

# THE FUTURE OF SPORTS BROADCASTING: AN INTERNATIONAL QUESTION

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## *I. Introduction*

Many years from now, when the Chicago Cubs are playing under the lights in Wrigley Field, the sports industry will look back and acknowledge that the advancing technology of television was the engine which drove the industry from a neophyte business to a dominant force in the world economy. Historians will note that it was the integration of the semi-conductor computer chip with the orbital placement of communications satellites which brought the television industry into the twenty-first century. In the relatively few years since the first sporting event was broadcast in 1939,<sup>1</sup> the television industry has become dynamic and expanding, ever conscious of the growing market for sports programming. Armchair fans, both in the United States and abroad, have demonstrated an insatiable desire for sports programming, and in an effort to meet this demand the television industry has invested millions of dollars.<sup>2</sup> Correspondingly, this

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The authors wish to thank Prof. Eli Noam, Columbia University, and Prof. Siegfried Wiessner, St. Thomas University for their comments and suggestions.

<sup>1</sup> On May 17, 1939, two Ivy League baseball teams met to battle for fourth place. Princeton University defeated Columbia University 2-1 and the sports broadcasting industry was born. See Garrett and Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155, 155 (1984) [hereinafter cited as *Sports Broadcasting*].

<sup>2</sup> In 1962, the Columbia Broadcasting System (CBS) paid the National Football League (NFL) \$4.6 million for the rights to broadcast NFL games that year, while the American Broadcasting Company (ABC) paid the American Football League (AFL) \$1.9 million. The National Broadcasting Company (NBC) did not have a professional football contract in 1962. The NFL's current contract period (1982-86) which includes agreements with all three national broadcast networks (ABC, CBS, NBC) is valued at \$2.1 billion. Each NFL club receives \$16 million for the

large influx of capital into sports programming has given rise to many legal battles,<sup>3</sup> with the outcome often turning on the intimacies of an ever advancing technology which is governed by an inherently static jurisprudential system. During the past fifty years, there has been a rapid rise in the number of sports programs on the air as the networks compete to cover sporting events ranging from baseball to synchronized swimming. New satellite sports networks such as the Entertainment and Sports Programming Network (ESPN) and the Madison Square Garden Network (MSGN), both of which transmit sports programs almost exclusively, have flourished. Superstations such as WTBS and WOR,<sup>4</sup> which transmit many hours of sports programming each week, have also prospered. With the development of such networks, it has been increasingly difficult to legally govern the sports broadcasting industry.<sup>5</sup>

Furthermore, the penetration of sports programming into the television marketplace and the fees paid for the television rights to those events have reached a plateau in the United States.<sup>6</sup> Consequently, American sports programmers have begun to explore new markets, hoping to generate ancillary in-

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1986 season from the national TV contract, or a league total of over \$400 million in 1986. See generally, Hochberg and Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 LAW AND CONTEMPORARY PROBLEMS 112 (1973-74) [hereinafter cited as *Broadcasting and CATV*]; see generally CABLESPORTS, Nov. 4, 1985.

It is estimated that the NFL will have total revenues of over \$700 million for 1986, and with \$400 million coming from television, the league's dependence on the sports broadcasting industry is apparent. See *QV Publishing, Inc.*, TELEVISION SPORTS RIGHTS II 36 (1986) [hereinafter cited as TELEVISION SPORTS RIGHTS].

<sup>3</sup> See *Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club, Inc.*, 97 F.2d 223 (7th Cir. 1938); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Liberty Broadcasting System v. National League Baseball Club of Boston, Inc.*, Trade Cas. (CCH) 67,497 (N.D. Ill 1952).

<sup>4</sup> "Superstation" is a term of art which refers to an independent over-the-air station which has its signal transmitted to a satellite which in turn retransmits it back to earth.

<sup>5</sup> Sports broadcasting is governed domestically by several statutes. These include: The Communication Policy Act of 1984, 47 U.S.C. §§ 601-605 (1984); The Sports Broadcasting Act of 1962, 15 U.S.C. §§ 1291-1295 (1962); The Copyright Act of 1976, 17 U.S.C. §§ 101-118 (1982); Cable Communications Act of 1985, 47 U.S.C. § 701 (Supp. II 1985); Communications Act of 1934, Copyright Office Pub. L. No. 73-416; 73 Stat. 1064 (codified in scattered sections of 47 U.S.C. (1964)).

<sup>6</sup> See generally *TV to Sports: The Buck Stops Here*, SPORTS ILLUSTRATED, Feb. 24, 1986, at 22.

come. This desire to look for new markets, coupled with the growing viewer demand for American sports programs in other countries, as many Europeans and Asians gain access to new forms of television previously unavailable to them, paves the way for an explosive global television marketplace. Last year the United States exported over 500 million dollars worth of television programs, of which sports programming was the second largest component, trailing only feature films.<sup>7</sup> In the years to come this number will increase substantially.<sup>8</sup> Currently, the greatest growth component on European television is American football, with NFL games purchased by a consortium of European networks which televise the games weekly in England and in many countries on the continent, including France, the Netherlands, Spain, and Italy.<sup>9</sup> This is only the tip of the sports programming iceberg, for, without question, there are more sporting events on world television today than ever before and this trend is on the rise.<sup>10</sup>

However, as American sports programs expand into the international television arena, a plethora of domestic and interna-

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<sup>7</sup> VARIETY, Feb. 5, 1986, at 1.

<sup>8</sup> *Id.* at 2. Television programming, with sports as a major component, comprises a substantial part of the United States service export industry, which is a vital part of the United States quest for a balance of trade. Moreover, as the economy becomes more dominated by communications, rather than manufacturing, the United States service industries will account for two-thirds of the gross national product and approximately 70% of employment. See *U.S. Completes Its Study of Services Trade, Hoping for Another GATT Round*, 20 U.S. EXPORT WEEKLY (BNA) 493 (Jan. 3, 1984); *BLS, Commerce Likely to Receive Funds to Update Service Sector Data Services*, 20 U.S. EXPORT WEEKLY (BNA) 309 (Nov. 22, 1983); see also, Porat, *Communications Policy in an Information Society*, COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVE FOR THE 1980's (1978); J. PELTON, *GLOBAL TALK* (1981).

<sup>9</sup> See *Sporting Salesman's Goal*, TV WORLD, Dec.-Jan. 1985-86, at 28. In addition to traditional television sports, professional wrestling has become increasingly popular. Although many sports authorities consider it theatre, professional wrestling is one of the highest rated programs in the television industry. This is true not only in the United States, but also in Europe, where a weekly two hour show on a European satellite network is that network's highest rated program. See *Muscling in on the Make-Believe*, TV WORLD, Dec.-Jan. 1985-86, at 30.

<sup>10</sup> The influence of television in the marketplace is illustrated by the 1984 Los Angeles Summer Olympic Games. Over one billion people in over 50 countries around the world viewed this event. See C. Firestone, *INTERNATIONAL SATELLITE AND CABLE TELEVISION*, UCLA COMMUNICATIONS LAW PROGRAM 164 (1985) [hereinafter cited as *INTERNATIONAL TELEVISION*]. Additionally, sports programs on Italian television continue to rise at a rate of 10% per year. See *Sport: Italy*, TV WORLD, Dec.-Jan. 1985-86, at 27.

tional legal issues is triggered, giving rise to numerous and complex questions, each demanding an answer if a global television market is to thrive. These issues, with sociological, political, and economic components, break down into three major areas which prevent the transborder flow of television signals: 1) *Cultural Protectionism*, or government actions which impede the importation of programming into their respective countries, usually in the form of programming content and advertisement restrictions; 2) *Technological Regulation*, which includes the technical standards, equipment regulation, and government control of the free flow of information; and 3) *Financial Regulations*, or the issues surrounding taxation, repatriation of currency, foreign investment in television entities, and suppression of competition through government or quasi-government monopolies.

This article will address each of these issues. However, a basic understanding of the technology used in the industry, as it applies to the United States and the rest of the world, is essential in order to understand the problems posed by each issue. Next, an examination of the global marketplace and the international agencies and conventions which regulate transnational television will be undertaken, including consideration of the parameters of domestic and international law. Finally, this article will outline the barriers impeding today's international television market and offer solutions to those barriers by way of domestic legislation, international agreements, and model regulations for foreign countries, culminating in a clear establishment of the rights and obligations of all parties necessary for the orderly growth of international sports television.

## *II. Current State of Sports Broadcasting*

Sports programming has always constituted a major portion of television events. Beginning with the first televised sports event,<sup>11</sup> the law has attempted to extend protection to the owners of that elusive and valuable electronic frequency which results in a moving image across the TV screen. Traditionally, the courts and legislatures have granted property rights in the event, in the public performance of the event, and in the broadcast of the event, be it via radio, over-the-air television, satellite transmis-

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<sup>11</sup> See *supra* note 1.

sions, or cable retransmissions.<sup>12</sup> However, only through a clear legal establishment of these rights can it become possible to sell sporting events in the international television marketplace, thereby ensuring the existence of sports broadcasting<sup>13</sup> as a world-wide industry.

### A) *History of Sports Broadcasting*

The courts, from as early as 1938, have held that the owners of sports franchises possess a property right in the games they promote and, therefore, may restrict the dissemination of continuous news, i.e., play-by-play commentary from those games.<sup>14</sup> This judicially created property right is rooted in the fact that the owners are in control of the park in which the game is being played, either by direct ownership or by lease. Courts have continually enforced this property broadcast right on the premise that without protection for these intangible property rights sports broadcasting would not survive.<sup>15</sup> This absolute right is always balanced, however, by the media's constitutional right of free speech.<sup>16</sup>

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<sup>12</sup> See, e.g., *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Radio Corp. v. Chicago Bears Football Club, Inc.*, 97 F.2d 223 (7th Cir. 1938). See also *Communications Act of 1934*, Copyright Office Pub. 2 No. 73-416, 73 Stat. 1064 (codified in scattered sections of 47 U.S.C. (1964)).

<sup>13</sup> Historically, the term broadcasting has referred to over-the-air broadcasting of a traditional Very High Frequency (VHF) or Ultra High Frequency (UHF) television signal with a reception radius of about 150 miles. See CONGRESSIONAL RESEARCH SERVICE, *UNAUTHORIZED HOME OVER-THE-AIR RECEPTION OF ENTERTAINMENT PROGRAMS* 15 (1982). Traditionally, the broadcasting of television signals has included free transmission to the public, giving rise to the legal premise that the airwaves are free. Furthermore, traditional broadcasts were paid for by advertisements; thus, programmers attempted to attract as many viewers as possible. Today, however, sports broadcasting also includes satellite transmissions, superstation transmissions, and cable retransmissions, which have different legal ramifications than over-the-air broadcasts do. See generally, Crane and Cryan, *Telecommunications Pirates—America's Newest Criminals?* 2 ENT. SP. L.J. 167 (1985) [hereinafter cited as *Telecommunications Pirates*].

<sup>14</sup> *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

<sup>15</sup> See, e.g., *Radio Corp. v. Chicago Bears Football Club, Inc.*, 97 F.2d 223 (7th Cir. 1938); *Liberty Broadcasting System v. National League Club of Boston*, Trade Cas. (CCH) 67,497 (N.D. Ill. 1952); *Zachini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>16</sup> Under the United States Constitution, the media may report highlights of a sporting event once the event is finished. The media has tried to expand this right of access, but the Supreme Court has supported the owner's absolute right of pub-

With each court decision, the law more clearly established the sports franchise owners' property rights in the description and accounts of their games.<sup>17</sup> Recognition of this common law right of publicity has brought the broadcasting of sporting events within the purview of the Copyright Act.<sup>18</sup> Copyright is defined as a legal monopoly over a creative work of limited scope and duration, under terms of which the creator may control the exploitation of the work.<sup>19</sup> This limited monopoly has its origin in the United States Constitution.<sup>20</sup> Pursuant to this constitutional grant of power, Congress passed a statute governing copyright.<sup>21</sup> Under this statute, any original work of authorship situated in a tangible medium of expression is copyrightable.<sup>22</sup> A copyright may be granted for literary works, musical works, dramatic works, pictures, sound recordings, motion pictures, and other audiovisual works.<sup>23</sup>

Once a copyright is established, the owner has the exclusive right to authorize any reproduction of the work, and control new works born out of or derived from the original piece.<sup>24</sup> Furthermore, the copyright owner has the right to control any republication of the event on television.<sup>25</sup> Therefore, copyright holders of sporting events are protected upon the fixation of the event, which occurs simultaneously when it is recorded on video tape and transmitted,<sup>26</sup> thus granting the owner the right to control all broadcasts of the game.<sup>27</sup>

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licity in a sporting event. See *Post Newsweek Stations Conn. Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981).

<sup>17</sup> See *supra* note 3.

<sup>18</sup> For an in depth analysis of the legal history of sports broadcastings, see generally *Sports Broadcasting*, *supra* note 1, at 161.

<sup>19</sup> See Ladd, Schrader, Leibowitz, and Oler, *Copyright, Cable, and the Compulsory License: A Second Chance*, 3 COMM. AND LAW 7 (1981) [hereinafter cited as *Copyright, Cable*].

<sup>20</sup> U.S. Const. art. I, § 8 empowers Congress: "To promote the progress of science and the useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."

<sup>21</sup> 17 U.S.C. §§ 101-118 (1976).

<sup>22</sup> 17 U.S.C. § 102 (1982).

<sup>23</sup> *Id.*

<sup>24</sup> 17 U.S.C. § 106 (1982).

<sup>25</sup> 17 U.S.C. § 106(4) (1982).

<sup>26</sup> 17 U.S.C. § 102 (1982).

<sup>27</sup> 17 U.S.C. § 106 (1982). Players have tried to assert that they have property rights in the games played, as well as the broadcast of the event. As of yet, no court

With the owners' rights established, the legal challenge becomes how to safeguard those rights as new technology permits the importation of sporting events with increasing facility to all nations around the world. However, it is necessary to understand the technology that makes international television, with its growing sports programming dimension, possible before examining the legal complexities involved.

### B) *The Technological Stage*

The current state of television technology is similar throughout the world, though United States consumers have, for several years, enjoyed the use of a number of forms of television which only recently have become available to the rest of the developed world.<sup>28</sup> Originally, the major American networks (ABC, CBS, and NBC) distributed television signals by relaying them via microwave stations to each major city in the nation, where a network affiliated station would receive and simultaneously retransmit the signal over the air, enabling the program to be picked up in most major markets in the country.<sup>29</sup> For many years this was the only form of distributing television signals to the consumer. However, in the 1960's and 1970's, due to terrestrial interference with over-the-air signals, communities began to install one very large antenna to pick up weak and distorted over-the-air signals, amplify them, and then retransmit the signals via a coaxial cable to homes within the community. This became known as Community Antenna Television (CATV) or CABLE.<sup>30</sup> This technological development of private local distribution of television signals caused the first segmentation of the television marketplace. With the advent of CABLE, television homes could now be reached directly by a network of affiliated over-the-air stations, or via cable, thus creating a new market tier of homes which could be reached indirectly and privately.

This phenomenon, combined with the utilization of geosta-

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has supported this position. See *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 30 PAT. TRADEMARK & COPYRIGHT J. (BNA) 142 (1985). See also *Sports Broadcasting*, *supra* note 1, at 165.

<sup>28</sup> Recent technology has allowed consumers various forms of cable.

<sup>29</sup> See generally Dordick, *Communications Satellites*, INTERNATIONAL SATELLITE TELEVISION UCLA COMMUNICATIONS LAW PROGRAM 6 (1983).

<sup>30</sup> See *Broadcasting and CATV*, *supra* note 2, at 122.

tionary satellites to relay television signals, has resulted in the birth of a new industry. Today there are over forty satellites in geostationary orbit owned by private concerns in the United States,<sup>31</sup> and many more will be deployed in the coming years. Each satellite is capable of receiving a pinpoint microwave signal, transmitted by a program supplier (up-links), that is retransmitted back to earth in a manner which literally sprays the signal across the country, where it is received by parabolic dish antennas of about three meters in diameter (down-links).<sup>32</sup> This type of satellite can receive a microwave signal from a single transmitter and then retransmit the signal at an angle that spans up to one-third of the earth's surface.<sup>33</sup> The angle of coverage of the retransmitted signal is called the "footprint."<sup>34</sup> A satellite positioned over the western hemisphere has a footprint which covers most of North, Central, and South America.<sup>35</sup> The effect of this technology is demonstrated by the fact that signal relays between three satellites stationed around the earth allow for penetration of the total global television marketplace.<sup>36</sup>

Originally, satellites were used primarily for government communications and telephone networks.<sup>37</sup> In recent years, however, satellite transmissions have increasingly carried television signals.<sup>38</sup> This began with satellites carrying live transmission of major sporting events.<sup>39</sup> As the price of satellite transmissions fell, television shows began to be carried via satellite in increasing numbers.<sup>40</sup> Today, many programming networks transmit via satellite twenty-four hours per day,<sup>41</sup> and

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<sup>31</sup> Geostationary orbit exists 22,300 miles above the equator. Any object deployed within this orbit will revolve at the same rate of speed and in the same direction as the earth, thereby remaining "stationary" over a fixed point on the globe. Gehrig, *Geostationary Orbit Technology and Law*, PROCEEDINGS OF THE TWENTIETH COLLOQUIUM ON THE LAW OF OUTER SPACE 267 (1977). See also Jakhu, *The Legal Status of the Geostationary Orbit VII*, VII ANNALS AIR AND SPACE L. 333 n.1 (1982).

