestrial communications systems. The following quotation better illustrates the important role that DBS communications systems may play in helping developing countries "leap-frog" stages of economic development.

Space technology can be a powerful tool to accelerate national development: it provides a way of leap-frogging over obsolete technologies and getting away from percolation and trickle-down models of development for which the developing countries do not have time. It could deal effectively with the problems of illiteracy, isolation and lack of information afflicting the development process.

Report of UNCEPUOS, *supra* note 189, at 4-5.

came to represent to many [nations] the epitome of a foreign cultural invasion tool which could invade countries and broadcast propaganda without domestic or native content or control."²⁶²

Based partially upon its domestic constitutional protection of free speech, and partially upon its readiness to exploit commercially its advanced technology, the United States criticized this concern as an excuse for government control of the press and as a violation of the individual right to seek and receive information.²⁶³ Most developing countries, however, only have become sovereign nations following the post-World War II period of decolonization. They presently are struggling to forge distinct national and cultural identities and, thus, react defensively to any perceived threats to their newly gained sovereignty.²⁶⁴ Accordingly, the developing nations would like a legal regime for DBS to require at least prior *notification* of broadcasts to the receiving state, and, perhaps even, prior *consent* from the receiving state. This regime would provide at least some control over content.

3. The Soviet Bloc

The Soviet Union has advocated aggressively strict regulation of information transmitted via direct broadcasting satellites. The hallmark of the Soviet bloc position is the requirement of "prior consent" before a foreign nation can transmit radio or television broadcasts to the receiving nation. In advancing the "prior consent" requirement, the Soviet Union asserts that sovereign nations share a fundamental right to be free from the type of external interference in their domestic affairs that occurs through direct broadcasting by satellites.²⁶⁵ In the debate surrounding the regula-

262. T. MCPHAIL, *supra* note 255, at 180.

263. The American delegate commenting on the passage of the 1982 United Nations' DBS principles calling for prior consent stated that any requirement that broadcasters obtain the consent of such government "would violate our own obligations toward both the broadcasters and the intended audience." See Pace, *supra* note 3, at A6, col. 3.

264. See *supra* note 255.

265. Underlying the Soviet Union's position appears to be the fear that direct broadcasting from the West to Soviet home television sets soon will become possible and that such broadcasting poses a serious political threat to the Soviet Union. Direct broadcasting to Soviet homes by foreign nations would undercut the use of television as a Soviet state instrument to advance Communist ideology. The importance of television as a state instrument for furthering political purposes is evident in the following Soviet statement made to television workers on the eve of the October Revolution's Fiftieth Anniversary: "We must see to it that every broadcast, going to millions of people, be infused with the acuteness of Marxist-Leninist thought, that it enrich the minds and feelings of men and draw them into active participation in the Communist construction." K. QUEENEY, DIRECT BROADCAST

tion of satellite communications, the Soviet Union has embarked upon a campaign to establish prior consent as an element of a legal regime governing DBS.

The Soviet bloc position has its genesis in the earliest United Nations debates on DBS. On September 10, 1962, the Soviet Union submitted its Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space to the United Nations.²⁶⁶ The Soviet Draft Declaration stated that "the use of outer space for propagating war, national or racial hatred or enmity between nations shall be prohibited."²⁶⁷ Indeed, the Soviet Union was the only space-resource state to make such an early reference to the subject of satellite communications.²⁶⁸ In 1967 Czechoslovakia more clearly defined the Soviet bloc position.²⁶⁹ The subject of space communications became controversial at a Committee on the Peaceful Uses of Outer Space (COPUOS) meeting that year,²⁷⁰ when Czechoslovakia noted the need for direct satellite broadcasting to further international peace and to respect the sovereign equality of States.²⁷¹

COPUOS, at the request of the General Assembly, had established a Working Group to consider the technical, economic, social, and legal aspects of DBS by 1968.²⁷² After the Working Group had met for two of its five commissioned sessions, the Soviet Union proposed to transfer the discussion of DBS back to the COPUOS

SATELLITES AND THE UNITED NATIONS 97, 103-04 (1978) (quoting R. Heffner, *Open Skies vs. Prior Censorship: The Soviet View of Direct Satellite Broadcasting* (unpublished paper presented at Schloss Leopoldskron, Salzburg (Oct. 30-Nov. 3, 1973))). The Soviet Union's objection to the freedom of information principle that the United States and other Western countries advocate is cast in the following terms by the Soviet delegation to the United Nations:

Further, the representative of Belgium, spoke on the free flow of information. But a question arises, whose flow? A clean flow, a creative flow in the interests of peace and mankind? Or is it to be polluted by sex, violence, propaganda, misinformation, slander, interference in international affairs, against the culture and civilization of every single nation? This is what we are talking about.

B. SIGNITZER, REGULATION OF DIRECT BROADCASTING FROM SATELLITES, THE U.N. INVOLVEMENT 47 (1976).

266. U.N. Doc. A/AC.105/L.2 (1962) [hereinafter cited as Draft Declaration], reprinted in C. CHRISTOL, *THE INTERNATIONAL LAW OF OUTER SPACE* 480 (1966); see also C. CHRISTOL, *supra* note 260, at 614-15.

267. Draft Declaration, *supra* note 266, quoted in C. CHRISTOL, *supra* note 260, at 614-15.

268. C. CHRISTOL, *supra* note 260, at 614.

269. U.N. Doc. A/AC.105/C.2/SR.80, at 15 (1967).

270. C. CHRISTOL, *supra* note 260, at 616-17.

271. U.N. Doc. A/AC.105/C.2/SR.80, *supra* note 269, at 15.

272. 4 *MANUAL ON SPACE LAW*, *supra* note 193, at 179.

Legal Sub-Committee.²⁷³ The Soviet Union thus hoped to ensure that a legally binding treaty would embody its view of strict DBS regulation.²⁷⁴ The Soviet Union declared that DBS would be illegal without the consent of the receiving state and, absent such consent, the state had the right to resist the illegal broadcasts.²⁷⁵

The Soviet bloc formally expressed these basic tenets in its proposed Declaration of Model Principles presented to the third session of the Working Group in May 1970.²⁷⁶ Principles 4, 6, and 7 were the three key principles of the 1970 Soviet Declaration. Principle 4 required the express consent of a receiving nation before a foreign nation could transmit radio or television broadcasts to it.²⁷⁷ Principle 6 provided that governments should bear the responsibility for any unauthorized broadcasts.²⁷⁸ Principle 7 provided that states had the right to counteract unauthorized broadcasts with "any available means."²⁷⁹

In 1972 the Soviet Union solidified the positions in the 1970 Declaration when it simultaneously introduced a resolution to the General Assembly seeking a binding treaty on DBS regulations²⁸⁰ and proposed a highly restrictive convention on DBS to the Assembly.²⁸¹ The draft convention, entitled Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting, was even more specific in its DBS restrictions than the 1970 Soviet Declaration.²⁸² For example, article IV of the draft

273. K. QUEENEY, *supra* note 265, at 95.

274. *Id.*

275. U.N. Doc. No. A/AC.105/PV. 62, at 32-34 (1969).

276. Declaration of Model Principles, U.N. Doc. A/AC.105/WG.3CRP. 1 (1970).

277. "Direct radio or television broadcasts by satellite to the population of a foreign State may be carried out only with the express consent of the Government of that State." *Id.* art. IV.

278. "[S]uch radio and television broadcasts to a foreign State may be carried out only by organizations under the control of the Governments of the States involved." *Id.* art. VI.

279. *Id.* art. VII.

280. G.A. Res. 2916, 27 U.N. GAOR Supp. (No. 30) at 14, U.N. Doc. A/8730 (1972).

281. Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting (1972), U.N. Doc. A/8771 (1972) [hereinafter cited as 1972 Draft Convention].

282. *See id.* The basic thrust of the Soviet Convention was that State sovereignty must be protected from external interference. Soviet Foreign Minister Andrei Gromyko in a letter accompanying the Convention made this clear.

The introduction of direct television broadcasting by means of satellites will raise serious legal problems connected with the need to establish conditions under which this new form of space technology will serve only the lofty goals of peace and friendship between peoples. *The first requirement is to protect the sovereignty of States from any external interference.*

Id. (emphasis added).

convention would prohibit specific types of programs such as "any material publicizing ideas of war, militarism, nazism, national and racial hatred and enmity between people, as well as material which is immoral or instigating in nature or is otherwise aimed at interfering in the domestic affairs or foreign policy of other States."²⁸³ Article V of the draft convention reiterated the 1970 requirement that direct broadcast take place only with the express consent of the receiving nation.²⁸⁴ Article VI deemed six types of broadcasts illegal and subjected nations transmitting such broadcasts to liability.²⁸⁵ Finally, article IX would permit any state to "employ the means at its disposal to counteract illegal television broadcasting."²⁸⁶ The Soviet Resolution essentially directed the COPUOS Legal Sub-Committee to begin considering a binding treaty on direct television broadcasting.²⁸⁷ Several Western countries, however, succeeded in amending the Soviet Resolution²⁸⁸ so that it merely called for an elaboration of principles "with a view to concluding an international agreement or agreements."²⁸⁹ The General Assembly overwhelmingly approved the amended Soviet Resolution on November 9, 1972.²⁹⁰

In 1974 the Soviet Union presented a less restrictive version of its 1972 draft convention.²⁹¹ The Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting retained the express consent requirement and the absolute

283. *Id.* art. IV.