<sup>32</sup> See *supra* note 29, at 22; *Glossary, supra* note 29, at 369, 377.

<sup>33</sup> I. POOL, TECHNOLOGIES OF FREEDOM (1983).

<sup>34</sup> See *Glossary, supra* note 29, at 370.

<sup>35</sup> See Dordick, *supra* note 29, at 29-30; see also *Glossary, supra* note 29, at 370.

<sup>36</sup> *Id.* at 27.

<sup>37</sup> For a discussion of the history of communications satellites, see L. SINGLETON, TELECOMMUNICATIONS IN THE INFORMATION AGE 77-79 (1983).

<sup>38</sup> See generally Owen, *Satellite Television*, ATL. MONTHLY, June, 1985, at 44.

<sup>39</sup> *Id.* at 46-47.

<sup>40</sup> *Id.* at 47-48.

<sup>41</sup> See *supra* note 37, at 25-27.



there are over 125 network signals which can be received from satellites in the United States.<sup>42</sup>

Once a television signal has been relayed via satellite, there are several ways to distribute the signals into a community. These methods include: Community Antenna Television (CATV or CABLE), Subscription Television (STV),<sup>43</sup> Multipoint Distribution Service (MDS),<sup>44</sup> MultiChannel Multipoint Distribution Services (MMDS),<sup>45</sup> Direct Broadcast Satellites (DBS),<sup>46</sup> Satellite Master Antenna Television (SMATV),<sup>47</sup> and Home Television Receive Only (TVRO) or Earth Station.<sup>48</sup> These forms of local distribution are technologically unique, and an understanding of each is necessary in order to consider the legal and economic ramifications each has on the future of sports programming.

### 1) Community Antenna Television (CATV or CABLE)

Cable is by far the most common method of locally distributing satellite television or Pay TV.<sup>49</sup> Customers desiring this service have their television receivers connected to a main cable that originates at a central location referred to as the "headend."<sup>50</sup> From the headend numerous signals can be simultaneously transmitted over the coaxial cable, allowing the cable operator to provide a wide choice of programming to the customer.<sup>51</sup> Once the foundational split or segmentation of the television marketplace is established with CABLE, the technological nature of the coaxial cable allows for a multitude of services to the consumer.<sup>52</sup>

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<sup>42</sup> See *SATELLITE ORBIT*, Mar. 1984, at B2-B15 for an example of the range of satellite television programming.

<sup>43</sup> See *Subscription TV Definitions*, 47 C.F.R. § 73.641 (1985).

<sup>44</sup> See *Multipoint Distribution Service*, 47 C.F.R. § 21.900 (1985).

<sup>45</sup> See 48 Fed. Reg. 33,873 (1983).

<sup>46</sup> Direct Broadcast Satellites relay television signals back to earth with a stronger signal than a traditional satellite, allowing a smaller dish to receive the signal. However, there are only a limited number of signals which can be received with the smaller dish, although there are reports of similarly sized dishes which are capable of receiving many satellite signals. See *Report and Order Docket*, 90 F.C.C. 2d 676 (1982).

<sup>47</sup> See generally *Telecommunications Pirates*, *supra* note 13.

<sup>48</sup> *Id.*

<sup>49</sup> Pay TV customers may receive several levels of private satellite television signals regardless of the method of local distribution.

<sup>50</sup> See generally *Telecommunications Pirates*, *supra* note 13.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

Specifically, CABLE exists in the forms of BASIC CABLE, which usually includes a package of several national satellite program suppliers for a flat rate,<sup>53</sup> and one or more levels of Pay TV which the customer may purchase for a specific, additional monthly fee.<sup>54</sup> Another form of distribution is PAY-PER-VIEW (PPV), whereby the customer elects to view a special event for a specific charge.<sup>55</sup>

## 2) Subscription Television (STV)

STV operators receive the satellite signals, then locally distribute them via traditional over-the-air frequencies.<sup>56</sup> They scramble their signals, however, so that reception is not possible without a "decoder."<sup>57</sup> Subscribers generally pay a monthly fee which includes rental of the decoder.<sup>58</sup>

## 3) Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS)

The MDS form of local distribution is another over-the-air service. The MDS signal is a microwave, and, correspondingly, the customer is provided with a microwave antenna and a down converter that receives the signal and converts down the frequency to one visible on the customer's television receiver.<sup>59</sup> Until recently, MDS had been able to supply only one or two channels of programming, but current technology makes possible the dissemination of many channels.<sup>60</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> A sporting event is most enjoyable when viewed live. Thus, sports programmers should vigorously pursue the application of home PPV to sporting events. An example of how this can be successful occurred during an important late season game in 1985, between the Dodgers and Mets with Fernando Valenzuela and Dwight Gooden on the mound. The Dodgers sold the game to 14,000 PPV homes (at an average of \$10 per home). See PAY-PER-VIEW UPDATE, Oct. 4, 1985, at 5. Moreover PPV is not limited to CABLE, but may be transmitted by all forms of local distribution.

<sup>56</sup> See generally *Telecommunications Pirates*, *supra* note 13.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

#### 4) Satellite Master Antenna Television (SMATV)

SMATV systems are used by customers who install and operate fully functional CABLE systems in privately owned developments, such as apartment houses, hotels, and condominiums. As with CABLE systems, the satellite signals are received by a dish and fed by coaxial cable to the individual units or apartments.<sup>61</sup>

#### 5) Home Earth Stations or Television Receive Only (TVRO's)

TVRO's are large receiving dishes which pick up programming directly from the satellite, bypassing the local distributor, thus giving direct access to the individual home.<sup>62</sup>

#### C) *The Program Suppliers*

A satellite program supplier is a network which typically transmits shows, via satellite, to local distributors, for a monthly fee, or without cost if the network is advertiser supported, public service, or religious in nature.<sup>63</sup> The network which places a program on the satellite pays a licensing fee to the copyright holder of the event in order to be allowed to transmit the program via satellite to local distributors (CABLE, MDS, STV).<sup>64</sup>

There are four types of satellite television program suppliers. In the United States there are National Satellite Television Program suppliers.<sup>65</sup> These networks place their programs solely on the satellite which transmits their programs nationwide, to be received almost exclusively by local distributors, who in turn retransmit the programs to the consumer through CABLE, MDS, and STV.<sup>66</sup> The best examples of American networks which operate in this fashion are the USA Network (USA), Cable News Network (CNN), Music Television (MTV) and the Entertainment

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<sup>61</sup> *Id.*

<sup>62</sup> The reception of satellite signals by the use of TVRO's in one's own backyard raises many complex legal issues. Congress has recently passed legislation allowing private home reception of satellite television signals without incurring liability in certain instances. For a more in depth analysis of these issues, *see id.* at 182.

<sup>63</sup> *Id.* at 169.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 169-70.

<sup>66</sup> The sole exception to the exclusive reception by local distributors is the private TVRO. *See id.* at 170.

and Sports Programming Network (ESPN), which are usually found as part of a CABLE system's BASIC package.<sup>67</sup> In Europe, there has been a growth of Pan-European satellite networks which follow the same technology and distribution pattern as in the United States. Typical examples of this type of network are Sky Channel, Music Box, and Screen Sport.<sup>68</sup> Additionally, nations such as Brazil, Japan, Australia, and the Middle East are also beginning to transmit television programs via satellite.<sup>69</sup>

The second type of supplier in the United States is a Regional Pay Network.<sup>70</sup> This category is dominated by regional sports programming networks, such as the New England Sports Network, Sports Channel New York, PRISM, Sports Vision, and Sports Channel New England.<sup>71</sup> To receive these networks, a subscriber pays a specific fee above the cost of basic service, often referred to as EXPANDED BASIC.<sup>72</sup> Additionally, several regional sports networks do not require the additional fee and

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<sup>67</sup> ESPN is currently the only national all sports programming satellite network. Recently in New York City, however, the Commerce Satellite Network introduced itself to the press. This network, known as the College Sports Network, may be a new force in satellite sports television because it does not pay rights fees for sports programs. Instead, the network barter with the syndicator, offering advertising time in exchange which keeps costs at a minimum. See *New Sports Network Claims Successful Launch*, MULTICHANNEL NEWS, Nov. 4, 1985, at 10.

<sup>68</sup> Sky Channel features films and sports programs. The Music Box is modeled after MTV. Screen Sport, a clone of ESPN, transmits sports programming exclusively. Telephone interview with Charles Stanford, Vice President Legal and Business Affairs, ABC Sports (Nov. 18, 1985).

<sup>69</sup> See *supra* note 42.

<sup>70</sup> A Regional Pay Network supplier transmits programs in a specific geographic area. This is important for sports programmers because an interest in a sports team is usually tied to the specific geographic location where the team plays.

<sup>71</sup> See CABLESPORTS, Oct. 28, 1985, at 7. See also E. Simon, *Regional Sports Webs Take on Growing Importance*, CABLEMARKETING (Sept. 1986) (stating that there are now 20 regional sports networks in the United States). One major impediment to a regional sports network is the prohibitive cost of programming. In an effort to minimize this expense and increase the availability of programming 10 regional sports networks agreed to share programs. See *Regional Sports Networks Agree to Share Programs*, MULTICHANNEL NEWS, Dec. 2, 1985, at 21. Recently, Major League Baseball (MLB) owners agreed to pool regional sports programming rights to MLB games if the local franchise owner has a financial interest in the regional sports network. Such agreements further unify the sports industry and satellite television. For a detailed analysis of this issue, see Cryan and Crane, *Sports on the Superstations: The Legal and Economic Effect*, 3 ENT. & SP. L.J. 35 (1986) [hereinafter cited as *Sports on the Superstations*].

<sup>72</sup> See CABLESPORTS, *supra* note 71, at 7.

are carried in a BASIC package. These include Sportsvision, Prime Ticket, and the Madison Square Garden Network.<sup>73</sup>

The third example of a satellite program supplier is the Premium Channels which charge a monthly fee above BASIC and EXPANDED BASIC for reception of their commercial free programs. Such networks in the United States include Home Box Office (HBO), Select-TV, The Movie Channel, and Showtime.<sup>74</sup>

Capable of being implemented by any form of local distribution or satellite television, provided the local distribution system is two-way addressable,<sup>75</sup> PPV offers great potential to sports program suppliers for expanded revenues. Currently there are five regional sports networks which offer PPV services: San Diego Cable Sports Network, Dodgervision, Blazer Cable, St. Louis Sports Network, and Tigervision,<sup>76</sup> and a typical PPV package might consist of twelve home games during the season and a twenty-five-week-off-season package of games, all for ninety dollars.<sup>77</sup>

The final type of program supplier in the United States has

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<sup>73</sup> *Id.* Currently, there are no regional sports satellite networks outside the United States. However, such networks may be developed in the near future.

<sup>74</sup> See *supra* note 42. Currently, there are no premium channels operating outside the United States.

<sup>75</sup> Two-way addressability refers to the ability of a local distribution system to transmit a specific event to a customer and place the PPV event on the monthly bill. For a complete analysis of this issue, including its technological potential and legal ramifications, see Hoff, *Two-Way Cable Television and Informational Privacy*, 6 COMM. ENT. L.J. 797, 797 (1984).

<sup>76</sup> See CABLESPORTS, *supra* note 71, at 7.

<sup>77</sup> The Portland Trailblazers offer their fans three different PPV packages. One such package consists of 12 home games and 25 away games during the year, for a \$90 fee. Another example of a PPV package is the St. Louis Sports Network, which will transmit 50 Cardinal games via PPV next year. See PAY-PER-VIEW UPDATE, Oct. 4, 1985, at 5. If technology improves to allow customers to choose specific events shortly before they are to take place, PPV will flourish by televising events such as the Hagler-Mugabi fight. See *United States Boxing PPV for Denver-Area Subs*, MULTICHANNEL NEWS, Nov. 4, 1985, at 16; see also *Warriors Sign Deal to Start PPV Service*, MULTICHANNEL NEWS, Dec. 12, 1985, at 10 (Golden State Warrior home games at \$10 each); PAY-PER-VIEW UPDATE, Nov. 1, 1985, at 2 (Texas-Oklahoma college football game). Once PPV is established in the rest of the world, programmers will have another valuable market in which to transmit sporting events. The revenue generating ability of PPV programming is illustrated by world-wide market distribution. An event may appear on American PPV, American satellite network, European satellite network, as well as American and European over-the-air television networks. See generally Leibowitz, *The Sequential Distribution of Television Programming in a Dynamic Marketplace*, 34 CATH. U.L. REV. 671, 671 (1985).

been the cause of much controversy within the sports industry because of its unique technological and legal position. Known as a "Superstation," this type of program supplier is both a local independent over-the-air television station, and a national satellite distributor of that over-the-air programming.<sup>78</sup> This unusual combination of services is governed by an exemption in the copyright statute.<sup>79</sup> Currently, there are four superstations operating in the United States, all with some affiliation to a major league baseball team: WTBS (Atlanta Braves), WPIX (New York Yankees), WGN (Chicago Cubs), and WOR (New York Mets).<sup>80</sup> Ultimately, these program suppliers offer a tremendous amount of sports programming to the public.

Having examined the technology which permits a television signal to be transmitted as well as the different levels of market segmentation within the sports broadcasting industry, the next area to be addressed is the international market for sports television.

### *III. The Global Marketplace*

#### *A) The Statistics of the Marketplace*

Since the late 1960's, the number of television receivers and the size of the global television audience has grown remarkably; at that time there were approximately 273 million television receivers with an audience of 883,900,000.<sup>81</sup> In the years to follow these figures grew exponentially; where, for example, there was a world-wide audience of 600 million for the 1968 Olympic Games in Mexico City, the 1984 summer games in Los Angeles drew

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<sup>78</sup> See generally *Sports on the Superstations*, *supra* note 71.

<sup>79</sup> 17 U.S.C. § 111 (1976).

<sup>80</sup> See generally TELEVISION SPORTS RIGHTS, *supra* note 2. If an American superstation transmitted to other parts of the world, a multitude of legal issues would arise. Moreover, there is no comparable satellite superstation in Europe. However, there are problems with the cable retransmission of distant over-the-air signals by bordering European countries which raises many difficult copyright issues. Furthermore, there are new sports networks emerging as technology advances. One such network is Cable Sports Tracker, a 24-hour sportstext service that recaps all the major sports scores, standings, as well as the Las Vegas point spreads. See CABLE MARKETING, March 1986, at 12.

<sup>81</sup> See T. Varis, *The International Flow of Television Programs*, 34 J. OF COMM. 53 (1984) [hereinafter cited as *International Flow*].

well over one billion viewers.<sup>82</sup> Currently there are about 525 million television sets in use throughout the world.<sup>83</sup> Of the total number of sets, the largest single concentration is in Europe with 222 million,<sup>84</sup> followed by North America with 165 million.<sup>85</sup> The third largest market is Asia with sixty-six million.<sup>86</sup> This figure is misleading, however, because mainland China, potentially the largest television market in the world, represented to have only twenty-seven million television sets, although the total viewing audience is estimated to be 400 million.<sup>87</sup> Coupled with the fact that the Chinese government continues to open up to Western culture in an effort to further development, the television industry can expect to grow in a logarithmic fashion.<sup>88</sup> It is apparent that cable and satellite television will be a powerful force in the global television industry.<sup>89</sup>

In 1982, roughly twenty-five million or thirty-two percent of the then eighty-three million television households in the United States were subscribing to a Pay TV service.<sup>90</sup> By 1990 that figure will grow to almost sixty million Pay TV subscribers or sixty percent of the then projected 100 million television households.<sup>91</sup> While there are currently 119 million television homes in Europe, only twenty-eight million receive television signals over a cable system.<sup>92</sup> It is reasonable for Europe to expect growth comparable to that experienced in the United States;

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<sup>82</sup> *Id.*

<sup>83</sup> See INTERNATIONAL TELEVISION, *supra* note 10, at 242. The United States represents almost 85 million of the 222 million television homes in North America, many of which have more than one set. See NIELSEN REPORT ON TELEVISION 3 (1985).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See INTERNATIONAL TELEVISION, *supra* note 10, at 242.