284. *Id.* art. V.

285. The six tahoo types of broadcasts were

- (a) Broadcasts detrimental to the maintenance of international peace and security;
- (b) Broadcasts representing interference in intra-State conflicts of any kind;
- (c) Broadcasts involving an encroachment on fundamental human rights, on the dignity and worth of the human person and on the fundamental freedom for all without distinction as to race, sex, language or religion;
- (d) Broadcasts propagandizing violence, horrors, pornography, and the use of narcotics;
- (e) Broadcasts undermining the foundations of the local civilization, culture, way of life, traditions or language;
- (f) Broadcasts which misinform the public in these or other matters.

Id. art. VI.

286. *Id.* art. IX.

287. G.A. Res. 2916, *supra* note 280, at 17.

288. U.N. Doc. A/C.1/PV. 1871, at 57-60 (1972); *see also* K. QUEENEY, *supra* note 265, at 113-15.

289. U.N. Doc. A/C.1/PV. 1871, at 57 (1972).

290. United Nations Office of Public Information, Press Release UNESCO/2060 (Nov. 15, 1972); *see also* K. QUEENEY, *supra* note 265, at 115.

291. Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting (1974), U.N. Doc. A/AC.105/WG.3(V)/CRP.1 and Corr. 1, *reprinted in* U.N. Doc. A/AC.105/107, Annex II [hereinafter cited as 1974 Draft Convention].

prohibition against certain programs,²⁹² but the Soviets substantially shortened the lengthy list of illegal broadcasts.²⁹³ The 1974 version of principles also reduced the remedies available to states receiving illegal broadcasts from "the means at its [state's] disposal" to those means "recognized as legal under international law."²⁹⁴

By 1978 COPUOS had formulated a set of Draft Principles on Direct Television Broadcasting,²⁹⁵ but the Committee reached no consensus on the provisions reflecting the basic tenets of the Soviet position.²⁹⁶ For example, COPUOS drafted, but was unable to adopt, a provision regarding the need for "strict respect" for national sovereignty and noninterference,²⁹⁷ provisions requiring some type of consent or "consultation" between states before broadcasting to a foreign state,²⁹⁸ provisions regulating program content,²⁹⁹ and provisions defining illegal broadcasts.³⁰⁰ COPUOS

292. 1974 Draft Convention, *supra* note 291, art. V.

293. *Id.* art. IV.

294. *Id.* art. IX.

295. Draft Principles on Direct Television Broadcasting, U.N. Doc. A/AC.105/218, Annex II, at 3 (1978).

296. *See id.* at a.

297. The rejected provision would have recognized "that international direct broadcasting by means of artificial earth satellites *should be based on strict respect for the sovereign rights of States and non-interference in their internal affairs.*" *Id.* at 3 (emphasis added).

298. COPUOS' Draft Principles included the following provisions:

1. A direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State, which shall be established only when it is not inconsistent with the provisions of the relevant instruments of the International Telecommunication Union, shall be based on appropriate agreements and/or arrangements between the broadcasting and receiving States or the broadcasting entities duly authorized by the respective States, in order to facilitate the freer and wider dissemination of information of all kinds and to encourage co-operation in the field of information and the exchange of information with other countries.

2. For that purpose a State which proposes to establish or authorize the establishment of a direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State shall without delay notify that State of such intention and shall promptly enter into consultations with that State if the latter so requests.

Id. at 6.

299. COPUOS' Draft Principles mandated that

States undertaking activities in direct television broadcasting by satellites should in all cases exclude from the television programmes any material which is detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the domestic affairs of other States or which undermines the foundations of the local civilization, culture, way of life, traditions or language.

Id. at 7.

300. *See id.*

in 1982, however, managed to agree on a set of principles that the General Assembly, subsequently, adopted in a resolution.³⁰¹ These principles certainly favor the Soviet position over the American viewpoint, but the developing countries' intermediate position espousing prior consultation—if not prior consent—seems to be the ultimate victor.

C. The Results Thus Far in the Policy Debate—The Soviet and Developing Nations' View Predominates

1. The ITU's Radio Regulation 428A and WARC-ST 1977

The ITU provided one of the earliest forums for the debate on content regulation. At WARC-71 the developing countries, among others, called "for the revision of article 7 of the Radio Regulations to ensure that before the establishment of a broadcasting-satellite service, there should be a previous agreement among countries who may not want such transmissions or whose services may be disturbed by spill-overs from such transmissions."³⁰² The result was a revised article VII, embodied in Radio Regulation 428A, which obligates states to reduce the spillover effects of their broadcasts unless the affected states reach a prior agreement. The revised regulation states that "all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries."³⁰³ The results of WARC-ST-77, in which the conference adopted *a priori* planning for frequency allocations in Regions One and Three, augmented the restrictive effect of Radio Regulation 428A.³⁰⁴

In light of the revised Radio Regulation 428A and WARC-ST-77, the United Kingdom submitted a working paper to the COPUOS Legal Sub-Committee arguing that "[r]adical rethinking [was] now necessary on the question of whether prior consent is necessary in the Legal Sub-Committee."³⁰⁵ At the time this com-

301. See *infra* part III, section C, subsection 6. See also Pace, *supra* note 3, at A6, col. 3.

302. Jasentuliyana, *supra* note 193, at 189, 203.

303. ITU Radio Regulations 428A, ITU Radio Regulations and Additional Regulations (1976), reprinted in 2 *MANUAL ON SPACE LAW*, *supra* note 193, at 51.

304. Jasentuliyana, *supra* note 193, at 219. "The resulting allocations established a system in which [DBS] can only be used for national service, and not international unless states specifically agree to state-to-state broadcasting." *Id.*

305. United Kingdom, Working Paper on Elaboration of Principles Relating to Direct

mittee of COPUOS had been working on draft principles related to the use of DBS by different nations. The United Kingdom's position was that the existing technical requirements of the ITU were the functional equivalent of a regime recognizing the principle of prior consent. Operators could not transmit foreign DBS broadcasts without prior agreements, and any country violating the technical requirements dealing with state-to-state broadcasts would be in breach of its ITU treaty obligations.³⁰⁶ Other members of the COPUOS Committee, however, argued that "ITU regulations and plans, important as they are in their technical and administrative aspects, did not eliminate the inherent political and legal problems in [DBS], which need clear, agreed legal principles to avoid future conflicts."³⁰⁷ The rejection of the British working paper should have been predictable; a distinguishing feature of the debates surrounding DBS has been the constant demand for a "legal regime" and the consistent refusal of a large majority of states to acquiesce to any foreign DBS broadcasts without prior consent.³⁰⁸ As a result, the technological aspects of DBS have become the domain of the ITU regime, while the resolution of the issues of prior consent and content regulation is in the hands of UNESCO, COPUOS, and, ultimately, the United Nations' General Assembly.

2. The 1972 UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting

The debates within UNESCO, culminating in the 1972 Declaration of Guiding Principles for the Use of Satellites, had the effect of accelerating the work of the United Nations' COPUOS. As early as 1962, UNESCO had begun to study the potential of space communications.³⁰⁹ At that same time the United Nations' COPUOS was considering draft principles on the peaceful uses of outer space. While the debates on these proposed principles stirred much interest, the principles ultimately adopted in 1967 did not address the issue of space communications.³¹⁰ In 1968 the United

Television Broadcasting by Satellites (Mar. 18, 1977), reprinted in 4 *MANUAL ON SPACE LAW*, *supra* note 193, at 238, 240.

306. United Kingdom, *supra* note 305, at 240; see also Jasentuliyana, *supra* note 193, at 219-20.

307. Jasentuliyana, *supra* note 193, at 220. The author observes that "Argentina, Canada, Hungary and Sweden, among others, have expressed this view." *Id.* at 220 n.137.

308. Jakhu, *Direct Broadcasting Via Satellite and A New Information Order*, 8 *SYRACUSE J. INT'L. L. & COM.* 374, 385-86 (1981).

309. K. QUEENEY, *supra* note 265, at 118.

310. See United Nations Treaty on Principles Governing the Activities of States in the

Nations' General Assembly authorized COPUOS to embark upon a specific study of the technical feasibility of DBS and the legal implications of its development.³¹¹ By 1972 both the United Nations' General Assembly and UNESCO's General Conference debated the issues of prior consent and program content. In the United Nations the debate centered upon the Soviet Union's proposed convention on principles governing the use of direct broadcasting³¹² and a resolution calling for the formulation of a binding treaty.³¹³ In UNESCO the General Conference approved the Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information and the Spread of Education and Greater Cultural Exchange.³¹⁴

Although the language of the 1972 Declaration indicated generally that nations should not restrict unreasonably consent to receive broadcasts,³¹⁵ the Declaration "was not so much a balance

Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, *reprinted in* 2 MANUAL ON SPACE LAW, *supra* note 193, at 1. For a general background discussion of the Treaty, see Dembling, *Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, in 1 MANUAL ON SPACE LAW, *supra* note 193, at 1.