<sup>87</sup> See B. Redmont, *Inside Chinese Television: A New "Great Leap Forward"*, TELEVISION QUARTERLY, Winter 1986, at 8. This represents a very attractive market for television programmers, and some U.S. networks have already begun to export programs to China.

<sup>88</sup> *Id.*

<sup>89</sup> See FROST AND SULLIVAN, INC., THE EUROPEAN CABLE TV MARKET 196 (1983) [hereinafter cited as EUROPEAN CABLE]. See also *supra* note 77. Due to an expected increase in the demand for sports programming, there will be approximately 44 million PPV customers in the United States by the end of the decade.

<sup>90</sup> See EUROPEAN CABLE, *supra* note 89.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

therefore, the demand for more programming will almost certainly increase. Furthermore, the potentially explosive Asian market, with a population of two and one-half billion, has seen the beginnings of Pay TV penetration.<sup>93</sup> In Japan, for instance, 3.3 million or ten percent of television homes are wired for CABLE.<sup>94</sup>

Two clear trends have emerged as the global television market continues to grow. First, there is a one-way flow of programming from large exporting nations, mainly the United States, to the rest of the world.<sup>95</sup> Second, entertainment material, composed mostly of sports programming, dominates this flow.<sup>96</sup> Outside of the United States, imported programming averages approximately one-third or more of total programming aired.<sup>97</sup> Within the large European market several nations are heavy importers of programming, including West Germany where twenty-four percent of all programming is imported, Finland where it climbs to thirty-seven percent, Ireland at fifty-seven percent, and Spain reaching seventy-four percent.<sup>98</sup> Additionally, Asia and the Pacific are large importers of programming, with Hong Kong importing sixty-four percent, Singapore seventy percent, and Australia forty-four percent.<sup>99</sup>

Sporting events are perennially a major component of imported programs. In 1983, sports programming comprised thirty-six percent of all imported television programs into Western Europe,<sup>100</sup> forty-three percent into Eastern Europe,<sup>101</sup> thirty-two percent into the U.S.S.R.,<sup>102</sup> and twenty-eight percent into Asia.<sup>103</sup>

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<sup>93</sup> See *supra* note 86.

<sup>94</sup> *Id.* See also *Japan: Cable Gets Moving*, TV WORLD, Feb. 1986, at 16.

<sup>95</sup> See *International Flow*, *supra* note 81, at 269.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 273.

<sup>98</sup> *Id.* at 272.

<sup>99</sup> *Id.* Hong Kong imports 64%, Singapore 70%, and Australia 44%. It is interesting to note that the United States imports only 2% of its television programming.

<sup>100</sup> *Id.* at 276.

<sup>101</sup> *Id.* at 277.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*



### B) *Government Control of the Marketplace*

With the exception of the United States, over-the-air television has been controlled by state owned television stations.<sup>104</sup> Traditionally, these state monopolies have operated from tax dollars, broadcasted commercial free programming, and have not generated any revenue.<sup>105</sup> In Europe an annual license fee on television sets is levied by state governments.<sup>106</sup> On the average, a European family pays a seventy-one dollar per year television license fee.<sup>107</sup> It has been presumed that in return for this fee the household should receive advertisement-free television. However, in an effort to underwrite the cost of operating a television network, many state governments began to allow the sale of limited advertising time under a myriad of restrictions.<sup>108</sup> Estimates indicate that if there were no advertisements allowed, the annual license fee would rise to \$105 per year.<sup>109</sup>

State run television monopolies have never competed in a dynamic market place, and, as a result, though the programming has been educational and of strong parochial concern, it has often fallen short as an entertainment medium. Coupled with the reality that many nations have a strong desire to strictly control the informational and cultural flow to its citizens, this combination has created a less than vibrant television product.<sup>110</sup> Additionally, in 1950 the state run over-the-air television networks in Europe formed an association called the European Broadcasting Union.<sup>111</sup> This association, which transmits programs through-

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<sup>104</sup> The American television industry has been privately owned since its inception. The United States has a long tradition of a right of free access to over-the-air television signals. However, under a United Nations Agreement, which the United States promoted, the Government sanctioned a private monopoly in the international satellite transmission industry. This has raised many legal issues concerning the free flow of international television programs. See *infra* note 282 and accompanying text.

<sup>105</sup> See B. Maddox, *The Theology of Satellite Television*, TELEVISION QUARTERLY, Winter 1986, at 44.

<sup>106</sup> *Id.*

<sup>107</sup> On the average, a European family pays a \$71 yearly television license fee. See J. Taks, *Stop Your Meddling*, TV WORLD, Dec.-Jan. 1985-86, at 21.

<sup>108</sup> These restrictions on advertisement are a major impediment to the flow of international television programs. See *infra* note 190 and accompanying text.

<sup>109</sup> See *Stop Your Meddling*, *supra* note 107.

<sup>110</sup> This cultural protectionism operates as a block to the flow of international programming. See *infra* note 200 and accompanying text.

<sup>111</sup> See *infra* note 206 and accompanying text.

out Europe, has also added to the restrictions on the international flow of television programs.<sup>112</sup>

Private satellite television, however, offers the first non-government owned free market for television programs.<sup>113</sup> Though there are many restrictions on this form of television,<sup>114</sup> it is, nevertheless, the beginning of a dynamic marketplace. Moreover, as more television program properties are traded throughout the international marketplace, the problem of protecting and properly exploiting these property rights in a transnational legal paradigm becomes an enormous task.<sup>115</sup>

#### *IV. International Telecommunications Regime*

Television signals and the programs transmitted within these signals have, for the most part, fallen into the legal category of copyright.<sup>116</sup> In examining the flow of international television programs, international copyright protection offers the oldest and most evolved body of law by which to protect copyright holders.<sup>117</sup> Currently, the unanswered questions stemming from the broadcast and transmission component of television programs, coupled with a multitude of unresolved copyright issues,<sup>118</sup> places the international television industry in legal chaos.<sup>119</sup>

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<sup>112</sup> The formation of the EBU, and its restrictive effect on the flow of television programs, raises several antitrust questions. *Id.*

<sup>113</sup> In addition to private satellite television, some nations have begun to allow private advertisement supported over-the-air broadcast stations to be licensed. Denmark has allowed private stations to broadcast, and although advertisement is restricted in Denmark, the private channel does generate revenues from subscribers. See *Denmark: Countdown to Commercial TV*, TV WORLD, Feb. 1986. France has also opened its doors to private television. See *Le Développement des Télévisions*, LETTRE DE MATIGNON, Aout 5, at 2 (1985). See also *Une Télévision de la Création vivante et du patrimoine*, Le Monde, Feb. 15, 1986.

<sup>114</sup> *Id.*

<sup>115</sup> See generally, Cryan and Crane, *International Telecommunications Pirates: Protecting U.S. Satellite Signals from Unauthorized Reception Abroad*, 17 N.Y.U.J. OF INT'L L. AND POL. 851 (1985) [hereinafter cited as *International Telecommunications*].

<sup>116</sup> See H.C. Jehoram, *Satellite Television in Europe*, INT'L BUS. LAW., Oct. 1983, at 17, 23.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* See also Corbet, *Satellites et droit d'auteur—Study of Problems in the field of copyright raised by radio and television transmissions via communications satellites*. UNESCO WIDOSAT5 (Lausanne Conference 1971).

<sup>119</sup> See A. Deringer, *Legal Problems of Satellite and Cable TV Within the European Economic Community*, INT'L BUS. LAW., Oct. 1983, at 21.

International television is currently governed by a complex matrix of organizations and agreements throughout the world. The legal issues surrounding international telecommunications include the regulation of: 1) Domestic over-the-air broadcast signals; 2) Domestic cable distribution; 3) Domestic distribution of satellite signals; 4) International distribution of satellite signals across many borders; and 5) International allotment of satellite space.<sup>120</sup>

Furthermore, the international protection and regulation of copyrights and communications rights requires a difficult analysis of choice of law and conflict of laws problems, which must be interpreted in light of existing bilateral agreements. Accordingly, both international and domestic law must be addressed in order to establish which law is applicable to the protection of: 1) satellite up-link signals; 2) satellite down-link signals; 3) the program within the signal; and 4) the retransmission of the signal either via cable or other over-the-air stations.

Traditionally, domestic over-the-air and satellite broadcast transmissions have been regulated by each nation's communications agency. However, international radio, television, and satellite signals have fallen under the auspices of several international agencies and bodies of law, the oldest of which is the International Telecommunication Union.

#### A) *International Telecommunication Union*

The International Telecommunication Union (ITU) was founded in 1865,<sup>121</sup> for the purpose of unifying, through agreements and cooperation of its 150 member nations, the regulation and use of telecommunications.<sup>122</sup> The ITU establishes technical

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<sup>120</sup> This is a major concern of many nations given the finite space available for geostationary satellites. This problem is exacerbated by the rate at which the technologically advanced countries deploy such satellites. As a result, many lesser developed nations are requesting satellite slots. It may be many years, however, before such nations are financially able to place a satellite in those spaces. For a comprehensive analysis of these issues see Rothblatt, *ITU Regulation of Satellite Communication*, 18 STANDARD J. OF INT'L LAW 1 (1982) [hereinafter cited as *ITU Regulation*]; see also Weissner, *The Public Order of the Geostationary Orbit: Blueprints for the Future*, 9 YALE J. WORLD PUB. ORDER 217 (1983).

<sup>121</sup> Rusch, Book Review, 36 FED. COM. B.J. 95, 95 (1984).

<sup>122</sup> *International Communications and Information Policy: Hearings Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on*

standards, regulations, and operating procedures, in addition to formulating agreements on the allocation of radio frequencies and orbital positions for satellites.<sup>123</sup> The activities of the ITU are governed by the International Telecommunications Convention (ITC),<sup>124</sup> and since the signing of the ITC, the ITU has steadily increased its authority over satellite communications by establishing new international legal norms to ensure the uniform and undisputed use of international telecommunications.<sup>125</sup>

In addition to the agency regulation of international television, there are a number of multilateral agreements which govern the industry. The heart of these agreements is based on copyright law. However, there are several accords which also deal specifically with television and satellite signals.

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*Foreign Relations*, 98th Cong., 1st Sess. 4 (1983) (statement of George P. Shultz, Secretary of State).

<sup>123</sup> *Id.*

<sup>124</sup> *International Telecommunications Conventions, opened for signature* Nov. 12, 1965, 18 U.S.T. 575, T.I.A.S. No. 6267. The ITU formally came into being as a result of Article 52 of the ITC. See generally G. CODDING, JR. AND A. RUTKOWSKI, *THE INTERNATIONAL TELECOMMUNICATIONS UNION IN A CHANGING WORLD*, (1982); D. LEIVE, *INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM* (1970). For a detailed analysis of the ITU, see Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 997 (1983) [hereinafter cited as *Global Networks*].

<sup>125</sup> See *ITU Regulation*, *supra* note 124. Another major multilateral organization concerned with satellite signals is the United Nations Committee on the Peaceful Use of Outer Space (COPUOS). COPUOS was established in 1967 "to study the technical feasibility of communications by direct broadcast from satellites and the current and foreseeable development in the field." G.A. Res. 2260 (XXII), 22 U.N. GAOR Supp. (No. 16) at 11, U.N. Doc. A6883 (1967), reprinted in XID. DJONOVICH, *United Nations Resolutions 251, 252 (1966-68)*. The legal subcommittee of COPUOS drafted nine articles to govern the use of satellites. These include: the need to address state responsibility, international cooperation and international law. U.N. Doc. AAC 105271 Annex I (1976).

These principles have not been adopted due to disagreement among member nations. Issues which must be addressed before promulgation of these principles are whether each sovereign should be granted the privilege of prior consent before signals from other countries are transmitted into their nation, whether a member state should be able to deem certain broadcasts inadmissible, and whether the U.N. principles should permit the regulation of program content. See generally Pool, *Direct Broadcast Satellite and the Integrity of National Cultures*; NATIONAL SOVEREIGNTY AND INTERNATIONAL COMMUNICATION 120, 129-53 (1979) (examining U.N. debate on content regulation). Ploman, *Satellite Broadcasting, National Sovereignty and Free Flow of Information*, NATIONAL SOVEREIGNTY AND INTERNATIONAL COMMUNICATION 154, 157-60 (1979). In addition to the ITU and COPUOS, the actual placement of international satellite signals into space is governed by the International Telecommunications Satellite Organization (INTELSAT). See *infra* text accompanying note 145.

## B) *International Agreements*

### 1) European Agreement on the Protection of Television Broadcasts

Due to their proximity, it was imperative that the states of Europe reach an agreement as to television broadcasting. This necessity resulted in the first multilateral accord pertaining to television rights, the European Agreement on the Protection of Television Broadcasts.<sup>126</sup> Traditionally, television organizations were powerless to restrain the rebroadcasting of their over-the-air signals which crossed state borders. Therefore, the fundamental premise of this agreement is to provide protection to member states so as to allow the broadcasting organization to authorize or prohibit: 1) rebroadcasting; 2) the diffusion of broadcasts to the public by wire (cable retransmissions); and 3) the communication of broadcasts to the public by means of any instrument for the transmission of signs, sounds, or images.<sup>127</sup>

### 2) Brussels Satellite Convention

In addition to the European agreement on television broadcast signals there is only one multilateral treaty which addresses the distribution of international television programs, the Convention Relating to the Distribution of Programs Carrying Signals Transmitted by Satellite<sup>128</sup> (Brussels Satellite Convention). This convention regulates all satellite signals and offers protection of those signals from unauthorized use.<sup>129</sup> However, there are several textual weaknesses to the convention, the most important of which is the convention does not apply to direct

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<sup>126</sup> European Agreement on the Protection of Television Broadcasts, Strasbourg, Jun. 22, 1960, *reprinted in* Dordick, *supra* note 29, at 76.

<sup>127</sup> *Id.* Prior to licensing the program for over-the-air broadcast, it is imperative that the seller include an appropriate prohibition in the contract. *See Motion Picture Export Association of America Memorandum on the Uses of Satellite Technology, reprinted in* INTERNATIONAL TELEVISION, *supra* note 10, at 370, 378.

<sup>128</sup> Convention Relating to the Distribution of Programmers Carrying Signals Transmitted By Satellite (May 21, 1974), Senate Foreign Relations Comm. Treaty Doc. 98-31-Ratified, *reprinted in* RECORDS OF THE INTERNATIONAL CONFERENCE OF STATES ON THE DISTRIBUTION PROGRAM CARRYING SIGNALS TRANSMITTED BY SATELLITE vii-xxiii (Unesco/WIPO 1974).

<sup>129</sup> *Id.*

broadcast satellites.<sup>130</sup>

Due to these weaknesses, the convention, to a large degree, is meaningless as a tool in governing and protecting the international flow of television programs. However, the recent ratification of the convention by the United States and the possibility of revising the accord may enable the Convention to serve as a foundation for a new international television agreement which will adequately protect copyright holders in the international arena.<sup>131</sup>

Notwithstanding the regulation of broadcast and satellite rights, the majority of issues concerning international television centers around the law of copyright. As the oldest body of law offering protection for creative works, copyright is the law most often looked to to protect and regulate video signals.<sup>132</sup> International copyright law is in a quandary with respect to the new technological innovations of television, and, without a new accord, the potential abuses of copyrights may have repercussions far beyond the entertainment industry.<sup>133</sup>

Most importantly, almost every major television executive has asserted that the lack of copyright protection is the greatest impediment to the growth and development of the international television industry.<sup>134</sup> In light of the magnitude of this issue, it is essential to examine the state of international copyright, including the three major conventions which dominate, their effect on international television, and other legal impediments blocking the flow of television programming.

### 3) Berne Convention

In 1886, ten states signed the Berne Convention for the Protection of Literary, Artistic, and Scientific Works.<sup>135</sup> The conven-

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<sup>130</sup> See *International Telecommunications*, *supra* note 115, at 872 for a more detailed analysis.

<sup>131</sup> *Id.*

<sup>132</sup> See *supra* note 117.

<sup>133</sup> See generally Ladd, *Securing the Future of Copyright: A Humanist Endeavor*, 16 INTERNATIONAL COPYRIGHT 76 (1985) [hereinafter cited as *The Future of Copyright*].

<sup>134</sup> See *Trade Barriers to U.S. Motion Picture and Television, Pre-recorded Entertainment, Publishing and Advertising Industries*, reprinted in INTERNATIONAL TELEVISION, *supra* note 10, at 238 [hereinafter cited as *Trade Barriers*].