Because the DBS broadcasts flow through satellites placed in the geostationary orbit, the following issues are unclear: whether the 1967 Treaty principle regarding the peaceful uses of outer space should dictate that DBS broadcasting activity must be for peaceful purposes; and whether transmissions flowing from this orbit are subject to national law. The recent passage by the United Nations' General Assembly of principles governing the use by states of artificial earth satellites for international direct television broadcasting significantly clarifies these issues of space law. For a discussion of the United Nations' 1982 DBS principles, see *infra* notes 356-90 and accompanying text.

311. Dalfen, *Direct Satellite Broadcasting*, in 1 MANUAL ON SPACE LAW, *supra* note 193, at 283; 4 MANUAL ON SPACE LAW, *supra* note 193, at 507. See also C. CHRISTOL, *supra* note 260, at 617 (citing earlier General Assembly interest).

312. See *supra* note 281 and accompanying text.

313. See *supra* note 280 and accompanying text.

314. Records of the General Conference, UNESCO 17th Sess., vol. 1, U.N. Doc. 17 C/Res. 4.111 (1972), *reprinted in* U.N. Doc. A/AC.105/109 (1973), and in K. QUEENEY, *supra* note 265, at 236-40 [hereinafter cited as 1972 UNESCO Declaration]. Ultimately, the United Nations referred both the 1972 Soviet Draft Convention and the UNESCO Declaration to COPUOS—the United Nations forum with proper jurisdiction over the issues relating to a DBS legal regime. For a discussion on the question of internal authority between the United Nations and UNESCO, see K. QUEENEY, *supra* note 265, at 95-137; McWhinney, *The Antimony of Policy and Function in the Institutionalization of International Broadcasting*, 13 COLUM. J. TRANSNAT'L L. 3, 22 (1974). In 1973 the United Nations broadened COPUOS' mandate by asking the Committee to discuss principles on the use of direct broadcasting by member nations. See 4 MANUAL ON SPACE LAW, *supra* note 193, at 179.

315. The 1972 UNESCO Declaration states that "it is necessary that [Nations], taking account of the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission." 1972 UNESCO Declaration, *supra* note 314, art. IX(1).

between two conflicting positions of national sovereignty and freedom of information as it was a ringing affirmation of 'prior consent'.³¹⁶ While compliance with the prior consent principle of the 1972 Declaration would not require explicit consent as, for example, the Soviet proposed convention would,³¹⁷ the principle did state that states should "reach or promote agreements" prior to broadcasting.³¹⁸ The Declaration's restrictions on commercial advertising and educational programs were the most stringent, whereas the transmission limitations imposed upon news and cultural programs were the most lax. Transmissions of commercial advertising were to be subject to specific agreement, and each country had the right to decide the content of the educational programs that its people received.³¹⁹ News broadcasts needed to be "factual" and had to "identify [both] the body which assumes responsibility for the news program as a whole" and news sources when appropriate.³²⁰ Cultural programs were subject to few restrictions.³²¹

While the 1972 UNESCO Declaration, like the 1972 Soviet draft convention, clearly called for a regime of prior consent and control over content, the two documents differ in several important aspects. These differences illustrate that the developing countries' concerns regarding DBS do not match the fears of the Soviet Union. The 1972 UNESCO Declaration contained a sliding scale of prior consent restrictions applying to four content categories. The Soviets proposed broad content proscriptions against any foreign broadcasts that might encroach on sovereignty over domestic affairs. The UNESCO Declaration subjected commercial advertising to the greatest restrictions because developing countries fear for both economic and political reasons that DBS will foster Western tastes in their people. The political ideology of many nations will not tolerate the cultural impurity that results from Western commercialism. Further, the economies of the developing nations cannot support the heavy cash requirements of the Western lifestyle. The UNESCO Declaration subjected news and cultural programs to the fewest restrictions, presumably because these broadcasts tend to be the least disruptive to the economic systems of less-developed nations.

316. K. QUEENEY, *supra* note 265, at 117.

317. See *supra* notes 280-81 and accompanying text.

318. See *supra* note 315.

319. See 1972 UNESCO Declaration, *supra* note 314, art. XI(2), art.VI(2).

320. *Id.* art. V.

321. *Id.* art. VIII.

After the 1972 UNESCO Declaration, UNESCO deferred work in the area of space communication principles to the United Nations' COPUOS.³²² Although UNESCO's later work does not concern DBS specifically, it has had important ramifications for the global regime governing the flow of information and communications. For example, UNESCO's 1978 Declaration of Principles Concerning the Use of the Mass Media, the "MacBride Report," and its Draft Medium-Term Plan for 1984-89 are three recent UNESCO actions that affect the content control of DBS.

3. UNESCO's 1978 Mass Media Declaration

UNESCO's passage of the "Mass Media" Declaration³²³ symbolized the organization's rejection of the "free flow of information" principle and acceptance of the principle of the "free and balanced flow of information."³²⁴ The Declaration stated that "the strengthening of peace and international understanding, the promotion of human rights and the countering of racialism, apartheid and incitement to war demand a free flow and a wider and better balanced dissemination of information. To this end, the mass media have a leading contribution to make."³²⁵ While affirming the basic principle of freedom of the press, however, the Declaration contained numerous statements that would seem to undercut free speech.³²⁶

The Mass Media Declaration aroused great concern among Western observers. For example, the *New York Times* argued that the Declaration:

defines the press not as a bearer of tidings, good and bad, but as a political agent in the causes of strengthening peace and understanding, promoting human rights and countering racism, apartheid and incitement to war. The declaration . . . concludes with an oblique [reference to] the international convention on Civil and Political Rights [of the United Nations], which stipulates that war propaganda and incitement to discrimination shall be prohibited by law. To Americans there can be no "free speech" or "balanced" news

322. *See id.*

323. The formal name is the Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War.

324. C. HAMELINK, *THE NEW INTERNATIONAL INFORMATION ORDER: DEVELOPMENT AND OBSTACLES* 17-20 (1980); *see also* Masmoudi, *The New World Information Order*, 29 J. COMMUNICATIONS 172 (1979).

325. Mass Media Declaration, Records of the General Conference, UNESCO 20th Sess., U.N. Doc. 4/9.3/2, at 100-04 (1978).

326. *See, e.g., id.* arts. I, III(1), IV, VI, VIII & X(3).

unless those who advocate racism and apartheid and, yes, war are also free to speak.³²⁷

Although the United States perceived the Declaration as an attempt to legitimize government control and censorship of the press, the developing nations argued that the principles sought "to promote [the] decolonization and democratization of communication structures and contents" from the West's dominance and allow the question of controls to be "left for each society to settle in accordance with national laws and practices."³²⁸ In addition, developing nations pointed out that the "free-flow" principle of the West disguises a one-way flow of information with the developing nations as recipients.³²⁹ These nations also argued that no "free flow" can exist until their countries possess their own communications infrastructures and trained personnel capable of using them.³³⁰ Finally, the developing nations argued that to have a truly balanced flow of information, an internationally accepted right of reply and correction must exist.³³¹

327. Androunas & Zassoursky, *UNESCO's Mass Media Declaration: A Forum of Three Worlds*, 29 J. COMMUNICATIONS 186, 189 (1979) (quoting the N.Y. Times, Nov. 27, 1978, at A35, col. 1) (emphasis added). For a discussion of the Convention on Civil and Political Rights mentioned in the N.Y. Times article, see *infra* note 361.

328. Nordenstreng, *U.S. Policy and the Third World*, 32 J. COMMUNICATIONS 54, 55 (1982).

329. Being on the "receiving end" of global information flow means more than just a lack of communications infrastructure. See *infra* note 330. To developing countries, it means that they are not capable of communicating their version of global events.

330. Though developing countries lack basic communications infrastructures, they particularly lack equipment geared towards the production of their own information. Moreover, the little equipment they do have tends to be of the "receiving-end" type. See B. SIGNITZER, *supra* note 265, at 84. The 1980 MacBride Report is a good UNESCO study of the contemporary imbalances in communications infrastructures. See *infra* notes 332-42 and accompanying text. Most recently, UNESCO's Draft Medium-Term Plan for 1984-89 emphasized the continuing imbalances in this area:

The huge disparities that exist at the international level in the production and circulation of messages and programmes is today a recognized fact. In 1978, the developing countries, representing 70 percent of the world's population, commanded only a small fraction of the media of communication: . . . 27 percent of radio transmitters, 18 percent of radio receivers, 5 percent of television transmitters and 12 percent of television receivers . . . [T]hese disparities . . . have . . . been constantly increasing as technology has developed.

Draft Medium-Term Plan for 1984-89, Records of the General Conference, UNESCO 4th Extraordinary Sess., U.N. Doc. 4/XC/4, at 81-82 (1982) [hereinafter cited as Draft Medium-Term Plan for 1984-89].

331. For example, the Director-General of UNESCO, Amodou Mahtar M'Bow, explained the importance of the principle of respecting the right of reply and correction. While criticizing the failure of the Western press to publish his corrections, he stated:

the newspapers or the media presenting UNESCO programmes or the so-called attitudes of UNESCO, have never deigned to publish the corrections made by UNESCO.

Although the Mass Media Declaration did not proscribe specific types of content, the Declaration's prescriptive terms define the ends that the media should serve and, by implication, restrict any media content that does not serve those ends.

4. The 1980 MacBride Report

The MacBride Report, issued in 1980 by UNESCO's International Commission for the Study of Communication Problems, did not address directly DBS content regulation, but the report did lend factual and ideological support to the Soviet and developing countries' position.³³² The report documented the imbalances among nations in the flow of information and in the availability of communications technology and also raised "some disturbing questions about the relationship between modern telecommunications and information technologies and the production and delivery of mass media programming."³³³ Moreover, it suggested "a panoply of changes to existing international regulations and agreements, and propos[ed] the formulation of new legal tools to ensure more equitable access to and use of modern information and communications technology in the developing worlds."³³⁴

While the twenty-first General Conference of UNESCO endorsed the Report, the paper's eighty-two recommendations for the implementation of its objectives received no endorsement.³³⁵ Instead, the General Conference called for the creation of the International Program for the Development of Communication (IPDC), which would facilitate the growth of national communication infrastructures and the improvement of personnel quality within the developing countries.³³⁶ The United Nations' General Assembly

. . . .
 . . . If the information media have the liberty to say what they like, then others have the right to judge what they say. What becomes of freedom when people . . . refuse to allow others to judge what they say? When this is the case, there is no liberty but a monopoly We should then have come to a regime, to a system, which would not only be a monopoly system but a dictatorial system where liberty would be absent.
 UNESCO Press Release No. 88, Paris, France (Dec. 1982). See also Masmoudi, *supra* note 324, at 175-76.

³³² INT'L COMM'N FOR THE STUDY OF COMMUNICATION PROBLEMS, *MANY VOICES, ONE WORLD* (1980).

³³³ Bortnick, *International Information Flow: The Developing World Perspective*, 14 CORNELL INT'L L.J. 333, 346 (1981).

³³⁴ *Id.* at 347.

³³⁵ *Belgrade 1980: Breakdown or Breakthrough?*, I CHRON. INT'L COM., Jan.-Feb. 1980, at 2.

³³⁶ Special Political Comm. Questions Relating to Information, 35 U.N. GAOR An-

subsequently endorsed UNESCO's IPDC plan in a two-part resolution.³³⁷ The first part of the resolution endorsed the IPDC alone, and the second part endorsed it as one of a number of United Nations activities that would serve to foster the "establishment of a new, more just and more effective world information and communication order . . . based on the free circulation and wider and better balanced dissemination of information."³³⁸

The role that the IPDC will play in a DBS regime is unclear. Mustapha Masmoudi, a leading advocate for the position of the developing nations, has suggested that the IPDC should become a central supervisory body serving "to coordinate the development of international communications cooperation."³³⁹ The tasks of such a body might include the collection of "monies to be deposited as compensation for the use of the geostationary orbit and as contributions toward space communications development in Third World countries, and generally to respond to all questions arising from [nontechnical] cooperation and coordination in the communications field."³⁴⁰ Masmoudi's proposed supervisory body also might "deal with the question of broadcast programming and content."³⁴¹ Perhaps, because of the potentiality the IPDC holds for serving such a role, the United States, after its initial enthusiasm for the IPDC proposal, now has cooled in its support.³⁴²

5. UNESCO's Medium-Term Draft Plan for 1984-89—Programme III—Communication in the Service of Man

The latest step in UNESCO's development of a regulatory system for DBS is its December 3, 1982, adoption of Major Programme III—"Communication in the Service of Man," which is one of several programs in its Draft Medium-Term Plan for 1984-89.³⁴³ In this plan UNESCO actively attempts to coordinate two of its major programs: "Communication in the Service of Man" and

nex (unedited Agenda Item 59), U.N. Doc. A/35/765 (1980).

337. Nordenstreng, *supra* note 328, at 57.

338. *Id.*

339. Masmoudi, *The New World Information Order and Direct Broadcasting Satellites*, 8 SYRACUSE J. INT'L L. & COM. 323, 341 (1981).

340. *Id.*

341. *Id.*

342. Nordenstreng, *supra* note 328, at 58.

343. Draft Medium-Term Plan for 1984-89, *supra* note 330, at 79. Significantly, "Communication in the Service of Man" is based on the provisions of the 1978 Mass Media Declaration as well as upon UNESCO's resolutions adopted at the twenty-first conference in Belgrade, during which the MacBride Report was discussed.

"Information Systems and Access to Knowledge."³⁴⁴ Such coordination of information flows and communication programs illustrates UNESCO's efforts to work towards the creation of a New World Information and Communication Order (NICO).³⁴⁵ UNESCO efforts are not aimed merely at the creation of a New World Information Order (NIO), as most Western writers refer to it. Instead, UNESCO envisions a new order that links the flow of information to communication systems.

Aspects of NICO may have a direct effect on DBS. For example, the goals of preserving cultural identity and traditional national heritage³⁴⁶ will require "safeguard[s] from the intellectual influence of the communications industry over the minds of citizens"³⁴⁷ and "impeding external intrusions, to thwart cultural and intellectual dependence, the main source of technological, economic and political alienation."³⁴⁸ Perhaps most importantly, NICO symbolizes "the right of each nation to utilize its own communication system to protect its sovereignty, defend its political, moral and cultural values, and communicate its interests and aspirations to the world."³⁴⁹

As UNESCO's Draft Medium-Term Plan contemplates, a web of independent national information policies will serve to foster a NICO. The plan includes the encouragement of national information policies as one of its objectives in the furtherance of this new order.³⁵⁰ Accordingly, numerous developing nations and many Western European nations have begun to adopt their own information policies—known in United Nations jargon as national in-

344. *Id.*

345. *Id.* In the major program, "Communication in the Service of Man," the section laying out the program's strategy illustrates the breadth of issues upon which NICO touches. These issues include eliminating information monopolies, balancing the flow of information, having developed countries aid developing countries in creating their own media, respecting cultural and ethnic diversity, and encouraging ethnic and social groups to participate in the communicative process. *Id.* at 83.

346. One of the objectives of the "Communication in the Service of Man" program is: (c) to encourage efforts to devise solutions matching the needs and values of each people; however, safeguarding pluralism, which necessarily implies respect for cultural identities, does not debar us from seeking to define bases for action and common objectives in the field of communication, rooted in interests that are tending to converge in an ever more interdependent world
Id. at 84.

347. Masmoudi, *supra* note 339, at 327.

348. *Id.*

349. *Id.* at 329.

350. See Draft Medium-Term Plan for 1984-89, *supra* note 330, at 84.

formatics policies.³⁵¹

While the creation of independent national communications infrastructures is the immediate goal of these policies, the policies also indirectly tend to regulate content, and, therefore, may influence the regulation of DBS in the future.³⁵² For example, the executive secretary of Brazil's informatics policy states that:

[t]he aim of such control is not to restrain the information flow but rather to give commercial reciprocity to the exchange of information among countries. It concerns the use of data banks, software, data processing capability and other facilities. In terms of strategy, it is fundamental that a country have control over the information resources essential to its sovereignty and development. Thus, the international commerce of information products and services must be submitted to conditions related to their content.³⁵³

Although the Brazilian plan does not illustrate the present potential for information policies to affect the content regulation of incoming DBS programs, Canada's informatics policies do demonstrate this potential. As noted in a recent House Report on DBS: "The Canadian government views communications and information resources as being very important to its economy, and the influx of non-Canadian (mostly American) content in publishing, broadcasting, and film products is seen as a serious threat to a uni-

351. Informatics policies are predicated on the belief that information is a sovereign resource and that every nation has the right to nurture and obtain the benefits flowing from this resource. See, e.g., Bortnick, *supra* note 333; Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 14 CORNELL INT'L L.J. 203 (1981); Ramsey, *Europe Responds to the Challenge of The New Information Technologies: A Teleinformatics Strategy for the 1980's*, 14 CORNELL INT'L L.J. 237 (1981). As the Intergovernmental Bureau of Informatics of the United Nations has defined it, informatics is "the rational and systematic application of information to economic, social and political development." UNITED NATIONS INTERGOVERNMENTAL BUREAU FOR INFORMATICS, *INFORMATICS: ITS POLITICAL IMPACT* 2 (1980). By the late 1970's, over 60 nations already had adopted some official information policy. Pipe, *National Policies, International Debates*, 29 J. COMMUNICATIONS 114, 121 (Summer 1979). Most of these countries "have enacted legislation creating an administrative authority to direct and coordinate the procurement of data processing equipment and training operators, and to set priorities in its use and application." *Id.*

352. At present, the United States appears to be more concerned with the impact of national informatics policies on its capability to export information and services than with the impact of national informatics policies on content regulation or the free flow of information as it relates to barriers to transborder data flows. See, e.g., SENATE COMM. ON COMMUNICATIONS, SCIENCE AND TRANSP., REPORT ON S. 246: INTERNATIONAL TELECOMMUNICATION ACT OF 1982, S. REP. NO. 669, 97th Cong., 2d Sess. (1982); *International Telecommunications Deregulation Act of 1982: Hearings on S. 2469 before the Senate Subcomm. on Communications of the Comm. on Communications, Science, and Transp.*, 97th Cong., 2d Sess. (1982).