<sup>135</sup> Berne Conventions for the Protection of Literary, Artistic, and Scientific Works *opened for signature* Sept. 9, 1886, *revised* Nov. 13, 1908, *revised* March 20,

tion has been revised five times since then, most recently in 1971.<sup>136</sup> The United States is not a signatory despite several attempts by the executive branch to persuade the Senate to ratify the treaty.<sup>137</sup> The Berne Convention is, however, the basic source of copyright law for most of Europe and a large part of the less-developed world.<sup>138</sup>

The Berne Convention establishes two types of obligations for member states. First, member states are required to adopt by legislation specific Convention Rules.<sup>139</sup> Second, member states are expected to adhere to the Convention's broad principles.<sup>140</sup> The most important of these principles is the notion of national treatment, under which foreign copyright holders enjoy the same legal status as their domestic counterparts.<sup>141</sup>

The 1948 revisions to the Berne Convention assured authors broad rights with respect to the authorization of the broadcasting of their works.<sup>142</sup> However, the extent to which the Convention permits the limited use of compulsory copyright licenses is a matter of significant controversy among member states.<sup>143</sup> The growing amount of programming, specifically sports program-

1941, revised June 2, 1948, revised June 26, 1948, revised July 24, 1971 [hereinafter cited as Berne Convention]. For a discussion of the Berne Convention and its history see generally WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION (1978).

<sup>136</sup> See N. Boorstyn, COPYRIGHT LAW § 12.3 (1981) [hereinafter cited as Boorstyn].

<sup>137</sup> UNITED STATES COPYRIGHT OFFICE, TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE 31 (1984) [hereinafter cited as INTELLECTUAL PROPERTY RIGHTS], reprinted in *Oversight on International Copyrights: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 845 (1984).

<sup>138</sup> See *International Copyright Communications Policies: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 16 (1983) (statement of David Ladd, Register of Copyrights) [hereinafter cited as *International Copyright Communications*].

<sup>139</sup> *Id.* at 28.

<sup>140</sup> *Id.*

<sup>141</sup> The "national treatment" principle is set forth in Article 5(3): "However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors." Berne Convention, *supra* note 135.

<sup>142</sup> *Id.* at Art. 11bis (1).

<sup>143</sup> Article 11bis (2) of the Berne Convention allows for the limited use of a compulsory copyright scheme and leaves the establishment of mechanisms for implementing the authorization rights of Art. 11bis (1) to national legislation. See Berne Convention, *id.* at Art. 11bis (2).

ming which is being retransmitted by over-the-air stations and Cable systems, continues to fuel this controversy.<sup>144</sup>

Moreover, the applicability of the Berne Convention to the underlying works carried by satellite transmissions presents additional problems. Specifically, interpretations of the Convention's use of the term broadcasting differ: one school of thought holds that broadcasting, as used in the Convention, relates *only* to the transmission of signals that can be received directly by the public, traditionally thought to include only over-the-air signals; another school of thought maintains that broadcasting includes signals intended not only for direct public reception, but also those intended for indirect user reception through intermediary terrestrial distributors.<sup>145</sup> Under the first interpretation, United States television programs transmitted via satellite, and then retransmitted without authorization by a foreign broadcast or cable television system, would not be covered by the Convention's general protections of copyright holders.

These problems are highlighted by the Convention's requirement of a specific contractual obligation between the copy-

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<sup>144</sup> See *International Copyright Communications*, *supra* note 138, at 28.

<sup>145</sup> The transmission of the broadcast, rather than the reception, would be the decisive event for triggering the principle of territoriality. Therefore, when over-the-air broadcast television signals cross national frontiers, there is no copyright protection. For example, no action in copyright exists when a copyright holder permits a transmitter to broadcast a sports event and this signal is received by a neighboring country. There is also no copyright liability where there is point to point communications links, because the signal is not intended for use by the general public. Once received, the retransmission of this signal is a new act with copyright implications.

In the alternative, the transmission of the television signals to the satellite cannot be deemed a broadcast, since it is aimed only at the satellite and not the general public. Therefore, a relevant broadcast takes place only from the satellite. Since the satellite is in outer space, the principle of territoriality has no application. Thus, it is suggested that the law of the transmitting country and the law of the receiving country should be applied. Where there are several receiving countries, it is questionable whether broadcasting has occurred in all of them, or only one. For a more detailed analysis, see *Television Without Frontiers*, GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MARKET FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE 305 (1984). [hereinafter cited as *Television Without Frontiers*]. For a discussion of these differing interpretations, see also *Direct Broadcast Satellites: Protecting Rights of Contributing Artists and Broadcasting Organizations*, 12 CAL. W. INT. L.J. 204 (1982); and Szilagy, *International Copyright Questions of Indirect Broadcast by Satellites*, PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 213 (1979).



right holder and the broadcast organization, including its defined area of transmission, in order to access royalties.<sup>146</sup> This requirement is complicated by the difficulty in determining who is a broadcaster, and in restricting broadcast signals. However, should the definition of broadcaster become settled and the contracted-for international distribution of signals become accepted, this convention could act as a powerful base upon which to ensure the proper payment of internationally sold programs.

#### 4) Universal Copyright Convention

In 1952, representatives of fifty nations negotiated the Universal Copyright Convention (UCC).<sup>147</sup> Under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the United States led the effort to establish the new convention with several goals in mind, including the creation of a more pervasive regime of national treatment than that embodied in the Berne Convention and the alignment of international copyright protection with existing United States law.<sup>148</sup>

Today more than seventy nations adhere to the UCC.<sup>149</sup> Under the UCC, member states are required "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors."<sup>150</sup> Member states must afford the same protection to works of nationals of member states as is provided to the works of its own nationals.<sup>151</sup>

The UCC, however, is not well suited to address the issues of broadcast signals, satellite transmissions, and cable retransmis-

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<sup>146</sup> *Id.*

<sup>147</sup> Universal Copyright Convention *opened for signature* Sept. 6, 1952, *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 216 U.N.T.S. 134 [hereinafter cited as Copyright Convention].

<sup>148</sup> See INTELLECTUAL PROPERTY RIGHTS, *supra* note 137, at 31-32.

<sup>149</sup> For a list of signatories as of late 1980, see Boorstyn, *supra* note 136.

<sup>150</sup> See Copyright Convention, *supra* note 147, at Art. I.

<sup>151</sup> Art. II of the Universal Copyright Convention provides:

- 1) Published works of Nationals of any Contracting State and works first published in that state shall enjoy in each other Contracting State the same protection as that other state accords to works of its nationals first published in its own territory.
- 2) Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other state accords to unpublished works of its own nationals.

Copyright Convention, *supra* note 147, at 29.

sions of copyrighted programs. Its protection provision allows for many interpretations.<sup>152</sup> Given the UCC's embodiment of the "national treatment" principle,<sup>153</sup> the clause probably envisions that the rights enjoyed by copyright holders will vary from one member nation to another. The minimum rights granted by the UCC ensure that only the author of a copyrighted work is authorized to reproduce his or her work<sup>154</sup> and to approve the publication of translations.<sup>155</sup> These provisions are weakened, however, by the clause which allows member states to enact exceptions to these rights, so that only a reasonable degree of protection is necessary.<sup>156</sup> The Rapporteur-General of the 1971 UCC Revision Conference explained that this ability to make exceptions to the UCC's minimum rights was conditioned only on there being a logical basis for the exceptions.<sup>157</sup> Therefore, this provision may allow for a weakening of minimum broadcast, transmission, and retransmission rights of copyright holders whose works are carried via satellite.

Beyond the vagueness of the "adequate and effective protection" language and the narrow scope of the minimum rights afforded copyright holders by the UCC, the convention also lacks specific provisions on satellite signals and cable television. Moreover, UCC members and the UNESCO Secretariat have in recent years focused primarily on the concerns of Third World signatories.<sup>158</sup> Specifically, UNESCO and the International Copyright Information Center—a clearinghouse formed as a result of 1971 negotiations among UCC members—have concentrated on education, information dissemination, and technical legal assistance

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at Art. IVbis.

<sup>155</sup> *Id.* at Art. V.

<sup>156</sup> *Id.* at Art. IVbis (2) which provides:

However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this convention, to the rights of this Article mentioned in paragraph 1 (copyright holders' exclusive right to authorize). Any state whose legislation so provides shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

<sup>157</sup> Records of the Conference for Revision of the Universal Copyright Convention, Paris, July 5-25, 1971, at 67.

<sup>158</sup> See INTELLECTUAL PROPERTY RIGHTS, *supra* note 137, at 46-51.

in Third World member states.<sup>159</sup> The two groups have also prepared model contracts for licensing works in developing nations, formulated international recommendations for the implementation of the UCC's compulsory licensing rules, and provided legal information to states for the preparation of national copyright laws and regulations.<sup>160</sup> As of today, however, the UCC regime has not begun to formulate what the role of the Convention is with regard to modern electronic technologies. Whether the preference of less-developed nations for compulsory licenses will be accommodated by UCC members remains to be seen. Furthermore, the recent United States decision to withdraw from UNESCO<sup>161</sup> means that future UNESCO negotiations regarding UCC protection of satellite signals will not reflect United States interests.

#### 5) The Rome Convention

The Convention for the Protection of Performers, Producers, and Broadcasting Organizations,<sup>162</sup> (Rome Convention of 1961) plays an important role in protecting the interests of performers, phonogram and videogram producers, and broadcasting organizations. Technically the Rome Convention is not a copyright agreement, but a neighboring rights treaty. Neighboring rights are those granted performers, phonogram producers, and broadcasters for protection against the unauthorized public user.<sup>163</sup> Included among these rights are the right of performers to prevent the direct broadcast or communication of their performances without their consent, and the right of broadcasting organizations to authorize or prohibit the rebroadcasting and reproduction of their broadcasts.<sup>164</sup>

Under the Rome Convention, broadcasters are not consid-

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<sup>159</sup> *Id.* at 49.

<sup>160</sup> *Id.*

<sup>161</sup> The Reagan Administration announced the United States withdrawal from the United Nations Educational, Scientific, and Cultural Organization in December of 1983. See Massing, *UNESCO Under Fire*, ATL. MONTHLY, July 1984, at 89.

<sup>162</sup> Convention for the Protection of Performers, Producers and Broadcast Organizations *opened for signature* Oct. 26, 1961, 496 U.N.T.S. 44 [hereinafter cited as Rome Convention].

<sup>163</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 197 (1980).

<sup>164</sup> *Id.*

ered authors simply by virtue of the fact that they transmit programming, nor is a broadcast necessarily protected by the Convention's neighboring rights.<sup>165</sup> To gain the protection of the Rome Convention, broadcasters must buy the copyright in a work or create a work and secure its copyright.<sup>166</sup> Nevertheless, even if the broadcaster has secured a copyright in the words that it transmits by satellite, its rights are subject to the derogation rights of states which are parties to the Convention.<sup>167</sup> Article 16 of the Convention permits a contracting state to decline to implement the Convention's protections applicable to broadcasting organizations, with the only consequence that other contracting states may, as a result, deny the Convention's protections to that contracting state's broadcast organizations.<sup>168</sup> The United States is not a signatory to the Rome Convention, and historically the United States television, motion picture, and sound recording industries have not favored United States adherence to the Convention because of the exceptions to signal protection and conflicting United States intellectual property rights laws, specifically with reference to sound recordings.<sup>169</sup>

#### *V. Barriers to the International Distribution of Sports Programming.*

The inadequacies of the international copyright framework offer by far the greatest impediment to the transborder flow of television programs.<sup>170</sup> Although more elusive, cultural barriers to international programming may, in fact, be an equally restrictive component within the global television market. Furthermore, additional restrictions, such as the pervasive existence of government owned communications companies, the unfettered operations of cable retransmissions, international monetary and taxation problems, and anti-competitive laws governing the Un-

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<sup>165</sup> See *International Copyright Communications*, *supra* note 138, at 30.

<sup>166</sup> Rome Convention, *supra* note 162, at Art 7.

<sup>167</sup> *Id.* at Art. 15.

<sup>168</sup> *Id.* at Art. 16.

<sup>169</sup> INTELLECTUAL PROPERTY RIGHTS, *supra* note 137, at 55-56.

<sup>170</sup> Copyright infringement is responsible for the single greatest dollar loss to the international television industry each year, and the Motion Picture Export Association of America has listed the European Community, Canada, and the Far East as trouble areas. Unfortunately these countries are major markets for exported programs. See *Trade Barriers*, *supra* note 134, at 238.

tied States communications industry all contribute to the shackling of transborder television.

### A) *Cultural Barriers*

Historically, the nations of the world, and Europe in particular, have tried to protect their national borders and cultural identity by restricting television programming through a myriad of regulations.<sup>171</sup> Many nations believe that domestic television is a scarce national resource, and therefore they must regulate it in order to insure the preservation of their cultural identity. These cultural barriers most often manifest as quantitative and qualitative restrictions on: 1) the flow of information; 2) the importation of foreign programs; 3) the limitation of advertisement and sponsorship; and 4) the restricted use of advertisements produced in foreign countries.<sup>172</sup>

#### 1) Advertisements and Sponsorship

The free use of sponsorship of television programs to exploit a company's goods or services is not permitted by television regulatory bodies around the world, particularly in Europe.<sup>173</sup> Thus, in distributing sports programming internationally, programmers must be concerned with the laws regulating advertisements and sponsorship, including domestic and international restraints. Specifically, there are two levels of advertisement restrictions, the first of which limits the amount of advertisement time which can be sold in a given day, including where it is shown with respect to the sporting event—during natural breaks in the action, or all at the beginning and end of the program, or maybe

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<sup>171</sup> See *TV's Commercial Barriers Come Tumbling Down*, EXECUTIVE WORLD, Aug. 1984, at 12 [hereinafter cited as *TV's Commercial Barriers*]. For example, Italy bans pet food, Britain prohibits camera shots below the waist, and Belgium restricts commercials altogether. See Maddox, *The Theology of Satellite Television*, TELEVISION QUARTERLY, Winter 1986, at 42.

<sup>172</sup> For example, Canada requires privately owned broadcast stations to have at least 60% Canadian programming during the day, and at least 50% from 6:00 p.m. to midnight. Additionally, private broadcasting companies in the United Kingdom may not program more than 14% imported programming, while France places severe restrictions on foreign programs and requires a percentage of programs to have substantial national content. See *Trade Barriers*, *supra* note 134, at 249.

<sup>173</sup> See *Sponsorship Agreements Between Sponsors and Sports Teams*, 12 INTERNATIONAL MEDIA LAW REPORTER 2 (1985) [hereinafter cited as *Sponsorship Agreements*].

even in the middle with one long break.<sup>174</sup> The second level of restraint concerns what advertisements and their content are broadcast, including the billboards on a stadium wall, signs affixed to the scoreboard, and the sponsor's name as it appears on the players' jerseys.<sup>175</sup>

Today almost every nation places some restriction on the amount of daily advertising time allowed on a particular channel. In fact, several European nations including Belgium, Denmark, Norway, and Sweden,<sup>176</sup> have an absolute ban on advertisements. Other nations also severely restrict the amount of advertisement time—for example, Austria has a maximum of twenty minutes of ads per day per channel,<sup>177</sup> Italy allows twenty-eight minutes,<sup>178</sup> China only ten minutes per evening,<sup>179</sup> France twenty-four minutes,<sup>180</sup> and Luxembourg sixty-eight minutes.<sup>181</sup> This is a far cry from the 180 minutes allowed in the United States.<sup>182</sup> This problem is compounded when television commercials produced outside the country are forbidden for use by domestic broadcasters, as is the case in Argentina, Chile, Canada, Australia, Italy, and Korea.<sup>183</sup> Accordingly, the importation of presold or sponsored programming in such instances is illegal.<sup>184</sup>

A comparison of the various national advertisement policies indicates that some nations require the advertisement to be separated from the rest of the program.<sup>185</sup> In addition, many nations

<sup>174</sup> See Dewin, *Sponsorship: Defining a Reference Framework*, 25 EUR. BROADCASTING UNION REV. 29 (May 1984).

<sup>175</sup> *Id.*

<sup>176</sup> This can also mean a ban on imported satellite television commercials. Specifically, Belgian cable operators are required to omit advertisements from the different foreign programs. In practice, however, this is not done. See *The Half-Law of the Ad-Jungle*, TV WORLD, Feb. 1986, at 30. One of the methods by which Swedish advertisers attempt to circumvent this prohibition on commercials is to purchase poster sites around British soccer fields. These are then broadcast back to Sweden as part of a weekly sports telecast. See *TV's Commercial Barriers*, *supra* note 171, at 12.

<sup>177</sup> See *Television Without Frontiers*, *supra* note 145, at 343.

<sup>178</sup> *Id.*

<sup>179</sup> See *Sponsors Seek a Sporting Chance*, TV WORLD, Dec.-Jan. 1985-86, at 34.

<sup>180</sup> See *Television Without Frontiers*, *supra* note 145, at 343.

<sup>181</sup> *Id.*

<sup>182</sup> See *TV's Commercial Barriers*, *supra* note 171, at 12.

<sup>183</sup> See *Trade Barriers*, *supra* note 134, at 250.

<sup>184</sup> *Id.*

<sup>185</sup> Germany, Luxembourg, Ireland, the United Kingdom, and the EBU have such a requirement. See *Television Without Frontiers*, *supra* note 145, at 234.

will allow advertisement breaks to be inserted only between the programs, allowing the show to run continuously,<sup>186</sup> while other nations allow ads to be introduced during natural breaks in the program.<sup>187</sup>

Beyond these restrictions, many nations prohibit the running of advertisements on Sundays and holidays, a restriction of concern to the sports industry because many major sporting events occur on weekends or during a holiday festival.<sup>188</sup> Even more important to the sports industry is the almost pervasive advertising ban on tobacco and alcohol.<sup>189</sup> While it has become accepted that tobacco commercials cannot be aired during an event, the problems arise when a tobacco billboard at a stadium comes within the view of the camera, thus triggering the prohibition in some countries.<sup>190</sup> The prohibition on alcoholic beverage advertisements also strikes at the heart of the sports industry since beer has been a major advertiser of sporting events for years, and to forbid beer commercials would cause the demise of sports broadcasting.<sup>191</sup>

Under the wide variety of advertisement restrictions, and the practical impossibility of satisfying the rules on advertising in each state that a satellite signal enters, the danger that international broadcasters may be blocked grows.<sup>192</sup> Moreover, the specifics of sponsorship require a sponsor to bear in mind that the

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<sup>186</sup> *Id.* at 235.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 238. Satellite distribution in Europe is indicative of this dilemma. Germany proscribes television commercials on Sundays. Sky Channel, which broadcasts advertisements every day, was being received by a Munich CABLE company. Ultimately, the German government forced the CABLE company to suspend its Sunday programming.

<sup>189</sup> *Id.*

<sup>190</sup> These issues are often resolved by agreements between the tobacco industry and the domestic government. In the United Kingdom the tobacco industry will adhere to the voluntary code, with respect to sports, and in turn is granted minimal advertising freedoms. In exchange, the tobacco industry must limit its annual expenditures on commercials, include government health warnings on promotions and signs, refrain from patronizing events in which the participants are less than 18 years of age, support non-televised amateur and minor activities, and consult with the Minister of Sport regarding financing sports previously not subsidized. See *Sport Sponsorship: Regulation of the U.K. Industry*, 12 INTERNATIONAL MEDIA LAW REPORTER 19 (1985) [hereinafter cited as *Sports Sponsorship*].

<sup>191</sup> Recent United States attempts to ban alcoholic drinks on television have met much resistance for this very reason.

<sup>192</sup> See *Television Without Frontiers*, *supra* note 145, at 255.

national laws and regulations restricting the use of the sponsor's name in connection with a sporting event vary considerably.<sup>193</sup> The regulations which exist at this moment are dealt with on an ad hoc basis, and must be compared and contrasted with the laws governing advertisements and sales promotions throughout the various nations in which a sports program may be distributed.

Specifically, television broadcasting distinguishes the different types of sponsorship. The first concept is that of a sponsored program, i.e. the Kodak World of Sports,<sup>194</sup> in which the sponsor receives some form of credit, usually with the titling, known as top and tailing, in return for financing the television production of the show.<sup>195</sup> The second method of sponsorship is where an event owes its existence to the sponsor, i.e. the Paine Webber Tennis Classic.<sup>196</sup> The third concept encompasses advertisements, including names on players' shirts, which may be picked up by the camera.<sup>197</sup> The extent of this regulation is extremely detailed. In Europe, for example, an agreement between the soccer authorities and the broadcasters requires that sponsors' names on players' jerseys during televised games contain lettering no longer than sixteen inches, no wider than two inches, on only one side of the uniform, and not on any other clothing or equipment.<sup>198</sup> Ultimately, the confusion and inconsistency sur-

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<sup>193</sup> See *Sponsorship Agreements*, *supra* note 173, at 3.

<sup>194</sup> See *Sponsors Seek a Sporting Chance*, TV WORLD, Dec.-Jan. 1985-86, at 34 [hereinafter cited as *Sporting Chance*].

<sup>195</sup> This type of sponsorship is complicated by regulations which preclude conflicts of interest in advertising. For example, consider an oil company sponsoring a documentary on oil pollution. This issue is more acute when an automobile manufacturer is sponsoring a Formula One Grand Prix. See *Sports Sponsorship in Independent Broadcasting?*, 27 EUR. BROADCASTING UNION REV. 29 (1986).

<sup>196</sup> See *Sponsorship Agreements*, *supra* note 173, at 3.

<sup>197</sup> An example of the complexity of this issue is the Kim logo which is owned by an Italian leisurewear firm. However the logo is identical to a Kim logo for cigarettes and is clearly visible when worn by a player at Wimbledon. See *Sports Sponsorship*, *supra* note 190, at 19. This problem is compounded when stadium ads come within the camera's view during an internationally broadcast event. A nation may invoke stringent advertisement restrictions. For example, Swedish authorities often threaten to prohibit the broadcast of a match because the advertisements being picked up by the camera do not conform to Swedish law. In fact, they have blacked out World Cup soccer matches because they did not conform to Swedish law. Telephone interview with Judge Marie-Louise Gustavsson, Lansratten I Vasterbottens Lan; Umea, Sweden (Dec. 11, 1985).

<sup>198</sup> See Theobalds, *Is There a Case for Sponsorship in Independent Broadcasting?*, 27 EUR. BROADCASTING REV. 16 (1986).



rounding these issues is fueled by the growth of satellite television. Since no European broadcaster has a formal policy for the sponsoring of programs, this chaotic state will only grow.<sup>199</sup>

## 2) Restrictions on Data Flow

Although the United States has enjoyed a long history of a guaranteed right to a free flow of information, including television programming, the same has not been true for the rest of the world.<sup>200</sup> Traditionally, many nations have viewed the unbridled transmission of information to their citizens as a threat to their national sovereignty, and as both the industrialized and lesser developed nations continue to build national telecommunications systems, these governments seek to protect their natural interests by establishing legislative and regulatory barriers restricting the transborder flow of information.<sup>201</sup>

Areas of immediate concern, because of their market status, include Europe, Canada, and Japan,<sup>202</sup> where governmental restrictions are viewed as a means of maintaining an influence over the national press. In fact, West German Chancellor Helmut Schmidt was so concerned about this problem that he said "mass appeal [satellite delivered] programming could ultimately pose a greater peril for German society than any danger inherent in nuclear technology."<sup>203</sup>

With respect to many multilateral agreements, the right to broadcast international television is a component of the guaranteed free flow of information.<sup>204</sup> Specifically, the Universal Declaration of Human Rights, adopted by the General Assembly in 1948, states,

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas

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<sup>199</sup> See *Sporting Salesmen's Goals*, TV WORLD, Dec.-Jan. 1985-86, at 29.

<sup>200</sup> The Supreme Court has stated that the first amendment guarantees the right to speak and receive information. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). Moreover, the first amendment protects the right to communicate with citizens of foreign nations. *Id.*; see also *Global Networks*, *supra* note 124, at 1016.

<sup>201</sup> See *Trade Barriers*, *supra* note 134, at 253.

<sup>202</sup> *Id.*

<sup>203</sup> See LeDuc, *Direct Broadcast Satellites: Parallel Policy Patterns in Europe and the United States*, J. OF BROADCASTING, Spring 1983, at 100.

<sup>204</sup> *Id.*

through any media and regardless of frontiers.<sup>205</sup>

The U.N. accord, as well as many others,<sup>206</sup> features not only the freedom to express opinion, but also the freedom to receive information from all the usual sources of access.<sup>207</sup> This combination guarantees transborder broadcasting as a particularly important example of generally accessible information.<sup>208</sup>

Freedom of expression and information, however, does not operate without restrictions.<sup>209</sup> International guarantees of free information contain a number of reservations for national rules, and permit freedom of information and expression to be weighed against other important values.<sup>210</sup> An example of such a restriction is found in Art. 10(2) of the European Convention on Human Rights which states that the freedom of information may be subject to legal restrictions which:

[A]re necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>211</sup>

Obviously, these broad and sweeping exemptions grant great latitude to governments which do not have a highly developed judicial system to champion the rights of private individuals, allowing them

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<sup>205</sup> U.N.G.A. Res. 217 (III) of Dec. 10, 1948. U.N. G.A.O.R. 3d Sess. Resolution A810, Art. 19.

<sup>206</sup> G.A. Res. 133, U.N. Doc. 59(1) (1946) states that "Freedom of information is a fundamental human right and basis for all freedoms to which the U.N. is committed." The UNESCO Constitution preamble advocates the free exchange of ideas and knowledge and Art. 1 the promotion of the free flow of ideas by word and picture. The UNESCO Resolution of 1948 recommends that members recognize the right of citizens to listen to broadcasts from other countries, UNESCO, Third Session, Res. 7.2221, Beirut 1948. Furthermore, Art II (1) of the UNESCO declaration on mass media of Nov. 28, 1978, states: "The exercise of freedom of opinion, expression and information, recognized as an integral part of human rights and fundamental freedoms, is a vital factor in the strengthening of peace and international understanding."

<sup>207</sup> *Id.*

<sup>208</sup> See *Television Without Frontiers*, *supra* note 145, at 25.

<sup>209</sup> In the United States, first amendment analysis has always applied a balancing test in which the freedom of information may be restricted if there is a compelling governmental interest; see *Global Networks*, *supra* note 124, at 1016.

<sup>210</sup> See *Television Without Frontiers*, *supra* note 145, at 26.

<sup>211</sup> *Id.*

to act with little justification to curtail the freedom of information. In fact, this major restriction on the free flow of information forced a majority of television executives to directly reduce the amount of international sports programming, which makes up the second largest category of television shows in the marketplace.<sup>212</sup>

### B) *Government Owned Communications Companies*

Many communications companies throughout the world are owned by the governments of the states in which they are located.<sup>213</sup> These government owned communications companies act as barriers to the international distribution of sports programming when they abuse their status as natural monopolies to the detriment of privately owned organizations attempting to sell the rights to sports programming in the international arena. In effect, sellers in the industry are confronted with a buyer's cartel which, in some cases, may be powerful enough to create artificially low copyright fees.

Although these monopolies also exist in Central and South America, Africa, and Asia, this phenomenon is, perhaps, best exemplified on the European Continent where the countries immediately surrounding the Mediterranean Sea have formed an association called the European Broadcasting Union (EBU).<sup>214</sup> In today's international marketplace, the potential for trans-border sports programming is severely restricted by actions such as those taken regularly by the EBU.

#### 1) European Broadcasting Union—The Problem

In February 1950, a European Broadcasting Conference meeting in Torquay, United Kingdom created the European Broadcasting Union.<sup>215</sup> The EBU describes itself as a professional, non-commercial association whose objective is to integrate communications activities throughout its membership by promoting the development of broadcasting, the exchange of radio and television programs, and the enforcement of interna-

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<sup>212</sup> See *Trade Barriers*, *supra* note 134, at 238.

<sup>213</sup> See e.g., C. FIRESTONE INTERNATIONAL SATELLITE TELEVISION, UCLA COMMUNICATION LAW PROGRAM 183 (1983).

<sup>214</sup> See generally European Broadcasting Union 1985 Organizational Brochure, Geneva, Switzerland (1985) [hereinafter cited as Organizational Brochure].

<sup>215</sup> *Id.*

tional agreements relating to television.<sup>216</sup>

Effectively, the EBU operates as a network of over-the-air state controlled broadcasting stations. Some nations have two or more of these transmitting within their territory. This inherent monopoly of state broadcast stations in each country is compounded by the implementation of the EBU accord which solidified the EBU's status as a natural monopoly or cartel dominating Europe without any threat of competition.<sup>217</sup>

The power of this cartel is two-fold. First, the EBU is able to directly restrict the distribution of television programming, in general, and of sports programming, specifically, between member states (i.e., between union and non-union members within those states).<sup>218</sup> Secondly, the EBU is able to act as the sole available buyer representing all EBU members (and practically speaking, all non-EBU member broadcasting organizations in Europe, as well).<sup>219</sup> The Union, therefore, serves as the single agent for several separate principals, any number of which may be willing and able to bid on programming as potential buyers.

As a result, the EBU cartel appears to be restraining communications trade in several respects. For example, a non-European seller of television programming who wishes to access the European over-the-air market presently has only two options available. First, the seller could approach any privately owned television station in Europe to negotiate for the sale of the programming. However, this is a very poor alternative because there are so few of these stations on the continent, and those which do

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<sup>216</sup> *Id.* As of January 1985, the EBU was comprised of 37 active members in 32 countries, and in excess of 60 associate members in 45 countries. The American associate members include ABC, CBS, NBC, the Corporation for Public Broadcasting, Turner Broadcasting Systems, United States Information Agency, and WFMT, Inc.

The headquarters for the EBU, including the offices of the secretary general, television and radio programming, and legal affairs, is located in Geneva, while the technical center is in Brussels. Significantly, the EBU operates and maintains an office in New York City.

Eurovision is the program exchange through which EBU member stations receive programming. The programming is distributed via a complex system of terrestrial microwave links. Beyond this land network, the EBU has recently added several satellite systems to its Eurovision operations giving the EBU the technological capacity to function as a European television network.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

exist cover such a small portion of the European television market, in comparison to the vast areas covered by EBU member broadcasters, that this alternative is not viable for most programming sellers.<sup>220</sup>

Consequently, sellers are forced to negotiate with the EBU for the over-the-air broadcast of programming throughout the EBU network, known as Eurovision.<sup>221</sup> While at first glance this may appear to be a satisfactory option when one considers the broad membership of the EBU and the convenience of negotiating with one agent rather than with several broadcasting entities spread throughout Europe, it has actually resulted in a situation whereby sellers receive artificially suppressed copyright fees for their sports programming. A vivid example of this price suppression is the 1984 Summer Olympic Games held in Los Angeles. The Los Angeles Olympic Committee was paid \$1.67 per household by ABC after an intense bidding war between the three American networks.<sup>222</sup> Meanwhile, because the EBU was not faced with similar competition for the European rights to the Los Angeles Games, it was able to negotiate a deal with the Los Angeles Olympic Committee for a mere seventeen cents per household.<sup>223</sup>

Another restraint of free communications trade arises out of the EBU rule which prevents a non-European seller of sports programming from receiving the benefits of any competitive bidding on the copyright fees between television stations within a single EBU member state.<sup>224</sup> This creates a second cartel for the

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<sup>220</sup> However, for the first time there is talk of private ownership of TV stations in France which has raised many issues. R. Bernstein, *French TV Sale Raises Fear of Unbridled Power in Private Hands*, International Herald Tribune, June 25, 1986, at 2.

<sup>221</sup> This inherently unfair bargaining process is exemplified by the negotiations which transpired between the EBU and Trans World International (TWI). TWI possessed the world-wide rights to the U.S. Tennis Open. After successfully negotiating a contract to broadcast the Open in America, TWI approached the EBU to market the event in Europe. The EBU responded with an impractical offer, and TWI refused it. Many Europeans complained to the EBU because of the absence of the Open. The following year, the EBU accepted a reasonable offer from TWI. Telephone interview with Peter Smith, Vice President of TWI (Dec. 4, 1985).

<sup>222</sup> See Taffe, *The Big Three Aren't Sold on Seoul*, SPORTS ILLUSTRATED, Sept. 23, 1985, at 28. See *infra* note 248 and accompanying text for the potential antitrust problems which are presented by this issue.

<sup>223</sup> *Id.*

<sup>224</sup> See *infra* note 226.

purposes of negotiating with a seller. As a result, the three separate channels in France are able to await a decision by the French government, which owns all three stations, as to which will broadcast a particular sports program.<sup>225</sup>

This "no competition restraint" also occurs when the program seller is a European EBU member nation. Therefore, the stations are sheltered from competition with each other regardless of where the program originates.

Another restraint is the EBU requirement that a seller who has sold to an EBU member in one nation must deal exclusively with EBU members in all other nations.<sup>226</sup> In addition, the EBU will not allow these sellers to deal with non-EBU members unless all EBU members within a particular state have expressed their intentions either to not enter into negotiations for a particular program or to discontinue negotiations for that event.<sup>227</sup>

## 2) Two Possible Solutions

Therefore, the EBU may be in violation of competition laws on several accounts. Two possible bodies of law which may be useful in curbing these restraints of trade are the antitrust laws of the European Economic Community (EEC) and the United States.