353. Address by Joubert de Olivera Brizida, Executive Secretary of the Brazilian Special Secretariat of Informatics, 1980 Intergovernmental Bureau for Informatics Conference on Transborder Data Flow Policies, in Rome, Italy (June 23, 1980), reprinted in 3 TRANSNAT'L DATA REP. NO. 3, 33-34 (1980).

fied sense of Canadian identity.' ”³⁵⁴ Having adopted such a broad definition of the proper parameters of national sovereignty, Canada has used this “expansive definition . . . to justify even recommendations concerning foreign programming on Canadian television.”³⁵⁵ Nonetheless, one only can speculate upon the impact of a nationally integrated information policy on DBS.

6. The 1982 United Nations' Resolution of Principles On the Use of DBS by States

In December 1982 the United Nations' General Assembly overwhelmingly passed over the objections of the United States and its allies a DBS resolution that calls for strict governmental controls on international satellite transmissions.³⁵⁶ The *New York Times* reported that the resolution, the culmination of fourteen years of work by the COPUOS Legal Sub-Committee, endorses the right of nations “to veto any incoming television broadcasts by satellite from abroad.”³⁵⁷ Although United Nations resolutions of this kind are not binding under international law, the resolution indicates the form that a more binding document, such as an international convention, might take.³⁵⁸ Furthermore, it indicates the direction of international consensus on the issue of DBS and the struggle that the United States and its allies face if they wish to preserve the free flow of information.

354. HOUSE COMM. ON GOVERNMENT OPERATIONS, DIRECT BROADCAST SATELLITES: INTERNATIONAL REPRESENTATION AND DOMESTIC REGULATION, H.R. REP. NO. 730, 97th Cong., 2d Sess. 8 (1982).

355. Eger, *supra* note 351, at 231.

356. These principles are the current last word on the issues of prior consent and sovereignty. The vote was 108 to 13 with 13 abstentions. The countries voting against the adoption of the principles were: the United States, Belgium, Britain, Denmark, West Germany, Iceland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, and Spain. Pace, *supra* note 263, at A6, col. 3.

On November 22, 1982, by a vote of 88 to 15, with 11 abstentions, the Special Political Committee of the United Nations approved the draft principles of COPUOS' Legal Subcommittee, and, subsequently, referred them to the General Assembly. *Static over the Skywaves*, III CHRON. OF INT'L COM., Nov.-Dec. 1982, at 2.

Significantly, the Special Political Committee's approval came under the heading of a resolution entitled “Preparation Of An International Convention On Principles Governing The Use By States Of Artificial Earth Satellites For Direct Television Broadcasting.” U.N. Doc. A/SPC/37/L.5/Rev. 1 (Agenda Item 63) (1982). In addition to the title of the resolution foreshadowing a possible move toward a DBS convention in the future, the *New York Times* in reporting on the United Nations' endorsement of the principles stated that: “[t]he principles it contains . . . are widely expected here to serve as a basis for negotiations on an international convention.” Pace, *supra* note 263, at A6, col. 1.

357. Pace, *supra* note 263, at A6, col. 1.

358. See *supra* note 356.

(a) *Noncontroversial DBS Principles*

The members of the COPUOS Working Group by 1981 had obtained consensus on seven of the resolution's ten principles. These principles included: (1) the overall purposes and objectives of the DBS principles; (2) the applicability of international law; (3) the rights and benefits of states under these principles; (4) international cooperation; (5) the peaceful settlement of disputes; (6) copyright and neighboring rights under DBS; and (7) the duty to notify the United Nations of state activities with DBS.³⁵⁹ Among the "purposes and objectives" that should guide the use of DBS, the principle of the sovereign right to nonintervention in domestic affairs is given equal weight with the principle of a person's right to seek, receive, and impart information.³⁶⁰ The use of DBS must be compatible with both of these principles as well as the "ideas as enshrined in the relevant U.N. instruments."³⁶¹ Perhaps most im-

359. These principles entered the text of the Working Group's drafts "unbracketed"—in other words, debate on these principles had ceased. The number of noncontroversial or unbracketed principles has fluctuated. By 1978, the Working Group's draft had nine unbracketed provisions. 1978 COPUOS Working Group's Draft, U.N. Doc. A/AC.105/218, Annex II (1978), *reprinted in 2 MANUAL ON SPACE LAW, supra* note 193, at 105. By 1981, however, the Working Group's draft had only seven unbracketed provisions; the provisions that went from being "unbracketed" to "bracketed" from 1978 to 1981 were the sections on "state responsibility" and "duty and right to consult." See 1981 Working Group's Draft, U.N. Doc. A/AC.105/288, Annex II (1981).

360. United Nations Resolution of Principles on the Use of DBS by States, G.A. Res. 92, 37 U.N. GAOR Supp. (No. 51) at 98, U.N. Doc. A/37/51 (1982) [hereinafter cited as 1982 United Nations Resolution].

361. *Id.* That DBS activities should be conducted in a manner that is consistent with both the principles of nonintervention and the free flow of information is a blow to the United States' desire to hold the principle of the free flow of information supreme regardless of borders. The United States, in short, considers the free-flow principle immune to compromises stemming from the principle of nonintervention in domestic affairs. Furthermore, that this section of the United Nations' DBS principles also states that DBS broadcasts should be conducted in a manner that is compatible with ideas "enshrined in the relevant U.N. instruments" indicates that the principles embodied in instruments such as the United Nations' Declaration on Human Rights, the United Nations' Covenant on Civil and Political Rights, and the 1972 UNESCO Declaration of Guiding Principles for the Use of Satellite Communications are all equally applicable and further diminish the status of the free-flow principle. For example, the Universal Declaration of Human Rights, article 22, states that the "national effort and international co-operation" should be used to protect "cultural rights." G.A. Res. 217, U.N. Doc. A/810, art. 22 (1948). The United Nations' Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, *adopted & opened for signature, ratification & accession by* G.A. Res. 2200A(XXI), U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316/52 (1966), also leaves nations substantial latitude to restrict the flow of information to individuals if they consider such restrictions necessary. Article 19 of the Covenant states:

- 1) Everyone shall have the right to hold opinions without interference.
- 2) Everyone shall have the right to freedom of expression; this right shall include free-

portantly, DBS broadcasters must pay "due respect . . . to the political and cultural integrity of states."³⁶²

A further glance at the "noncontroversial principles" reveals that the states for which the principles are most concerned are the lesser-developed nations. Under the provisions concerning "international cooperation" and "copyright and neighboring rights," states must "give special consideration to the interests of developing countries in the use of direct television broadcasting [by satellites] for the purpose of accelerating their national development."³⁶³ Under the section on "purposes and objectives," countries engaged in DBS activities "should . . . assist in educational, social and economic development, particularly in the developing countries."³⁶⁴ Last, according to the provision on "rights and benefits," "[e]very state has an equal right to conduct [DBS] activities;" and "[a]ccess to the technology in this field should be available to all states without discrimination on terms mutually agreed by all concerned."³⁶⁵ This last provision is a direct reference to the controversies over the allocation of DBS frequencies and access to the geostationary orbit.

dom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. *It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) For respect of the rights or reputations of others;

(b) *For the protection of national security, of public order (order public), or of public health or morals.*

International Covenant on Civil and Political Rights, *supra*, art. 19 (emphasis added). Finally, the document that is most compromising to the principle of the free flow of information and that gives a state the most latitude to decide what is acceptable information is the 1972 UNESCO Declaration of Guiding Principles. *See supra* part III, section C, subsection 2. Part 2 of Article VII of the Declaration states that DBS broadcasts of cultural programs "should respect the distinctive character, the value and the dignity of each, and the right of all countries and peoples to preserve their cultures as part of the common heritage of mankind." 1972 UNESCO Declaration, *supra* note 314, art. VII(2).

This Article has singled out these instruments for discussion because their principles are illustrative of the host of principles that the phrase "ideas . . . enshrined in relevant U.N. instruments" may encompass.

362. 1982 United Nations Resolution, *supra* note 360. Of course, this provision is significant in that it may tip the balance between the free-flow-of-information principle and the nonintervention principle in favor of the latter. *See supra* text accompanying note 361.

363. 1982 United Nations Resolution, *supra* note 360. The phrase "by satellites" appears only in the "international cooperation" provision.

364. *Id.*

365. *Id.*

(b) *Controversial DBS Principles*

For a long time the greatest stumbling block in COPUOS's various groups has been the issue of whether a DBS broadcaster must obtain the prior consent of the receiving nation before it can transmit any broadcast into that nation. The complement to that controversy is whether the receiving state should have the authority to censor or restrict the program content of incoming transmission.³⁶⁶ The third outstanding and connected issue relates "to possible recourses states might have against unwanted broadcasts."³⁶⁷ Compared to previous drafts of the Working Group of COPUOS, the DBS principles in final form are surprisingly moderate in their requirements for obtaining prior consent and, even more surprisingly, practically silent on the issues of program content and recourse for the unwilling recipient of DBS transmissions.