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<sup>225</sup> For example, if the rights owner of the Miami Grand Prix attempts to sell the race in France, the seller is precluded from negotiation with either TF-1, Antenne 2, or FR-3 in Paris. Instead the seller must negotiate with the EBU, which in turn will allocate the race to one of these stations. In addition, should one of the stations within the EBU member state be a privately owned EBU member, then the EBU will make the decision as to which station will be allowed to broadcast the sporting event.

<sup>226</sup> As EBU member nations begin to transmit programming via satellite across other borders, a number of issues will arise. Currently, the EBU statutes do not allow member nations to compete with each other for programs being transmitted across the borders of several nations. This problem first erupted when the Turner Broadcasting System, an affiliate member of the EBU, transmitted its Cable News Network (CNN) via satellite to all parts of the world. In Finland, the Helsinki Television Cable System agreed to retransmit CNN to 100,000 subscribers. The EBU argued that this violated the EBU non-competition across borders statutes and threatened to expel Turner Broadcasting from the EBU. This problem will be compounded if Turner Broadcasting can successfully complete negotiations—have CNN rebroadcasted over-the-air by one of the BBC channels. *See Turner Breaking Rule to Get Foot in Finnish Door?*, VARIETY, Feb. 5, 1986, at 5.

<sup>227</sup> *See id.*

a) *EEC Antitrust*

The European Common Market was formed by several treaties binding the major nations on the continent,<sup>228</sup> ultimately resulting in the Treaty of Rome which created the European Economic Community. The goals of the EEC, as stated clearly in the Treaty, are "to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated standard of living and closer relations between the states belonging to it."<sup>229</sup>

Realizing that working together for common economic goals could lead to anti-competitive behavior, the Community included important antitrust provisions in the Treaty, namely Articles 85 and 86.<sup>230</sup> Furthermore, Article 90 of the Treaty stipulates that these provisions are binding upon governments of member

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<sup>228</sup> The European Common Market originally consisted of France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. See Treaty Establishing the European Coal and Steel Community, July 25, 1952, 261 U.N.T.S.; Treaty Establishing the European Atomic Energy Community, Jan. 1, 1958, 289 U.N.T.S. 1969; Treaty Establishing the European Economic Community, Jan. 1, 1958, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome]. These nations were later joined by Great Britain, Denmark, and Ireland. Treaty of Accession, Jan. 1, 1973 — U.N.T.S. — while Greece and Spain joined the European Common Market in 1980.

<sup>229</sup> Treaty of Rome, *supra* note 228, at Art. 2.

<sup>230</sup> *Id.* at Art. 85 and 86. Art. 85 provides: 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their objective or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchaser selling prices or any other trading conditions;
- (b) limit or control, production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement of category of agreements between undertakings;

states and their agents.<sup>231</sup>

Application of these provisions to the EBU would not aid interests outside of the EEC, such as program distributors in the United States, because these articles have never been construed to protect non-EEC resident entities.<sup>232</sup> However, many of the restraints caused by EBU activity directly affect EEC interests, such as private television stations not belonging to the EBU in France, England, Italy, and Spain.<sup>233</sup> While the antitrust provisions of the Treaty of Rome do not prohibit the formation of cartels or monopolies, they do prohibit the abuse of concentrated economic power.<sup>234</sup> Therefore, the EBU may not abuse its position as a cartel if it hopes to remain in compliance with EEC antitrust law. However, it is impossible for the EBU to meet this

- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Art. 86 provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>231</sup> *Id.* at Art. 90.

<sup>232</sup> See CROTTI, *TRADING UNDER EEC AND U.S. ANTITRUST LAWS* (1977) [hereinafter cited as *EEC AND U.S. ANTITRUST*].

<sup>233</sup> See Palermo, *European Broadcasting Union, 61st Ordinary Session of the Legal Committee, Work of Satellites/Cable Working Party and Subgroups in the Field of Sports Transmissions, Legal Aspects of EBU Sports Rights Acquisition Practice*, 3 *COM. J.* 1044, 1045 (1985) [hereinafter cited as *EBU Sports Rights Acquisition*].

<sup>234</sup> See Myers, *EEC Antitrust Law: Its Development and Philosophy with Special Attention to Intellectual Property Rights*, 10 *N.C.J. INT'L AND COM. REG.* 41 (1979) [hereinafter cited as *EEC Antitrust Law*].



obligation. The EBU effectively controls 100 percent of the over-the-air sports television market within the EEC.<sup>235</sup> This places the EBU in what the European Court would interpret as a position of market dominance. The Court has recently indicated that an organization controlling a mere forty percent share of the market can be considered dominant.<sup>236</sup> Therefore, any anti-competitive actions committed by the EBU should be held in violation of the Treaty. Moreover, the court has extended the application of Articles 85 and 86 to a quasi-governmental communications corporation, specifically British Telecommunications.<sup>237</sup> Such a landmark decision paves the way for a valid attack upon the EBU, which, if disarmed of its monopoly, would allow for the market to dictate the flow of television programs, and sporting events would surely flourish.

Furthermore, the EBU has instituted a policy whereby transmission rights for sporting events are acquired by the EBU itself rather than by individual EBU members.<sup>238</sup> The Union has even created a Controller of Sport to implement this centralized rights acquisition policy, thus eliminating any private broadcasters.<sup>239</sup> Compounding this violation of EEC antitrust laws is the non-competition clause in the EBU's *Model Contract for the International Televising of a Sporting Event*.<sup>240</sup> This clause prohibits programming sellers from negotiating with any other broadcasters, EBU members, and non-EBU members in the targeted geographic area.<sup>241</sup>

The likelihood of using EEC antitrust laws to thwart abuses by the EBU, however, is lessened by the leniency which the European Commission and the European Court have demonstrated

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<sup>235</sup> See *supra* note 214, and accompanying text.

<sup>236</sup> See *United Brands Co. v. Commission of the European Communities*, 21 Common Mkt. L.R. 429 (1978).

<sup>237</sup> *Government of the Italian Republic v. Commission*, 2 Common Mkt. L.R. 368 (1985).

<sup>238</sup> See *EBU Sports Rights Acquisition*, *supra* note 233, at Annex 4.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> For example, if the organizer of the New York City Marathon attempts to sell the event in France, where there are three EBU member stations as well as a private non-EBU station, he would, for all practical purposes, go to the EBU and allow the EBU to determine which station would carry the marathon. If the programmer chose to sell the marathon to the private station, he would be precluded from dealing with the remainder of Europe. Thus, this is not a viable option.

towards activities which they deem have enhanced "intra-member trade and fortunes."<sup>242</sup> It is possible, however, that as non-EBU trade in Europe increases, these bodies will hold that the EEC's goal of economic growth will be better served by a stronger stance against the EBU's anti-competitive acts.

b) *American Antitrust*

Congress enacted the Sherman Antitrust Act<sup>243</sup> to break up the large trusts and cartels which dominated American industry in the late nineteenth century. Sections 1 and 2 of the Act were carefully drafted to cover a wide range of anti-competitive behavior.<sup>244</sup> In addition, section 4 of the Clayton Antitrust Act provides for treble damages for any violations of American antitrust law.<sup>245</sup> These statutes, therefore, reflect a sincere desire on the part of the United States to preserve free competition and open markets. The EBU cartel is a blatant violation of section 2 of the Sherman Act, which forbids even "attempt[s] to monopolize."<sup>246</sup> The actions taken by the EBU also violate the Sherman Act under section 1, which prohibits "restraint[s] of trade on commerce among several states, or with foreign nations."<sup>247</sup> Indeed, all of the elements for a section 1 violation are present. There is evidence of a contract, combination, or conspiracy since the cartel is actually impeding competition for television sports programming, and there is a significant adverse effect on trade between

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<sup>242</sup> See *EEC Antitrust Law*, *supra* note 234, at 46.

<sup>243</sup> 15 U.S.C. §§ 1-7 (1890).

<sup>244</sup> 15 U.S.C. §§ 1 and 2 (1890) read as follows:

Sec. 1. Every contract combination in the form of otherwise, or conspiracy, in restraint of trade or commerce among several states, or with foreign nations, is declared to be illegal. . . .

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty. . . .

See also *ECC AND U.S. ANTITRUST*, *supra* note 232.

<sup>245</sup> 15 U.S.C. § 4 (1914) reads as follows:

Sec. 4: Any person who shall be injured in his business . . . shall recover *threefold the damages*. . . .

See also *ECC AND U.S. ANTITRUST*, *supra* note 232.

<sup>246</sup> 15 U.S.C. § 2 (1890).

<sup>247</sup> 15 U.S.C. § 1, (1890).

EBU member nations and the United States.<sup>248</sup> Difficulty arises, however, in attempting to attach American antitrust law jurisdiction to the EBU. Since the EBU does maintain an office in New York City, a United States court could hold either that part of the illegal conspiracy or combination took place on American soil, or that agents of the EBU committed acts in restraint of trade through this American office. Furthermore, another approach may be to consider the damaging effect the EBU has had on American interests albeit from its European (Geneva, Switzerland) headquarters.

Unfortunately, American courts may be reluctant to follow either of these routes toward attaching long-arm antitrust jurisdiction against the EBU. The principle of comity,<sup>249</sup> however, should not prevent such attachment. As described earlier, the EBU buyers cartel is not in compliance with EEC antitrust laws

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<sup>248</sup> See ECC AND U.S. ANTITRUST, *supra* note 232, at 29. The essential characteristics of a Sec. 1 violation are:

1. a contract combination, or conspiracy (meaning more than one entity involved);
2. a restraint (meaning the act itself that impedes or would impede competition); and
3. the restraint must *affect* or be likely to affect trade or commerce between two or more states of the United States or between any part of the United States and a foreign nation.

This third characteristic, known as the "Effects Doctrine," stipulates that when a foreign business transaction has a substantial and foreseeable affect on United States commerce, the foreign parties to that transaction are subject to United States Laws. See *United States v. Aluminum Co.*, 148 F.2d 416, 444 (2d Cir. 1945); see also THE DEPARTMENT OF JUSTICE ANTITRUST GUIDE FOR INTERNATIONAL BUSINESS OPERATIONS 6 (1981); SCHACHTER AND HELLAWELL, COMPETITION IN INTERNATIONAL BUSINESS: LAW AND POLICY ON RESTRICTIVE PRACTICES, 262-69 (1981) [hereinafter cited as SCHACHTER AND HELLAWELL]. Thus, it appears the EBU may come within the purview of United States antitrust laws "Effects Doctrine" in light of the United States market repercussions due to EBU actions. The applicability of United States antitrust law is exemplified by the example mentioned above where the rights fee paid by ABC to the L.A. Olympic Committee for the 1984 summer games. The United States network spent \$1.67 for each of the 100 million American households, while the EBU paid only \$0.17 for approximately the same number of households, thus, indirectly underwriting the cost of broadcasting the games to the European market. Even if courts should analyze this problem with a "rule of reason" test, there is little doubt that the great disparity between rights fees paid on either side of the Atlantic would constitute an unreasonable restraint of trade.

<sup>249</sup> Under this principle, nations are under a clear moral duty to cooperate with each other in enforcing their respective laws and to resolve international conflicts fairly with a sensitivity to each other's interest. See CANENBLEY, ENFORCING ANTI-TRUST FOREIGN ENTERPRISES 13 (1981).

forbidding the abuse of monopoly power.<sup>250</sup> Thus, if the EBU runs afoul of EEC law, there is no burden on the courts in this country to excuse it under the principle of comity.

Similarly, the Act of State doctrine<sup>251</sup> should not prevent United States courts from enforcing the Sherman Act against the EBU. It is clear that this doctrine will not shield governments from the responsibility of their acts when their conduct is of a commercial nature.<sup>252</sup> Clearly, the negotiation of sports television programming contracts constitutes commercial activity. Moreover, successful application of United States antitrust laws furthers the unshackled development of sports programming.

### C) *Cable Retransmission*

Another concern of international television distributors is the unauthorized cable retransmission of their product, which inevitably limits the distributor's ability to exploit a program throughout the global marketplace. For many years, primarily in Europe due to its geography but also in other parts of the world, CABLE operators have used large antennas to receive relatively distant over-the-air signals, which they in turn retransmit via their cable systems to their customers.<sup>253</sup> For example, a cable operator in Brussels will pick up the BBC over-the-air signal from London and retransmit it to its viewers. This immediately triggers copyright infringement because when the copyright holder sells the U.S. Open to the BBC for over-the-air coverage in London, a fee is based on over-the-air exposure to the London population. However, when the signal is received and retransmitted to 200,000 cable subscribers in Brussels, the copyright holder has received nothing for that retransmission.

This problem is exacerbated by the technological ability of cable operators in Brussels to receive and retransmit signals from France, Holland, Germany, Luxembourg, and the United Kingdom.<sup>254</sup> Therefore, program copyright holders have looked for ways to protect their product. The United States addressed this

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<sup>250</sup> See *supra* note 214 and accompanying text.

<sup>251</sup> See *Banco Nacional De Cubar v. Sabbatino*, 376 U.S. 398 (1964).

<sup>252</sup> See generally *SCHACHTER AND HELLAWELL*, *supra* note 248, at 240-76.

<sup>253</sup> See *supra* note 137, at 23.

<sup>254</sup> AGIOCA, COLLECTIVE MANAGEMENT FOR FILM PRODUCERS, [hereinafter cited as AGIOCA].

problem by passing the Copyright Act of 1976,<sup>255</sup> outlawing such retransmission as a violation, and implementing a statutory license which compensated those copyright holders infringed.<sup>256</sup> Several European nations have also granted protection for these copyrights via case law in the Belgium decision of *Coditel v. Cine Vog*,<sup>257</sup> as well as in Austria and Switzerland,<sup>258</sup> stipulating that simultaneous cable retransmissions of over-the-air broadcasts were protected copyrighted works under national copyright law and the Berne Convention.

Television copyright holders can protect this right by contractually licensing their product in the marketplace or by attempting to legislatively implement a compulsory license.<sup>259</sup> The avenue of compulsory license chosen by the United States has come under fire because it artificially suppresses the fees paid copyright holders.<sup>260</sup> Therefore, a statutory compulsory license should not be adopted by the rest of the world. In fact, the Belgian government recently signed an agreement with a copyright collection agency, which may offer the wisest solution to the problem.

In light of the enormous amount of programming retrans-

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<sup>255</sup> 17 U.S.C. §§ 101-118 (1982).

<sup>256</sup> For a more detailed analysis of the U.S. compulsory license issues, see generally *Sports on the Superstations*, *supra* note 71. See also Cryan and Crane, *Sports Promoters Irked by Copyright Exemption Seek Changes in Compensation System*, 145 N.Y.L.J. 33 (1986).

<sup>257</sup> 2 Common Mkt. L.R. 362 (1980). This case centered around the film "Le Boucher" (The Butcher), for which exclusive distribution rights in Belgium were granted to Cine Vog Films. Under the terms of the agreement, the Belgium television rights could only be exercised 40 months after the first theatrical showing of the film. Within the 40 month period, an authorized over-the-air television broadcast of the film in Germany was received by a Belgian CABLE operator, CODITEL. Without authorization CODITEL retransmitted the film to their cable subscribers. The court held this to be a violation of the copyright.

<sup>258</sup> See AGICOA, *supra* note 254.

<sup>259</sup> See Verlinde, *Some Comments on the Signing of the Cable Agreement in Belgium*, 25 EUR. BROADCASTING UNION REV. 27 (1984).

<sup>260</sup> Recently there has been proposed United States legislation to abolish the compulsory license; see generally *Sports on the Superstation*, *supra* note 71. A compulsory license legislatively sets a fee of a percent of a CABLE operator's gross revenues. In the United States this fee is 3.75 percent for every distant signal retransmitted, to be paid to a collection body which in turn distributes the money proportionally to the copyright holders whose programs were retransmitted down the cable. The problem is that the statutory fee is fixed and does not reflect the supply and demand of the marketplace.

mitted by CABLE operators, it was necessary to form a collection agency; thus, AGICOA<sup>261</sup> was born. AGICOA functions as a central clearinghouse for the cable retransmission rights of copyrighted programs, with which CABLE operators may negotiate. In 1984, the first cable retransmission agreement was entered into between the Belgian cable operators and AGICOA.<sup>262</sup> The agreement provides that Belgian cable operators may retransmit over-the-air broadcasts emanating from Belgium, France, Germany, Luxembourg, the Netherlands, and the United Kingdom, in exchange for a yearly royalty of fifteen percent of the cable operators gross revenues.<sup>263</sup>

This is more desirable because it allows the marketplace to dictate the price of the copyright royalty. With the future application of AGICOA in sight, sports programmers who have their product retransmitted via cable systems in Europe can go to AGICOA as a means of protecting and exploiting their copyrights.

D) *Foreign Exchange Remittance, Restrictions on Earnings, and Discriminatory Taxation*

The problems surrounding foreign exchange remittance and international taxation pose an equally large impediment to the international flow of television programs. All multinational businesses must deal with foreign exchange remittance restrictions. However, when dealing with television programming the problem becomes more acute since revenues may be derived from licensing or copyright royalties rather than solely the direct sale of television programs. This problem exists, for example, in many countries throughout South America, Africa, and the Middle East, which totally block the exit of currency, which would in-

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<sup>261</sup> AGICOA is the Association for the International Collective Management of Audiovisual Works (Association de Gestion International Collective des Oeuvres Audiovisuelles) created by the International Federation of Film Producers Association; see Madoff, AGICOA, Motion Picture Export Association of America, *reprinted in* INTERNATIONAL TELEVISION, *supra* note 10, at 393.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* Once the money is received by AGICOA, a complex formula is employed to allocate the monies to the rights holder. This formula is based on the length and category of each program, the time of day of the broadcast, and the broadcasting source. See AGICOA, *supra* note 254.

clude royalty payments.<sup>264</sup> Furthermore, many nations, including Mexico and Brazil, tax the repatriation of earned surplus at such an exorbitant rate that foreign investment is discouraged.<sup>265</sup> India, another nation with a large and growing television market, taxes operating profits at fifty-two percent.<sup>266</sup> Additionally, many nations impose taxes which directly burden the broadcasting industry. Canada, for example, has a tax code provision which prevents expenditures for foreign broadcasts from being treated as a business expense for tax purposes.<sup>267</sup>

It is apparent that some states will impose discriminatory customs valuation on what enters via the state airwaves as a protectionist measure. Moreover, as technologies such as Direct Broadcast Satellites continue to develop, this issue will become more pronounced.

These monetary issues, coupled with other barriers to international television, have resulted in the development of several possible solutions to these problems. For example, if the demand for programming is high but the money to purchase programming is lacking, the government may relax the advertising regulations and thereby create a valuable commodity. Under these two market conditions, CBS recently culminated a programming deal which takes advantage of these positions and also avoids international monetary problems. Specifically, CBS and mainland China's national network CCTV reached an agreement for sixty-four hours of programming.<sup>268</sup> The Chinese will be able to select from CBS' total program inventory and in return CBS is allocated advertising time to resell. CBS will retail the time to international advertisers interested in the mainland China market; such companies include IBM, Boeing, and Kodak.<sup>269</sup> This type of barter transaction bypasses all monetary exchange and taxation problems and allows CBS to receive dollars on United States soil.

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<sup>264</sup> See *Trade Barriers*, *supra* note 134, at 250.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See *Better by Barter?*, TV WORLD, Feb. 1984, at 19. See also *Sporting Chance*, TV WORLD, *supra* note 194. An additional advantage to this type of transaction is the avoidance of currency exchanges with a strong United States dollar.

<sup>269</sup> *Id.*

E) *No Financial Interest No Syndication*

There are two United States domestic policy limitations on the development of a global freemarket for television programs. The first of these is known as the FCC Financial Interest and Syndication Rules (FISR).<sup>270</sup> In 1970, the FCC, in order to expand competitive opportunity in television program production, adopted rules to exclude the networks (ABC, NBC, CBS) from domestic syndication—network licensing of program series to local independent stations on a market by market basis—and from the foreign syndication of independently (non-network) produced programs.<sup>271</sup> As a result, the networks are prohibited from acquiring foreign distribution rights in programs they license from other companies for domestic network broadcast. Therefore, of the programs broadcast on United States networks, CBS, NBC, and ABC can only sell abroad those programs they produce themselves.<sup>272</sup> Additionally, the FCC implemented the financial interest rule which prohibits the networks from having any financial interest in programs they have not produced themselves.<sup>273</sup> At the time, due to the imbalance of power between the independent producer and the three networks, the FCC felt the rules were in the public interest. In the last ten years, however, many other networks have risen to prominence. Thus, the need for this rule is seriously questioned.<sup>274</sup>

Specifically, this rule forces the networks to avoid buying sporting events that they do not produce, thus limiting the amount of sports on the air since the networks are unable to use an independently produced program either for domestic syndication at a later time or for sale to the foreign markets. The enormous potential of the syndicated marketplace and the size of this restraint is demonstrated by the recent avenue the Turner Broadcasting Systems (TBS) used in distributing the Moscow Goodwill Games to the over-the-air television market. TBS's main opera-

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<sup>270</sup> Financial Interest and Syndication Rules, 47 C.F.R. § 73.658 (J) (1982) [hereinafter cited as FISR].

<sup>271</sup> See Kintzer, *The Proposed Repeal of the Financial Interest and Syndication Rules: Network Domination or Public Interest Representation?*, 6 COMM. ENT. 513 (1983) [hereinafter cited as *Proposed Repeal*].

<sup>272</sup> See *Trade Barriers*, *supra* note 134, at 249.

<sup>273</sup> See *supra* note 270.

<sup>274</sup> See *Proposed Repeal*, *supra* note 271.



tion is as a superstation, which allows access to the forty million cabled homes in America.<sup>275</sup> However, there are an additional sixty million homes in the United States plus millions internationally which do not have cable.<sup>276</sup> Therefore, TBS completed agreements with independent over-the-air stations in every major market throughout the world to carry the games.<sup>277</sup>

The reason why TBS is allowed to complete such an arrangement while CBS, NBC, or ABC are not is because TBS does not fall within the FCC definition of a network. Therefore, even if one of the networks wanted to be involved in this type of sports programming, it would be precluded by the FISR. This raises questions about the inequity of these restraints in a global marketplace.<sup>278</sup>

#### F) INTELSAT

The final major barrier to the development of a global television system is the current United States operating restrictions for the international satellite distribution of programming. Any programmer which desires to transmit television signals internationally on a continuous basis must comply with the Communications Act of 1934.<sup>279</sup> Specifically, section 214 of the Act prohibits the transmission of satellite signals beyond a signal carrier's authorized service region without permission of the FCC.<sup>280</sup> Since all United States satellite television networks were originally granted permission to transmit only within the United States, they cannot legally transmit to any foreign nation without FCC permission.<sup>281</sup> In order for the FCC to authorize such transmis-

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<sup>275</sup> See *Ted Turner's U.S.-Soviet Games Face Olympic Hurdles at Home*, Wall St. J., March 26, 1986, at 34, col. 2.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Another example of the power of the syndication market is the income generated from the syndication of prime time television. For example, *Miami Vice* is independently produced at a cost of approximately \$1,000,000 per episode. The program is then sold to NBC for about \$900,000. If the series ran for five years the producer would lose \$10,000,000. However, the first day when *Miami Vice* goes into syndication the producer will recoup the loss, and everyday thereafter make a profit. Telephone interview with Linda Lenzen, Director Sawgrass Studios, Ft. Lauderdale, Florida (Apr. 1, 1986).

<sup>279</sup> 47 U.S.C. § 214 (1964 & Supp. 1985).

<sup>280</sup> *Id.*

<sup>281</sup> See *supra* note 32.

sions, two conditions must be satisfied: 1) the nations in which the requested services are to be delivered must consent; and 2) the International Telecommunications Satellite Organization (INTELSAT) must be notified of such services.<sup>282</sup> Satellite signal carriers in the United States have petitioned the FCC for permission to transmit signals to foreign countries and the FCC has approved some of these applications, thereby opening access to international television.<sup>283</sup> The most notable of these new international distributors is TBS, which currently links CNN continuously, via satellite, around the world.<sup>284</sup>

The crux of the problem lies in the conditions of United States adherence to the INTELSAT accord. Currently the terms of the INTELSAT agreement grant INTELSAT, and its officially designated agency in each nation, a monopoly on international satellite transmissions.<sup>285</sup> Under the agreement, each country is required to create a communications organization to deal exclusively with INTELSAT.<sup>286</sup> In many nations this entity is a government agency. In the United States, however, it is a private

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<sup>282</sup> See *International Copyright Communication*, *supra* note 138, at 16. For a discussion of the process by which the FCC permits domestic satellite signal carriers to provide international service, see Letter from James L. Buckley, Under Secretary of State, to Hon. Mark Fowler, Chairman, Federal Communications Commission (July 23, 1981) (discussing mechanism of INTELSAT in context of State Department position with respect to pending carrier applications to provide satellite transmissions abroad) *reprinted in International Copyright Communications*, *supra* note 138, at App. B, 54.

Under the auspices of the United Nations, the International Telecommunication Satellite Organization (INTELSAT), composed of 104 member nations operating 15 satellites world-wide, was established as a result of a two-part agreement: 1) Agreement Establishing Interim Arrangements for a Global Commercial Communication Satellite System, *opened for signature* Aug. 20, 1964, 2 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26 and 2) Special Agreement, *opened for signature* Aug. 20, 1964, 2 U.S.T. 11745, T.I.A.S. No. 5646, 514 U.N.T.S. 48. The INTELSAT system consists of a series of communications satellites and earth stations. Article XIV (d) of the INTELSAT Agreement requires a signatory intending to rely on space segment facilities separate from the INTELSAT system to furnish certain information to the Assembly of Parties through the Board of Governors, to insure technical compatibility with existing INTELSAT space units and to avoid significant economic harm to the global system of INTELSAT. For a more detailed discussion of INTELSAT, see L. HENKIN, *INTERNATIONAL LAW: CASES AND MATERIALS* 1056-58 (2d ed. 1980).

<sup>283</sup> See *Shuttle Mishap Gives CNN Huge European Debut*, VARIETY, Feb. 5, 1986, at 1.

<sup>284</sup> *Id.*

<sup>285</sup> See *supra* note 282.

<sup>286</sup> *Id.*

company, the Communication Satellite Corporation (COMSAT).<sup>287</sup> Enjoying a governmentally sanctioned monopoly, COMSAT has been the sole provider of international satellite signal space for over twenty years.<sup>288</sup>

As a result, COMSAT is able to charge the American user a price which is unchecked by an artificially constrained market. For example, INTELSAT currently charges COMSAT \$390 per circuit,<sup>289</sup> while in turn COMSAT charges the carriers who serve the public, i.e. ATT, MCI, etc., \$1125 for that same circuit.<sup>290</sup> Those carriers in turn charge a higher rate to the ultimate consumer. If the government would allow common carriers direct access to INTELSAT, thus eliminating the monopoly middleman, the result would be a stimulation of competition and a reduction of rates, ultimately increasing international telecommunications traffic.<sup>291</sup>

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<sup>287</sup> This anti-competitive system was established by Congress in the Communications Satellite Act of 1962. 47 U.S.C. §§ 701-721 (1962).

<sup>288</sup> *Id.*

<sup>289</sup> See *Direct Access to INTELSAT*, reprinted in *INTERNATIONAL TELEVISION*, *supra* note 10, at 211.

<sup>290</sup> *Id.*

<sup>291</sup> This very complex issue may ultimately have to be resolved by the Supreme Court. See *ITT World Communications, Inc. v. FCC*, 725 F.2d 732 (D.C. Cir. 1984), *appeal pending consolidated proceeding sub nom. Western Union International, Inc. v. FCC*, No. 84-1202 (D.C. Cir. 1986). Moreover, with the FCC having granted private entities the right to install complete international satellite transmission systems in direct competition with INTELSAT, the question is raised whether this action is in violation of the rights and duties under the original agreement forming INTELSAT. For an in depth analysis of these issues, see U.S. DEPT. OF COMMERCE AND NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *A WHITE PAPER ON NEW INTERNATIONAL SATELLITE SYSTEMS* (1985). See also U.S. DEPT. OF STATE, *FLEXIBILITY TO COMPETE: INTELSAT IN AN ERA OF SEPARATE SYSTEMS* (1985). There are several other impediments to the growth of a global television marketplace. The first is the technical standards of television. These include the amount of electrical current the set runs on, the number of horizontal lines the television signal is broadcasting in, and the compatibility of interfacing transmission receiving and broadcasting equipment, all of which can slow down, if not prevent, the flow of television programming within a nation. Another restriction centers around local workers, hiring, and immigration. Because highly skilled individuals are needed to operate the technology based products and services, it is imperative that international distributors be able to export the needed personnel. Unfortunately, immigration restrictions often prolong the availability of such personnel.

## **VI. Contractual Guidelines for the International Sale of Sports Programming**

The legal confusion which surrounds international television, stemming from an ever advancing technology and the barriers impeding the flow of sports programming, requires that the rights and conditions embodied in a programming contract be as detailed as possible. Specifically, the contract should contain what television rights exist and to what extent they may be exploited. The first decision within this context is whether the program seller has the exclusive rights to the event or whether they are limited in any manner.

The most basic of all sports television rights is the granting of live or differed transmission. This clause will be defined more specifically along technical lines. However, fundamentally the rights should be included in a lump sum basis, if possible, in order to limit distribution royalty exposure.<sup>292</sup>

Based on the scope of the time covered in the contract, the next condition to be outlined is the territorial parameters of television transmission. As the television industry becomes more aware of the global marketplace for sports programming, it becomes more difficult to acquire the worldwide rights to a given event. Therefore, it is necessary to be as detailed as possible in granting these rights under the contract. This becomes a complex calculus to complete when dealing with satellite footprints which may cover a variety of national borders.<sup>293</sup>

The new television technologies have given birth to multiple systems of market access which need to be meticulously drafted and appropriately timed. Therefore, a rights contract must outline the scope of transmission and broadcast systems to be used, including: closed circuit, Pay TV, over-the-air, and cable, each of which may trigger several legal issues. When dealing with subscriber Pay TV, a rights contract must accurately define the number of subscribers, and insure proper remuneration because Pay TV creates residuals to various unions for actors, directors,

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<sup>292</sup> See PALERMO, LEGAL ASPECTS OF EBU SPORTS RIGHTS ACQUISITION [hereinafter cited as LEGAL ASPECTS].

<sup>293</sup> Territorial limits are made possible with satellite signals when they are encrypted. See Flint, *Programme Acquisition Agreements*; reprinted in INTERNATIONAL TELEVISION, *supra* note 10, at 390.

crafts, and the like, and liability for payment will be attached.<sup>294</sup> Furthermore, contracts for satellite Pay TV should allow for a later sale to the same territory via over-the-air broadcast by contracting for the penetration of the satellite footprint so as to not be restricted by stray signals wandering into uncontracted territory.<sup>295</sup> Permeating any of the above conditions will be the language of the transmission. The scope and depth of any language clause should properly define the number of languages and for which areas those languages are granted.

A rights contract must also address the type and scope of advertisement to accompany the broadcast, along with the placement of advertisements at the stadium which might come within the view of the camera. A producer should avoid pre-selling the show with advertisements which must accompany any future transmission of the event due to the severe restrictions on advertisements in many nations. Furthermore, many distributors may want the right to omit advertisements, which a producer must be able to grant. Many broadcasting organizations will stipulate in the contract the amount of advertisements at an event site and how large they can be, even spelling out what action may be taken should too many advertisements appear at the stadium.<sup>296</sup>

The republication of music which accompanies a television

<sup>294</sup> *Id.*

<sup>295</sup> See Kuhn, *The First Footprint Deals: The Opinion Section 12 INTERNATIONAL MEDIA LAW 18* (1985).

<sup>296</sup> See generally the EBU Model Contract for the Televising of a Sporting Event; see also Clause 8 on advertising, cited in *LEGAL ASPECTS*, *supra* note 292.

#### MODEL CONTRACT FOR THE INTERNATIONAL TELEVISIONING OF A SPORTING EVENT

The Administrative Council

(i) *Noting* that except for long-term agreements covering events taking place in different countries, for which the Eurovision rights agreement should be concluded by the EBU itself, the member organizations in the country where the event is staged are best qualified to negotiate the Eurovision rights agreement, though they may always ask the EBU to assist them or negotiate in their stead;

(ii) *Reaffirming* its advice to members that it is in their own best interests to negotiate contracts for TV sports transmission, whenever possible, directly with the organizations or entities which are responsible for planning, organizing and staging the event, and which are in a position to assume all the obligations arising from the contract for sale of the television rights;

(iii) *Recognizing* that in view of

- their familiarity with the organizers, the venue and the circumstances specific to sports events in their countries,

broadcast must also be covered in the rights contract to ensure that the proper music copyright collection agencies are paid.