(1) Program Content and Recourse for the Unwilling DBS Recipient

As late as 1981, the Working Group's draft contained a principle on program content that was reminiscent of the 1972 Soviet proposed convention, the 1972 UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting, and the 1978 UNESCO Mass Media Declaration. The proposed provision restricted commercial advertising and directed that all broadcasts:

should in all cases exclude . . . any material which is detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the domestic affairs of other States or which undermines the foundations of the local civilization, culture, way of life, tra-

366. From the American point of view, the two key issues indeed have been "prior consent" and "programme content." See, e.g., Note, *Toward the Free Flow of Information: Direct Television Broadcasting via Satellite*, 13 J. INT'L L. & ECON. 329, 330 (1979).

The United States distinguishes between prior consent and program content—concepts frequently lumped together, see, e.g., Jasentuliyana, *supra* note 193, at 218—because the latter principle is much more of an anathema to the United States than the former, although the United States does not accept either principle. Of course, a regime accepting the principle of prior consent, by operation, might allow a country to screen content by simply refusing to grant consent to the broadcast. Nonetheless, this utilization of a prior consent provision would be more tolerable than a principle that universally holds certain program contents to be unlawful and inadmissible on their face.

367. Although not discussed as much as the issues of prior consent and program content, the issue of possible recourses that nations might have against unwanted broadcasts has remained a controversial outstanding issue in the DBS debates. See Dalfen, *supra* note 311, at 291. The present principles now call upon nations to act within the principles of international law and to settle their disputes peacefully in accordance with the principles of the United Nations.

ditions or language.³⁶⁸

The present DBS principles do not include this provision.³⁶⁹

The United Nations' present principles do contain a section on "state responsibility" that appears to be a compromise version of a former draft section on "unlawful/inadmissible broadcasts."³⁷⁰ The original provision on "unlawful/inadmissible broadcasts" would have permitted each state to decide what broadcasts it considered inadmissible; thus, the principles would have left the decisions regarding content entirely to the receiving state's discretion.³⁷¹ Further, the former draft section would have called upon states to "agree to give every assistance in stopping unlawful direct television broadcasting by satellite."³⁷² Finally, the original provision touched upon the notion of prior consent by regarding as "unlawful and as giving rise to the international liability of States" DBS broadcasts that were transmitted without permission or received as a result of spillover "if the broadcasting State had refused to hold appropriate consultations with the State in which the broadcasts [were] received."³⁷³ A comparison of the language of the proposed provision on unlawful and inadmissible broadcasts with the final "state responsibility" principle reveals compromises. The present language reads that "[s]tates should bear international responsibility for activities in the field of international direct television broadcasting by satellite carried out by them or under their jurisdiction and for the conformity of any such activities with the principles set forth in this document."³⁷⁴

(2) Prior Consent

The two most controversial concepts during the debates on the draft principles were the provisions on "duty and right to consult" and "consultations and agreements between states"³⁷⁵—the provisions pertaining to prior consent. Throughout the years, numerous countries submitted draft provisions. The provisions that the Soviet Union, the United Kingdom, and the United States submitted and the joint proposal of Canada and Sweden illustrate the range

368. 1981 COPUOS Working Group's Draft, *supra* note 359, at 7.

369. See 1982 United Nations Resolution, *supra* note 360.

370. *Id.*

371. See 1981 COPUOS Working Group's Draft, *supra* note 359, at 7.

372. *Id.*

373. *Id.*

374. 1982 United Nations Resolution, *supra* note 360.

375. *Id.*

of approaches taken by countries.³⁷⁶

The Soviet Union asked for a binding obligation to obtain express consent prior to broadcasts.³⁷⁷ The United Kingdom's position was that the relevant instruments of the ITU provided an adequate framework for consultations and arrangements and instituted an obligation for transmitting nations to obtain prior consent because without doing so a broadcasting state would be in breach of its ITU treaty obligations.³⁷⁸ The United States agreed with the British position, but made additional arguments that "unnecessary political restraints would reduce the use of satellites and thus inhibit the growth of space technology." The United States further suggested that "until adequate practical experience has been gained on the use of DBS, no international political limitations on use should be imposed."³⁷⁹ The United States' proposal for prior consent would have required a broadcasting state to notify a receiving state of its intention and "promptly enter into consultations with that State if the latter so requests."³⁸⁰ While a broadcaster was to give "due regard to the interests and concerns of the foreign State . . . [a]ny such consultations should also be premised upon facilitating a free flow and a wider dissemination of information."³⁸¹ The United States version would have allowed great flexibility in the form that these consultations might take, leaving a broad range within which to negotiate broadcasting services on a bilateral basis.

The Canadian-Swedish principles, which formed the basis of the compromise working paper in 1979, contained a draft provision that called for prior consent on the basis of "agreements and/or arrangements" which were not inconsistent with the regulations of

376. For illustrations of the position that the Soviet Union has taken, see *supra* part III, section B, subsection 3. See also Soviet Submission to the COPUOS Legal Sub-Committee, U.N. Doc. A/AC.105/C.2/L.89 (1973), reprinted in 4 *MANUAL ON SPACE LAW*, *supra* note 193, at 194-99. For an illustration of the United Kingdom's position, see its working paper submitted to the Legal Sub-Committee, *supra* note 305. For an illustration of the American position, see the American working paper submitted to the COPUOS Legal Sub-Committee, 1979 United States Working Paper, U.N. Doc. A/AC.105/C.2/L.118 (1979), reprinted in 4 *MANUAL ON SPACE LAW*, *supra* note 193, at 251-52. For the Canadian-Swedish position, see the proposed set of draft principles submitted to the COPUOS Legal Sub-Committee, 1979 Canadian-Swedish Draft Principles, U.N. Doc. A/AC.105/C.2/L.117 (1979), reprinted in 4 *MANUAL ON SPACE LAW*, *supra* note 193, at 249-51.

377. See *supra* part III, section B, subsection 3.

378. See United Kingdom, *supra* note 305.

379. C. CHRISTOL, *supra* note 266, at 352.

380. 1979 United States Working Paper, *supra* note 376, at 252.

381. *Id.*

the ITU.³⁸² The Canadian-Swedish proposal would not have required express consent; informal arrangements would be in compliance with the principle. This concept of consultation followed by arrangements or agreements "has been referred to as 'the key part of the key principle.'"³⁸³ The United Nations' present DBS principles contain this compromise position. The Canadian-Swedish draft also balanced the duty and the right to consultation between the state desiring to initiate the broadcast and the state intending to receive the proposed broadcast. The broadcasting state had the duty to initiate consultations, and the receiving state had the duty to enter into consultations.³⁸⁴ This version provided the receiving state with "a much broader base for seeking consultations."³⁸⁵ The United Nations' present DBS principles incorporate this Canadian-Swedish proposal as well.

On April 3, 1981, in a significant step towards compromise, twelve member countries of the COPUOUS Legal Sub-Committee presented a set of proposed draft principles deleting the principles on "programme content" and "unlawful/inadmissible broadcasts."³⁸⁶ This set of draft principles formed the final basis for later negotiations.³⁸⁷ Besides removing the two controversial provisions, the twelve-country draft set forth an entirely new section concerning the nature of the consultative process following the establishment of a DBS service between the broadcasting and receiving state.³⁸⁸ Furthermore, it extended the right to request consultations and the duty to enter into them to any other broadcasting or receiving state "within the same service."³⁸⁹ The countries were to conduct these consultations without prejudice to other consultations which other States "may undertake with any other State on

382. 1979 Canadian-Swedish Draft Principles, *supra* note 376, at 251.

383. C. CHRISTOL, *supra* note 260, at 687. See generally *id.* at 686-88.

384. *Id.* at 685-86.

385. *Id.* at 686.

386. Twelve-Country Draft Principles, U.N. Doc. A/AC.105/C.2/L.131 (1981); U.N. Doc. A/AC.105/288, Annex IV (1981). For a discussion of the 1981 12-country working paper, see C. CHRISTOL, *supra* note 260, at 698-703. Notably, the 12 countries were from neither the West nor the Soviet bloc; the countries were Argentina, Brazil, Canada, Chile, Colombia, India, Indonesia, Iraq, Kenya, Mexico, Niger, and Venezuela.

387. Compare Twelve-Country Draft Principles, *supra* note 386, with 1982 United Nations Resolution, *supra* note 360.

388. See Twelve-Country Draft Principles, *supra* note 386; C. CHRISTOL, *supra* note 260, at 698-703. The twelve-country draft principles shifted the section previously titled "right and duty to consult" to the section now labeled "consultations and agreements"; despite this shift, however, the section is more or less the same as when Canada and Sweden first presented it in their draft principles in 1979.

389. C. CHRISTOL, *supra* note 260, at 701.

that subject."³⁹⁰ The proposals were significant because they extended the right and duty to consult to parties beyond a specific sending and receiving nation, thus allowing simultaneous consultations among a number of nations within the same service range and permitting the simultaneous existence of diverse arrangements between different states within the same service. The principles that the United Nations' General Assembly endorsed incorporate these features.

(c) Summary

Despite the United Kingdom's arguments that the ITU's "technical requirements" and system of *a priori* allocation sufficiently establish the principles of prior consent under international law, other nations have felt that a legal regime is needed to regulate the use of DBS by states. In December 1982 the United Nations' General Assembly took the first step towards the creation of such a legal regime by approving a set of principles confronting this issue. These principles indicate that the duty to consult with a nation prior to broadcasting and the right of a receiving nation to request such consultations, in addition to the duty to enter agreements or arrangements prior to broadcasting, will be at the heart of any future convention.

While the United Nations' present DBS principles impliedly allow a state to pass on the contents of programs by their right to refuse broadcasting services, they do not expressly prohibit certain program content as previous working drafts had proposed. In addition, they do not label as "illegal" or "unlawful" broadcasts that are sent without prior consultations, agreements, and arrangements. The DBS principles merely call upon the states to settle their disputes peacefully.

IV. INTERNATIONAL COOPERATION AGREEMENTS FOR DBS

The momentum in the United Nations for prior restraints on the content of DBS programs is at odds with the technological ambitions of the few developed countries. Although the United States has not yet had to decide whether to sign a multilateral convention that would impose prior constraints on DBS broadcasting, the time for such a decision looms in the near future. The question in this turbulent atmosphere, thus, becomes whether the United States

390. *Id.* The 1982 United Nations Resolution, *supra* note 360, contains the same provision, under the title "duty and right to consult." *See id.*

still can find a way to lead technologically, while being sensitive to, and compromising upon, cultural and political issues.

One way for nations to avoid the particular pitfalls of the United Nations debate is to work bilaterally; countries are not confined to multilateral arrangements. Accordingly, developed countries already have negotiated successfully bilateral treaties and working arrangements between themselves and with the developing countries. Moreover, with DBS technology so far beyond the grasp of an impoverished nation,³⁹¹ developing countries will form consortia, regional arrangements, and bilateral agreements to get their projects off the ground. So long as restraints in any multilateral convention do not exceed radically the restrictions that bilateral parties desire, and the regimes that the convention establishes are flexible and conciliatory, an interwoven regulatory system consisting of externally imposed convention principles and self-imposed bilateral contract provisions should work. Indeed, the ITU has encouraged bilateral regimes to solve problems of frequency sharing, broadcast spillover, and even prior consent.³⁹²

391.

The development, construction, launch, operation and control of a single broadcasting satellite today, depending upon satellite size and complexity, would cost at least \$100 million and could cost as much as \$200 million, just to place the satellite operationally available, in orbit, with necessary tracking, telemetry, and control systems in place.

Doyle, *International Satellite Communications and the New Information Order: Distressing Broadcasting Satellites*, 8 SYRACUSE J. INT'L L. & COM. 365, 366-67 (1981). See also Pritchard & Kase, *Getting Set for Direct Broadcasting Satellites*, SPECTRUM, Apr. 1981, at 22.

392. Cross-border broadcasting is permissible under the plan established by WARC-BS-77, if agreed to under a bilateral regime. Warren, *A Canadian Perspective on Direct Broadcast Satellites and the New World Information and Communication Order*, 8 SYRACUSE J. INT'L L. & COM. 391, 393-94 (1981). See also FINAL ACTS of the WARC-79, Geneva, III, RR7-1, art. 7, paras. 1,2,5. Paragraph one permits two or more members, under the provisions of Article 31 of the Convention, to conclude special arrangements regarding the suballocation of bands of frequencies to the appropriate services of the participating countries.

The terms of bilateral agreements may include shared risk, commercial and experimental joint ventures, trade, aid, and instructional programs. Activities that bilateral arrangements govern may include:

- (a) provision of a launch for satellites;
- (b) the loan of an orbiting satellite or of part of its capacity;
- (c) the loan of ground equipment;
- (d) provision of sounding rockets for scientific experiments;
- (e) provision of tracking support for satellites;
- (f) permitting the reception of data;
- (g) exchange or provision of scientific or other data;
- (h) provision of training facilities;
- (i) provision of advice and consultancy;
- (j) joint planning, development and manufacturing of satellite systems;

A. Canada and the United States

Canada and the United States share the most complex and sophisticated bilateral communications relationship that exists between any two countries.³⁹³ The relationship began in 1962 with the launching by NASA of Canadian fixed satellite Alouette I.³⁹⁴ Most of the subsequent projects have followed the principles for bilateral coordination articulated for that venture.³⁹⁵

The United States and Canada began coordinating DBS projects in the late 1960's. The coordinated efforts began with the Communications Technology Satellite (CTS or HERMES), which used the 12-14 GHz bands and low-cost transportable ground terminals.³⁹⁶ Canada developed and built the CTS that the United States launched in 1976. The satellite remained in orbit for three years and the nations used it on alternate days for experimental purposes such as teleconferencing, telemedicine, health care, and community educational and special services.³⁹⁷ The CTS project was successful for both countries—it provided the United States with an opportunity for further development of DBS technology and helped propel Canada to the forefront of space technology as a manufacturer of broadcast satellites. Moreover, the CTS project proved the feasibility of using the 12-14 GHz bands and laid the groundwork for the future use of small and inexpensive, individual earth terminals.³⁹⁸ Encouraged by the success of CTS, both countries have planned further joint and independent programs.³⁹⁹ GT Satellite, an American corporation, plans to use the Canadian ANIK-B satellite to broadcast commercially in the United States.⁴⁰⁰ The bilateral arrangement in this instance is between a

(k) integration of payloads/experiments of one country in another's satellites.

Report of UNCEPUOS, *supra* note 189, at 85-86.

393. See Warren, *supra* note 392, at 391.

394. N. MATTE, AEROSPACE LAW 160 (1982).

395. These principles include:

1. No funds were to cross the border at the government to government level.
2. Tasks were defined at each level.
3. Each country was to be responsible for its part of the program.
4. The technical, managerial, and financial interfaces between the two countries

were carefully defined.

Id. at 161.

396. *Id.* at 162.

397. *Id.*

398. *Id.*

399. *Id.*

400. Interview with Keith Fagan, General Counsel's Office at Satellite Television Corporation (STC), in Washington, D.C. (Jan. 16, 1983).

private American firm and a publicly owned Canadian utility.

B. France and Germany

Inspired by their successful joint venture with the Symphonie satellites that the two nations used for telecommunications and nonprofit experiments,⁴⁰¹ France and the Federal Republic of Germany decided in 1979 to develop jointly an operational direct television broadcast satellite system.⁴⁰² This prompted their withdrawal from the European regional experiment in H-Sat which was to have a similar function.⁴⁰³ The West Germans and the French decided to enter a joint venture for DBS because they wanted to avoid the complications and potential delays of a multilateral venture.⁴⁰⁴ The system was scheduled for launching at the end of 1983, and the two countries planned to set up a bilateral organization to manage it.⁴⁰⁵ In keeping with the bilateral concept, the nations planned to establish the organization along the lines of the body that managed the Symphonie satellites.⁴⁰⁶ In the Symphonie agreement two management groups were formed: (1) a Board of Directors, with three members elected by each country; and (2) an Executive Committee, to manage the technical and financial aspects of the program. The agreement required the Board to take action only when unanimous agreement existed between the representatives of the countries.⁴⁰⁷

The new "TV-SAT" effort between France and Germany is expected to earn substantial profits. Other neighboring European countries probably will rent the use of spare DBS channels. Moreover, their system most likely will attract contracts to build additional systems and other space hardware for the rest of Europe.⁴⁰⁸ The joint venture is both public and private in nature. The respective governments negotiated the agreements but the governments planned to designate private firms in each country to be the major

401. The *Consortium Industriel Franco-Allemand pour Symphonie* built the Symphonie Satellites for experimental purposes. The first satellite was launched into the geostationary orbit in 1974. See N. MATTE *supra* note 394, at 162.

402. See N. MATTE, *supra* note 394, at 181; Bassett, *French, Germans to Begin TV-Sat Effort*, AVIATION WEEK & SPACE TECH., Dec. 10, 1979, at 96.

403. Grandi & Richeri, *Western Europe: The Development of DBS Systems*, 30 J. COMMUNICATIONS 169, 172 (1980).

404. *Id.*

405. See Bassett, *supra* note 402, at 96.

406. *Id.*

407. See N. MATTE, *supra* note 394, at 162.

408. See Bassett, *supra* note 402, at 96.

participants in the arrangement. The apportionment of shares was forty-six percent French and fifty-four percent German.⁴⁰⁹

C. *The United States and the Developing Countries*

1. India

India was the first country to use DBS to transmit educational information directly to remote villages.⁴¹⁰ For one year, India, borrowing four hours of ATS-6 satellite time a day from NASA, conducted a pilot project known as the Satellite Instructional Television Experiment (SITE).⁴¹¹ India undertook the responsibility for the ground segment and the software,⁴¹² while the United States, through NASA, supplied the satellite. The bilateral regime that India and the United States established was exclusively for experimental purposes and did not allow the exchange of funds between the two nations. Through the project, the Indians hoped to provide educational programs in family planning, national integration, academic education, agriculture, and occupational skills.⁴¹³ In addition, they wanted to test a system of broadcasting satellite television for national development. The United States wanted to test its FM transmitter operating in the 800-900 MHz band and to gain experience in applying space technology.⁴¹⁴

Since the termination of the project, both parties have hailed it as a great success in helping to spur development. India has planned to operate a DBS system (INSAT) on a regular basis as soon as such a system is technically feasible.⁴¹⁵ Moreover, SITE has proved to be a valuable example for other developing countries.⁴¹⁶ The United States achieved its primary objectives and also earned profits for its space industry by selling two telecommunications satellites to India for its INSAT system.⁴¹⁷

2. PEACESAT

The University of Hawaii initiated the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) to

409. *Id.*

410. Mody, *Programming for SITE*, 29 J. COMMUNICATIONS 90, 91 (1979).

411. *Id.* at 91-92; N. MATTE, *supra* note 394, at 163-64.