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- the easy availability of the necessary production staff and facilities, frequently including their own permanent facilities at the venues, such as camera positions, commentator booths, interview studios, local telecommunications installations and the like, and
  - the principle of national reciprocity underlying the Eurovision exchange system,

the member organizations in the country where the sporting event is staged are best fitted to provide coverage of the event;

(iv) *Emphasizing* the desirability of securing the most uniform conditions possible for all members relaying a sporting event via Eurovision;

(v) *Accepting*, at the same time, that it will not be possible in each individual case to acquire exclusive, comprehensive and unlimited television rights for each individual member interested in a particular sporting event relayed via Eurovision;

(vi) *Reminding* members that once negotiations for Eurovision rights in a specific event or series of events have commenced, and until they have been formally declared to have failed, it would seriously weaken and indeed compromise the Eurovision rights negotiators' position if individual members engaged in private separate negotiations for their own national transmission rights in the same event;

*Recommends* active member organizations originating Eurovision sports transmission rights on behalf of all the other interested Eurovision members, to make use, to the extent feasible and bearing in mind the foregoing considerations, of the following model contract for acquisition of Eurovision rights in a sporting event:

This Agreement is made on \_\_\_\_\_ between the \_\_\_\_\_ (hereinafter referred to as "the Organizer"), represented by \_\_\_\_\_ of one part, and the \_\_\_\_\_ (hereinafter referred to as "the Organization"), represented by \_\_\_\_\_ of the other part.

#### WHEREAS

(i) The Organizer declares that he is in a position to meet all the obligations arising from this Agreement for sound and visual broadcast transmissions of \_\_\_\_\_ to be held in \_\_\_\_\_ on the \_\_\_\_\_ (hereinafter referred to as "the event");

(ii) Any broadcasting organization may broadcast the event on sound radio by any technical method, in any language, and on any wavelength, without payment;

(iii) This Agreement shall in no way affect the right of any television organization to show in its information programs up to \_\_\_\_\_ (minutes per day, per match) selected from recorded material of the event made available to it by no matter what source.

#### NOW IT IS AGREED AND DECLARED AS FOLLOWS:

1. The Organization possesses, under the terms of this television, or cause it to be so transmitted wholly or in part, by any technical means (including transmissions by direct broadcast satellite, by satellite-to-cable, by wire, cable or wireless, on closed circuit or pay television, in black and white or in colour, live or by means of any type of recordings made or obtained), for private and public viewing, in all countries of the European Broadcasting Area as defined by the International Telecommunication Convention currently in force (in which the European Broadcasting Union shall have at the beginning of the event one or more active or associate

Also, a choice of law provision should be included which allows for the greatest protection of the product and signal. Usually, this will be the law of the nation of transmission. However, when dealing with cable retransmissions, the law of the nation where the cable system is located will most likely be applicable. Ultimately, broadcasters will press for additional rights, but a pro-

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members), including the overseas territories which form part of such countries, even if these territories are situated outside the European Broadcasting Area.

However, nothing in this Agreement shall oblige the Organization to carry out the transmissions covered.

2. For the purpose of this Agreement, "exclusive right" shall mean

- (a) that the Organization alone, to the exclusion of any third party, may transmit the event or cause it to be transmitted in the countries referred to in 1 above,
- (b) that the Organizer undertakes not to allow third parties to carry out coverage of the event for transmission in those countries. If there is any breach of this undertaking the Organization may withdraw from this Agreement without prejudice to its other legal remedies.

3. The Organization shall be solely responsible for the television coverage required for the transmissions covered by this Agreement and shall be entitled, on a priority basis, to install and use all necessary equipment at any emplacement and to have commentators at any suitable spot (according to a plan which shall be drawn up in agreement between the Organizer and the Organization by \_\_\_\_\_ (date) and shall form an integral part of this Agreement).

The Organizer undertakes that all contracts with third persons relating to the transmission and reproduction of the whole or part of the event shall contain a written stipulation to the effect that any installation of commentators or equipment shall be carried out in agreement with the Organization.

The video and sound signal produced by the Organization shall be its own exclusive property and no use of this signal or of parts thereof by the Organizer or by any third party shall be permitted unless prior written consent has been obtained.

4. The Organizer undertakes to supply the Organization with a sufficient number of accreditations giving all persons under its control required for the transmissions free access to all relevant grounds and premises.

5. The Organization undertakes that the persons under its control shall in no way interfere with the normal course of the event.

The Organizer undertakes that no third party shall in any way impede the Organization in the exercise of the right and in the activities covered by this Agreement.

6. The Organizer guarantees the Organization against any claims that may be brought against it by third parties (e.g. participants, spectators, clubs, owners of grounds or premises, etc.) by reason of the transmissions covered by this Agreement.

7. The Organizer guarantees that all contracts for the reproduction of the event or any part of it in a cinematograph film, videogram or newsreel shall include a written stipulation to the effect that the films, videograms or newsreels thus made shall not be released for television transmission as defined in 1 above in the countries referred to in 1 above without prior consent from the Organization (before the

gram producer who carefully drafts the scope of any distribution contract will be reasonably safe from exploitation.

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expiry of a period of \_\_\_\_\_ days after the end of the event, from which date the right referred to under 1 above shall become non-exclusive).

This restriction does not apply to recorded material used under (iii) of the preamble to this Agreement.

8. The organizer guarantees that advertising at the venue, if any, shall fully comply with the following principles:

8.1 Advertisements must not affect the quality of coverage or interfere with a complete and aesthetically satisfying view of the event for the television audience, for example, by being placed on two or more tiers positioned in camera range.

8.2 Advertisements must not be positioned between the camera and the action.

8.3 The colours used for advertising must not adversely affect the television picture, and the use of fluorescent colours is banned. Luminous and rotating advertisements are likewise banned.

8.4 Advertisements must be placed on permanent supports forming an integral part of the venue and no occasional installations are allowed. This prohibition applies mutatis mutandis to cases where the event is staged at a venue without permanent installations.

Where for technical reasons (e.g. absence of suitable permanent supports) it is not possible to comply with the rule laid down in clause 1, but where other venues of the same type normally dispose of permanent supports allowing the fixation of advertisements, advertisements shall also be admissible on occasional installations, provided they are affixed in a single continuous line and the overall effect and impression is largely identical.

Advertising on mobile supports such as banners, pennants, etc. is prohibited.

8.5 The size of the panels and of the advertisements must remain within limits compatible with a picture of the sports event entirely visible on the television screen from all angles. The figures, letters, logos and designs shall be a maximum of 80 centimeters in height.

8.6 No advertising may be made in sound during the transmissions.

8.7 Advertising must not infringe the national rules and laws of the country where the sports event is staged.

8.8 Advertising may only consist of a maximum of three of the following five items:

- a company name,
- a trademark,
- a single noun describing a product or service,
- an indication of the geographical origin of the product or service,
- a simple visual image depicting a product or service.

8.9\* Advertising on clothing, equipment and the playing surface where the event is staged is prohibited. (\*An express exception to this rule can be provided for in a second paragraph if, and to the extent that, such advertising has become customary for the type of sports event in question.)

9. The Organizer undertakes to provide the Organization, not later than \_\_\_\_\_ days before the event, with a complete list of the advertisements, including their exact wording, which will appear in the normal range of the cameras during the course of the event. In the list he will specify, as far as possible, the position of the advertisements and the size of the lettering thereon. He guarantees



### VII. *Proposed Legislation to Improve the Global Marketplace*

As our technology inexorably advances, constantly creating

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that the advertising thus notified shall have undergone no change or addition from any source or of any kind whatsoever by the time the event takes place and also that it will not be changed during the event.

In light of this list and the information mentioned in the above paragraph, and not later than \_\_\_\_\_ days after its communication, the Organization shall be entitled either to withdraw from this Agreement without any payment whatsoever or to request an appropriate reduction in the agreed remuneration where the advertising contained in the list causes the withdrawal of any of the broadcasting organizations originally scheduled as relaying organizations.

Should the advertising appearing in the normal range of the cameras in any way exceed that stated in the above-mentioned list or should it not comply with any of the principles laid down in 8 above, the Organization shall be entitled to reduce the remuneration provided for under this Agreement by one-half or to withdraw from this Agreement without any payment whatsoever.

10. There shall be no identification of any timing or data-processing firm on the television screen unless expressly agreed with the Organization.

11. Before signature of this Agreement, the Organizer shall inform the Organization whether, and to what extent, it is intended to exploit the event by way of "merchandising," i.e. marketing of symbols, insignia, identifying tunes, etc. connected with the event in the form of records, pictures, figurines, T-shirts, key-rings and the like. Such merchandising, if any, may not contain or allude to the name, insignia, etc. of the Organization or of any other broadcasting organization covered by this Agreement, and it may in no way prejudice or affect the value of the rights referred to under 1 above.

12. The Organizer guarantees that all the transmissions covered by this Agreement may be effected in all countries referred to in 1 above without any restriction whatsoever and without any fee additional to that laid down in 13 below.

13. In consideration of the obligations assumed by the Organizer towards the Organization under this Agreement the Organization shall pay to the Organizer the total, all-inclusive sum of \_\_\_\_\_ as follows:

The Organizer declares that upon payment of this total sum all his claims under this Agreement will have been satisfied.

14. In the event of cancellation or postponement for any reason whatsoever of the event, or of any substantial alteration to the structure of or arrangements for the event as known at the time of signing this Agreement, the Organization may within \_\_\_\_\_ days of being informed by the Organizer in writing of such change, notify the Organizer in writing of its withdrawal from this Agreement or request him to effect an appropriate reduction in the fee provided for in 13 above.

The Organizer undertakes to inform the Organization at once and in writing of any changes of the kind mentioned above.

15. In the event of withdrawal from this Agreement the Organizer shall refund to the Organization all sums paid up to and including the date of such withdrawal. In the event of a reduction in the fee, the Organizer shall refund to the Organization any sums already paid to him in excess of the fee as reduced. Re-

new dimensions for the sports broadcasting industry,<sup>297</sup> there are several measures which should be taken into account to help guide global telecommunications into the twenty-first century. Most important, the free market must survive as the world grows smaller, and the communications industry is the cutting edge of this movement. In an effort to promote a truly free international television marketplace, a three-pronged approach needs to be pursued: 1) Domestic Legislation; 2) Global Deregulation; and 3) Multilateral Accords.

#### A) *Domestic Legislation*

There are several steps which can be taken in the United States to promote a free market for global television. First, the United States government should officially ratify the Berne Convention and join other nations in the observance of this important copyright treaty. Next, the United States Congress should repeal the FISR. This would free the United States networks to compete unshackled in the international marketplace and contribute to the growth of the American export service industry. Complementing this free market move, Congress should also grant direct access to INTELSAT, thus removing the governmentally created monopoly, allowing the international satellite industry to operate under a true supply and demand equation.

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funds shall include the bank interest which the sum to be refunded has or would normally have yielded.

16. Any dispute arising out of this Agreement shall if unresolved be referred under the law of the Organization's country to \_\_\_\_\_

17. This Agreement is drawn up in \_\_\_\_\_ The \_\_\_\_\_ version shall prevail in the event of dispute.

Done on \_\_\_\_\_ at \_\_\_\_\_

<sup>297</sup> Specifically, there are two prospects on the horizon. First, there is the possibility of a professional sports league, such as Major League Baseball, establishing its own network; see TELEVISION SPORTS RIGHTS, *supra* note 2, at 67. Second, technology itself has been able to bring a new market to sports programming as demonstrated by the QB-1 System. This National Football League (NFL) sanctioned enterprise allows, through a two-way addressable system, a fan at home to become actively involved in an NFL game. Basically, the fan subscribes to the system, whereupon a computer terminal is installed to a television set. The fan, while the team is in the huddle, predicts the play he or she expects the team to run. The fan may pick, run right, run left, pass left and right, deep or short, etc., with points being awarded for how accurately the fan selects the plays. The fan plays QB-1 against other QB-1 players in the same city and across the nation, with satellite and computer hook-up displaying the standings after each series. See QB-1, NTN. Communication, Inc. prospectus with Huberman, Margaretten and Straus, 1986.

Beyond these actions, Congress should strongly consider enacting additional antitrust legislation expressly expanding the Sherman Act to clarify and strengthen the decision of Judge Hand in *Alcoa*<sup>298</sup> which extended the extraterritorial jurisdiction of our antitrust law.<sup>299</sup> Some additional modifications of the act might include the elimination of punitive damages, thus increasing the acceptability of these long-arm actions by foreign states.<sup>300</sup> Any action along this line would require that United States courts apply United States antitrust laws to United States multinational and foreign corporations consistently to avoid the appearance of protectionism. Correspondingly, the courts should interpret the Act of State Doctrine<sup>301</sup> so as *not* to allow commercial activity of foreign organizations disguised as governmental agencies to conduct commercial business affairs with immunity. At the same time, the United States government should limit its trade protectionist policies to foster international cooperation and compliance, insuring a global free market for television.

### B) *Deregulation*

The greatest factor which contributed to the rise of the American Telecommunications Industry was the strong deregulatory stance taken by the executive branch and the FCC. If there is truly going to be a global television market, Europe and the rest of the world will have to follow suit. Fortunately the European regulatory environment in the broadcasting and telecommunications fields is undergoing rapid changes in the face of years of strict regulations and state monopolies.<sup>302</sup> The United States government must continue to exert pressure on foreign nations to deregulate television policies and define standards. As the world moves towards the information age, Europe and the Third World, rooted in traditional industries, need to be en-

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<sup>298</sup> U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

<sup>299</sup> *Id.* at 32.

<sup>300</sup> See HERMANN, CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY: ISSUES OF EXTRATERRITORIALITY 56 (1982) [hereinafter cited as Extraterritoriality].

<sup>301</sup> See *supra* note 251.

<sup>302</sup> See *Broadcasting and CATV*, *supra* note 2, at 365.

couraged to develop new technologies, such as international television.

C) *Multilateral Accords*

The most fundamental international treaty which must be implemented is a new copyright accord. Such an agreement, establishing substantive standards and rules of protection, would have to be a comprehensive act to which all nations could adhere, remedying the weaknesses of the UCC and Berne Convention.<sup>303</sup> This accord would have to standardize protection so as to offer all copyright holders a reasonable expectation of protection in the global marketplace.<sup>304</sup>

Beyond such a copyright treaty, a new accord should be drafted creating and detailing a new form of rights, *Communications Rights*, which would standardize television technology, clarifying rights to access of television programs, defining the limits of broadcasting and signal reception, outlining the scope of the broadcaster's intention and the parties so intended for reception, and mandating protection of the signal by scrambling. This would create a rebuttable presumption of private contractual intent to operate as prima facie evidence of mens rea to steal or pirate should theft of a signal occur.

A final and most philosophically sweeping level of action to improve the free movement of television programs is to develop new antitrust laws by sovereigns throughout the world, taking into consideration the available models of the United States, United Kingdom, and EEC. Moreover, nations which have antitrust laws on the books should begin to enforce them as a more competitive free market economy develops around the world. These steps should also be taken by multilateral communities, like the EEC, so as to solidify the growth of the telecommunications industry.

Most important, an international antitrust accord should be developed by the United Nations similar to the efforts of its Committee on Trade and Development, in drafting principles and

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<sup>303</sup> See Flint, *Signal Reception and Piracy*, 10 INT'L BUS. LAW. 10 (1983).

<sup>304</sup> See Ladd, *Securing the Future of Copyright: A Humanist Endeavor*, 16 IIC 76, (1985). See also *International Delegation Okays HDTV Standard Proposal*, MULTICHANNEL NEWS, Nov. 18, 1985, at 1.

rules to facilitate the control of restrictive business practices.<sup>305</sup> An excellent enforcement mechanism for such principles would be the International Court of Justice. However, because many of the conflicts which would arise under such an international anti-trust accord would involve transnational enterprises, there should also be United Nations legislation which grants multinational corporations standing before the court, a right which presently only sovereign nations enjoy.

### VIII. Conclusion

The role of television as an international telecommunication vehicle increases with each passing year. As network and program suppliers extend their product into the seemingly insatiable global market, a myriad of governmental, cultural, legal, economic, and political issues must be addressed. Although the ever increasing number of worldwide viewers of television may be diverse, there remains one constant—a love for sports programming. The international distribution of these sporting events offers great economic opportunity, but is shackled to some degree, however, by the transborder restrictions and regulations of the various nations. In time, these impediments will be overcome, as inroads towards a truly international economy are made by the intellectual property of the information age, television programming. In our new world-wide economic order television programming is the first truly global good or service in that the technology now allows for the penetration of all geographic regions instantaneously. Ultimately, with the implementation of this powerful tool, assuming barriers of cultural and governmental regulation can be cleared, our planetary society will have taken a major step towards establishing a global free market.

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<sup>305</sup> See Extraterritoriality, *supra* note 300, at 56.