412. *See* Mody, *supra* note 410, at 91-92.

413. *Id.* at 92-93.

414. N. MATTE, *supra* note 394, at 164.

415. *Id.* at 165.

416. *Id.*

417. *Id.*

determine the extent to which concerned nations can utilize satellite communication to provide health care and education to island groups in the Pacific by allowing these groups to share scarce and costly resources.⁴¹⁸ The United States and Australia, Fiji, the Gilbert Islands, New Guinea, New Zealand, Papua, Samoa, the Solomon Islands, and Tonga initiated the project in 1971. Each participating country was able to control the content of the programs transmitted to its respective country.⁴¹⁹ PEACESAT transmitted programs to educational and medical institutions and to libraries through the use of small and inexpensive earth stations.⁴²⁰ Indeed, the entire project proved inexpensive considering its advantages; between 1971 and 1976 operating costs of the project were under \$500,000.⁴²¹ PEACESAT may pave the way for future regimes in which an affluent country such as the United States provides broadcasting services and programming that is sensitive to the cultural needs and tastes of recipient countries at a minimal cost.

D. Australia and Canada

Australia currently is engaging in cooperative experiments with the Department of Communications of Canada.⁴²² Through this cooperation, Australia hopes to gain experience in the utilization of satellites to establish its domestic telecommunications and TV broadcasting system. Australia plans to launch two geostationary satellites to provide direct broadcast and telephone service to its remote areas.⁴²³ The Canadians, by providing training and satellite experience to the Australians, stand to gain enormous profit from their liaison with Australia in the event the Australians decide to purchase space and ground equipment from Canada. Such future purchases seem likely at this stage.

E. Summary

Bilateral regimes are a useful tool in guiding and establishing mutually beneficial DBS programs. Because they are based on the idea of "mutual benefit," they are a pragmatic and uncomplicated form of cooperation that willing countries easily can undertake.⁴²⁴

418. *Id.* at 180.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 174.

423. *Id.*

424. *Id.* at 165.

V. CONCLUSION

The discussion of direct broadcast satellite television in the United States encompasses consideration of both the actual DBS service and the program being broadcast. Both—the service and the programming for that service—are in a state of flux. The FCC stepped bravely out in front when it granted the eight DBS permits in 1982 and thus formally established a policy of nurturing the technological development of the service and espousing a freedom of programming viewpoint through a “hands-off” regulatory attitude. To the FCC, DBS service was and is a desirable and convenient field in which to apply its new policy of broadcast deregulation. That DBS technology is so different from previous television technology facilitated the implementation of the Commission’s new relaxed policy. The FCC action one year before the ITU Regional Administrative Radio Conference (RARC-83) undeniably gave the new technology a boost, and strong communications companies were ready and willing to act upon it. Although the eight DBS permittees suffered some uncertainty before the RARC-83, the United States approached the conference in a cooperative spirit and its delegation was able to return from the conference with more than sufficient orbital slots and frequencies for the FCC now to confirm the eight DBS permittees and to consider a few more applications.

The immediately favorable outcome of the conference and certain compromises by the United States delegation laid the foundation for successful future international negotiations in ITU. At RARC-83 the United States agreed to participate in *a priori* planning—in which the United States until then had declined to participate. A serious test of whether this principle will be acceptable to the United States in future participation in ITU or whether RARC-83 merely represents a temporary compromise will occur when the World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Services Utilizing It (WARC) meets in 1985. That conference concerns DBS because all direct broadcast satellites are in geostationary orbit; the RARC-83 agreement is merely a recommendation to WARC-85.

Free competition among the various DBS services in the United States promises to bring the United States consumer into a new age of communications technology with high definition television, teletext, and other new services. This development will have important economic implications not only because it will bring new

DBS service but also because it will provide a market for the sale of new equipment to support the new service. Furthermore, to be successful, the new DBS service will require new programs. DBS will only be commercially successful if the programs are attractive to consumers; most likely, only programs distinctive from the fare that commercial television already offers will prove attractive.

It is in the programming context that the United States has become embroiled in a difficult debate of the cherished first amendment concept of the free flow of communications. In virtually all international fora there is growing discord between the United States' position on the free flow of information and the positions of practically all other countries. This discord is most intense in debate with the communist and developing countries; it is less severe with the other industrialized nations. Unfortunately for the United States, the debate is taking place in United Nations fora in which one country-one vote is the rule; thus, the United States is totally outvoted, as the recent 108-to-13 vote in the United Nations' General Assembly exemplifies.⁴²⁵ A large majority of countries in the United Nations is opposed to DBS television without prior consultation and agreement with receiving countries.

Among the international fora, in ITU the discussion centers upon technical aspects of DBS development—namely, upon ITU's commitment to prevent harmful interference and to monitor overspill of the radiation of DBS satellite signals. Of course, a disincentive to investing money in television that is not free from harmful interference exists. This disincentive has prompted the United Kingdom to express the view that the ITU assignments have resolved the free flow debate.⁴²⁶ As agreed at WARC-77, the RARC-83 agreement, which the United States signed with some reservations,⁴²⁷ provided assignment of orbital positions and frequencies. The British view, however, has not found support; most countries continue to insist that an international regime must impose specific program controls on DBS services. Indeed, in another international forum, UNESCO, members have approved declarations and plans favoring the right of each country to decide on the content of commercial and educational DBS programs transmitted into a country from abroad.⁴²⁸ The United States, of course, has objected. Such strenuous objection from the United States may not be un-

425. See *supra* notes 3, 301 & 356 and accompanying text.

426. See *supra* notes 305-08 and accompanying text.

427. See *supra* notes 219-27 and accompanying text.

428. See *supra* part III, section C, subsections 2-5.

derstood well by foreign countries that are familiar with content regulation within the United States. Freedom of speech is regulated in the United States whenever the government has a legitimate interest in preserving public order and avoiding violence.⁴²⁹ The FCC regulated the broadcast media because of the limited availability of resources and the corresponding public interest in the use of the airwaves.⁴³⁰ Such justifications, however, do not pertain readily to DBS.

The free flow versus noninterventionist debate has been most intense and of longest duration in the United Nations. Early in the debate the USSR claimed the right to be free from television programs propagandizing violence, horrors, pornography, and the use of narcotics.⁴³¹ More importantly, the USSR also would make illegal all other programs televised to the USSR from foreign countries without the consent of the USSR. The Soviet stand against free flow of communications found some sympathy in most other countries. The developing countries proved to be the Soviet's staunchest allies in the debate; the United States, of course, positioned itself antithetically. The technical and economic advantages that the United States enjoys over other nations partially explain the lack of support for the American position.

The United Nations discussion came to a conclusion in the December 1982 General Assembly resolution. While the resolution does not declare specifically that each country has a right to control all communication within its sovereign borders, it does provide that:

A state which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving state or states of such intention and shall promptly enter into consultations with any of those states which so requests.

An international direct television broadcasting satellite service shall only be established after the conditions set forth in [the above] paragraph have been met and on the basis of agreements and/or arrangements in conformity with the relevant instruments of the International Telecommunications Union and in accordance with these principles.⁴³²

The content of these provisions and the overwhelming support that these provisions and the resolution as a whole received, however, are tempered by the realization that resolutions of the United Nations' General Assembly are *not* treaties and do not have the

429. See *supra* part II, section A, subsection 1.

430. See *supra* part II, section A, subsection 2.

431. See *supra* note 285 and accompanying text.

432. See 1982 United Nations Resolution, *supra* note 360.

binding effect of treaties. Whether a more binding instrument soon will follow remains to be seen.

In contrast to the relative lack of success in multilateral negotiations concerning the program content of DBS, the United States has enjoyed mutually beneficial bilateral arrangements with Canada, with India, and with certain developing Polynesian nations. That the United States is at odds with other countries on DBS programming and on the free flow of DBS programs should not overshadow the American successes in these bilateral arrangements and in agreeing with other countries on necessary DBS service in ITU and RARC-83. At RARC-83 the United States received sufficient orbital slots and frequencies to meet *its* current DBS needs—whether or not the service can flow into other nations with which no bilateral agreement exists. This country, therefore, is assured of new and exciting domestic television service in the near future.